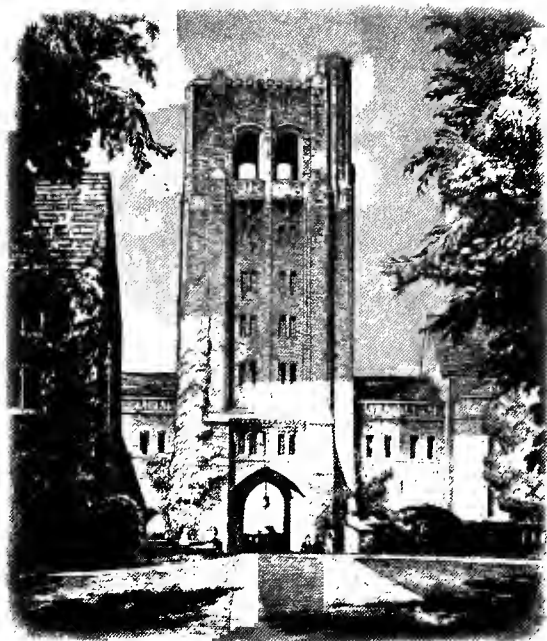




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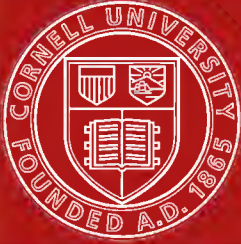
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# A TREATISE

ON

# SUITS IN CHANCERY:

SETTING FORTH

THE PRINCIPLES, PLEADINGS, PRACTICE, PROOFS AND PROCESSES

OF

THE JURISPRUDENCE OF EQUITY;

AND GIVING

NUMEROUS ILLUSTRATIVE FORMS

OF

PLEADINGS, WRITS, ORDERS, REPORTS, DECREES AND OTHER PROCEEDINGS IN SUITS IN CHANCERY  
FROM THEIR BEGINNING TO THEIR ENDING;

BESIDES MANY PRACTICAL SUGGESTIONS

FOR

SOLICITORS AND MASTERS.

*Cursus Curie est Lex Curie.*

BY

HENRY R. GIBSON, A.M., LL.D.,

CRANCELLOR OF THE SECOND CHANCERY DIVISION  
OF TENNESSEE

SECOND EDITION:

REVISED AND ENLARGED

BY

THE AUTHOR.

KNOXVILLE, TENN.:

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1907

Entered, according to Act of Congress, in the year, 1907, by  
HENRY R. GIBSON,  
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TO  
MY WIFE,  
FRANCES REED GIBSON,  
THIS BOOK  
IS  
DEDICATED,  
AS  
A TOKEN OF MY APPRECIATION  
OF  
HER SYMPATHY AND ASSISTANCE  
DURING  
ITS PREPARATION



## PREFACE TO THE FIRST EDITION.

---

WHILE there is a general family resemblance between the systems of jurisprudence prevalent in the various States of the Union, the differences and peculiarities in their systems of pleading and practice are, nevertheless, so great that no work, dealing with the procedure in Courts, is of much practical value to the practitioner, unless it is adapted to the jurisprudence and practice of the particular State in which he lives. Books of general practice, with foot-notes of the diverse rulings in various States, are often more confusing than enlightening. What the practitioner needs is a book on Court procedure that omits everything that is not the law in his own State, and contains everything that he is likely to need in the progress of a suit. Such a book I have endeavored to make this, so far as the Chancery practice is concerned.

What ordinarily happens in a litigation can well be compressed into one volume; but what very seldom happens, the unusual and the possible, would fill several volumes. What happens in matters of pleading and practice in 99 out of every 100 suits, I have labored to give; what may happen in the hundredth suit, I have not striven to forecast. The ordinary law is comparatively small in compass: it is the exceptional and the uncommon that necessitate a multiplicity of books, and fill libraries. And while I have not attempted to give what is exceptional and uncommon, my purpose has been to give everything likely to prove of value, to be found in our statutes, decisions, and rules of practice, and in standard authorities on the subject.

1. *In Matters of Equity Jurisprudence*, this work is based mainly on Pomeroy, Story, and the statutes and judicial decisions of our own State.

2. *In Matters of Chancery Pleading*, I have followed Story, in so far as consistent with our statutes. Daniel and Barbour have, also, been drawn on, quite largely. The many differences, between our system of pleading and that of the English Court of Chancery, are clearly pointed out, where necessary to prevent confusion.

3. *In Matters of Chancery Practice*, the works of Daniel and Barbour have been relied on when consistent with our statutes, decisions, rules of practice, and system of jurisprudence.

4. *In Drawing the Forms, Pleadings, Orders, and Decrees*, brevity, simplicity, perspicuity and precision have been constantly kept in view; and surplusage and prolixity have been avoided and reprehended.

5. *In the Arrangement of the Contents of the Book*, everything has been given in the order of time in which it usually takes place in the progress of a suit, when possible so to do.

6. *In Providing Means for Finding any Particular Matter in the Book*, a full index has been given in the back part of the book, and a complete table of contents in the front part of the book; and the titles of the chapters and articles have been given in the top margins of the book, and many cross references will be found in the foot-notes. Each section begins with a statement of its subject, in bold face type.

The object of this work is to aid those who minister in the Chancery Courts; and to contribute somewhat to the improvement of the pleadings and practice in those Courts.

HENRY R. GIBSON.

## PREFACE TO THE SECOND EDITION.

---

WHATEVER a man does he flatters himself he can improve on, and so the author of the first edition of this work, better aware of its deficiencies than anyone else, began the preparation of what he hoped would be an improved edition before the first had been fully printed.

The main object of the original edition was expressed in its Title, and Preface; but it left many suits in Chancery unconsidered, and left others very imperfectly considered. To supply these deficiencies is the main object of the present edition.

The deficiencies in the first edition were caused, first, by an apprehension that the necessary additional matter would make too unwieldy a volume; and second, by the author's duties as Chancellor engrossing too much of his time. In preparing this edition, the author has had adequate time, and the suggestions of a considerable proportion of the lawyers of the State, besides the use of the Law Library of Congress for over ten years: so he hopes the deficiencies have been reduced to the minimum consistent with one volume.

The present edition, (which contains 20 per cent more matter<sup>1</sup> than the original,) treats of every kind of suit in Chancery the average lawyer will be called on to bring, or defend, in an average lifetime,<sup>2</sup> the suits oftenest brought being most fully considered.

The author cannot forbear expressing his gratitude to the Judges and Chancellors of the State, and to the members of the bar, for their kind reception of the first edition: it largely compensated him for the drudgery devoted to its compilation and publication. In this connection it may not be out of place to say, that none of the references to reports and text books in either edition are second-hand, but are the results of original investigation, and can be implicitly relied on.

The Code references are, unless otherwise noted, to the Code of 1858: the reasons for this are, 1st, it is the only Statutory Code of the State; 2d, all subsequent Codes contain it, so far as extant; and 3rd, this work may outlive the temporary Codes of individuals, (of which there have already been four,) but cannot hope to outlive the Code of the State. Statutes passed since the Code of 1858 are usually referred to by the date and chapter of the Act.

The quotations of maxims to illustrate the text will, it is believed, prove helpful. No book that treats of Equity is complete without them. They are not the mere gewgaws of pedantic lore, but the crystallized wisdom of the law, polished and preserved by the masters of jurisprudence.

HENRY R. GIBSON.

Knoxville, Tenn.,

March 4, 1907.

<sup>1</sup> 61 old sections have been omitted or consolidated, and 244 new sections added. Over 1,000 of the old sections have been re-written, or revised.

<sup>2</sup> *Ad ea quæ frequentius accidunt jura adaptantur.*



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# PART I.

## THE CHANCERY COURT: ITS HISTORY, JURISDICTION AND PRINCIPLES.

### CHAPTER I.

#### THE HISTORY OF THE CHANCERY COURT.

ARTICLE I. Origin and Evolution of Equity Jurisprudence.

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#### ARTICLE I.

##### ORIGIN AND EVOLUTION OF EQUITY JURISPRUDENCE.

§ 1. The Civil Law: its Development.

§ 2. Evolution of Equity in England.

§ 3. Character of the First Chancery Suits.

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§ 7. How the Law has Followed Equity.

§ 8. The Divine Law of Justice the Rule of Decision.

§ 9. Other Causes Contributing to the Establishment of the Chancery Court.

§ 1. **The Civil Law: Its Development.**—The system of jurisprudence called Equity was originally largely derived from the civil law of the Romans; and its early development in England was similar to the development of an analogous system in the jurisprudence of Rome. Therefore, in endeavoring to trace the origin of the Chancery Court, it may be well to notice, briefly, the development of the civil law.

The early laws of Rome, like the old common law of England, were exceedingly stern, rigid, formal and arbitrary, paying little attention to abstract right and justice.<sup>1</sup> Their judicial proceedings were technical to the last degree. Absolute accuracy was required in complying with the established phrases and acts in the enforcement of civil rights. Any omission, or mistake, of a word or a movement was fatal.<sup>2</sup> As civilization, however, progressed in Rome, subtle technicalities gave way to simpler methods of pleading; but even then it was found that cases occasionally arose to which the improved formulas were inadequate. These extraordinary cases were decided by the prætor without being referred to the ordinary tribunal, and without being hampered by any technical requirements as to the proper formula, or kind of action, he himself determining both the law and the facts of the case! The complainant stated the facts of his case, the defendant set up his defense, the prætor decided. This extraordinary method of determining suits, so simple, so free from technicalities, so easily moulded to the exigencies of every case, was found so superior to even the

improved formulas, that eventually it superseded them, and became the only mode of procedure,—much as, in many of the States and in England, the procedure by bill and answer has supplanted the rigid formulas of common law actions.<sup>3</sup> Not only were the pleadings thus simplified by the Roman jurists, but the law was correspondingly improved; and a deliberate and persistent effort was made to bring their jurisprudence into perfect harmony with an absolutely impartial equity, that should do equal and perfect justice to all.<sup>4</sup> And, thus, was perfected that system of jurisprudence known as the civil law, from which are derived many of the maxims, principles and doctrines of Equity, now followed and enforced in the Chancery Courts.<sup>5</sup>

§ 2. **Evolution of Equity in England.**—The development of the extraordinary jurisdiction of the Chancery Court of England was similar, in its causes, progress and results, to the development of the system of Equity in the Roman law, as already intimated.<sup>6</sup> In England, the King was regarded as the “fountain of justice;” and, when any person conceived that he had been wronged, either in court or out of court, he had the privilege of petitioning the King for redress. The King, being unable to hear and determine all of these complaints because of their number and complexity, generally referred them to his chief secretary, who was called his Chancellor. This officer was an ecclesiastic, trained in the law and theology of Rome,<sup>7</sup> and was sometimes called the “keeper of the King’s conscience.”<sup>8</sup> When thus directed to adjudicate the rights, and determine the remedies, of those petitioning the King for justice, the Chancellor naturally had recourse to the civil law of Rome, being most familiar therewith; and, also, finding therein a diviner sort of justice, and a simpler and more efficient form of procedure. Besides, these Chancellors, who were generally very able and very learned men, were no doubt, disposed to regard the English common law as a barbarous code compared with the Roman civil law.<sup>9</sup> The Chancellor’s office was one of great trust and confidence: he was the King’s adviser and confidant, the chief member of his council, and the keeper of his great seal of State. He is spoken of, at a very early day, as one who “annuls unjust laws, and executes the commands of a pious prince, and puts an end to what is injurious to the people or to morals.”<sup>10</sup>

§ 3. **Character of the First Chancery Suits.**—The Chancellors, following the example of the Roman prætors,<sup>11</sup> applied the equitable principles of the civil law to the determination of all suits referred to them by the King. The suits thus referred were, generally: 1, applications to obtain redress for injuries and acts of oppression where from the power of the offender, or for any other cause, a fair trial in the ordinary courts could not be had; 2, cases where there were fraud, deceit and dishonesty beyond the reach of the common law;<sup>12</sup> and 3, cases where the common law was inadequate to the requirements of justice. In those times of disorder and oppression, many were the appeals to the King by the poor and the weak for protection against the rich and the strong, the local magistrates being often overawed; and many were the complaints of want of remedy at law. The King, unable to give personal attention to so many petitions, finally conferred upon the Chancellor full authority to give relief in all matters of “Grace,” as these applications for redress were termed; and from this period petitions began to be addressed to the Chancellors themselves, and not to the King. This delegation of authority was made in the year 1348;

3 1 Pom. Eq. Jur., § 6. See *post*, § 15.

4 1 Pom. Eq. Jur., § 8.

5 1 Sto. Eq. Jur., § 23; 1 Pom. Eq. Jur., § 14.

6 1 Pom. Eq. Jur., §§ 1-9; 1 Sto. Eq. Jur., § 50.

7 1 Sto. Eq. Jur., § 23. The fact that the first

Chancellors were ecclesiastics, generally bishops or archbishops, accounts for and explains various words and phrases found in the old forms of bills, such as: (1) “Orator,” one who prays; (2) “doings contrary to conscience,” the bishop being bound to act according to conscience; and being also, the keeper of the King’s conscience; and (3) “and your orator

shall ever pray, etc.,” the full sentence being, “and your orator shall ever pray for you.” Barton’s Suit in Equity, 40, note; see also, Sto. Eq. Pl., § 14; and Lube’s Eq. Pl., 260. This antiquated conclusion is still sometimes used.

8 Snell’s Pr. Eq., 10. The Chancery Courts of Tennessee represent the conscience of the State, as the Chancery Court of England represented the conscience of the King.

9 1 Pom. Eq. Jur., § 17.

10 Bouvier’s Law Dic., “Equity.”

11 1 Sto. Eq. Jur., § 50.

12 1 Pom. Eq. Jur., § 31.

and, in the next fifty years, the Equity jurisdiction of the Chancellor was clearly established.<sup>13</sup>

§ 4. **Principles on which the Early Chancellors Acted.**—When matters of Grace were thus referred to the Chancellor, he issued a writ commanding the party complained against to appear and answer the complaint, and abide by the order of the Court.<sup>14</sup> The principles on which the Chancellor based his decisions were those of Honesty, Equity and Conscience.<sup>15</sup> By "Conscience" was meant those obligations one person is under to another to exercise that good faith the other has a right to expect.<sup>16</sup> On an application to Parliament for redress, the petition was referred to the Chancellor, with the command: "Let there be done, by authority of the Parliament, that which right and reason, and good faith and good conscience, demand in the case."<sup>17</sup>

Matters of Grace being thus brought before the Chancellor, as the keeper of the King's conscience, and he being required to do justice in the King's name, he felt under no obligation to determine the rights of petitioners by that law from which they had fled to the King for relief; and, for reasons already stated, the Chancellors, at an early day, adopted the equitable principles and simple procedure of the civil law of Rome, adapting them, with wisdom and prudence, to the emergencies of the particular cases. The matters referred to them being matters of Grace and of conscience, the Chancellors felt bound to decide the cause according to conscience. The jurisdiction of the Chancellor being thus established upon Grace and conscience, and his judgments being in the name of the King, and by his authority, whenever the Courts of common law were inadequate to the demands of justice, the party unable to obtain relief therein would have recourse to the Chancellor, who in his Court, called the High Court of Chancery of England, undertook, like the prætor of Rome, to administer an equity not found in the law, himself determining all questions both of law and fact, and rendering a decree adapted to all the exigencies of justice.<sup>18</sup>

§ 5. **The Common Law as Compared with the Civil Law.**—The common law was then utterly incapable of doing complete justice in many cases; and, in not a few cases, it furnished no remedy or relief whatever. It had certain rigid molds or formulas, into some one of which every cause of action had to be cast; and if the cause could not be run into any of these molds, there was no redress; and if it could be run into one of the molds, only such redress as the formula gave could be had, regardless of the equities of the case, and the real rights of the parties. The fictions, formalisms and arbitrary technicalities of the common law, and its dialectical refinements, were inexplicable and incomprehensible jargon to the public, and often a costly mockery of justice to the litigants. Those who asked for bread were often given a stone, and those who applied for a fish sometimes received a serpent.

Equity, on the other hand, disregarded forms, ignored fictions, subordinated technicalities to the requirements of justice, and indulged in no dialectical refinements. Its pleadings were simple and natural, and its doctrines were founded upon the eternal principles of right as interpreted by a lofty Christian morality. Its great underlying principles, the constant sources, the never failing roots of its particular rules, were the principles of equity, justice, mor-

<sup>13</sup> 1 Sto. Eq. Jur., §§ 44; 46.

<sup>14</sup> This writ was the *subpœna*.

<sup>15</sup> 1 Spence Eq. Jur., 338-339.

<sup>16</sup> *Ibid.*, 411. *Fides est obligatio conscientie olicujus ad intentionem alterius.* (Good faith is an obligation binding the conscience of one party to a transaction according to the understanding of the other party.)

<sup>17</sup> *Ibid.*, 346. The matters thus brought before the King were decided according to reason and conscience; and when matters were referred to the Chancellor, either by the King or by Parliament, he was required to do "that which right and reason, and good faith, and good conscience demanded in the case." The term "conscience" embraced all those obligations which

rested upon a person, who, from the circumstances in which he was placed towards another, and the relations subsisting between them, was bound to exercise good faith in his conduct and dealings with that other person. 1 Spence Eq. Jur. 411. The early Chancellors decided, as a rule, according to this conscience, but, in process of time, a system of rules and general principles, based on reason and conscience, were evolved from the adjudications of the Court, or were adopted by the Chancellors from the jurisprudence of the Civil Law, as formulas to specify the nature and limit the extent of their equity jurisdiction. 1 Pom. Eq. Jur., §§ 43-58. See *post*, § 58.

<sup>18</sup> 1 Pom. Eq. Jur., § 5; Bisph. Pr. Eq., §§ 6-8.

ality and honesty, enforced according to conscience and good faith, and so adapted to the requirements of each case and the complications of business affairs, that the rights and duties of all the parties were fully determined.<sup>19</sup>

§ 6. **Some of the Deficiencies of the Common Law.**—The common law then was not what it has since become under the benign inspiration of the Chancery jurisprudence.<sup>20</sup> At common law, 1, a vendor's lien could not be enforced; 2, a fraudulent conveyance could not be set aside; 3, a defective instrument could not be reformed; 4, a mistake or accident could not be effectually relieved against; 5, a debt, note or account could not be assigned; 6, a resulting trust could not be set up; 7, a beneficial interest in property could not be enforced; 8, a void instrument could not be cancelled; 9, a will or trust could not be construed in advance of action thereon; 10, testimony could not be perpetuated; 11, a trust fund could not be impounded; 12, a specific performance could not be decreed; 13, an equitable partition of land could not be had; 14, a deed could not be declared a mortgage; 15, title to land could not be effectually quieted; 16, waste, trespasses and other violations of rights could not be stayed; 17, a forfeiture or penalty could not be relieved against; 18, a set-off could not be obtained; 19, land could not be redeemed from a mortgagee; 20, a lien on realty could not be enforced; 21, a lost instrument could not be set up; 22, the estates of minors and lunatics could not be administered; 23, a *pro rata* distribution of assets could not be had; 24, a contract could not be apportioned; 25, a cloud could not be removed from one's title; 26, securities could not be marshalled; 27, a partnership could not be wound up; 28, a subrogation or contribution could not be obtained; 29, trusts were not recognized, and could be violated with impunity; 30, a wife's equities did not exist; 31, a title bond was no defence to an action of ejectment; 32, an injunction could not be had in any case, or for any purpose, however great the wrong; 33, receiverships were unknown; 34, equitable rights and interests were not recognized, and, 35, frauds could not be adequately remedied.<sup>21</sup>

§ 7. **How the Law has Followed Equity.**—Under the influence of the principles of Equity as administered in Chancery, the rugged features of the common law have grown constantly more and more smooth and humane, and its capacity to do justice has constantly increased. The evolution of the law in England and in America has been on the lines marked out by Equity,<sup>22</sup> until, in the language of Lord Hale, "by the growth of Equity on Equity the heart of the common law has been eaten out."<sup>23</sup> To show the effect of the principles and doctrines of Equity upon our own statutes the following illustrations are cited: 1, the law in reference to gambling and wagering contracts;<sup>24</sup> 2, the whole law of landlords', mechanics', laborers' and other liens;<sup>25</sup> 3, the law of notice through registration of deeds;<sup>26</sup> 4, the *pro rata* distribution of insolvent estates;<sup>27</sup> 5, the apportionment of rents;<sup>28</sup> 6, the provisions for the benefit of married women;<sup>29</sup> 7, the guardianship over the estates of infants and persons of unsound mind;<sup>30</sup> 8, the allowance of set-offs;<sup>31</sup> 9, the right to sue upon a debt, note or account purchased from the original creditor;<sup>32</sup> 10, the statutory remedy of interpleader;<sup>33</sup> 11, the right to set aside the satisfaction of a judgment;<sup>34</sup> 12, the proceeding by garnishment;<sup>35</sup> 13, the right to a sale of land

<sup>19</sup> 1 Pom. Eq. Jur., §§ 49-56; 1 Sto. Eq. Jur., §§ 25-30.

<sup>20</sup> The present common law of England is as dissimilar from that of Edward III as is the present state of society. *Jacob v. State*, 3 Hum., 493; *Box v. Lanier*, 4 Cates, 408. Equity jurisdiction was established in England in the reign of Edward III. *Green v. Allen*, 5 Hum., 197. Edward III was born in 1312, and died in 1377.

<sup>21</sup> See 1 Pom. Eq. Jur., §§ 40; 43-88; 97; 102-117; 137; 162; 155; 175; 182; 279-280; 340; 379-406; 430; 912; 1098; 1121; 1179-1180; 1270; 1280.

<sup>22</sup> Case, trover and assumpsit were invented to give *quasi* equitable remedies, in the Courts of law. 1 Pom. Eq. Jur., §§ 24-29.

<sup>23</sup> 3 Pom. Eq. Jur., § 1180, note.

<sup>24</sup> Code, §§ 1769-1775.

<sup>25</sup> M. & V.'s Code, § 2739-2799; 4280-4305.

<sup>26</sup> Code, §§ 2071-2075.

<sup>27</sup> Code, §§ 2311-2397.

<sup>28</sup> M. & V.'s Code, § 3289.

<sup>29</sup> Code, §§ 2478-2488.

<sup>30</sup> Code, §§ 2489-2546; 3681-3719.

<sup>31</sup> Code, §§ 2918-2925. *Nashville Trust Co. v. Bank*, 7 Pick., 336.

<sup>32</sup> Code, §§ 2795-2797.

<sup>33</sup> Code, § 2800.

<sup>34</sup> Code, §§ 2990-2996.

<sup>35</sup> Code, §§ 3087-3103.

for partition;<sup>36</sup> 14, the proceeding at law to remove a cloud from title by suing a claimant not in possession, in ejectment;<sup>37</sup> 15, the right to defend by title bond as by deed;<sup>38</sup> 16, the power to sell the property of infants and lunatics for reinvestment or support;<sup>39</sup> 17, the right to impound the property of absconding debtors;<sup>40</sup> 18, the remedies by motion allowed sureties;<sup>41</sup> 19, the removal and appointments of trustees;<sup>42</sup> 20, giving the right to take depositions at law;<sup>43</sup> 21, making parties witnesses;<sup>44</sup> 22, providing for the perpetuation of testimony and the taking of evidence *de bene esse*;<sup>45</sup> 23, allowing lost instruments to be proved;<sup>46</sup> and authorizing lost records to be supplied.<sup>47</sup> All of these statutes are mere enactments of rights recognized and enforced, remedies employed, defences allowed, and procedures used, in the Chancery Court by virtue of its inherent jurisdiction, and were wholly unknown to the common law, their recognition in our Courts of law depending exclusively upon the statute, and the statute being suggested by the practice in Equity.

§ 8. **The Divine Law of Justice the Rule of Decision.**—The statement, often made, that the Court of Chancery was established to mitigate the rigor of the common law, and to supply its defects, is not wholly true.<sup>48</sup> This Court was established to do justice, regardless of any and all law. The King deemed it a duty imposed upon his conscience, both by his oath and by religion, to “decree justice,” and in decreeing justice he deemed himself bound rather by the Divine Law than by human law;<sup>49</sup> and, when the Chancellor acted in his stead, he based his decisions, not upon the law of the land, but upon honesty, equity and conscience, for so was he commanded to do in exercising the King’s prerogative of Grace.<sup>50</sup> In short, the Chancery Court was established rather as a Court based on the precepts of *Religion* than as a Court based on the rules of *Law*.<sup>51</sup>

It is unquestionably true that the harshness of the common law, its unfitness to cope with fraud, its incapacity to do justice in many cases, the defects in its remedies, the opportunities it gave the strong to oppress the weak, and its general inadequacy to meet the requirements of equity, greatly contributed to perpetuate the existence of the Chancery Court, and to enlarge and justify its jurisdiction. Nevertheless, the vital principle from which the Court sprung was the prerogative doctrine that the King was the “fountain of justice;” and that, when a citizen could not get justice in the ordinary Courts, he might come to this fountain.<sup>52</sup> The King, in administering justice in such cases, deemed himself above all the laws and customs of his realm, and bound only by his conscience and his will. As it was not a matter of right in a citizen to draw on this reserve source of justice, when remedy was given it was deemed “granted as of Grace.”<sup>53</sup>

§ 9. **Other Causes Contributing to the Establishment of the Chancery Court.**—As the Chancery was the office out of which all writs at common law issued, the Chancellor retained cases for his own disposition when the facts were such that no common law writ was adapted to the requirements of the case, or when the common law Courts were unable to furnish adequate relief; and some contend that herein originated the extraordinary jurisdiction of the Chancellor. In this class of cases, the Chancellor determined the matters in dispute, so that the court of the King might not be deficient in doing justice.<sup>54</sup> But it is believed that the equitable jurisdiction of the Chancellor originated mainly, if

36 Code, §§ 3262-3322.

37 Code, § 3231.

38 Code, § 3243 a.

39 Code, §§ 3323-3340; 3708-3719.

40 Code, § 3455. This was a substitute for the writ of *ne exeat* in Equity. See *Cox v. Breedlove*, 2 Yerg., 516.

41 Code, §§ 3620-3635.

42 Code, §§ 3648-3664.

43 Code, §§ 3836-3870.

44 Code, §§ 3813 a.

45 Code, §§ 3876-3885.

46 Code, §§ 3901-3906.

47 Code, §§ 3907-3908.

48 1 Sto. Eq. Jur., §§ 16-17.

49 By Me Kings reign, and princes decree justice. Proverbs, 8:15.

50 1 Pom. Eq. Jur., § 35; 1 Sto. Eq. Jur., § 21.

51 1 Pom. Eq. Jur., § 55.

52 Bisph. Pr. Eq., § 7; 1 Pom. Eq. Jur., §§ 33-37.

53 1 Pom. Eq. Jur., §§ 32-35; 1 Sto. Eq. Jur., § 44.

54 1 Sto. Eq. Jur., §§ 43-44.

not exclusively, from the reference to him by the King of petitions for justice and redress, as already stated.<sup>55</sup> It is unquestionably true, however, that, had it not been for the deficiencies of the common law, the number of these petitions to the King would have been comparatively few.

When the lay Chancellors succeeded the ecclesiastics, no material changes were made in the jurisdiction of the Court. Its system of jurisprudence was, however, enlarged and made more comprehensive, precedents were more closely followed, and the decisions of the Chancellors more carefully preserved. But the equitable principles of the civil law were as fully enforced, and the peculiar proofs and practice of the Court in all things continued, the lay Chancellors being greatly aided herein by the Masters in Equity, who were permanent officers of the Court.<sup>56</sup>

Thus was established the High Court of Chancery of England; and thus originated that grand system of jurisprudence known as Equity; both maintaining their existence by virtue, alone, of their inherent merits, and their wonderful fitness for the purposes of administrative justice.<sup>57</sup> It may be well here to remark that, by an Act of the British Parliament, which went into operation in 1875, all the great Courts of England, including the High Court of Chancery, were consolidated, and a system of pleading and practice adopted similar to those in use in Chancery. The Act of Parliament also provides that "in all matters in which there is any conflict or variance between the rules of Equity and the rules of the common law, with reference to the same matter, *the rules of Equity shall prevail.*" And thus in England the triumph of the righteous principles of Equity over the rules of the common law is complete, and, no doubt, final.<sup>58</sup>

<sup>55</sup> *Ibid.*, §§ 39-50; 1 Pom. Eq. Jur., §§ 33-35.

<sup>56</sup> 1 Spence Eq. Jur., §§ 712-713. It will be seen from this review that Equity may be defined to be that system of jurisprudence, based on good reason, good conscience, and the Civil Law, introduced and developed by the Chancellors of England, by authority of the King and acquiescence of the Parliament, to do justice where justice was denied by the common

law, or to do more perfect justice than could be done through the common law.

<sup>57</sup> And under its beneficent influence the common law has become so transfigured that it no more resembles the common law of Coke than the image of Moloch stained with the blood of butchered babes resembles the living Jesus blessing the little children of Judæa.

<sup>58</sup> Bisph. Fr. Eq., §§ 1; 11; 1 Pom., Eq. Jur., § 12.



## ARTICLE II.

## THE HISTORY OF THE CHANCERY COURTS OF TENNESSEE.

- § 10. The Chancery Court of North Carolina.  
 § 11. Introduction of Courts of Equity into Tennessee.  
 § 12. Development of our Chancery Courts.

- § 13. How our Chancery Courts were Finally Established.  
 § 14. Growth of the Court in Public Favor.  
 § 15. Equity Jurisprudence, Pleadings, and Practice, in Other States.

§ 10. **The Chancery Court of North Carolina.**—When North Carolina was colonized by the English, they brought with them, as part of their jurisprudence, the principles and practice of the English Court of Chancery, and incorporated them into their judicial system. As early as 1713, we find a Court of Chancery in existence in North Carolina; and it is safe to say that this Court was coeval with the first legal institutions of the colony. The Court of Chancery is referred to in the Acts of 1720, ch. 6; of 1723, ch. 10; of 1746, ch. 2; of 1748, ch. 2; and of 1762, ch. 5. The court thus established by the Lords Proprietors of North Carolina, under the general power given them by the Charter of King Charles II, was similar to the Chancery Court of England, and was held by the Governor and Council.<sup>1</sup>

This court continued until the outbreak of the American Revolution; but no provision having been made for its re-establishment under the State authority, it ceased to exist, for a few years—the struggle for Independence and the conflict of armies absorbing public attention. The people of North Carolina, however, in their Constitution of 1776, expressly provided for Courts of Equity,<sup>2</sup> and thus recognized the jurisprudence administered by the Chancery Court as a fundamental part of the law of the new State. Although no Court of Chancery was established, equitable rights continued to exist, notwithstanding;<sup>3</sup> and in 1782 the people discovered, and through their Legislature solemnly declared, that “*the Courts of law were not equal to the redress of all kinds of injuries, that many innocent men were withheld of their rights, and some deprived of them altogether, for want of a Court or Courts of Equity.*”<sup>4</sup> It was

<sup>1</sup> Griffin v. Graham, 1 Hawks N. C. Rep. 97, 132; Green v. Allen, 5 Hum., 255. The decree in the case of William Duckinfield v. John Arderne's heirs, pronounced May 13, 1713, is probably the most ancient memorial of the Chancery Court of North Carolina in existence. <sup>2</sup> Rev. Stats. of N. C. (by Iredell & Battle,) 528. This decree was confirmed in August, 1720, by the Provincial Legislature. Iredell's Laws of N. C. 36. In Locke's Fundamental Constitutions of North Carolina, made in 1669, it was provided that: “§ 35. The Chancellor's Court, consisting of one of the Proprietors and his six counsellors, one shall be called vice-Chancellors, shall have the custody of the seal of the Palatine. \* \* \* To this Court, also, belong all invasions of conscience.” Iredell & Battle's Rev. Stats. of N. C. 454.

<sup>2</sup> Const. of North Carolina, §§ 13; 21; 29. The meaning of the term “Equity” was not defined. The Constitution assumed that it was known, as in case of other words used without definition, and we are, therefore, to look to the jurisprudence then in existence for a proper understanding of the term. Franklin v. Armfield, 2 Sneed, 353.

<sup>3</sup> Griffin v. Graham, 1 Hawks, 132.

<sup>4</sup> Acts of 1782, ch. 11, § 1. The 1st and 2nd sections of this Act are as follows:

1. “Whereas the Courts of Law as at present

established, are not equal to the redress of all kinds of injuries, but many innocent men are withheld of their rights, and some deprived of them altogether, for want of a Court or Courts of Equity.

II. “Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, that from and after the expiration of the present session of the General Assembly, each Superior Court of Law in this State shall also be, and act as, a Court of Equity for the same district, and possess all the powers and authorities, within the same, that the Court of Chancery which was formerly held in this State under the late Government used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws in force in this State, and not inconsistent with our present Constitution.” This statute also made the Courts of Equity courts of record. Hayw. & Cobb, 173.

It will thus be seen that the Courts of Equity of North Carolina, established in 1782, were Courts of general Equity jurisdiction. This was not only so declared by the statute referred to, but was also a necessary implication from the language of the Constitution itself. And from the date of that Act down to the cession of Tennessee to the United States, the powers and jurisdiction of the Courts of Equity

accordingly enacted in that year by the Legislature of North Carolina that each of the Superior Courts of Law should also be Courts of Equity, and possess all the powers and authorities formerly held by the Court of Chancery under the Colonial government, and that were properly and rightfully incident to such a Court, and not inconsistent with the laws and Constitution of the State.<sup>5</sup>

This Act prescribed a procedure for the Court, and granted subpoena, and such process to enforce decrees as belonged to Courts of Chancery. All matters of fact were triable by jury, as in suits at Law; costs were to be paid by either party at the discretion of the Court; the proceedings of the Court were to be kept distinct from those of the Law Court; and it was expressly declared that the Court should be "a Court of record."<sup>6</sup> The English Court of Chancery was not a Court of record, and the statement in some of our reports that "by our Acts of 1787 and 1801, our Court of Equity is a Court of record,"<sup>7</sup> while true, ignores the previous Act of 1782.

§ 11. **Introduction of Courts of Equity into Tennessee.**—When counties were created in the territory now Tennessee, by the Legislature of North Carolina, they were at first made parts of adjoining Judicial Districts in that State; but in 1784, the counties of Washington, Sullivan, Greene and Davidson were constituted a separate Judicial District, and named the District of Washington. This District covered the whole of the territory now Tennessee; but, in the following year, Davidson county was given a separate Court. The Courts thus established in this territory by North Carolina, were vested with general jurisdiction in Law and Equity.<sup>8</sup>

In 1787, the two-fold Court of Law and Equity was divided, and it was enacted that the Chancery branch of the Court should be styled the "Court of Equity;" and a "Clerk and Master in Equity" was appointed for each Court of Equity. But both Courts continued to be held by the same Judge. This Act authorized publication as to non-resident and absconding defendants; and provided that executions to enforce money decrees might issue as at law, instead of the then mode of enforcing money decrees by "attachment, *habeas corpus*, attachment with proclamation, and commissions of rebellion."<sup>9</sup>

In 1790, the territory now Tennessee was deeded to the United States by North Carolina; and the Act and Deed of Cession provided that "the laws of North Carolina should continue in full force within the territory until repealed, or otherwise altered, by the legislative authority of the territory."

In 1793, by an ordinance of William Blount, Territorial Governor, the counties of Knox and Jefferson were formed into a Judicial District, called the District of Hamilton, and the Courts of Law and Equity therein were ordered to be held at Knoxville.<sup>10</sup> The first session of the 1st Territorial Legislature met in Knoxville in 1794; and the first Act passed by it declared that the North Carolina Act giving Equity jurisdiction to the Superior Courts of Law should be in full force and effect.<sup>11</sup> This same Legislature created the Judicial Districts of Washington, Hamilton and Mero, and vested in the Courts thereof the general Equity jurisdiction conferred by the Act of 1782; and thus the peculiar powers, pleadings, proofs and practice of the Chancery Court were formally made a part of the jurisprudence of the new Territory.<sup>12</sup>

§ 12. **The Development of our Chancery Courts.**—In 1796, this system of Equity jurisprudence was incorporated into the Constitution of the new State,<sup>13</sup> and thus imbedded in the very foundations of the government. In 1801, an Act was passed to regulate the proceedings of the Court of Equity: this Act pre-

of North Carolina were, in and for their respective districts, identical in kind and commensurate in extent with the powers and jurisdiction of the English Court of Chancery at the time of the American Revolution.

<sup>5</sup> 1 Scott's Rev., 261.

<sup>6</sup> 1 Scott's Rev., 264.

<sup>7</sup> Carson v. Richardson, 3 Hay., 231.

<sup>8</sup> 1 Scott's Rev., 328; 350.

<sup>9</sup> 1 Scott's Rev., 389.

<sup>10</sup> 1 Scott's Rev., 454.

<sup>11</sup> 1 Scott's Rev., 484. The North Carolina statute referred to was the famous Act of 1782, (Ch. 11.) above mentioned, establishing Courts of Equity.

<sup>12</sup> 1 Scott's Rev., 457-484.

<sup>13</sup> Art. V, §§ 1, 2.

scribes; in detail, the practice of the court; and a large proportion of the provisions of the Act are in force today. Among the changes made in the practice by this Act was the power conferred on the Chancery Court to divest title to land, instead of requiring parties to convey, as had hitherto been the practice.<sup>14</sup>

In 1809, the Superior Courts of Law and Equity were abolished, and Circuit Courts established in their stead, and invested with all of their powers and jurisdiction both at common law and in Equity.<sup>15</sup> A Supreme Court of Errors and Appeals was created by the same statute, to be composed of two Supreme Judges and one of the Circuit Judges. By the Act of 1811,<sup>16</sup> this Supreme Court was given "exclusive jurisdiction in all Equity causes arising in the Circuit Courts," and either party was given the right to take depositions. Previous to this Act, the evidence in Equity suits was generally oral. The Act of 1811, repealed so much of the Act of 1809 as authorized Circuit Judges to sit with the Supreme Judges.<sup>17</sup>

In 1813, the Circuit Judges were given concurrent jurisdiction with the Supreme Court in all Equity causes, and the Circuit clerks were made Clerks and Masters in Equity.<sup>18</sup>

In 1817, it was provided that Equity causes, wherein a Circuit Judge was incompetent, might be adjourned to the Supreme Court, and there heard on the original papers, as though brought there originally.<sup>19</sup>

In 1819, the old practice allowing witnesses to give oral evidence in Chancery suits, and the law compelling their attendance, were repealed; and it was enacted that depositions should be taken in all Chancery cases.<sup>20</sup> In this Act, the Circuit Courts sitting in Equity causes, are styled "Courts of Chancery."<sup>21</sup>

In 1822, it was enacted that the Chancery Courts should be held by one of the Judges of the Supreme Court; and in 1824, a Chancery Court was required to be held twice a year in each circuit. Finally in 1827, the laws giving the Supreme Judges original Chancery jurisdiction were repealed, and two Chancellors were appointed to hold the Chancery Courts. At the same time the State was laid off into two Chancery Divisions, the Eastern and the Western, with one Chancellor for each. The Chancellors were declared to be Chancellors for the State, and were given authority to interchange.<sup>22</sup>

§ 13. **How our Chancery Courts were Finally Established.**—In 1834, a new Constitution was formed, which recognized "the several Courts of Equity" as part of the judicial power of the State, and authorized the establishment of Courts of Chancery, and the appointment of Chancellors and Clerks and Masters.<sup>23</sup> This Constitution continued all laws and ordinances then in force and use, until altered or repealed.<sup>24</sup> The first Legislature under this Constitution increased the number of Chancellors to three, and vested them with "the same powers, privileges and jurisdiction in all respects that the Chancellors then had by existing laws, and that were properly and rightfully incident to a Court of Chancery, agreeably to the laws then in force in the State, not inconsistent with the Constitution."<sup>25</sup> This statute, in substance, re-enacts the North Carolina Act of 1782; and is in force today.<sup>26</sup>

The number of Chancellors was increased to three by the same statute, and a Middle Division established. The Act required Chancellors to make rules "with a view to the attainment of the following improvements in the practice:

<sup>14</sup> 1 Scott's Rev., 685; *Dibrell v. Eastland*, 3 Yerg., 534.

<sup>15</sup> 1 Scott's Rev., 1148.

<sup>16</sup> Ch. 72, § 4.

<sup>17</sup> 2 Scott's Rev., 36.

<sup>18</sup> 2 Scott's Rev., 146.

<sup>19</sup> *Ibid.*, 361. And we learn from *Dibrell v. Eastland*, 3 Yerg., 535, that, in 1832, this law was then in force. By the Act of 1822, ch. 14, on an appeal to the Supreme Court, in a Chancery cause, the original papers, including the depositions, were filed in the Supreme Court,

instead of a transcript as now. *Car. & Nich.*, 220.

<sup>20</sup> 2 Scott's Rev., 485; *Hardin v. Stanly*, 3 Yerg., 381.

<sup>21</sup> 2 Scott's Rev., 485.

<sup>22</sup> 1 Hay & Cobb, 175.

<sup>23</sup> Art. VI, §§ 3, 13.

<sup>24</sup> Art. XI, § 1.

<sup>25</sup> Acts of 1835, ch. 4.

<sup>26</sup> Code, § 4279. Whenever the Code is referred to, the Code of 1858 is meant, unless otherwise stated.

1st, the abbreviating of bills and answers and other proceedings; 2d, the expediting of the decision of causes; 3d, the diminishing of costs; and, 4th, the remedying of such abuses and imperfections as may be found to exist in the practice."<sup>27</sup> Each Chancery Division was subdivided into Districts, each District composed of from one to four counties, and the Court was held at some one place in each District.

The number of Chancellors and the number of Chancery Divisions have been increased from time to time down to the present; but no further changes were made in the *status* of the Chancery Courts, until 1870, when the present Constitution was adopted. By it the Chancery Courts are made Constitutional Courts, and thus put beyond the reach of the Legislature.<sup>28</sup> In 1877, the jurisdiction of the Chancery Courts was so enlarged as to "include all civil causes of action triable in the Circuit Courts, except for injuries to person, property or character, involving unliquidated damages."<sup>29</sup> The far-reaching effect of this statute is hardly yet fully comprehended; but the Courts are giving it that liberal construction evidently intended by the Legislature, and the result is not only a great increase in the power of the Chancery Courts to do full justice, legal as well as equitable; but a great increase in their prestige and popularity.

§ 14. **Growth of the Court in Public Favor.**—The Chancery Court has been struggling, for over five hundred years, to justify its existence, and to vindicate the superiority of its jurisprudence. Having had a foreign origin when originally established in England, and its jurisdiction interfering with the common law, these circumstances naturally created a prejudice against the Court. The fact that its proceedings were out of sight of the people, that it had no juries, that no witnesses were examined before it, and that its decrees were pronounced by a single Judge, all tended to strengthen this prejudice. The Court, too, laid a heavy hand on great and rich men, and exposed and righted the wrongs committed by designing and crafty men, and required guardians, trustees and even husbands and fathers to do right towards those depending on them; and above all, was quick to detect and correct frauds and unconscientious conduct. Wicked men, thus thwarted in their schemes of wrong-doing, endeavored to justify themselves by abusing the "one man" Court. But, notwithstanding these adverse influences, the Chancery Court of England continued to grow in power and popularity as the English people grew in civilization and intelligence, until now its principles are supreme in all the Courts of that country.<sup>30</sup>

As in England, so in Tennessee, the Chancery Court has had its adversaries, and has had its triumphs. Its history, as already briefly shown, demonstrates the fact of its constant growth in popular favor, from the beginning of our existence as a State down to the present. By various Acts of the Legislature, its jurisdiction has been greatly increased,<sup>31</sup> its powers have been much enlarged, its practice has been simplified and improved, and its process made more efficacious. In the language of Judge Freeman, "The Chancery Court has been steadily advancing and widening the boundaries of its jurisdiction from its earliest history to the present day."<sup>32</sup> In Tennessee, these extensions of the boundaries of the Court have been made by the people, through their legislatures, thus giving conclusive evidence of the growth of the Court in public favor. And now, by the Constitution of 1870, it is made a Constitutional Court, and by the Act of 1877, it has been given jurisdiction of all civil actions triable in the Circuit Court except actions for injuries to person, property or character, involving unliquidated damages, thus making its vindication complete, and its triumph perfect and permanent.

Equity, founded upon the eternal verities of right, justice and morality,

<sup>27</sup> Acts of 1835, ch. 4.

<sup>28</sup> Const. of 1870, Art. VI, § 1; *Halsey v. Gaines*, 2 Lea, 319; *Jackson v. Nimmo*, 3 Lea, 597.

<sup>29</sup> Acts of 1877, ch. 97.

<sup>30</sup> *Ante*, § 9.

<sup>31</sup> *Nolen v. Woods*, 12 Lea, 615.

<sup>32</sup> *Jackson v. Nimmo*, 3 Lea, 604.

rather than upon arbitrary customs and rigid dogmas, and acting according to the dictates of reason and good conscience, rather than unadjustable formulas, has the capability to reach and cover every civil case which can possibly arise out of the transactions of mankind, its doctrines and rules furnishing a sure means of accurately and justly determining the rights and duties of all the parties, and its flexible remedies inherent and statutory, adjusting and adapting themselves to all the intricacies of every emergency;<sup>33</sup> so that in our Courts of Chancery there is now absolutely nothing wanting that man can devise for the perfect administration of complete equity; and there can never be any failure to do adequate justice, in any suit, unless the proof fails to disclose the real facts and circumstances of the transaction, or the Chancellor fails to comprehend the doctrine, or apply the remedy, applicable to the case.

§ 15. **Equity Jurisprudence, Pleadings, and Practice, in Other States.**—The jurisprudence of Equity, and its pleadings and practice prevail in all the States of the Union; and in many of the States have completely supplanted the pleadings and practice of the common law. There is an opinion, somewhat prevalent, that there is no Equity jurisprudence in those States of the Union which have abolished Chancery Courts. This is a gross misconception. The doctrines, principles and remedies of the Chancery Court are in full force in every State; and while, in many of the States, there are no separate Chancery Courts, in all of them the jurisprudence of Equity is, nevertheless, recognized and administered as fully as though special courts of Equity were in existence. In those States that have adopted the “code practice,” or “reformed procedure,” as it is variously termed, instead of the principles, pleadings, practice and remedies of the Chancery Court being abolished, in fact the common law practice pleadings and remedies have been abolished, or greatly conformed to those in Chancery. Under the so-called “code practice,” the principal pleadings are: 1, The petition or complaint, which is identical with a bill in Chancery; 2, A special demurrer, and 3, An answer, which are the same in form and substance as the like pleadings in Chancery. In short, those States that have adopted the “code practice,” have, in effect, by statute substituted the simple and pliable pleadings of Chancery for the stiff and cumbrous forms of the common law. And so, although in many of the States there are no separate Chancery Courts, yet in those very States the pleadings, practice and principles of Chancery are prevalent, and well nigh supreme, although to some extent under new names.<sup>34</sup> And in the Federal Courts the principles, pleading and practice of Equity remain wholly unimpaired.

<sup>33</sup> 1 Pom. Eq. Jur., § 59.

| <sup>34</sup> *Ibid*, §§ 282-288.

CHAPTER II.

JURISDICTION OF THE CHANCERY COURT.

ARTICLE I. Jurisdiction of the Chancery Courts Generally Considered.

ARTICLE II. Equitable or Inherent Jurisdiction of the Chancery Court.

ARTICLE III. Statutory Jurisdiction of the Chancery Court.

ARTICLE I.

JURISDICTION OF THE CHANCERY COURTS GENERALLY CONSIDERED.

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| <p>§ 16. Jurisdiction of the Chancery Courts of North Carolina.</p> <p>§ 17. Jurisdiction of the Chancery Courts of Tennessee.</p> <p>§ 18. Our Chancery Practice Founded on that of England.</p> <p>§ 19. Powers and Jurisdiction of the Chancery Courts.</p> | <p>§ 20. Statutory Changes in the Powers and Jurisdiction of the Court.</p> <p>§ 21. Effect of the Act of 1877, Generally Considered.</p> <p>§ 22. Classification of Matters of Equitable Jurisdiction.</p> |
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§ 16. **Jurisdiction of the Chancery Courts of North Carolina.**—The Article devoted to the History of the Chancery Courts of Tennessee plainly indicates the character and extent of their jurisdiction. The Act of 1782<sup>1</sup> vested the Courts of Equity in North Carolina with “all the powers and authorities within their respective districts that the Court of Chancery, formerly held under the Colonial government, used and exercised, and that were properly and rightfully incident to such a Court.”<sup>2</sup> This Act was continued in force in Tennessee by the Deed of Cession;<sup>3</sup> by the Territorial Legislature;<sup>4</sup> by the Constitution of 1796;<sup>5</sup> by the Constitution of 1834;<sup>6</sup> by the Act of 1835;<sup>7</sup> by the Code of 1858;<sup>8</sup> and by the Constitution of 1870.<sup>9</sup>

The question then arises: What were the “*powers and authorities used and exercised by the Chancery Court of North Carolina*” at the time of the American Revolution? This question can be answered only with approximate accuracy, no records, ordinances or statutes defining the jurisdiction of that Court being in existence, so far as known.<sup>10</sup> The Court was established by the Lords Proprietors under the general power given them by the Great Charter of King Charles II.: it was held by the Governor and his Council, and there can be no doubt that its model was the Court of Chancery in England.<sup>11</sup> The Supreme Court of North Carolina held, in the case of *Griffin v. Graham*,<sup>12</sup> that the Equity system of England was a part of the common law of North Carolina in force and use within its territory at the time of the American Revolution, which common law was, in 1778, declared by the legislature of North Carolina to be in “full force within the State.”<sup>13</sup> Chancellor Kent, in *Manning v. Manning*,

1 Chap. 11.

2 1 Scott's Rev., 261.

3 *Ibid.*, 438.

4 Acts of 1794, Ch. 1, § 77; 1 Scott's Rev., 457.

5 Art. X, § 2.

6 Art. XI, § 1.

7 Chap. 4.

8 Code, § 4279.

9 Art. XI, § 1.

10 *Green v. Allen*, 5 Hum., 205. See also, *Griffin v. Graham*, 1 Hawks, (N. C.) 97; 132.

11 See Judge Gaston's argument in *Griffin v. Graham*, 1 Hawks, (N. C.) 103.

12 *Ibid.*

13 Acts of 1778, ch. 5, § 1; 1 Scott's Rev., 226.

held that the English system of Equity jurisprudence at the commencement of the Revolution "formed an important and very essential branch of the common law."<sup>14</sup>

§ 17. **Jurisdiction of the Chancery Courts of Tennessee.**—The same conclusion was reached by Judges Turley and White, in the great case of *Green v. Allen*,<sup>15</sup> Judge White holding that the powers of our Chancery Courts "are no doubt as ample as those of the Chancery Court of England, with no other difference except that which grows out of the difference of our institutions." Judge Green in *Oakley v. Long*,<sup>16</sup> concedes to our Chancery Courts "the jurisdiction which was exercised by the Chancery Court of England as a Court of Equity;" and in *Dickson v. Montgomery*,<sup>17</sup> he states that "our Court of Chancery has jurisdiction in all cases where, in England, the Lord Chancellor in the exercise of his extraordinary jurisdiction,<sup>18</sup> could have afforded relief." And Judge Cooper, in *Lake v. McDavitt*,<sup>19</sup> says: "The Chancery Court is vested with 'all the powers, privileges and jurisdiction incident to a Court of Equity by existing laws,' that is, by the statutory and common law of the State. It is a Superior Court as contra-distinguished from a Court of peculiar, special and limited jurisdiction. It possesses, except where changed by statute, the jurisdiction which was exercised by the Lord Chancellor of England as an Equity Judge, denominated his extraordinary jurisdiction." In this case Judge Cooper recognizes the Equity jurisprudence as a part of the "common law of the State," thus concurring with the Judges heretofore cited on this point.

§ 18. **Our Chancery Practice Founded on that of England.**—Not only are the principles and doctrines of the English Chancery Court in force in the Chancery Courts of this State, but, before the passage of the Act of 1801, we were governed by the English rules in Chancery practice almost exclusively, and our Equity proceedings had the force and effect of proceedings in the English Court.<sup>20</sup> And as late as 1822, the Rules adopted by the Supreme Court for the regulation of the practice of the Chancery Court provided that "in all cases where the Rules prescribed by Act of Assembly, or those Rules heretofore adopted, do not apply, the practice of the Courts of Chancery shall be regulated by the practice of the High Court of Chancery in England."<sup>21</sup> The U. S. Circuit Courts in this State, in their Equity proceedings, are also governed by the practice of the English Chancery, as it existed in 1842.<sup>22</sup>

In Tennessee, while the pleadings and practice, in the main, conform to the pleadings and practice of the English Court of Chancery prior to 1875, there are, nevertheless, many material modifications, all of which will appear in their appropriate places in this treatise.<sup>23</sup>

§ 19. **Powers and Jurisdiction of the Chancery Courts.**—It will thus be seen that both the jurisprudence and the practice of the English Chancery

<sup>14</sup> 1 Johns. Ch., 531. The "common law" of the English colonies in America embraced the whole body of the laws the colonists brought with them from England, including the Chancery Court and its jurisprudence. See note 19, *infra*.

<sup>15</sup> 5 Hum., 206; 239.

<sup>16</sup> 10 Hum., 259.

<sup>17</sup> 1 Swan, 361.

<sup>18</sup> This "extraordinary jurisdiction" was the Equity jurisdiction. *Lake v. McDavitt*, 13 Lea, 30; Pom. Eq. Jur., §§ 33-35. This extraordinary jurisdiction embraces the whole field of Equity treated of in Story's Equity Jurisprudence.

<sup>19</sup> 13 Lea, 30. See note 14, *supra*.

<sup>20</sup> *Dibrell v. Eastland*, 3 Yerg., 535.

<sup>21</sup> Cooke, (Appendix.) 444.

<sup>22</sup> Rules of Practice, U. S. Courts of Equity, § 90; see also, Cooke, 392; 415.

<sup>23</sup> The practice in the Chancery Courts of Tennessee is a modified practice, partaking of the code features to a considerable extent. See Code §§ 4305-4494. And in Tennessee, as in other States, there has been a struggle between the two systems of pleading—between the stat-

utory system and the preceding system; and our Supreme Court rulings on the subject have oscillated between the two, sometimes conforming to the requirements and spirit of the statutes; and, at other times, ignoring the statutes, and reasserting the supremacy of the ancient rules, according as the judges have been inspired with admiration for the new or veneration for the old.

As a result of our statutory enactments on the subjects of pleading and practice, the text books that treat of Chancery Practice and Pleading, while in the main valuable guides, are nevertheless liable at times to mislead in matters wherein, by direct enactment or by necessary implication, the former practice has been repealed or modified. And one of the main purposes of this book is to give so much of the old practice as is in force, and to substitute the new practice for so much of the old as is no longer in force, thus presenting to the practitioner the whole of the practice, old and new, now prevailing in our Chancery Courts, and omitting so much of the old practice as has become obsolete, or has been repealed or modified by statute.

Court are in force in our State, except in so far as changed by our Statutes and Rules. So that, in summarizing the "powers, privileges and jurisdiction" conferred on our Chancery Courts by the Code,<sup>24</sup> it may be safely stated that the powers and jurisdiction of the Chancery Courts of Tennessee, in and for their respective districts, are, except as changed by statute, identical in kind, and commensurate in extent, with the Equity powers and jurisdiction of the High Court of Chancery in England at the time of the American Revolution.<sup>25</sup> And it may be added, the statutory changes in the powers and jurisdiction of our Chancery Courts have greatly enlarged those powers and jurisdiction, and proportionately increased their efficiency and beneficence.

§ 20. **Statutory Changes in the Powers and Jurisdiction of the Court.**—As has been already stated, the statutory changes in the powers and jurisdiction of the Chancery Courts have mainly been *additions*, and not limitations. "Jurisdiction" means the authority possessed by a Court to determine a controversy; and the "powers" of a Court are its right and ability to enforce its determinations.

1. **The Principal Additions to the Powers of the Court** are the following, given in order of time:

1. Power to order a bill to be taken for confessed.<sup>26</sup>
2. Power to issue an execution to enforce a money decree.<sup>27</sup>
3. Power to bring defendants before the Court by publication.<sup>28</sup>
4. Power to divest and vest title to property by decree.<sup>29</sup>
5. Power to issue attachments to impound property.<sup>30</sup>
6. Power to appoint a commissioner to execute a conveyance, release or acquittance, in the name of either the parties or of himself.<sup>31</sup>
7. Power to appoint administrators *ad litem* when necessary in the progress of a cause.<sup>32</sup>

2. **The Principal Additions to the Jurisdiction of the Court** are the following, given in chronological order:

1. Jurisdiction to empanel a jury to try an issue of fact.<sup>33</sup>
2. Jurisdiction to proceed against non-resident and absconding defendants, by publication.<sup>34</sup>
3. Jurisdiction to decree a divorce and alimony.<sup>35</sup>
4. Jurisdiction to proceed *in rem* against the estates of non-residents by attachment and publication.<sup>36</sup>
5. Jurisdiction to proceed against the real and personal property of non-resident defendants.<sup>37</sup>
6. Jurisdiction to proceed by attachment and publication against the estates and persons of non-resident absconding debtors.<sup>38</sup>
7. Jurisdiction to appoint an administrator, and wind up his intestate's estate.<sup>39</sup>
8. Jurisdiction to keep corporations in the line of their duties, and to decree a forfeiture of their charters.<sup>40</sup>
9. Jurisdiction over the persons and estates of idiots, lunatics and persons of unsound mind.<sup>41</sup>
10. Jurisdiction to consent to, and decree, a sale of the property of infants

<sup>24</sup> Code, § 4279. All references to Code sections are to the sections in the Code of 1858.

<sup>25</sup> See cases cited in the preceding sections. See also, 1 Pom. Eq. Jur., §§ 282-288; 1 Sto. Eq. Jur., § 57.

<sup>26</sup> Acts of 1782, ch. 11.

<sup>27</sup> Acts of 1787, ch. 22; *Deaderick v. Smith*, 6 Hum., 146.

<sup>28</sup> Acts of 1787, ch. 22.

<sup>29</sup> Acts of 1801, ch. 6; *Dibrell v. Eastland*, 3 Yerg., 534.

<sup>30</sup> Acts of 1801, ch. 6, § 3.

<sup>31</sup> Acts of 1838, ch. 176.

<sup>32</sup> Acts of 1889, ch. 137.

<sup>33</sup> Acts of 1782, ch. 11.

<sup>34</sup> Acts of 1787, ch. 22.

<sup>35</sup> Acts of 1799, ch. 19.

<sup>36</sup> Acts of 1801, ch. 6.

<sup>37</sup> Acts of 1801, ch. 6.

<sup>38</sup> Acts of 1836, ch. 43.

<sup>39</sup> Acts of 1842, ch. 177.

<sup>40</sup> Acts of 1846, ch. 57.

<sup>41</sup> Acts of 1851-52, ch. 163; *Fentress v. Fentress*, 7 Heisk. 433.



and married women. If the Court had inherent jurisdiction<sup>42</sup> to do this, the statute certainly settled all doubts and enlarged that jurisdiction.<sup>43</sup>

11. Jurisdiction to prevent the usurpation of office, and to declare an office forfeited.<sup>44</sup>

12. Jurisdiction of all civil causes of action triable in the Circuit Court, except for injuries to person, property or character, involving unliquidated damages.<sup>45</sup>

§ 21. **Effect of the Act of 1877 generally Considered.**—In 1801, it was enacted that “after answer filed and no plea in abatement to the local jurisdiction of the Court, no exception for want of jurisdiction shall ever afterwards be made.”<sup>46</sup> It has been uniformly held ever since the passage of this Act, that on failure of the defendant to object to the jurisdiction of the Court before answering, the Court had the right, and it was its duty, to determine the controversy, unless the matter was unfit for a Court of Equity. Under the operation of this holding, the Chancery Court had, for seventy-five years, been in the habit of entertaining demands, and causes of action, purely legal in their nature. The Act of 1877 is only one step further than the law was before, as Judge Freeman, in *Jackson v. Nimmo*,<sup>47</sup> very conclusively shows. The Chancery Court has long had jurisdiction, in attachment cases, of “debts or demands of a purely legal nature, except causes of actions founded on torts.”<sup>48</sup> Thus, it will be seen, the Act of 1877 is by no means as revolutionary as was at first supposed. Every enlargement of the Chancery jurisdiction for five hundred years, in England and America, has been the signal for an alarm; but the enlargements have continued, until, both in England and a majority of the American States, the Chancery methods of pleading and the principles of the Chancery jurisprudence have, in a large measure, superseded the unbending formalities and the harsh doctrines of the common law.<sup>49</sup>

The Act of 1877 goes far to settle the ancient controversy, between the Chancery and the Common Law Courts, with respect to the boundary line between their respective jurisdictions; and it includes not only the disputed territory, but also all the territory adjacent thereto, within the concurrent jurisdiction of the Chancery Court.<sup>50</sup>

In the English Judicature Act, passed in 1873, it is provided that “generally, in all matters in which there is any conflict or variance, between the rules of Equity and the rules of the common law with reference to the same matter,

<sup>42</sup> *Brown, ex parte*, 8 Hum. 200; *Mason v. Tinsley*, 1 Tenn. Chy. 154; *Greenlaw v. Greenlaw*, 16 Lea, 435; *Williams v. Williams*, 10 Heisk. 570.

<sup>43</sup> Code of 1858, § 3323.

<sup>44</sup> Code of 1858, § 3409.

<sup>45</sup> Acts of 1877, ch. 97.

<sup>46</sup> Acts of 1801, ch. 6, § 16; 1 Scott's Rev., 688.

<sup>47</sup> 3 Lea, 597, 610.

<sup>48</sup> Code, § 3461.

<sup>49</sup> In those States which have what is termed the “Code Practice,” the procedure is based largely on the ordinary Chancery Practice; and although the names of their Courts have been changed, the substance of the Equity jurisprudence and procedure remain, while common law forms and procedures have, in the main, been abrogated.

<sup>50</sup> It is safe to say, that the Act of 1877, ch. 97, gave to the Chancery Courts a practically supreme sovereignty over all the really debatable territory that formerly existed on the common law frontiers; and forever terminated the disputations, with which our Courts had re-sounded, for a hundred years, as to where the elastic domain of Equity really ended, and where the rigid realm of Law inviolably began.

What struggles the Chancery records disclose, over attempts to get the Court to determine cases, in which the jurisdiction was debatable! what contrariety of rulings on demurrers in such cases! what subtle dialectical distinctions were drawn, sometimes to sustain,

and sometimes to defeat, the jurisdiction! what clamors were raised against interfering with the jurisdiction of the common law Courts, and the sacred right of trial by jury! what invocations of Magna Charta, and the inviolable Bill of Rights! what appeals to the Chancellor to stretch forth the strong right arm of his beneficent power, and take jurisdiction, that Equity might be administered, and iniquity overcome! what references to the Master, reports, exceptions, recommitals, and decrees in the lower Court; and what appeals, writs of error, remandments, and reversals, to and by, the Supreme Court! And then, perhaps, the complainant, thus finally denied justice in a Court of Equity, went to the Circuit Court for redress, and there, after multitudinous motions, demurrers, pleas, continuances, trials, new trials, bills of exceptions, appeals, reversals and more trials, and perhaps more appeals and reversals, he was at last informed by a new set of Judges, that the suit was one that should have been brought in the Chancery Court! All such unseemly and costly controversies over questions of disputed jurisdiction, and the consequent scandal on the Courts of Justice, are happily and forever ended by the beneficent Act of 1877. And no more will Justice weep in her own temple to see her suitors torn to pieces by her own ministers contending for the jurisdiction over them. See *Hay v. Marshall*, 3 Hum., 623; *Hale v. Hale*, 4 Hum., 183; and *Taylor v. Tompkins*, 2 Heisk., 89.

the rules of Equity shall prevail." The effect of this provision is to make the rules of Equity supreme, in all litigation, in all the Courts of England. It is believed the Tennessee Act of 1877 has the same effect in all common law rights of action sought to be enforced in Chancery. When the jurisdiction of a Court is enlarged, the new subjects of jurisdiction should not be treated as aliens, and discriminated against; nor should the parties to such suits be held in disfavor, or denied any equitable right, benefit or privilege, accorded by the Court in the ordinary exercise of its jurisdiction. The Act of 1877 was manifestly intended to enlarge the jurisdiction of the Chancery Court *as a Court of Equity*, and not to make it, as to this enlargement, a *mere Common Law Court*,<sup>51</sup> and hence, in all suits brought under the Act of 1877, the pleadings, practice and principles, of Equity jurisprudence will control.<sup>52</sup>

§ 22. **Classification of Matters of Equitable Jurisdiction.**—The importance formerly attached to a proper classification of the subjects of Equity jurisdiction no longer exists in this State, and it is now immaterial whether the matter in controversy is within the equitable or the statutory jurisdiction of the Court; and if within the equitable, it is unimportant whether the jurisdiction be exclusive or concurrent. As a result, all the abstruse learning in the books on the lines of demarcation between the different grounds of jurisdiction has ceased to be of much practical value. The legal niceties, the complex technicalities and the dialectical discriminations on the subject of jurisdiction, with which the great jurists of England and America wrestled in the last five centuries, no longer perplex either the student or the practitioner in this State.

For convenience of consideration, the jurisdiction of our Chancery Courts, as now constituted, may be divided into: 1, The Equitable, or Inherent, and 2, The Statutory:

1. **The Equitable, or Inherent**, to include all of those matters, whether purely equitable in their nature or having characteristics both equitable and legal, jurisdiction over which is derived exclusively or chiefly from their inherent powers as Courts of Equity; and

2. **The Statutory**, to include all of those matters, whether equitable in their characteristics or purely legal in their nature, jurisdiction over which is derived exclusively or chiefly from our statutes.

<sup>51</sup> *Lenoir v. Mining Co.*, 4 Pick, 168. In this case it was decided that when a suit based on claims purely legal is tried in the Chancery Court the maxims and principles of Equity will be applied.

<sup>52</sup> The Chancery Court in Tennessee is now equipped with full power to do complete and speedy justice in all suits within its jurisdiction, however numerous the parties, or complicated their rights and duties. It is vested with authority to so shape and mould its decrees as to meet every exigency required either by Law or Equity, and to adjust all matters in controversy, legal as well as equitable, so as to give each party his exact rights, and to require of each party his exact duties,

whether such party be complainant or defendant, and whether the obligations be between complainants and defendants, or between co-complainants or between co-defendants. And it has been clothed with unlimited power to use any kind of process, legal or equitable, to enforce its orders and decrees; and if an emergency should arise necessitating a process not hitherto used, the Court would, when absolutely necessary to prevent a failure of substantial justice, so modify one of the customary legal or equitable processes as to adapt it to the exigencies of the emergency. The Act of 1877 is liberally construed, *Simmons v. Leonard*, 5 Pick., 622.

## ARTICLE II.

## THE EQUITABLE, OR INHERENT, JURISDICTION OF THE CHANCERY COURT.

§ 23. The Equitable, or Inherent Jurisdiction of the Chancery Court Generally Considered.

§ 24. The Equitable, or Inherent Jurisdiction Generally Stated.

§ 25. The Equitable, or Inherent Jurisdiction Specially Stated.

§ 23. **The Equitable, or Inherent, Jurisdiction of the Chancery Court generally Considered.**—The jurisprudence and procedure of the Chancery Court constituted a part of the law our ancestors brought with them from England, when they founded the Colony of North Carolina. When that Colony became a State, this jurisprudence was recognized, and its administration provided for, in its Constitution; and in 1782, its Legislature conferred this jurisdiction upon the Courts. Tennessee being then a part of North Carolina, that jurisprudence became a part of our law; and, when we became a State, both the Deed of Cession and the Act of Admission by Congress, made the laws of North Carolina our laws, until we saw fit to change them. In our first, and in all subsequent, Constitutions, the jurisprudence and procedure of the Chancery Court were fully recognized, and their administration abundantly provided for. While the procedure has been modernized, simplified and improved, in many particulars, as already fully shown, the jurisprudence has in no particular been changed, except in so far as it has been extended and enlarged on the lines of its legitimate development.<sup>1</sup>

This original jurisdiction, thus derived, through the Colony and State of North Carolina, from the Equity Jurisprudence of England, is called the *inherent* jurisdiction of the Court, to contradistinguish it from the *statutory* jurisdiction; and it is to this original and inherent jurisdiction that our statute refers when it says: "The Chancery Courts shall *continue to have* all the powers, privileges and jurisdiction, properly and rightfully incident to a Court of Equity, by existing laws."<sup>2</sup>

The inherent powers, privileges and jurisdiction of our Chancery Courts, within their respective local and personal jurisdictions, are identical in kind and commensurate in extent, with the Equity powers, privileges and jurisdiction of the High Court of Chancery in England, at the time of the American Revolution.<sup>3</sup>

The Chancery Court is a Superior Court<sup>4</sup> of general original jurisdiction of

<sup>1</sup> See Article on the History of the Chancery Courts of Tennessee, *ante*, §§ 10-14. The Chancery Court, under its inherent jurisdiction, deals only with property and the rights and duties of parties incident thereto; and every affirmative decree either affects the property of some party, or some right or duty of some party in reference to property. Its jurisdiction over infants, *non compos*, and married women arises out of their property and property rights. Its jurisdiction in suits for divorce, mandamus, *habeas corpus* and other suits formerly triable exclusively in Courts of Law, is purely statutory. As to what property is, and what are rights of property, see *post*, § 56.

<sup>2</sup> Code, § 4279. In some cases the statute has given the Court jurisdiction of matters over which it had inherent jurisdiction already, as (1) in case of partition, *Hopper v. Fisher*, 2 Head. 254; (2) in proceedings to sell the lands of infants, *Gray v. Barnard*, 1 Tenn. Ch., 298;

(3) to appoint and remove trustees, Code, §§ 3648-3664; *Watkins v. Specht*, 7 Cold., 594; 1 *Perry on Trusts*, §§ 280-282; and (4) to aid a judgment creditor after a return of *nulla bona*. Code, §§ 4282-4285.

<sup>3</sup> See the following Article; also, *Lake v. McDavitt*, 13 Lea, 30.

<sup>4</sup> *Hopper v. Fisher*, 2 Head, 254; *Lake v. McDavitt*, 13 Lea, 30. The rule of jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged. *Kilcrease v. Blythe*, 6 Hum., 378. The Chancery Court is a Superior Court within the sense and meaning of the term as contradistinguished from an Inferior Court. *Hopper v. Fisher*, 2 Head, 253; *Robertson v. Winchester*, 1 Pick., 187.

all cases of an equitable nature, where the debt or demand exceeds fifty dollars; and every matter of equitable cognizance above said amount is presumed to be within its inherent jurisdiction as a Court of Equity.<sup>5</sup>

§ 24. **The Equitable, or Inherent, Jurisdiction generally Stated.**—The whole inherent jurisdiction of the Chancery Court, aside from its injunctive powers, may be briefly summed up in these four propositions.

1. If a lawful and equitable contract be the subject matter of the suit, all the Court can do is (1) to equitably enforce the contract, or (2) to award compensation for its breach, or (3) to require the party in default to do such act relative thereto as he, in good reason and good conscience, ought to have done without suit.<sup>6</sup>

2. If there be no contract, or the contract be inequitable, and the parties disagree as to their rights and duties, all the Court can do is (1) to require the party in default to do, or refrain from doing, what good reason and good conscience require, or (2) where injury has been done, to make the defendant atone therefor.

3. If any of the parties are under disability, and (1) their interests will be promoted by a sale of their property, or by a conversion of their money into other property, or by using a portion or all of the *corpus* of their estate for their maintenance, education or support; or (2) if their rights need protection or enforcement; on the application of a guardian, or next friend, the Court will (1) by decree do for them what they in reason and conscience would themselves have done if under no disability, or (2) will require the parties who are *sui juris* to do to or for those under disability, what in good reason and good conscience, they should have done without suit.

4. If the parties are *sui juris*, whatever they consent to during the progress of the suit will, if violative of no law, be binding on the Court; and if it is to the interest of an infant or lunatic party to join in any lawful consent, and the state of the pleadings permit, the Court can consent for such infant or lunatic. And, generally, where there is consent, the parties bind the Court;<sup>7</sup> and where there is no consent, the Court binds the parties.

§ 25. **The Equitable, or Inherent, Jurisdiction, Specially Stated.**—The equitable or inherent jurisdiction of the Chancery Court includes all cases of an equitable nature, where the debt or demand exceeds fifty dollars.<sup>8</sup> These cases include the following:

1. All suits resulting from accidents and mistakes.
2. All suits resulting from frauds, actual, and constructive.
3. All suits resulting from trusts, express, constructive, and resulting.
4. All suits for the specific performance of contracts.
5. All suits for the reformation, re-execution, rescission, and surrender of written instruments.
6. All suits for an accounting, and for surcharging and falsifying accounts.
7. All suits between partners, and to wind up an insolvent partnership.
8. All suits for the administration and marshaling of assets.
9. All suits for subrogation and substitution.
10. All suits for the enforcement of liens created by mortgages, deeds of trust, sales of land on credit, or other equitable considerations.
11. All suits by married women against their husbands, except for divorce.<sup>9</sup>
12. All suits against married women and minors in reference to their estates, not cognizable at law.
13. All suits by wards against guardians, executors, administrators and

<sup>5</sup> Code, §§ 4279-4281. As to the fifty dollar limit, see § 26, *post*, note 5.

<sup>6</sup> Equity compels a defendant to do that which an upright and conscientious man would have done without compulsion. White, J., in *Perkins v. Hays, Cooke, 166*. Equity delights in placing parties in the situation they ought

in reason and conscience to occupy. *Hancock v. Bryant, 2 Yerg., 478*.

<sup>7</sup> And so the maxims declare: *Consensus facit legem. Conventio vincit legem*.

<sup>8</sup> Code, § 4280. See *post*, § 26.

<sup>9</sup> Suits for divorce are brought under the statutory jurisdiction of the Court.

others, where an accounting, or surcharging or falsifying an account, is necessary.

14. All suits for an apportionment and contribution.
15. All suits for the marshaling of securities.
16. All suits for relief against forfeitures and penalties.
17. All suits for the redemption of land or other property.
18. All suits to have absolute deeds or bills of sale declared to be mortgages.
19. All suits for the construction and enforcement of wills and trusts.
20. All suits to obtain a set-off against a judgment in favor of a non-resident or insolvent.
21. All suits for the discovery and perpetuation of testimony.
22. All suits to compel claimants to interplead.
23. All suits for equitable attachments and receivers.
24. All suits where a *ne exeat republica* is sought.
25. All suits where an injunction is a substantial part of the relief sought.
26. All suits to remove clouds and quiet titles.
27. All suits for the establishment and execution of charities.
28. All suits for a new trial after a judgment at law.
29. All suits to have void judgments so declared, and to avoid voidable judgments.
30. All suits to execute decrees, and to impeach decrees and judgments.
31. All suits to prevent the doing of an illegal or inequitable act to the injury of complainant's property rights, or interests, *quia timet*.
32. All suits for the exoneration or protection of sureties.
33. All other suits where the defendant has done, or is doing, or is threatening to do, some inequitable act to the injury of the complainant, and there is no adequate remedy therefor in any other court.

## ARTICLE III.

## STATUTORY JURISDICTION OF THE CHANCERY COURTS.

§ 26. Statutory Jurisdiction of the Court generally Considered.

§ 27. Jurisdiction Concurrent with the County Courts.

§ 28. Jurisdiction Concurrent with the Circuit Courts.

§ 29. The Act of 1877 Specially Considered.

§ 30. Exclusive Statutory Jurisdiction of the Chancery Courts.

§ 26. **Statutory Jurisdiction of the Court generally Considered.**—With perhaps the single exception of the Act prohibiting interlocutory injunctions against the collection of State taxes,<sup>1</sup> all of the statutes now in existence relative to the powers, privileges and jurisdiction, of the Chancery Court are either declaratory or augmentative, as has been shown in a preceding Article. The Statute declares that the Court has all the powers, privileges and jurisdiction properly and rightfully incident to a Court of Equity, by existing laws.<sup>2</sup> The effect of this statute is to make the inherent jurisdiction of the Court, in a sense, also statutory. The statute further declares that the Court has exclusive original jurisdiction of all cases of an equitable nature, where the debt or demand exceeds fifty dollars, unless otherwise provided by the statute.<sup>3</sup> The Court has no jurisdiction of any debt or demand of less value than fifty dollars,<sup>4</sup> except upon an ejectment bill to recover land, or on a replevin or detinue bill, or on a bill to aid a judgment creditor,<sup>5</sup> or on a bill to enforce the statutory rights of a purchaser of realty at a tax sale.<sup>6</sup> The Court cannot enforce a vendor's lien when the amount of the demand is less than fifty dollars.<sup>7</sup>

The statutory jurisdiction, while including matters also belonging to the inherent jurisdiction, may for convenience be divided into: 1, Jurisdiction concurrent with the County Court; 2, Jurisdiction concurrent with the Circuit Court; and 3, Jurisdiction exclusive of all other Courts.

§ 27. **Jurisdiction Concurrent with the County Courts.**—The Chancery Court has jurisdiction concurrent with the County Court:

1. Of the persons and estates of idiots, lunatics, and other persons of unsound mind.<sup>8</sup>

<sup>1</sup> Acts of 1873, ch. 44.

<sup>2</sup> Code, § 4279. See preceding Article, §§ 16-22.  
<sup>3</sup> Code, § 4280. What is meant by "cases of an equitable nature" is the whole body of Equity Jurisprudence as a remedial system. Pomeroy and Story are authors of works on Equity Jurisprudence recognized by our Supreme Court; and their treatises have been largely used in the compilation of this book.

<sup>4</sup> Code, §§ 4280-4281.

<sup>5</sup> The Court has jurisdiction in a *mandamus* suit where the amount in controversy is under fifty dollars; State, *ex rel.*, v. Alexander, 7 Cates, 156; and in suits to recover land which is of less value than fifty dollars. Frazier v. Browning, 11 Lea, 253. The Chancery Courts have jurisdiction, also to aid a judgment creditor after a return of *nulla bona*, when the amount of his judgment is less than fifty dollars; Putnam v. Bentley, 8 Bax., 84; State v. Covington, 4 Lea, 58; but they have no jurisdiction to enforce a vendor's lien when the amount is less than fifty dollars. Malone v. Dean, 9 Lea, 336. If the debt or demand as set forth in the bill exceeds fifty dollars, the Court *prima facie* has jurisdiction; and if the

defendant, without pleading in abatement, answers the bill, he cannot, at the hearing, resist a decree on the mere ground that the amount of the debt, as ascertained by the proof, is less than fifty dollars. Spurlock v. Fuels, 1 Swan, 289; Birmingham v. Tapscott, 4 Heisk., 382; Wagstaff v. Braden, 1 Bax., 304; Smets v. Williams, 4 Paige (N. Y.) 364.

<sup>6</sup> Acts of 1903, ch. 258, § 78.

<sup>7</sup> Malone v. Dean, 9 Lea, 336. After this decision, the Legislature clothed the County Courts with jurisdiction to enforce vendors' liens when the amount is under fifty dollars. Acts of 1887, ch. 141. Why the jurisdiction was not conferred on the Chancery Courts, it is hard to understand, inasmuch as the rules of practice and pleading in the Chancery Court are required to be followed in the County Court in such cases, and the costs in the two Courts in such cases are *precisely the same*. The proceedings in the County Courts in suits to sell lands are often so inartificial as to be unintelligible, and often so defective as to convey no title to the purchaser.

<sup>8</sup> Code, § 4298.

2. Of the persons and estates of infants, and of the appointment and removal of guardians.<sup>9</sup>

3. Of suits for the partition,<sup>10</sup> or sale, of estates, by heirs or tenants in common.<sup>11</sup>

4. Of suits for the sale of a decedent's land at the instance of his personal representatives or creditors, if the personal property is insufficient to satisfy the debts of the estate.<sup>12</sup>

5. Of suits for the allotment of dower.<sup>13</sup>

6. Of suits for the appointment of an administrator of a decedent's estate, when six months have elapsed since his death, and no person will apply to the County Court, or can be procured, to administer in the usual way,<sup>14</sup> and

7. Of suits to enforce the payment of legacies and distributive shares.<sup>15</sup>

§ 28. Jurisdiction Concurrent with the Circuit Courts.—The Chancery Court has jurisdiction concurrent with the Circuit Court in the following cases:<sup>16</sup>

1. Of suits for divorce and alimony.<sup>17</sup>

2. Of suits for the partition, or sale, of estates by heirs or tenants in common.<sup>18</sup>

3. Of suits for the sale of a decedent's land at the instance of his personal representatives or creditors, if the personal property is insufficient to satisfy the debts of the estate.<sup>19</sup>

4. Of suits for the allotment of dower.<sup>20</sup>

5. Of arbitration and agreed cases.<sup>21</sup>

6. Of suits for the abatement and recovery of usury.<sup>22</sup>

7. Of suits to enforce the payment of legacies and distributive shares.<sup>23</sup>

And, under the Act of 1877, the Chancery Court has jurisdiction, concurrent with the Circuit Court, in the following cases:<sup>24</sup>

8. Of all suits to recover money due for work or labor done, or services rendered, or for the hire, rent, use, price or value of property, real or personal.<sup>25</sup>

9. Of all suits to recover money expended for the defendant's use and benefit, or at his instance and request.

10. Of all suits to recover money the defendant has received from or for the complainant, without the right to retain it against him.

11. Of all suits to recover money agreed, or adjudged, to be paid.

12. Of all suits to recover money due on any contract, express or implied; or due on any judgment or award; or lost at gaming.

13. Of all suits to recover penalties,<sup>26</sup> or liquidated damages, or damages liquidated or unliquidated, for breaches of contracts, expressed or implied; or for breaches of any obligation or legal duty.<sup>27</sup>

14. Of all suits to recover damages in all other cases,<sup>28</sup> except damages for injuries to person, property or character, involving unliquidated damages.

<sup>9</sup> Code, § 4299. The Code following the North Carolina Act of 1762, ch. 5, expressly provides that the powers of the Chancery over the estates of infants are not to be abridged by the concurrent jurisdiction conferred on the County Court, § 2493. As to the power of the Chancery Court to appoint guardians for infants, see Lake v. McDavitt, 13 Lea, 26.

<sup>10</sup> The Chancery Court has inherent jurisdiction of partition. Hopper v. Fisher, 2 Head, 253.

<sup>11</sup> Code, §§ 4302; 4201; 3266.

<sup>12</sup> Connell v. Walker, 6 Lea, 709; Burgner v. Burgner, 11 Heisk., 729; Kindell v. Titus, 9 Heisk., 727.

<sup>13</sup> Code, §§ 2407; 4302.

<sup>14</sup> Code, §§ 4304, 2209-2219. See Article on this subject, *post*, §§ 985-987.

<sup>15</sup> Code, § 2312; Stewart v. Glenn, 3 Heisk., 581.

<sup>16</sup> For cases at law where the Chancery Court has no jurisdiction, see *post*, §§ 290-298.

<sup>17</sup> Code, §§ 4301; 2451. See Chapter on Divorce and Alimony.

<sup>18</sup> Code, § 3266.

<sup>19</sup> Code, §§ 2253; 2267.

<sup>20</sup> Code, §§ 4302; 4233.

<sup>21</sup> Code, §§ 4303; 3432-3454.

<sup>22</sup> Code, § 4300.

<sup>23</sup> Code, § 2312.

<sup>24</sup> Acts of 1877, ch. 97.

<sup>25</sup> Even if the property has been tortiously converted, the tort may be waived and the value of the property sued for in Chancery. Baker v. Huddleston, 3 Bax., 1. And the suit may be brought against the administrator of the tortious converter. Elrod v. Alexander, 4 Heisk., 342.

<sup>26</sup> McCreary v. First National Bank, 1 Cates, 128.

<sup>27</sup> Damages for breach of warranty. Williams v. Burg, 9 Lea, 455; or for breach of a bond, Glenn v. Moore, 11 Lea, 256.

<sup>28</sup> Such as for negligence, Kirkeys v. Crandall, 6 Pick., 532, and fraudulent conduct.

15. Of all suits to recover land, or any interest therein, or any rent or profit thereon.

16. Of all suits to recover specific personal property.

17. Of all such "special actions and proceedings"<sup>29</sup> as ejectment,<sup>30</sup> forcible entry and detainer, replevin,<sup>31</sup> detinue, mandamus,<sup>32</sup> habeas corpus,<sup>33</sup> summary proceedings by motion, and proceedings to change names, and to legitimate and adopt children; and

18. Of all other civil causes of action triable in the Circuit Court, except for injuries to person, property or character, involving unliquidated damages.<sup>34</sup>

The Chancery and Circuit Courts have also concurrent jurisdiction:

19. Of all suits in the name of the State against corporations, and to prevent the usurpation of office,<sup>35</sup> and

20. Of all suits commenced by attachment against the property of the defendant.<sup>36</sup>

21. Of all suits to enforce mechanics' liens,<sup>37</sup> landlords' and furnishers' liens,<sup>38</sup> liens on boats,<sup>39</sup> liens of cotton sellers,<sup>40</sup> liens for wharfage,<sup>41</sup> liens of employes of corporations and partnerships,<sup>42</sup> liens of farm laborers,<sup>43</sup> liens of contractors and laborers on railroads,<sup>44</sup> and liens on personal property.<sup>45</sup>

22. Of all suits brought in the name of the State or County to enforce liens for taxes,<sup>46</sup> and

23. Of all appeals from the judgment of the County Court on an account stated by the County Court Clerk with an administrator, or executor.<sup>47</sup>

§ 29. Act of 1877, Specially Considered.—The Act of 1877, ch. 97, was at first regarded with disfavor by the Courts and the Bar, and even its constitutionality questioned. When recognized at all, it was done grudgingly, and attempts were made by both Judges and Solicitors to limit its application, and construe it as though it made a law Court out of the Chancery Court. But the Act gained steadily in favor; its constitutionality was recognized, and its wis-

<sup>29</sup> They are so denominated in the Code. See "Title 2, of Special Actions and Proceedings," between § 3223 and § 3229.

<sup>30</sup> Even when the land is worth less than fifty dollars. *Frazier v. Browning*, 11 Lea, 253; *Smith v. Taylor*, 11 Lea, 743.

<sup>31</sup> See *Womack v. Smith*, 11 Hum., 478; *Lee v. Cone*, 4 Cold., 392; *Chesney v. Rodgers*, 10 Heisk., 542.

<sup>32</sup> *Hawkins v. Kercheval*, 10 Lea, 542.

<sup>33</sup> The Chancery Court is given jurisdiction of habeas corpus suits by the Act of 1877, ch. 97; but it would seem that this Act does not give the Chancellor the powers of the Circuit Judge in habeas corpus cases at chambers. The habeas corpus "cases of equitable cognizance," referred to in the Code, § 3723, include only cases where a party has been committed by the Chancery Court, or Chancellor, for some contempt. See Code, §§ 4108-4109; 4482-4483, and the Article on Contempt, *post*, §§ 203; 922.

<sup>34</sup> Acts of 1877, ch. 97. The scope of this Act is broader than has sometimes been thought. By it the Chancery Court is given jurisdiction "of all civil causes of action triable in the Circuit Court, except for injuries to the person, property or character, involving unliquidated damages." The exception is confined to "injuries to person, property, or character, involving unliquidated damages." Hence, these three elements must co-exist in the suit to bring it within the exception. 1st, the suit must be for an injury; 2nd, the injury must be to person, property or character; and 3d, the injury must involve unliquidated damages. If a civil cause of action does not cover all three of these elements, then the suit may be brought in the Chancery Court. Nearly all of the excepted cases are included in the following three classes:

1. "Injuries to person involving unliquidated damages" include, (1) assault, (2) battery, (3) false arrest, (4) false imprisonment, (5) injury to the person from negligence, nuisances, seduction, and malpractice, and (6) malicious prosecution involving an arrest.

2. "Injuries to property, involving unliquidated damages" include injuries to property, real or personal, arising from trespasses, *vi et armis*, nuisances, negligence, and torts.

3. "Injuries to character" involving unliquidated damages" include (1) slander, (2) libel, and (3) malicious prosecution: the last is often for injuries to both person and character.

By the 2nd Section of the Act of 1877, no demurrer for want of jurisdiction of the cause of action shall be sustained in the Chancery Court, except in cases of unliquidated damages for injuries to person, property or character.

Liquidated damages are (1) such as are agreed upon by the parties either before or after the breach. *Bouv. L. Dic.*, "Liquidated Damages;" *Winters v. Fleece*, 4 Lea, 550; or (2) such as are definitely fixed by some rule of law. See *Glenn v. Moore*, 11 Lea, 253; *State v. Keller*, 11 Lea, 399; *Williams v. Burg*, 9 Lea, 460. But the Chancery Court in a suit to join injuries to property will go further and award damages for the injury done. See §§ 36; 38.

<sup>35</sup> Code, § 3411. See Article on these suits, *post*, §§ 1081-1083.

<sup>36</sup> Code, §§ 3455; 3460; 3461. See Chapter on Attachment Suits.

<sup>37</sup> Code, §§ 1987; 3543; Acts of 1873, ch. 19; Acts of 1889, ch. 103, § 2.

<sup>38</sup> Code, § 3541; *Sharp v. Fields*, 1 Heisk., 571. Any attachment suit, except for torts, may be brought in Chancery. Code, §§ 3455; 3461; 3507-3508.

<sup>39</sup> Code, § 3550; *Casey v. Weatherly*, 13 Pick., 297.

<sup>40</sup> M. & V.'s Code, § 2762.

<sup>41</sup> Code, § 1993.

<sup>42</sup> M. & V.'s Code, § 2769.

<sup>43</sup> M. & V.'s Code, § 2772.

<sup>44</sup> M. & V.'s Code, § 2776; Acts of 1877, ch. 97, § 2.

<sup>45</sup> Acts of 1889, ch. 12.

<sup>46</sup> Acts of 1887, ch. 2, § 64; *Grundy County v. Tenn. Coal Co.*, 10 Pick., 297.

<sup>47</sup> Code, §§ 2302-2304.



dom and usefulness appreciated. It is being more and more liberally construed, its far-reaching and beneficent effects are more and more fully understood, and its extensions of remedial powers and processes more and more generally appreciated and applied.

This Act places at the disposal of the Chancery Court all the powers and jurisdiction of the Circuit Court, in civil causes of action, except a few involving unliquidated damages; so that when a suit is being tried in Chancery, the Chancellor has at his disposal all the weapons and machinery of justice contained in the armories of the common law as well as those in the armories of Equity, thus enabling him to do full, complete and adequate justice in the suit before him, unhampered by the formalities and technicalities of the common law, and unhindered by the former statutes conferring exclusive jurisdiction of common law matters upon the Circuit Courts. The Act of 1877 did not carry the Chancellor into a Law Court to try the lawsuit, but carried the lawsuit into the Chancery Court to be heard by the Chancellor, and clothed him with all of the powers of the Circuit Court in addition to those of the Chancery Court, so as to enable him not only to administer the law applicable to the case, but at the same time, to apply any powers or principles of Equity necessary to determine all the questions involved in the controversy,<sup>48</sup> and render any further litigation not only unnecessary but improper.

While the maxim, When Chancery has jurisdiction for one purpose it will take jurisdiction for all purposes, has always been a favorite one, nevertheless the Court was formerly so hampered by not having a jury of its own to determine a controlling question of fact when the evidence was conflicting and the credit of witnesses to be weighed, or to assess unliquidated damages, that it often, perhaps too often, after deciding the equitable matters in controversy, refused to go further and remitted the complainant to the Courts of law in order to obtain the remainder of the redress he was entitled to. But now, clothed with law powers by the Act of 1877, and having full power to empanel a jury of its own, our Chancery Court can give full effect to the said maxim, and in one and the same suit determine every question of Equity, law or fact involved, including unliquidated damages where such damages are incidental to the main object of the suit.<sup>49</sup>

§ 30. **Exclusive Statutory Jurisdiction of the Chancery Court.**—The Chancery Court has exclusive statutory jurisdiction of the following suits, some of which, however, belong, also, to its inherent jurisdiction:

1. Of all suits to aid judgment creditors, when the property of the defendant cannot be reached by execution.<sup>50</sup>
2. Of all suits to set aside fraudulent conveyances, and subject the property so conveyed to the satisfaction of complainant's debt.<sup>51</sup>
3. Of all suits to subject the property of corporations to the payment of their debts, when the corporate franchises are not used, or have been granted to others, in whole or in part.<sup>52</sup>
4. Of all suits relating to controversies between the State and incorporated companies, their stockholders and creditors, growing out of the internal improvement laws of the State.<sup>53</sup>
5. Of all suits to enforce foreign judgments against the property of the non-resident defendant when the creditor has exhausted his legal remedy.<sup>54</sup>
6. Of all suits to sell the property of infants and married women, for their support, education and maintenance, and when manifestly for their interest.<sup>55</sup>
7. Of all suits to partition, sell and re-invest the property of lunatics, when for the manifest interest of the lunatic or his family.<sup>56</sup>

48 *Lenoir v. Mining Co.*, 4 Pick., 168.  
 49 See *post*, § 36, where this maxim is fully considered.  
 50 Code, §§ 4282-4286.  
 51 Code, §§ 4288-4293.

52 Code, §§ 4294-4295.  
 53 Code, § 4296.  
 54 Code, § 4297.  
 55 Code, §§ 3323-3340.  
 56 Code, § 3708-3719.

8. Of all suits of an equitable nature, where the debt or demand exceeds fifty dollars, unless otherwise provided by the Code of 1858.<sup>57</sup>

Each of these suits is considered at large, under appropriate headings, in subsequent sections.<sup>58</sup>

<sup>57</sup> Code, § 4280.

| <sup>58</sup> See Index, and Table of Contents.

## CHAPTER III.

## MAXIMS AND PRINCIPLES OF EQUITY.

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ARTICLE II. Maxims and Principles of Adjudication.

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## ARTICLE I.

## MAXIMS AND PRINCIPLES OF JURISDICTION.

§ 31. Maxims generally Considered.

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§ 38. Equity Delights to do Complete Justice, and Not by Halves.

§ 39. He who Seeks Equity must Do Equity.

§ 40. Courts of Equity will not Tolerate any Interference with their Officers, Process or Decrees, by the Courts of Law.

§ 31. **Maxims generally Considered.**—There are certain great underlying principles, often called *Maxims*,<sup>1</sup> which are the fruitful sources of a vast number of particular rules concerning both rights and remedies. These principles are a component part of Equity jurisprudence.<sup>2</sup> They lie at the foundation of universal justice; are the sources of municipal law; and have been worthily and aptly called *legum leges*—the laws of the laws.<sup>3</sup> These maxims are, in the strictest sense, the *principia*,<sup>4</sup> the beginnings, out of which has been developed the entire system of Equity jurisprudence, by a process of natural evolution. The student who has made these principles a part of his mental habit, who has, as it were, incorporated them into his very intellectual being, has already mastered the *essence* of Equity; and has made the acquisition of its particular rules an easy task.<sup>5</sup>

<sup>1</sup> *Maxim ita dicta quia maxima est ejus dignitas et certissima auctoritas atque quod maxime omnibus probetur.* Co. Lit., 11. (A maxim is so called because its dignity is *maximum* and its authority the most certain, and because approved at the *maximum* by all.)

<sup>2</sup> 1 Pom. Eq. Jur., § 120.

<sup>3</sup> 2 Kent's Com., 553. So fundamental are these maxims that he who disputes their authority is regarded as beyond the reach of reason. *Contra negantem principia non est disputandum.* Coke says, "Maxims of law are holden for law." Coke, Litt., 11, 67; and Bacon says, "They are the fountains of justice from which flow all civil laws." In *Box v. Vanier*, 4 Cates, 409, Beard, Ch. J., says, "Maxims have their foundation in universal law; they are embodied in the common law, and are an essential part of its warp and woof."

<sup>4</sup> *Principia probant, non probantur.* (Maxims are proof, and need no proving.)

<sup>5</sup> 1 Pom. Eq. Jur., §§ 121, 360. So vast is the number and variety of suits in Chancery, that it is impossible for a Solicitor to find a prece-

dent for every case, even if it existed; but he who has the maxims mastered is saved much of the drudgery of hunting precedents. Out of the twenty-six letters of the alphabet, by permutations and combinations, are made the countless multitudes of words and sentences written by earth's millions since writing was invented. So, out of a few fundamental maxims can be deduced the rules which, by proper application, will determine the equities of the vast proportion of equitable suits instituted in Chancery. *Melius est petere fontes quam sectari rivulas.* (It is better to seek the fountains [the maxims of the law] than to follow the rivers [hunt for adjudications based on maxims].)

The maxims and principles contained in this Chapter are not all strictly maxims and principles of Equity; many of them are maxims and principles of the common law. Nevertheless, they have all been adopted into the family of equitable doctrines and are constantly used and applied by our Chancery Courts. The author has long been convinced that no one can master the jurisprudence of Equity who

§ 32. **Equity Acts upon the Person.**<sup>6</sup>—When the Chancellors first began to exercise judicial functions, they refrained from using common law, or statutory processes, probably to avoid conflicts with the common law Courts, which were jealous of the extraordinary powers exercised by the Chancery Court. 1, Instead of commanding the Sheriff to make the money, decreed the complainant, out of the defendant's property, the Chancellor commanded the defendant to pay the money; 2, Instead of empowering the Master to divest the title to land out of the defendant, and vest it in the complainant, or the purchaser, the Chancellor required the defendant to execute a deed to the complainant, or to the purchaser; 3, Instead of forbidding a Court of law to proceed in a suit, or to enforce its judgment in a given case, the Chancellor forbade the plaintiff from proceeding in the suit, or doing any act towards obtaining an execution; and, 4, In general, the decrees of the Chancery Court were enforced through the personal act of the party himself.<sup>7</sup> If the party failed or refused, to do what the Chancellor by his decree required him to do, compulsory process was issued. But no compulsory process issued until the party had been served with a mandate, commanding him to do what the Court required of him.<sup>8</sup> If he then disobeyed, he was adjudged in contempt, and was committed to prison until he complied with the orders of the Court. If he still refused, his property, real and personal, was sequestered and applied to the satisfaction of the decree.

This was formerly the practice in North Carolina and Tennessee; but in 1787, in consequence of the then mode of "carrying into effect the decrees of the Court of Equity by attachments, habeas corpus, attachments by proclamation and commissions of rebellion being in many cases dilatory, oppressive and inadequate," the Legislature of North Carolina authorized executions to issue on Chancery decrees, as at law; and in 1801, the Legislature of Tennessee enacted that "instead of decreeing parties to convey lands, as theretofore practiced in equity," the Court was given power by decree to divest the title out of the person against whom the decree was pronounced.<sup>9</sup> Since the passage of these two acts, our Courts of Chancery have not acted, ordinarily, *in personam*. The vast majority of Chancery decrees are now enforced by executions, attachments of property, writs of possession, divestiture of title, and orders of sale; so that it may now be said that our Courts of Chancery do not act, ordinarily, *in personam*.

Nevertheless, the maxim that *Courts of Equity operate on the person*, is true; and most important results follow from the maxim; and although in practice, our Chancery Court acts ordinarily on the property of the party, yet it has all of its original authority to act on the person of the party, as will be seen by inspecting the Code, §§ 4478-4488; and as will be more fully shown hereafter.<sup>10</sup>

The principal cases in which Equity now operates on the person in Tennessee are the following:

1. Where the Parties Reside within the Jurisdiction of the Court, but the land, or other subject matter in controversy, is not. In such case, if Equity so require, the Court may, by attachment, compel one party to convey the land to the other.<sup>11</sup> Hence, a specific performance will be decreed as to lands in a foreign country; so, a trust will be declared and enforced, or a mortgage foreclosed or redeemed, or a fraudulent judgment overhauled, and even the sales under such a judgment, when the lands, or the judgment, are in a foreign country.<sup>12</sup> But

has not thoroughly comprehended that subtle alchemy in its maxims whereby the most difficult problems are readily solved; and, so believing, no little space has been devoted to them. These principles and maxims constitute a system of jurisprudence based on good reason and good conscience; and are designed to enable the Courts of Equity to do complete justice between all the parties in any litigation, however novel, abstruse, complicated or numerous, the questions involved may be.

<sup>6</sup> *Æquitas agit in personam*. Code, § 4305.

<sup>7</sup> 1 Pom. Eq. Jur., § 428.

<sup>8</sup> 2 Dan. Ch. Pr., 1043.

<sup>9</sup> 1 Scott's Rev., 389; 692.

<sup>10</sup> See Chapter on the Enforcement of Decrees.

<sup>11</sup> *Miller v. Birdsong*, 7 Bax., 537. It is not enough that a subpoena to answer was served on the defendant; he must be an actual resident within the territorial jurisdiction of the Court. *Wicks v. Caruthers*, 13 Lea, 353.

<sup>12</sup> Sto. Eq. Jur., §§ 1291-1294. In general the fact that the property is not within the jurisdiction constitutes no bar to a proceeding in a Court of Equity, if the person is within

where, in order to give the relief sought, it is necessary to deal directly with the land itself, without the agency of the parties, then the fact that the land is outside of the jurisdiction of the Court would debar the Court from granting the relief, because the Court will not make a decree that it cannot enforce by its own authority.<sup>13</sup> Thus, a bill cannot be brought for a partition of land outside of the jurisdiction, for the Court cannot send commissioners there; but a bill may be maintained for rents and profits of land outside of the jurisdiction.<sup>14</sup>

2. Where a Discovery of Facts, or of Property,<sup>15</sup> or the delivery of documents, or the surrender of personal property, or trust funds, is commanded.<sup>16</sup>

§ 33. **Equity will not Suffer a Wrong Without a Remedy.**—This maxim, and the maxim that “Equity operates upon the Person,” are two of the principles most active in originating and moulding the Chancery jurisprudence. The King, as the “fountain of justice,” with an oath resting upon his conscience to see that right was done to all his subjects,<sup>17</sup> and believing that he had the prerogative power, as the Supreme Judge of England, to do whatsoever he deemed was right and just as between man and man, without reference to laws, customs, statutes, precedents or Courts; and prompted, no doubt, by his ecclesiastical Chancellors, was not willing to see a wrong done to a subject, and to be told that there was no power in his kingdom to right that wrong, that the common law furnished no remedy therefor; and that, as a consequence, the wrong-doer, in that particular, was superior to law, and mightier than the King.

Hence was it, that the King, deeming such a state of facts derogatory to himself, disparaging to his prerogative, disgraceful to his kingdom and a dereliction of duty under his oath, took personal cognizance of such matters when petitioned to so do; and when petitions became too numerous for his personal attention, he referred them to his Chancellors, who were the “keepers of his conscience,” with authority to do whatever good conscience and good reason required in the premises.

The common law had a maxim, *Ubi jus, ibi remedium*, (Wherever there is a right there is a remedy for the violation of that right;) but the maxim was too general to be true. Had it been true, there would have been no need for a Chancery Court. To support this maxim it was held that if there was no remedy then there was no *right*, which was the same as saying that the right depended on the remedy; and, unfortunately for the common law, this was true. For, under the common law, every cause of action had to be adapted to some one of its technical and arbitrary forms of suit, and if this could not be done, then the suit could not be brought; so that, at common law, the right had to be adapted to the remedy, thus violating at the same time, both reason and justice. In the Chancery Court, the opposite rule was adopted and enforced, and the remedy was adapted to the right, and thus made to assume any form the right required.

This maxim, or, as it is sometimes expressed, *Equity will not suffer a right to be without a remedy*, is the original source of the entire equitable jurisdiction

the jurisdiction; for a Court of Equity acts upon the person; or, to use the appropriate phrase, *Equitas agit in personam*. But questions may arise under a bill respecting funds, or other things, in a foreign country, so purely local, that a Court of Equity in another country might very properly decline to interfere, and remit it to the domestic forum. *Sto. Eq. Pl.*, § 489. See also *Johnson v. Kimbro*, 3 *Head*, 557.

<sup>13</sup> *Extra territorium jus dicenti non paretur impune*. (The decree of a Judge who undertakes to exercise jurisdiction beyond his State may be disobeyed without punishment). *Telegraph Co. v. Railroad*, 8 *Bax.*, 61.

<sup>14</sup> 2 *Sto. Eq. Jur.*, §§ 1292-1300.

<sup>15</sup> *Code*, §§ 4283-4285.

<sup>16</sup> On the jurisdiction of the Chancery Court to act *in personam*, see *Pom. Eq. Jur.*, §§ 135; 170; 1317-1318.

<sup>17</sup> The Constitution of our State, which may be called our “fountain of justice,” provides that “every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” *Const. Tenn.*, Art. I, § 17. For every injury, the Constitution declares there shall be a remedy; and the Chancery Court has had, from its foundation, the inherent right to provide, or adopt, a remedy for any case or injury wherefor no remedy clearly appears. 1 *Pom. Eq. Jur.*, §§ 21-29; *Bisph. Pr. Eq.*, §§ 6-7; 1 *Sto. Eq. Jur.*, §§ 39-44.

of the Chancery Court, exclusive, concurrent and auxiliary; and a full explanation of the scope and meaning of this maxim would require a discussion of the whole system of Equity.<sup>18</sup> And now that the jurisdiction of the Chancery Courts has been so greatly enlarged by statutes in Tennessee, the force of the maxim and its beneficence have been proportionately enlarged.

The *wrong* that Equity will not suffer to be without a remedy, must be a civil injury to the complainant's rights or interests, legal or equitable. There are some duties Equity does not attempt judicially to enforce, such as charity, gratitude and kindness; and some wrongs with which Equity does not interfere, such as violations of honor, or of truth, or of morals, involving no question of property, and no question of pecuniary liability; but any wrong done to a legal or equitable right will be redressed in Equity, unless some other Court has exclusive jurisdiction.

This maxim was originally intended to mean that, in all civil cases within the scope of judicial action, where a wrong had been done, or was threatened to be done, and a full, complete, adequate and certain remedy could not be had in the common law Courts, a remedy would be provided, and enforced, in the Chancery Court; and all jurisdiction assumed necessary for that purpose. And, in order to enable the Court to adequately exercise this jurisdiction, and to make its remedies effective, without coming into conflict with the powers or processes of the common law Courts, the plan was devised of compelling the defendant himself to execute the decree of the Court of Chancery by imprisoning him, if necessary, until he did so. Hence, the maxim, Equity acts upon the person; and it might be said that on these two maxims hang all Equity.

In pursuance of these two maxims, the Court of Chancery has devised, or adopted, from the Roman, or civil law, the following remedies, none of which existed at common law: (1) Specific performance of contracts; (2) Injunctions to restrain the violation of rights, to stay unjust proceedings at law, to quiet title, and prevent wrongs; (3) The re-execution of instruments lost or destroyed; (4) the re-formation of deeds, or contracts, erroneously drawn by accident, or mistake; (5) The rescission and cancellation of agreements and conveyances obtained under circumstances of surprise, fraud or mistake; (6) the re-opening of settlements, and adjudication of complicated accounts; (7) The method of winding up all the affairs of a partnership; (8) The marshaling of securities; (9) The redemption and foreclosure of mortgages; (10) The partition of land between tenants in common; (11) The enforcement of trusts and fiduciary obligations; (12) The exoneration, contribution and subrogation of sureties; (13), The administration of estates; (14) The winding up of the estates of insolvent debtors, and insolvent corporations; (15) The enforcement of liens; (16) The protection of the persons and estates of infants; (17) The establishment of a wife's equity; (18) The remedy by interpleader; (19) The perpetuation of testimony; and (20) A discovery in aid of legal proceedings.

Thus, upon these two maxims, Equity will not suffer a wrong without a remedy, and Equity operates upon the person, was builded that grand structure of jurisprudence called Equity; and although by means of the improvements in the processes of the Courts, aided largely by wise legislation, remedies for every civil wrong known to the Courts, have been devised, and enforced, yet if, in the progress of civilization, if, in the complicated network of mercantile business, if, through the ingenuity and subtlety of the human mind bent on schemes of personal or pecuniary advantages, or intent on devices for aggrandizement, new remedies should be required to circumvent circumvention and to overcome the insidiousness of any sort of machiavelism, the Court of Chancery, operating in obedience to this maxim, will devise a remedy adequate to the emergency, and vindicate the beneficence and capacity of its inherent powers to do justice in any case, and to right every wrong, however intricate

the case, however great the wrong, or however powerful the wrong-doer.<sup>19</sup> The powers that lie dormant in this potent maxim will awaken, as the necessities for their action arise; and they will be found commensurate with every necessity.

It must not be forgotten, however, that this remedy may be forfeited or lost by the party wronged: *forfeited*, (1) by some fraudulent, illegal, or unconscionable conduct in connection with the wrong he complains of, whereby his hands have become stained with iniquity; or (2) by having, through his fault or negligence, occasioned, or contributed to, the loss complained of; for, when one of two persons must suffer, the loss must be borne by him whose act caused it.<sup>20</sup> Or the remedy may be *lost*, (1) by the fact that the adverse party has an equal, or a superior, equity; or (2) by *laches*, or acquiescence; or (3) by subsequent contract, or estoppel.

§ 34. **Equity Acts Specifically, and Not by Way of Compensation.**<sup>20a</sup>—This principle runs through the whole system of Chancery jurisprudence. Equity aims at putting the parties exactly in the position they ought to occupy, giving them *in specie* what they are entitled to enjoy; and putting a stop to injuries which are being inflicted. Thus, Equity decrees the specific performance of a contract, instead of giving damages for its breach. So, Equity restrains the commission of a trespass, instead of compensating the aggrieved party by damages. In some cases, also, a party will be compelled to specifically make good his representations by which another has been misled.<sup>21</sup> So, Equity will declare a person who has knowingly acquired trust property, a trustee; and will make property purchased in his own name by a fiduciary with trust funds, trust property; will construe and enforce wills and other express trusts; and will set up lost or destroyed instruments and records; and will cancel fraudulent deeds, and remove clouds on title, and will, by injunction, protect a party in his rights, or restrain a party in his wrongs. In all the foregoing cases, the common law either gave no remedy, or else merely allowed damages for the wrong, the latter remedy when allowed being often wholly inadequate, and sometimes, from the poverty of the defendant, wholly worthless.

§ 35. **When Parties are Disabled to Act the Chancery Court will Act for Them.**<sup>21a</sup>—Persons of unsound mind are disabled to act for themselves by nature; infants are disabled both by nature and by law, and married women are disabled by law alone. As a rule, none of these three classes can of themselves enter into any important contract, especially contracts relative to lands. But it is often of great importance to their welfare, to convert their property into another form, or to expend it for their urgent necessities; and the law would be greatly defective in this important matter if it furnished no remedy for such emergencies. The Chancery Court gives this remedy, and has full jurisdiction to do everything necessary for the welfare of persons under disability: it may sell, lease or exchange, their lands; convert personality into realty, or realty into personality; order the expenditure of any part of the principal of their estates for their education, or maintenance; and, in general, do any act indispensable to their welfare, the Court at all times having in view the best interests of the parties; and acting as would a prudent and considerate parent.<sup>22</sup>

<sup>19</sup> Chancery has been the handmaid of all courts in affording process to meet exigencies. She has done so in the face of tyranny, to break loose the iron hand of power when grasping against conscience. Peck, J., in *Cox v. Breedlove*, 2 Yerg., 499; 520. Before the establishment of the Chancery Court in England it might have been often said, *De legibus non curat maximus*.

<sup>20</sup> 1 St. Eq. Jur., § 387.

<sup>20a</sup> Snell's Pr. Eq., 47.

<sup>21</sup> Bishop. Pr. Eq., § 51.

<sup>21a</sup> While this is not a maxim, it is nevertheless a fundamental principle of Equity.

<sup>22</sup> *Ridley v. Halliday*, 22 Pick., 607. It is the peculiar province of Courts of Equity to give all needed and appropriate relief in case of infants whose rights have been sacrificed. *Couy v. Roane Iron Co.*, 21 Pick., 515. The Chancery Court acts as guardian for all persons under disability; and, on proper application, will protect them from the cupidity of faithless guardians and relatives, and the rapacity of unscrupulous strangers. But while accorded full protection they are not entitled to have technicalities strained in their behalf, especially against a stranger guilty of no unconscionable conduct.

§ 36. **When Chancery has Jurisdiction for One Purpose, it will Take Jurisdiction for All Purposes.**—This maxim is not always so broadly stated in the reports and text books, but in the light of the Act of 1877, extending the common law jurisdiction of the Chancery Courts, there can be no doubt about the correctness of the rule as given. Pomeroy states the rule thus: "Where a Court of Equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a Court of law."<sup>23</sup> The reason of the rule is, the duty of Courts to prevent a multiplicity of suits; and Courts of Equity delight to do complete justice, and not by halves. Our Chancery Court acted in accordance with this rule prior to the Act of 1877;<sup>24</sup> and it may now be considered as an invaluable rule, and one attended with very beneficent results.<sup>25</sup>

Where suits are brought to enjoin the further prosecution of a pending action at law, or the enforcement of a judgment recovered at law, either on the ground of some equitable defense not cognizable by the law Courts, or on the ground of some fraud, mistake, accident, or other incident of the trial at law, which rendered the legal judgment inequitable, in such cases a Court of Equity, having obtained jurisdiction for the purpose of an injunction, will decide the whole controversy, and render a final decree, even though the issues are legal in their nature, and capable of being tried by a court of law; and the legal remedies, therefore, are adequate. This rule is general in its operation, and extends to all suits brought to obtain the special relief of injunction, and is not confined to suits for the purpose of enjoining actions, or judgments, at law. It may be stated as a general proposition, that wherever the Chancery Court has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues, and make a final decree, granting full relief in the same manner as could a Court of law, decreeing damages for the wrongs enjoined when proper.<sup>26</sup>

Particular instances of the operation of this general rule concerning the remedy of injunction may be seen in cases of waste, of private nuisance, and of continuous or irreparable trespasses, where, the Chancery Court having obtained jurisdiction by injunction, will complete the relief the complainant is entitled to, by decreeing him damages for the injuries done.<sup>27</sup>

If the Chancery Court obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such, for example, as a discovery, or the specific performance of a contract, or the rescission, or cancellation, of some instrument, and it appears from facts disclosed on the hearing, but not known to the complainant when he brought his suit, that the special relief prayed for has become impracticable, and the complainant is entitled to the only alternate relief possible, that of damages, the Court then will, instead of compelling the complainant to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of compensatory damages.<sup>28</sup>

It is a fundamental rule of Equity jurisprudence, that the Court of Chancery, in any cause coming before it for decision, if the circumstances of the case permit, and all the parties in interest are or can be brought before it, will

<sup>23</sup> 1 Pom. Eq. Jur., § 231.

<sup>24</sup> *Almony v. Hicks*, 3 Head. 41; *Johnson v. Cooper*, 2 Yerg., 524; *Jones v. Perry*, 10 Yerg., 59.

<sup>25</sup> 1 Sto. Eq. Jur., § 64 k; *McHaney v. Cawthorne*, 4 Heisk., 508; *Hudgins v. Fanning*, 4 Bax., 374; *Smith v. Taylor*, 11 Lea, 744.

<sup>26</sup> 1 Pom. Eq. Jur., § 181. See *post*, § 826.

<sup>27</sup> 1 Pom. Eq. Jur., § 181.

<sup>28</sup> *Richi v. Chattanooga Brewing Co.*, 21

*Pick.*, 705; *Pearl v. Nashville*, 10 Yerg., 179; 1 Pom. Eq. Jur., §§ 224-228; 236-237; 1 Sto. Eq. Jur., § 64 k. Equity will not decree a suit where it may decree a remedy. Fran. Max., 42. The maxim, Equity delights to do complete justice and not by halves, is similar in its operation to the maxim above treated, and much that is found under its head might have been pertinently incorporated here. See *post*, § 38.



determine the entire controversy, and award full and final relief; and thus do complete justice to all the litigants, whatever may be the amount or nature of their interest or liability, and thus to bring all possible litigation over the subject-matter within the compass of one judicial determination. By virtue of this rule, and in order to promote justice, the Court, having obtained jurisdiction of a controversy for one purpose, will extend its judicial cognizance over rights, interests, and causes of action which are purely legal in their nature, and will award remedies which could have been adequately bestowed by a Court of law.<sup>29</sup> All this could have been done before the Act of 1877; and since that act the rule herein stated has become one of the ordinary jurisdiction of the Court.

§ 37. **The Chancery Court never Loses its Jurisdiction by Implication.**—Exactly what effect our Constitution has, on the stability and jurisdiction of the Chancery Court, has not been determined. That this jurisdiction can be *increased* is certain;<sup>30</sup> but it is doubtful whether its *equitable* jurisdiction can be *taken away*, or even *seriously impaired*. The system of Equity jurisprudence is tacitly recognized by the Constitution as a part of the fundamental law of the land. Hence, all the stronger in Tennessee is the rule that a Court of Equity never loses its jurisdiction by implication. In all cases where the Court had, originally, jurisdiction because of some want of adequate remedy at law, that jurisdiction is not lost by the fact that the Courts of law now give a remedy. The jurisdiction of the Chancery Courts cannot be made thus to ebb and flow. Their jurisdiction must be permanent, and must remain fixed until changed by a new Constitution, or by the Legislature acting within the present Constitution.<sup>31</sup> The common law Judges cannot diminish the inherent jurisdiction of a Court of Equity by enlarging their own jurisdiction; and when the Legislature enlarges the jurisdiction of the common law Courts, the rule is well settled that, unless the statute shows a clear legislative intent to restrict, or abolish, the jurisdiction of the Chancery Courts, such jurisdiction will continue unabridged,<sup>32</sup> for, without some positive act, the just inference is that the Legislature desires the jurisdiction in Equity to remain upon its old foundations.<sup>33</sup>

§ 38. **Equity Delights to do Complete Justice, and Not by Halves.**—This maxim has grown out of the desire of the Chancery Court to so completely decide every matter involved in the litigation that there will be no roots of controversy left out of which other suits may spring.<sup>34</sup> Hence, the Court requires that all persons interested, either legally or beneficially, in the subject-matter of the suit shall be made parties to it, either as complainants or as defendants, so that there may be a decree that will bind them all. By this means, the Court is enabled to make a complete decree between all the parties interested in the controversy, and thus not only to prevent future litigation by taking away the necessity of a multiplicity of suits, but to make it perfectly certain that no injustice has been done to any party interested in the subject-matter of the suit.<sup>35</sup> This, too, is one of the purposes of the Court in enforcing the maxim, *He who seeks equity must do equity*; for, by giving the defendant his rights in a cause, the Court not only does justice in full and not by halves, but the defendant is relieved from the necessity of instituting a suit in his own behalf. It is the constant and zealous aim of the Chancery Court to so frame its decrees as to adjust and compose all disputes as to all matters, legal and equitable, involved in the controversy, A Court of Equity will always do

<sup>29</sup> 1 Pom. Eq. Jur., § 242.

<sup>30</sup> Jackson v. Nimmo, 3 Lea, 597; Nolen v. Woods, 12 Lea, 616.

<sup>31</sup> 1 Sto. Eq. Jur., § 64 i.

<sup>32</sup> 1 Pom. Eq. Jur., §§ 278-279.

<sup>33</sup> Womack v. Smith, 11 Hum., 482; Bright v. Newland, 4 Sneed, 442; Smith v. Taylor, 11 Lea, 744; Bedwell v. Jones, 9 Lea, 168. In this

last case the paragraph on page 171, beginning with "If one," should read "It is one," &c.

<sup>34</sup> *Boni judicis est lites dirimere, ne lis ex lite oriatur.* (It is the duty of a good Judge to put an end to controversies, and not allow one suit to grow up out of another.) *Interest reipublico ut sit finis litium.* (The State is interested in having an end put to litigation.)

<sup>35</sup> Sto. Eq. Pl., § 72.

directly what can be done indirectly or circuitously, and will strive to prevent a multiplicity of suits.<sup>36</sup>

Formerly the jurisdiction of the Chancery Court ended where that of the Circuit Court began, and, as a consequence, it was often unable to do complete justice; but after doing half justice, was obliged to remit the complainant to the Circuit Court for the other half. This was especially true:

1. On bills to remove a cloud, or recover land, the complainants after recovering the land in the Chancery Court, were obliged to go to the Circuit Court to collect the rents and profits.

2. On bills to enjoin a nuisance, the complainants, after having the nuisance enjoined, were remitted to the Circuit Court to recover their damages.

3. On bills for a new trial, the parties complaining, after proving their case in Chancery, were remitted to the Circuit Court, if plaintiffs there, in order to obtain a recovery.

4. On bills to set up lost deeds, notes of hand, or other contracts, the complainants, after having their lost instruments set up in Chancery were obliged to resort to the Circuit Court to have them enforced.

5. On bills to enjoin waste, after a perpetual injunction was had in Chancery, the complainants were remitted to the Circuit Court to get compensation for the waste committed.

6. On bills to reform instruments, after getting them reformed in Chancery, the complainants were obliged to go to the Circuit Court, to obtain damages for their breach, or recover what was due on them.

7. On bills to enjoin a defendant in the Circuit Court from making an inequitable defence, or to enjoin a plaintiff from asserting an inequitable claim, after obtaining such relief the suits in the Circuit Court were often left pending.

8. On bills to declare the defendant a usurper, the complainant was given the office, but remitted to further litigation to recover his fees.

In most of the above instances the Chancery Court now administers full justice, its hand being no longer stayed by the fear of trespassing on the domains of the law Courts;<sup>37</sup> and the disposition of the Chancellors now is to disregard decisions and precedents obsolete since the Act of 1877, and administer justice to the full extent of their jurisdiction, and no longer remit a party to the Circuit Court, or force him to institute a second suit, when all the questions involved in the litigation, or incidental to it, can be effectually determined in the suit pending in the Chancery Court;<sup>38</sup> so that partial or half justice is now very seldom administered.<sup>39</sup>

§ 39. **He Who Seeks Equity Must Do Equity.**—Under the operation of this maxim, Courts of Chancery are enabled to adjust the equities of the complainant to the equities of the defendant, and thus do complete justice between the parties. Formerly, it was the practice of the Court to refuse relief to the complainant, unless the complainant would acknowledge, or concede, or provide for, the rights, claims and demands justly belonging to the defendant, and growing out of, or necessarily connected with, the subject-matter of the controversy. The ecclesiastical Chancellors sought to enforce in their Courts the divine injunction of doing unto others as we would have others do unto us, which is only another form of the maxim. But now, the Court of Chancery does not wait for the complainant to offer to do equity, but acts on the supposition that, knowing the rule of the Court, he is willing to do whatever equity towards the defendant the Court may require of him. (1), If a borrower of money upon usury seeks the aid of the Chancery Court to have cancelled the

<sup>36</sup> Two suits are a multiplicity. *Pearl v. Nashville*, 10 Yerg., 179, 185.

<sup>37</sup> The Act of 1877 gives the Chancery Court a free hand in dealing with most matters formerly cognizable exclusively in the Courts of Law.

<sup>38</sup> *Boni judicis est ampliare jurisdictionem.* It

is the duty of a good judge to amplify his jurisdiction, when necessary to do full justice.

<sup>39</sup> This maxim in its operation is similar to the maxim, When Chancery has jurisdiction for one purpose, it will take jurisdiction for all purposes. See *ante*, § 36.

usurious contract, the Court will require him to do equity by paying the lender what is legally due him; (2), If a taxpayer seeks relief from an over-assessment, he must pay what is justly due; (3), If a party seeks to have a tax-deed declared a cloud, he must pay all the taxes paid by the holder of the deed; (4), If a person asks for partition, he must pay his proportion of any incumbrance removed by the defendant;<sup>40</sup> (5), If a husband seeks the aid of a Chancery Court to reduce his wife's personal estate to possession, he will be required to do equity to the wife by allowing the Court to settle upon her, for the sole and separate use of herself and children, a reasonable portion of the proceeds of said estate; (6), If the owner of land allows another to make improvements thereon under the belief that he has the right, a Court of Chancery will compel such owner, seeking to assert his title, to pay for such improvements;<sup>41</sup> (7), Where a complainant seeks to have a certain fund decreed to him, he will be required, if insolvent, to pay the defendant what he owes him;<sup>42</sup> (8) Where a complainant has his deed declared a mortgage he must pay the consideration he received; (9), Where the complainant obtains the rescission of a contract, or the cancellation of an instrument he must make the defendant whole; (10), Where a married woman avoids a sale she must restore the consideration she received; (11), A mortgagor will not be allowed to redeem, without paying an incumbrance discharged by the mortgagee;<sup>43</sup> (12), A judgment will not be enjoined, unless complainant pays what he owes the judgment creditor,<sup>44</sup> and, (13), In general, whenever a complainant seeks to recover property from which the defendant has removed an incumbrance, or to the value of which the defendant has added in good faith, relief will be granted the complainant only on condition that the defendant be reimbursed to the extent the complainant has been by him benefited.

It will thus be seen that, in giving the complainant relief, a Court of Chancery will require of him whatever the defendant may, in good reason and good conscience, be entitled to in reference to the subject-matter of the suit, although this requirement may be one the Court would not otherwise enforce.<sup>45</sup> The condition thus imposed on the complainant is, as it were, the *price* of the decree the Court gives him. Under this maxim, an equitable right may be secured to the defendant which could not be obtained by him in any other manner—which he could not have secured by a suit brought for that purpose. The equity the complainant is required to do must, however, be connected with the subject-matter of the suit, or grow out of the very controversy before the Court; and conditions must not be arbitrarily imposed.<sup>46</sup>

The principle contained in this maxim enlarges the powers and jurisdiction of the Court when equities arise, in favor of the defendant, out of the subject-matter of the controversy; and hence, this might be termed a *jurisdictional* maxim. It, also, enables the Chancellor to determine the whole controversy in all its branches, and, if necessary, to make a sort of equitable compromise decree, giving to each party what, in good reason and good conscience, he ought to have; and requiring of each what, in good reason and good conscience, he ought to do;—thus fulfilling that other maxim, *Boni judicis est lites dirimere, ne lis ex lite oriatur*. (It is the duty of a good judge to so thoroughly decide a suit that another suit will not arise out of it.)

§ 40. **Courts of Equity will not Tolerate any Interference with their Officers, Process or Decrees, by the Courts of Law.**—This is an old and well-settled rule, and was adopted in the infancy of the Court of Chancery as a sort of law of self-preservation. For, if the Courts of common law could have had their way, they would have throttled the Chancery Court in its cradle. In those semi-barbarous times the beauties of Equity and Christian ethics were not appreciated;

<sup>40</sup> 1 Sto. Eq. Jur., § 64.

<sup>41</sup> Pom. Eq. Jur., §§ 389-390.

<sup>42</sup> Alexander v. Wallace, 10 Yerg., 105.

<sup>43</sup> Wilson v. Carver, 4 Hay., 90; Wood v. Chilcoat, 1 Cold., 423.

<sup>44</sup> Creed v. Scruggs, 1 Heisk., 590.

<sup>45</sup> Wilson v. Carver, 4 Hay., 90.

<sup>46</sup> 1 Pom. Eq. Jur., §§ 386-387.

and the rude, stern, arbitrary code of the common law was deemed the perfection of reason, and no higher or better law was deemed possible, or desirable.

It is manifest, that, from the necessity of the case, one Court cannot allow another Court to question its proceedings, to interfere with its process, to disturb its officers, or to thwart its decrees. All the authorities concur in considering it as settled law that a Court of Chancery will protect its own officers against any suit brought against them for acts done under its process.<sup>47</sup> This rule applies to Receivers, Sequestrators, and all other officers acting under the orders of the Court; and any interference with them will be deemed a contempt of Court, and punished as such.<sup>48</sup> Even a stranger to the suit, who has been dispossessed, must apply to the Court for redress, and cannot bring a forcible entry and detainer suit in another Court.<sup>49</sup> A party wrongfully dispossessed should file a petition for a writ of restitution.<sup>50</sup>

Every Court must have an inherent power of enforcing its judgments and decrees; and surely to no tribunal can this power more properly belong than to the Chancery Court.<sup>51</sup> And, in general, if any person suffers any injury, in consequence of any order, or proceeding, of the Chancery Court, or by reason of anything which has occurred in the execution of its process, he must apply to that Court for redress, and not to a Court of Law. If the matter complained of involves a question of jurisdiction, or of the validity or effect of its order or process, the Chancery Court will never allow such a question to be carried for decision to a Court of Law; but will, at its discretion, either itself give redress to the party aggrieved, or permit him to proceed at Law, as justice and convenience may require.<sup>52</sup>

<sup>47</sup> *Turner v. Breeden*, 2 Lea, 713.

<sup>48</sup> 2 Dan. Ch. Pr., 1056; 2 Sto. Eq. Jur., § 833, *a*.

<sup>49</sup> *Scott v. Newsom*, 4 Sneed, 456.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Deaderick v. Smith*, 6 Hum., 146.

<sup>52</sup> *Smith's Eq. Jur.*, 32.

## ARTICLE II.

## MAXIMS AND PRINCIPLES OF ADJUDICATION.

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| <p>41. Maxims of Adjudication Generally Considered.</p> <p>42. He who Comes into Equity must Come with Clean Hands.</p> <p>43. Equity Looks to the Intent rather than to the Form.</p> <p>44. Equity Imputes an Intention to Fulfil an Obligation.</p> <p>45. Equity Regards that as Done which Ought to be Done.</p> <p>46. No Person Bound to Act for Another can Act for Himself.</p> <p>47. Equity Delights in Equality.</p> <p>48. Equity will Undo What Fraud has Done.</p> <p>49. Equity Aids the Vigilant, Not Those who Sleep upon their Rights.</p> <p>50. So Use your Own as Not to Injure Another.</p> | <p>§ 51. No one Can Take Advantage of His own Wrong.</p> <p>§ 52. Where One of Two Persons must Suffer a Loss, He should Suffer whose Act or Neglect Occasioned the Loss.</p> <p>§ 53. Equity Follows the Law.</p> <p>§ 54. Where there is Equal Equity the Law must Prevail.</p> <p>§ 55. Where there are Equal Equities, the First in Order of Time shall Prevail.</p> <p>§ 56. To Protect and Enforce Rights to Property the Object of Suits in Chancery.</p> <p>§ 57. Equity Regards the Beneficiary as the Real Owner.</p> <p>§ 58. Equity Enforces What Good Reason and Good Conscience Require.</p> <p>§ 59. No One Should be Condemned Without a Chance to be Heard.</p> <p>§ 60. <i>Stare Decisis, et Non Quieta Movere.</i></p> |
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§ 41. **Maxims of Adjudication Generally Considered.**—In the adjudication of the questions that arise in Equity it is seldom that any statute is determinative, and not always that any decision of our Supreme Court is applicable; and hence the Chancellor is forced to rely on the rules of practice and pleading, and he maxims and principles of law and Equity, as his guides. These rules, maxims and principles are generally so thoroughly incorporated into his judgment that he uses them unconsciously in making a decision. But, if his opinion is written and analyzed, it will often be discovered that these rules, maxims and principles controlled the decision.

The principal maxims on which the Chancellor acts in adjudicating an equitable matter are the following, which might be designated as

THE TWELVE TABLES<sup>1</sup> OF EQUITY.

1. Equity acts upon the person, (forcing him to do what conscience requires.)
2. Equity will not suffer a wrong without a remedy.
3. Equity imputes an intention to fulfil an obligation.
4. Equity acts specifically, and not by way of compensation.
5. Equity regards that as done which ought to be done.
6. Equity requires him who seeks equity to do equity.
7. Equity regards the beneficiary as the real owner.
8. Equity delights to do complete justice, and not by halves.
9. Equity acts for those disabled to act for themselves.
10. Equity looks to the intent rather than to the form.
11. Equity delights in equality.
12. Equity requires diligence, clean hands and good faith.

Some of these maxims have been considered in the preceding Article, being, also, maxims of jurisdiction.

<sup>1</sup>In analogy to the Twelve Tables of the Roman Law.

§ 42. **He who Comes into Equity must Come with Clean Hands.**<sup>2</sup>—This maxim declares that a complainant, who has been guilty of unconscientious conduct or bad faith, or has committed any wrong, in reference to a particular transaction, cannot have the aid of a Court of Equity in enforcing any alleged rights growing out of such transaction. The Court of Chancery was regarded by the ecclesiastical Chancellors as a Temple into which none could come except those who had “clean hands and pure hearts.” In the origin of the jurisprudence, the theory was adopted that a Court of Equity interposed only to enforce the requirements of good conscience and good reason, as to matters not equitably determinable in the Law Courts; and this interposition being deemed a matter of Grace, it would not be exercised in favor of a person, whose conduct, in the matter he had complained of, had been unconscientious, or in bad faith; or who had violated any of those principles of Equity and righteous dealing, which the Court had been constituted to enforce. But the operation of the maxim is confined to misconduct connected with the particular matter in litigation; and does not extend to any misconduct, however gross, which is unconnected therewith, and with which the defendant is not concerned.<sup>3</sup> Under the operation of this maxim, the complainant must show that the transaction from which his claim arises is fair and just, that there is nothing unconscientious in his conduct relative thereto, and that the relief he seeks is equitable, and not harsh or oppressive upon the defendant. Hence, a specific performance will be refused when the complainant has obtained the agreement by sharp and unscrupulous practices, by over-reaching, by concealment of important facts, by taking undue advantage of his position, or by any unconscientious means; or, when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable circumstance; or, when the specific enforcement of the agreement would be oppressive upon the defendant, or would, in any other manner, work injustice.<sup>4</sup> So, if a contract is affected with fraud, or has a fraudulent purpose, none of the parties to such fraud can have the assistance of the Court either to compel the execution of such contract, or to have it cancelled, or to have the property or interests, transferred thereunder, restored. Equity will leave such parties where they have placed themselves, and will refuse all affirmative aid to either of the fraudulent participants. It is on this principle that the door of a Court of Equity is always shut against a debtor when he seeks to recover back property he has conveyed to hinder, delay or defraud his creditors. *Ex dolo malo non oritur actio.* (No right of action arises out of a fraud.) Agreements and transfers, the consideration of which is based on a violation of chastity, or on compounding a felony, or on gambling, or on the commission of any crime, or on any breach of good morals, are all deemed illegal, and no participant therein can get any relief, in the Chancery Court, whether the relief sought is an enforcement of the agreement, or a rescission of it.<sup>5</sup> *In pari delicto potior est conditio defendentis.* (Where parties are equally in the wrong the condition of the defendant is the stronger.) But where the parties are not *in pari delicto*, and where public policy is promoted thereby, the more excusable of the two may be granted relief by the Court setting aside the agreement and restoring him to his original position. A Court of Chancery will not enforce an usurious contract even when the defence of usury is not made; but will relieve against usurious contracts; and will also restore money or property lost upon any game or wager.<sup>6</sup>

§ 43. **Equity Looks to the Intent rather than to the Form.**—This maxim is

<sup>2</sup> There are several maxims akin to this: He who hath committed iniquity shall not have equity; *Ex turpi causa non oritur actio.* (No right of action arises out of an immoral transaction;) *In pari delicto potior est conditio defendentis.* (Where both parties are equally in fault, the situation of defendant is the stronger.)

<sup>3</sup> 1 Pom. Eq. Jur., §§ 398-399. The unclean-

ness of complainant's hands will defeat his suit whenever and however it appears. *Simmons Medicine Co. v. Mansfield Drug Co.*, 9 Pick., 84. See, *Horton v. Lyons*, 13 Pick., 180.

<sup>4</sup> 1 Pom. Eq. Jur., § 400. *Horton v. Lyons*, 13 Pick., 180.

<sup>5</sup> 1 Pom. Eq. Jur., §§ 401-402.

<sup>6</sup> Code, §§ 1771; 1954; *Bank v. Mann*, 10 Pick., 17.

connected with the one that says, *Equity regards that as done which in good conscience ought to have been done*; for it is only by looking at the *intent*, rather than at the *form*, of a transaction that Equity can treat as done what ought to have been done. The two maxims act together and aid each other;<sup>7</sup> and with the further help of the maxim, that *Equity imputes an intention to fulfil an obligation*, a Court of Chancery will not only hold a resulting trustee, or a constructive trustee, liable as such, but will impute to him an *intention* to act as such, regardless of the *form* of the transfer, or conveyance.

Equity heeds not forms, but strives to reach the substance of things; and to ascertain, uphold and enforce rights and duties which spring from the real relations and the actual transactions of the parties. Looking to the intent rather than to the form, whenever a penalty is designed merely to secure the payment of a given sum of money, or the performance of some act, Equity will relieve the obligor from the penalty, upon his paying the debt, or the actual damages, resulting from his default. So, if a lease has been forfeited for non-payment of rent, or for breach of some, but not all of the covenants contained in the lease, if the lessor can be adequately compensated for the breach of the contract, Equity will regard the forfeiture clause as merely a means of securing the observance of the contract, and a Court of Chancery will relieve from the forfeiture.<sup>8</sup> So, looking at the intent rather than at the form of the contract, Equity will consider the forfeiture clauses in mortgages and trust deeds as merely means of enforcing the payment of the money contracted to be paid, and will relieve from forfeitures incurred, upon the payment of the debt.<sup>9</sup> Equity will, also, upon parol evidence, convert an absolute deed into a mortgage; and will, in general, unless prohibited by some statute, set up and enforce the real contract of the parties, regardless of the form, or of the want of form; for Equity looks not at the outward form, but to the inward substance of every transaction, recurring to principles and disregarding ceremonies,<sup>10</sup> looking upon forms as made for justice, and not justice made for forms. Where there is substance for the Court to act on, the want of form will be disregarded, for Equity regards substance and not ceremonies. This is true not only in adjudicating the equities of the parties, but is true in matters of pleading, also. Thus if the bill makes out a case for relief, any want of formality, or any misnomer of the bill, or any eccentricity of phraseology, will not defeat the complainant's right to relief on the facts alleged and proved.<sup>10a</sup> So, if the necessary parties are before the Court, and a case for relief is alleged and proved, the fact that parties are made complainants who should have been made defendants, or *vice versa*, will not prevent the Court from decreeing according to the equities of the parties; and this is so even when persons under disability are to be affected by the decrees. The fact that the proper facts are alleged, and the proper parties are before the Court, is substance; the manner of alleging the facts and the position of the parties in the suit is ceremony.

No one is presumed to give something for nothing, and no one can in reason and conscience expect to receive something for nothing. Whenever a person parts with a consideration he is presumed to intend to acquire whatever that consideration pays for; and he who acquires the legal title to property for which another's money has paid, is bound in reason and conscience to hold it subject to the orders of the person whose money went into it. Reduced to the last analysis, the property acquired by another's money is only that money in an-

<sup>7</sup> Pom. Eq. Jur., § 378.

<sup>8</sup> Pom. Eq. Jur., § 381.

<sup>9</sup> Pom. Eq. Jur., § 382.

<sup>10</sup> Bond v. Jackson, 3 Hay., 191. Equity looks beneath the veil of form, and discerns the real features of the transaction, acting on the maxim, *Non quod dictum est, sed quod factum est, inspicitur*. Snell's Pr. Eq., 41. Equity considers the real and the substantial, and allows no rule of evidence at law, no fiction of Courts of law, and no acts or subterfuges of

parties, to tie its hands, or shackle its feet, or dim its sight, in searching for the real truth of the transaction under investigation. Courts of Equity act upon the circumstances and justice of the particular case, whereas Courts of law rather regard precedents, forms, rules of procedure and the strict letter of the law.

<sup>10a</sup> See *post*, §§ 139, note 19; 269; 431, note; 681; 719; 64, sub.-sec. 4.

other form; and property conveyed without receiving another's money therefor, continues, in Equity, the property of the conveyor. Hence, it is the passing of a consideration and not the form of the contract that in Equity passes title;<sup>11</sup> and whatever the form of the transaction, if no consideration passes, in Equity no title passes.<sup>12</sup>

§ 44. **Equity Imputes an Intention to Fulfil an Obligation.**—A Court of Conscience will not hastily conclude that an unconscientious act has been done, if the conduct of the actor is susceptible of a more charitable construction. The Court will presume an innocent intention, if such presumption will not hazard the equitable rights of the complainant. This maxim, therefore, is a mere statement of the general presumption upon which a Court of Equity acts; and it means that, whenever a duty rests upon an individual, in the absence of all evidence to the contrary, it will be presumed that he intended to do right rather than wrong; to act conscientiously rather than in bad faith; to perform his duty rather than to violate it.<sup>13</sup> Thus, when a person covenants to do an act, and he afterwards does something which is capable of being considered either a total or a partial performance of that act, he will be presumed to have done it with the intention of performing his covenant, although no such intention was expressed. So, whenever a trustee, or other person in a fiduciary position, acting apparently within the scope of his powers (that is, having authority to do what he does do), purchases lands, or personal property, with trust funds, and takes the title to such property in his own name, without any declaration of a trust, a trust with respect to such property at once results in favor of the beneficiary of said funds, and the purchaser becomes with respect to such property, a trustee. A Court of Equity assumes that the purchaser intended to do his fiduciary duty, and not to violate it; and he will not be heard to dispute this assumption. All the evidence the Court needs to create the trust is the proof that the trust funds were actually used in the purchase.

This maxim is applied to trustees proper, to executors and administrators, to directors and managers of corporations, to guardians of infants or of persons of unsound mind, to agents using the money of their principals, to partners using partnership funds, to husbands purchasing property with the separate estate of their wives, and generally, to all persons who stand in fiduciary relations to others.<sup>14</sup> And when it is shown that such persons have used money, by them so held in trust, in the purchase of any property, real or personal, taking the title in their own name, a Court of Chancery will impute to them an intention to fulfil their obligation, namely, to make the purchase for the benefit of the person entitled to the use of the consideration money; and they will be decreed to hold such property as trustees for the benefit of the parties whose funds were used in the purchase.

§ 45. **Equity Regards that as Done which Ought to be Done.**—In a Court of Chancery *ought to be* becomes *is*; and whatever a party ought to do, or ought to have done, in reference to the property of another, will, ordinarily, be regarded *as done*; and the rights of the parties will be adjudicated as though, in fact, it *had been done*.<sup>15</sup> This maxim is far-reaching in its operation, and full of beneficent consequences; the doctrines and rules creating and defining equitable estates or interests being, in a great measure, derived from it.<sup>16</sup>

As between the party *by* whom, and the party *for* whom, an act ought, in good conscience, to be done, or to have been done, Equity will consider it *as done*. For the purpose of reaching exact justice, Equity will frequently consider that property has assumed certain forms with which it ought, in justice, to be

<sup>11</sup> *Solutio pretii emptionis loco habetur.* (The payment of the purchase-money is equivalent to a purchase.)

<sup>12</sup> This is the reason a purchaser without a valuable consideration has no equity. See *post*, §§ 332; 390.

<sup>13</sup> 1 Pom. Eq. Jur., § 420. The law requires

that good faith be observed in all transactions between man and man. *Craddock v. Cabiness*, 1 Swan, 483.

<sup>14</sup> 1 Pom. Eq. Jur., §§ 421-422.

<sup>15</sup> *Stephenson v. Yandle*, 3 Hay., 115; *Wayne v. Fouts*, 24 Pick., 145.

<sup>16</sup> 1 Pom. Eq. Jur., § 364.



stamped,<sup>17</sup> or that parties have performed certain duties which they, in justice, ought to fulfill; and will regulate the ownership of estates and interests accordingly.<sup>18</sup> In such matters another maxim is sometimes invoked: *Equity regards the substance, not the forms of things*. Thus, (1) the vendor of land is regarded in Equity as the owner of the purchase-money, and the vendee is looked upon as the owner of the land; (2) the purchaser of a possible interest in land becomes the equitable owner of the interest; (3) the sale of a chattel not yet in existence, or not yet the property of the seller, becomes effective in Equity as soon as the thing comes into existencē, or becomes the property of the seller; (4) the assignment of a thing in action gives the assignee all the rights of the assignor; and (5) in general, whenever a party, for a valuable consideration transfers, or contracts to transfer, any interest in any property, or in any rights of property, a Court of Chancery places the assignee, or vendee, in the shoes of the vendor as to all the interests and rights transferred, or agreed to be transferred.<sup>19</sup> So, (1) when an agent invests his principal's money in land, and takes title in his own name; or (2) a partner uses partnership funds to buy land in his own name; or (3) when a guardian uses his ward's funds in the purchase of property in his own name; or (4) an executor, administrator, or any other trustee, uses trust money to buy property in his own name, in all such cases Equity will regard that as done which the purchaser ought to have done, that is, will regard the purchaser as holding the legal title for the benefit of the party who was entitled to the purchase money, and will decree accordingly. So, when a party acquires the legal title to property by fraud, he will be decreed to hold it as trustee for his vendor. And where an act is prevented from being done, by fraud, Equity will consider the act as done, in order to avoid the effects of the fraud.<sup>20</sup> Thus, a widow prevented by fraud from dissenting to a will, in Equity will be given all the rights she would have acquired by a dissent in due time.<sup>21</sup> And if a son pretend to destroy deeds to enable his father to devise the lands, but destroys only copies, Equity will treat the deeds as destroyed.<sup>22</sup> Equity, treating that as done which ought to have been done, will consider land as redeemed when the redeemer has done all that was required of him, and the purchaser refuses to re-convey, or to take the redemption money. This maxim is nearly allied to another maxim, *No one can take advantage of his own wrong*. To prevent a party deriving advantage from his own wrong, Equity regards that as done which, in good reason and good conscience ought to have been done. Hence, agreements based on a valuable consideration are, in Equity, considered, in the interests of the person entitled to their performance, as performed, and performed at the time when, and in the manner in which, they ought to have been performed.<sup>23</sup> And the same consequences attach to the agreement as though it had actually been performed, so that the party in default shall not benefit by his wrong, nor the other party suffer thereby.<sup>24</sup>

So where land is ordered to be sold by a will, it is considered as personalty; and where land devised by a will is afterwards contracted to be sold, it is deemed converted,<sup>25</sup> and the devisee gets nothing but the naked legal title without any beneficial interest in the property.<sup>26</sup> Money directed by a will to be invested in land is considered as land, and descends to the heirs of the original beneficiary, and not to his personal representatives; and, on the other hand, land directed by a will to be converted into money goes to the personal representatives of the original beneficiary, or is included in the general term "personal property."<sup>27</sup>

<sup>17</sup> *Wheless v. Wheless*, 8 Pick., 293.

<sup>18</sup> *Bisph. Pr. Eq.*, § 44.

<sup>19</sup> 1 *Pom. Eq. Jur.*, §§ 368-369.

<sup>20</sup> *Townsend v. Townsend*, 4 *Cold.*, 83.

<sup>21</sup> *Smart v. Waterhouse*, 10 *Yerg.*, 93; 1 *Sto. Eq. Jur.*, §§ 187; 256.

<sup>22</sup> *Belcher v. Belcher*, 10 *Yerg.*, 120.

<sup>23</sup> *Cook v. Cook*, 3 *Head*, 719.

<sup>24</sup> 1 *Sto. Eq. Jur.*, § 64 *g*.

<sup>25</sup> The doctrine of equitable conversion is firmly fixed in the jurisprudence of Tennessee. *Wayne v. Fouts*, 24 *Pick.*, 145.

<sup>26</sup> But the contract of sale must be one that is enforceable. *Blair v. Snodgrass*, 1 *Sneed*, 24.

<sup>27</sup> *McCormick v. Cantrell*; 7 *Yerg.*, 615; *Green v. Davidson*, 4 *Bax.*, 488; *Jones v. Kirkpatrick*, 2 *Tenn. Ch.*, 696; 1 *Pom. Eq. Jur.*, § 371; 1 *Sto. Eq. Jur.*, §§ 790-793; 1212-1214.

But an administrator has no power to make a conversion; and if he does, the money put into land will be deemed personality, at the election of those entitled to the money.<sup>28</sup>

In reference to agreements the maxim is sometimes stated thus: "What is agreed to be done is considered as done,"<sup>29</sup> and sometimes thus, "Equity treats that as done which is agreed to be done upon sufficient considerations."<sup>30</sup> But it must be borne in mind that this maxim seeks no more than to enforce an equitable obligation. There must be a right on one side and a corresponding duty on the other side. Equity does not regard as done what *might* have been done, or what *could* have been done, but what *ought*, in good reason and good conscience, to have been done. Nor does this rule operate in favor of any one except him who has the equitable right to have the act performed, and those standing in his shoes; nor does it operate against any one except him upon whom the duty has devolved, and upon those who stand in his place.<sup>31</sup>

§ 46. **No Person Bound to Act for Another in any Matter can, as to that Matter, Act for Himself.**—This, while not a maxim, is a fundamental doctrine of Equity, and one fruitful of many most beneficent consequences.<sup>32</sup> In the first place, whoever undertakes to act for another's benefit, impliedly contracts that in every matter affecting the other, he will do for him all that good reason and good conscience require. In order to avoid any possible contention, and to leave absolutely no room for casuistry, Courts of Equity lay it down as a rule, without exception, that no trustee shall in any case, or under any circumstances, directly or indirectly, acquire any personal interest or title in or to the trust property, or its proceeds, or make any personal profits out of the trust, or by means of his trust character, without the full consent of the beneficiary, given under circumstances that leave no room whatever to question the perfect fairness and good faith of the whole transaction. Even then, a Court of Equity acts hesitatingly in confirming such transactions; and when they are questioned, requires conclusive evidence of the fullest good faith on the part of the trustee, and the most thorough understanding of the facts, and the most absolute freedom of action, on the part of the beneficiary. When a relation of confidence is once shown, a Court of Chancery will presume that the dominion or influence arising therefrom was exercised.<sup>33</sup> Of course, if the beneficiary is a minor, or person of unsound mind, he is utterly incapable of giving any such consent.

This rule is potent of consequences in matters of implied trusts, and constructive frauds; and, under its operation, all trustees and quasi-trustees are kept in the strict line of their true and full duty; and when such duty is violated, Equity will, as far as possible, deal with them and their doings as though they were really intending to do their duty, and act for the beneficiary's benefit;

<sup>28</sup> *Roberts v. Jackson*, 3 Yerg., 77.

<sup>29</sup> The maxim is sometimes generalized thus: Equity looks on that as done which ought to have been done, or which has been agreed to be done, or which has been directed to be done. *Snell's Pr. Eq.*; *Stephenson v. Yandle*, 3 Hay, 115.

<sup>30</sup> *Griffey v. Northcutt*, 5 Heisk., 755.

<sup>31</sup> 1 Pom. Eq. Jur., § 365.

<sup>32</sup> *Cannon v. Apperson*, 14 Lea, 579-580.

<sup>33</sup> *Bayliss v. Williams*, 6 Cold., 441. No person who undertakes or assumes to act for another's welfare in any matter, can, without violating good reason and good conscience, so act in that matter as to obtain an advantage for himself, at the expense of the person for whom he assumes to act. A party who takes advantage of the trust or confidence reposed in him by another, and thereby benefits himself to the other's injury, is guilty of the grossest possible breach of good faith. A person who undertakes to act for another impliedly contracts with him to give him the full benefit of his wisdom, skill and diligence; and to prefer his principal's or ward's interest to his own. A person holding a relation of trust, confidence or agency, is bound by every consideration of reason and conscience to loyally

discharge the duties he undertakes, with an eye single to the welfare of the party trusting him; and before he can act for himself in any matter, affecting the interests of the person trusting him, he must surrender the relation in good faith, and acquaint such person with all the facts in his possession necessary to a complete understanding of those matters.

No greater business wrong can be committed, under the form of a contract, than the acquisition of the property, or taking other advantage, of a person by the betrayal of his confidence. Such an act is a sort of treason against good faith, and shocks the conscience of all mankind. In order to remove the temptation to such gross treachery, and thereby more effectually to prevent such wrongs, Courts of Equity consider all contracts between the person trusting and the person trusted as voidable at the election of the former. This rule applies to all persons who undertake or assume to act for others, or to become their confidential advisers, and to every case where influence is acquired and abused, or confidence is reposed and betrayed. See *Searcy v. Kirkpatrick*, 1 Overton, 423; *post*, § 57.

and will accordingly give the beneficiary all the benefits accruing to the trustee, or the quasi-trustee, by means of the transaction in question; will give the beneficiary the property or profits acquired, and will require the trustee, or quasi-trustee, to make good any loss caused by his conduct in the matter.

The reason of the rule, that a trustee can never act for himself in any trust matter, is the necessity of absolutely removing from him any temptation to violate his full duty, and the imminent peril of allowing him to occupy a situation wherein he may have occasion to doubt when he might, or might not, act for himself, and when he must, or may, act for the beneficiary or person confiding in him.<sup>34</sup>

In the meaning of this section, and also, wherever used in this book, the general term "trustee" denotes and includes executors, administrators, Clerks of Courts, Receivers, Special Commissioners, Sheriffs, constables, and all guardians, officers and persons who give bonds for the faithful discharge of their duties, and all other persons on whom fiduciary or trust duties are conferred by any instrument of writing, or by any statute, ordinance or by-law, public, corporate or private; and the term "quasi-trustee" denotes and includes husband, wife, parent, person in a parental situation, attorney, guardian *ad litem*, next friend, partner, agent, business manager, clerk, steward, secretary, treasurer, book-keeper, auctioneer, consignee, bailee, physician, spiritual adviser, the promoters, president, directors and other officers or managers of a corporation or association, vendor, creditor, principal debtor in cases of suretyship, and, in general, all other persons who undertake, or assume, the character of confidential advisers, or managers of another's affairs, or who occupy a position or relation that enables them to greatly influence the action of those relying upon them, or who in any way acquire influence and abuse it, or possess another's confidence and betray it. The term trustee includes both trustees and quasi-trustees, and the term *beneficiary* denotes and includes every one who expressly or impliedly confides or trusts his property, business or affairs, to another, and every one for whose benefit an express or implied trust arises, or a constructive fraud can be declared.<sup>35</sup>

§ 47. **Equity Delights in Equality.**—This maxim is sometimes more strongly expressed thus: *Equality is Equity*.<sup>36</sup> The common law delighted in preferences; it was the law of a people fond of distinctions, distinctions in personal rank, in social positions, in forms of procedure, in evidences of debt, and in forms of actions. But the Chancery Court, early in its history, endeavored to break down these distinctions in so far as property was concerned. Joint obligations were made several; liens were apportioned; contribution was enforced among co-contractors, co-sureties and co-legatees; and the estates of debtors were divided ratably among their creditors. These changes in the common law, thus enforced originally in Equity, have long since, by statute or otherwise, become a part of the general law of the land.

In accordance with this equitable maxim, a Court of Chancery will divide a common fund equally between those entitled; and if the fund is not sufficient to pay all in full, a *pro rata* distribution will be ordered. So, when a common

<sup>34</sup> A man cannot serve two masters at the same time, especially in case of conflicting trusts. *Denning v. Todd*, 7 Pick., 427. *Quicquid acquiritur servo acquiritur domino*. (Whatever is acquired by the servant is acquired by the master.) Whatever profit a trustee makes out of trust property is the profit of the beneficiary. The parable of the talents well illustrates this rule of Equity. *Matt.*, ch. 25, v. 20.

<sup>35</sup> Our legal nomenclature is deficient in satisfactory terms to express the relations of a general trustee and a general correlative to such trustee. The term trustee, while a good one, has been largely appropriated to denote an express trustee, and the terms, beneficiary

and *cestui que trust*, inadequately express the entire class of persons, for whose benefit implied trusts are created, and implied frauds constructed. Inasmuch, as in almost every variety of trust there is an express or implied relation of confidence, it is with reluctance and misgivings suggested that the word *confiditor* appropriately and not inadequately denotes and includes every one who, expressly or impliedly, confides or trusts; and the word *confidtee* equally as well denotes and includes every one in whom confidence or trust is expressed or impliedly reposed.

<sup>36</sup> Also, thus: *Aequitas est quasi aequalitas*. (Equity is equality, as it were.)

liability rests upon several persons in favor of a single claimant, as where several persons owe the same debt, a Court of Chancery will require each person, so liable, to discharge an equal proportion of the liability; or, if any one of them should pay more than his share, Equity will require the others to contribute enough to make good the excess.

Where an insolvent partnership, an insolvent corporation, or an insolvent estate, is wound up in Chancery, the Court always proceeds upon the principle that equality is equity, and apportions the assets *pro rata* among all the creditors, preferring none unless they have prior liens. The same rule prevails, when, in any case, any creditor files a bill, on behalf of all other creditors, to wind up the business of a debtor under a general assignment. So, where there is not enough money to pay all the legacies in full, Equity will make a *pro rata* deduction from each.<sup>37</sup> And so it may be stated, in general terms, that whenever there is a common burden, it must be borne equally by all; and when there is a common benefit, it must be shared equally by all. Of course, this maxim will not prevent parties, by contract among themselves, changing the operation of this general rule.

§ 48. **Equity will Undo What Fraud has Done.**—Fraud,<sup>38</sup> in the sight of a Court of Equity, vitiates every contract or transaction into which it enters, at the election of the injured party;<sup>39</sup> and the Court will not only undo what fraud has done, but will treat acts as done which fraud prevented from being done.

All Courts require good faith in dealings between men, and reprobate bad faith.<sup>39a</sup> But as the Courts of common law respected forms and ceremonies, and would not look beneath a seal, nor behind a writing, nor beyond the verdict of a jury, nor allow a judgment to be questioned, fraud took advantage of these rules, and made forms, writings, seals, verdicts, and judgments its instrumentalities and agencies in effecting its nefarious schemes for the undoing of the weak, the inexperienced, the trusting and the needy. When, however, Equity established her Courts, she disregarded forms, discredited ceremonies, peered beneath the seal, looked behind writings, questioned the verdicts of juries, and did not hesitate to set aside the solemn judgments of Courts, when found to be unjust and procured by fraud. Courts of Equity set aside deeds or converted them into mortgages, set aside the verdicts of juries in Courts of law and awarded new trials, and forbade the enforcement of judgments, when good reason and good conscience required. Whatever fraud touched was declared to be vitiated, wherever fraud trod was declared unholy ground, and whatever fraud did was pronounced null and void. All the haunts of fraud were laid bare, all of its paths, however crooked, were sign-boarded, all of its subterfuges pointed out, all of its false coins branded, and all of its allies detected and marked with badges. Fraud has been so crippled and hedged about by the Chancery Court that its power to deceive and do evil has been much weakened, and the remedies for its rascalities much increased, but it has not yet gone out of business.

<sup>37</sup> 1 Pom. Eq. Jur., §§ 405-411. In Equity, no one gets the lion's share, unless he has superior rights, or prior liens.

<sup>38</sup> *Fraus* (fraud) was one of the names of Mercury, the god of speech, traffic and theft; and it is curious, if not instructive, to note how his history and offices, in ancient mythology, illustrate the appropriateness of this *alias*. Mercury's first act was to cheat Apollo out of a herd of cattle by means of a lyre; he lulled the hundred-eyed Argus to sleep, and then murdered him; he overcame Prometheus, the wise, and bound him to Mt. Caucasus; he invented astrology, was the go-between of gods and women; the gull was his favorite bird, and he was worshiped, and prayed to for luck, by thieves and schemers. His wand was gilt at the point, blue in the middle, and black at the handle, and so his victims first felt rich,

then blue, then in black despair. He always wore a smile on his face, and curls in his hair; carried a purse in his hand, and was generally in a hurry. The metal, mercury, named for him, is very bright, but very elusive, hard to find, difficult to seize, impossible to hold; and is used by miners to gather gold, and by quacks to salivate their patients.

<sup>39</sup> *Gwinther v. Girding*, 3 Head, 197. See maxim, Equity regards that as done which ought to be done, *ante*, § 45.

<sup>39a</sup> The law requires good faith to be observed in all transactions between man and man. *Craddock v. Cabiness*, 1 Swan, 483. See *ante*, § 4; and *post*, § 58.

In the grand temple to Jupiter on the Capitoline Hill in ancient Rome, the statue of *Fides* stood on one side of Jupiter's and the statue of *Victoria* on the other, thus proclaiming that

As physicians diagnose internal disease by certain external signs, so Courts of Chancery diagnose the existence of fraud by certain signs termed "badges of fraud," which are treated of elsewhere.<sup>40</sup> In Courts of law it is a maxim that "Fraud is odious and not to be presumed,"<sup>41</sup> by which is meant that before so detestable a crime can be imputed to anyone it must be proved. But Courts of Chancery, while considering fraud more odious than do Courts of law, they nevertheless in certain cases presume fraud; that is, certain states of fact are considered in Chancery incompatible with an honest purpose, and when proved or admitted, fraud is presumed.<sup>42</sup> Courts of Chancery will, ordinarily impute fraud to a party on less evidence than is required in Courts of law;<sup>43</sup> and they allow a much greater latitude of proof in the search for fraud, and a more minute examination of witnesses.<sup>44</sup> And whatever the shapes and disguises fraud has invented in the refinements and diversities of commerce and the progress of civilization, the Courts of Equity have, always, been able to detect and expose it, to redress the wrong done by it, and to keep it odious, regardless of the rank or wealth of the perpetrator.<sup>45</sup>

§ 49. **Equity Aids the Vigilant, not Those who Sleep upon their Rights.**<sup>46</sup>— This maxim is designed to promote diligence on the part of suitors. Equity requires a party to assert his rights in a reasonable time after he discovers that he has been wronged. A person who delays suit, not only by his negligence makes the proof of his wrongs more difficult, but induces the other party to believe that he acquiesces in the situation. Besides, if Courts allow suits to be delayed, a party may wait until an adverse witness dies, or moves away, before he brings suit. A party in the wrong may be so misled by the non-action of the party wronged as do such acts, and otherwise so change his situation, that it would embarrass the Court in granting relief. He who seeks equity must keep himself in a condition to do equity; and if, by his own delay, he is disabled from doing equity he will be debarred from receiving equity. It is bad faith for a party wronged to delay suit until the wrong cannot be righted without doing another wrong. Good conscience requires a party to do no act that will mislead another to his detriment, even though that other may have done him wrong. Hence, it has been said that "nothing can call a Court of Chancery into activity but conscience, good faith and reasonable diligence."<sup>47</sup> In many cases, equitable relief depends upon the discretion of the Chancellor, and the *laches* of the complainant is often one of the most important of the elements taken into consideration when that discretion is exercised.<sup>48</sup> This maxim is

good faith among the people is as important in peace as is victory in war.

<sup>40</sup> See Article on "Fraudulent Conveyances," *post*, §§ 1009-1017.

<sup>41</sup> *Fraus est odiosa et non presumenda.*

<sup>42</sup> See *post*, §§ 449; 1011. By "presumption" in such cases, inference is meant.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Post*, §§ 448; 1010.

<sup>45</sup> Frauds are viewed with great horror and indignation by Courts of Equity, as destructive of that honorable confidence necessary for human intercourse, and as constituting a sort of treason against society itself. The subtle character of these violations, the great difficulty in making the proof, the absolute necessity, oftentimes, for probing the conscience of the alleged offender by searching interrogatories, the discerning intelligence required to ferret out the wrong and to detect fraud in its manifold and cunning disguises, the strong sense of equity necessary for the correction of secret acts of bad faith, and the inadequacy of the common law remedies to meet the manifest demands of justice, made it necessary for parties who had been defrauded to apply to a Court of Conscience in order to obtain complete redress; and to this fact the Chancery Court largely owes its existence and its jurisdiction; and the altars of this Court have always been the favorite refuge of parties seeking relief against those who have defrauded

them. See 1 Sto. Eq. Jur., § 185; 1 Pom. Eq. Jur., §§ 31-37. The following are some of the

Maxims and Sayings Relating to Fraud:

1. *Dolus versatur in generalibus.* (A person who intends to perpetuate a fraud uses general terms.)

2. *Fraus et jus nunquam cohabitant.* (Fraud and justice never dwell together.)

3. *Fraus est celare fraudem.* (It is a fraud to conceal a fraud.)

4. *Dolus circuitu non purgatur.* (Fraud is not purged by indirect action.)

5. *Suppressio veri suggestio falsi.* (The suppression of the truth is the suggestion of what is false.)

6. *Ex dolo malo non oritur actio.* (A right of action cannot arise out of a fraud.)

7. *Fraus latet in generalibus.* (Fraud lurks in general expressions.)

8. Once a fraud, always a fraud.

9. Fraud poisons all it touches.

10. Fraud has the outward visible sign of honesty, but lacks the inward spiritual grace.

11. The knot that fraud ties, Equity delights to untie.

12. Fraud strives to cover up its tracks.

<sup>46</sup> *Vigilantibus non dormientibus aequitas subvenit.*

<sup>47</sup> *Lafferty v. Turley*, 3 Sneed, 177; 1 Pom. Eq. Jur., § 419.

<sup>48</sup> *Bisph. Pr. Eq.*, § 39; *Snell's Pr. Eq.*, 39.

constantly applied where a party delays too long before he applies for an injunction, or to be relieved against a fraud, or seeks a specific performance of a contract, or the rescission of a contract. It applies, also, to persons who do not inquire after being put upon inquiry; to purchasers at public sales where there are no warranties of quality or title; and to those whose duty it is to take necessary steps to perfect their rights by giving notice of an assignment to them of a non-negotiable *chose in action*; or by having their instruments duly registered. Equity delights in diligence, and is slow to aid the slow. It not only requires clean hands and a pure heart, but also swift feet. But if the defendant has caused the complainant to sleep he can not complain of it, for that would be to take advantage of his own wrong.

§ 50. **So Use Your Own as Not to Injure Another.**—While this is a law maxim it is often applied in Equity. The Chancery Court frequently enforces this maxim by enjoining the erection, or commission, of nuisances to the complainant on the land of the defendant; because, although a man may own the land, he has no right to so use it as to prevent his neighbors from enjoying their land. A man may be driven from his home by bad smells, noxious vapors, unbearable noises, shocking spectacles, and other intolerable nuisances upon his neighbor's land, quite as effectually as though driven away by physical force. A man cannot so divert a stream on his own land as to turn water injuriously upon a neighbor's land; and he cannot dig so near the land of his neighbor as to cause the latter's land to cave in, or so near as to endanger his neighbor's wall; he cannot pollute a stream that flows through his neighbor's land; nor can he so stop, or change, the current of a stream as to prevent its ordinary flow through the land of another.<sup>49</sup>

A creditor, having his choice of two funds, ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds.<sup>50</sup> And it may be laid down as a general rule, that no one can so exercise a right as to impair the right of another, especially if the latter right is of equal dignity in the sight of the law. The rights of life, liberty, property and the pursuit of happiness, must all be so used and exercised as not to impair or injure the equal enjoyment of these rights by another.

The Chancery Court will, on due application, enjoin the defendant from so using his property, or so exercising a right, as to injure the property or rights of the complainant.

§ 51. **No one Can Take Advantage of His Own Wrong.**<sup>51</sup>—In vain should he seek the aid of Equity who has violated equity.<sup>52</sup> Such a person, in the sight of a Court of Chancery, has unclean hands. If a person could take advantage of his own wrong it would be a direct bribe to commit the wrong. This maxim applies where a trustee buys property in his own name with trust funds; where a trustee makes a profit by means of his trust; where any fiduciary obtains a good bargain by means of his position of confidence or influence; where a tenant or trespasser cuts down timber; where a party stands by and does not object to his own goods being sold as another's; where the true owner allows a *bona fide* purchaser to make improvements; and where a defendant fraudulently conceals the cause of action from the complainant and then pleads the statute of limitation. Where a party, by his words or conduct willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, the former is concluded by his words or conduct; as also is one who negligently allows another to contract on the faith and understanding of a fact which he can contradict. In brief, this

<sup>49</sup> Terminal Co. v. Jacobs, 1 Cates, 741; Cox v. Howell, 24 Pick., 130. *Sic utere tua ut alienum non laedas.*

<sup>50</sup> Parr v. Fumbanks, 11 Lea, 395.

<sup>51</sup> *Nullus commodum capere potest de injuria sua propria.*

<sup>52</sup> Equity has a two-fold meaning: it means (1) that system of jurisprudence administered exclusively in Chancery, and (2) a right, or claim, recognized by a Court of Equity as just. When used in the former sense it begins with a capital.

maxim operates to estop all persons, whose words, acts or silence, have misled another to his injury.<sup>53</sup>

§ 52. **Where One of Two Persons must suffer Loss He should Suffer whose Act or Neglect Occasioned the Loss.**—The reason of this maxim consists in the fact that the equity of the one, whose act caused the loss, is less than the equity of the other party; for the latter is entirely without fault and wholly innocent.<sup>54</sup> This maxim applies where a loss happens to a trust fund by the failure of a bank, or the misconduct of the trustee's agent or attorney, or the insolvency of the borrower. In such cases, the loss must be borne by the trustee, for he deposited the money in the bank, he chose the agent or attorney, and he loaned the money. The maxim applies, also, to cases where an agent has been given apparent authority to sell goods, or do any act, and, taking advantage of this apparent authority, sells the goods, or does the act, in fraud of the principal's rights, and misapplies the proceeds.<sup>55</sup> In such cases the loss falls not on the party who deals with the agent, but on the principal.<sup>56</sup> So, if a fraudulent vendee sell to an innocent purchaser before the vendor take steps to disaffirm the sale, such a sale will be good, because the act of the vendor enabled the vendee to make the sale.<sup>57</sup> Where a party signs a forged note as surety, believing the principal's signature thereto genuine, and the payee parts with value for such note, the party so signing as surety must bear the loss.<sup>58</sup> The intrinsic equity of this maxim is similar to that of the maxim, *No one can take advantage of his own wrong*; and it applies to a party who stands by and allows his property to be sold as another's; to any person who, even innocently, misleads, or who innocently enables another to mislead, a third party to his detriment; and, in general to all cases of estoppel, and to all other cases where one has innocently acted on the faith of another's acts or words.

The maxim is often expressed thus: Where one of two persons must suffer loss by the acts or fraud of a third party, he who enabled that third party to occasion the loss, or to commit the fraud, ought to be the sufferer.<sup>59</sup>

§ 53. **Equity Follows the Law.**—Equity follows the law in the following particulars:<sup>60</sup> (1) In adjudicating questions affecting legal estates, rights, interests or duties, Equity applies those rules of law the Circuit Courts would apply in like cases; (2) In adjudicating questions affecting equitable estates, rights, interests, or duties, Equity will follow the analogies of the law where any analogy clearly exists, especially the law in reference to the descent and distribution of estates, and the husband's right to his wife's chattels, but subject to her equity; (3) Where the Legislature has passed an act not expressly applicable to proceedings in Equity, nevertheless the Courts of Chancery will follow such statute, unless it contravenes some fundamentale equitable right or some equitable remedy; (4) Where the Courts of law and of Equity have concurrent jurisdiction, the statutes of limitations will be enforced in Chancery.<sup>61</sup> Indeed, it may be generally said that a Court of Chancery in enforcing a legal right, or in applying a legal remedy, will follow the law when no fundamental rule of Equity is thereby violated. Were it otherwise, a man's legal rights, or legal duties or liabilities, might, to some extent, depend on the Court in which the suit was pending. This remark, however, must not be so construed as to intimate that, when a legal cause of action is pending in Chan-

<sup>53</sup> Broom's Leg. Max., 276-295.

<sup>54</sup> *Coles v. Anderson*, 8 Hum., 493; *Whitby v. Armour*, 4 Lea, 686; *Bank v. Wolf*, 6 Cates, 255.

<sup>55</sup> *King v. Fleece*, 7 Heisk., 281.

<sup>56</sup> *Walker v. Skipwith*, Meigs, 509.

<sup>57</sup> *Arendale v. Morgan*, 5 Sneed, 704.

<sup>58</sup> *Trevathan v. Caldwell*, 4 Heisk., 535.

<sup>59</sup> *Walker v. Skipwith*, Meigs, 509; *Susong v. Williams*, 1 Heisk., 631; *Trevathan v. Caldwell*, 4 Heisk., 538. He who enables another to commit a fraud is answerable for the consequences, as (1) where the owner knowingly permits his property to be sold by another; or (2) where a

creditor, who has obtained a secret and undue advantage, signs a composition and thereby induces other creditors to sign it. *Snell's Pr. Eq.*, 474-475.

<sup>60</sup> By "law," in this section, is meant the common and statutory law.

<sup>61</sup> *Nicholson v. Lauderdale*, 3 Hum., 200; *Peebles v. Green*, 6 Lea, 475; *Hughes v. Brown*, 4 Pick., 586. But Chancery will not enforce the statute of limitations when the defendant fraudulently concealed the cause of action. *Smart v. Waterhouse*, 10 Yerg., 104; *Vance v. Matley*, 8 Pick., 310.

cery, the Court has not the power to apply the maxims and principles of Equity, and to enforce any equities that may exist in the case; and especially the power to compel the complainant to do equity.<sup>62</sup>

But this maxim must not be too broadly interpreted; for, as a rule, instead of Equity following the law, it widely departs from the law. Courts of Chancery follow the law as to the competency of witnesses, and the methods of obtaining testimony,<sup>63</sup> but contravenes the rules of law as to the admissibility and force of evidence, especially in cases of fraud, and in cases where parole evidence is heard to explain, vary, contradict or nullify a written instrument, or to assail a judgment or decree.<sup>64</sup>

§ 54. **Where there is Equal Equity the Law must Prevail.**—If two persons have equal equitable claims as to the same subject-matter, and, as to their equitable interests therein, are equally entitled to the aid of the Court, but one of them has the legal estate to said subject-matter, then he will prevail.<sup>65</sup> *In equali jure melior est conditio possidentis et defendentis.* (Where the right is equal the condition of the possessor and of the defendant is the better.)<sup>66</sup> The equity is equal between persons who are equally innocent and have been equally diligent. It is upon this account that the Chancery Court constantly refuses to interfere, either for relief or discovery, against a *bona fide* purchaser of the legal estate for a valuable consideration without notice of the adverse title, if he avails himself of this defence at the proper time and in the proper mode. In such a case, the equities being equal, the legal title prevails.<sup>67</sup>

§ 55. **Where there are Equal Equities, the First in Order of Time shall Prevail.**—This maxim is generally given in its Latin form, *Qui prior est tempore potior est jure.* (He who is prior in time is superior in right.) The maxim is sometimes misunderstood and misapplied. Its true meaning is this: As between persons having equitable interests only, if their interests are in all other respects equal, priority in time gives superiority in right. And, in a contest between persons having only equitable interests, priority of time will give superiority of right, provided there is not other sufficient ground of preference between them.<sup>68</sup> For, if the equities are equal, and one of the parties has, in addition, the legal title, then another maxim would apply: *Where there is equal equity the law must prevail.*<sup>69</sup> In a Court of Chancery, in a conflict of equities, the party having the superior equity will prevail; and if the equities are equal, and neither party has the legal title, then priority prevails; and if no priority the defendant prevails.

Under the operation of this maxim, grantees and incumbrancers take and are ranked according to the dates of their securities. Parties claiming liens or having judgments, or attachments, or execution liens, or assignments, all hold in order of time, provided there is no other ground of preference.<sup>70</sup> In a race of diligence between creditors having equal rights in law, or equal rights in Equity, he who is first in time becomes first in right,<sup>71</sup> for Equity rewards according to diligence.

§ 56. **To Protect and Enforce Rights to Property the Object of Suits in Chancery.**—The term “property,” as used in this section, includes everything that is the subject of exclusive individual ownership; or, to be more specific, includes not only lands, houses, goods and chattels, rights and credits, but, also, a man’s person, and his wife and minor children, and his right to work, and to sell and acquire property, and engage in any lawful business, and his and their

<sup>62</sup> Courts of Equity will not, in a case of purely legal cognizance, grant relief contrary to the settled maxims and principles of Equity jurisprudence; but will apply and enforce those maxims and principles even in cases where the rules of the Circuit Court are otherwise. *Lenoir v. Mining Co.*, 4 Pick., 168.

<sup>63</sup> Code, § 4455.

<sup>64</sup> See *ante*, §§ 6-7, for cases where law follows Equity.

<sup>65</sup> *Perkins v. Hays, Cooke*, 163.

<sup>66</sup> *Broom's Leg. Max.*, 690.

<sup>67</sup> 1 *Sto. Eq. Jur.*, § 64 c; *Reeves v. Hager*, 17 Pick., 712.

<sup>68</sup> 3 *Com. Eq. Jur.*, §§ 414, 678-734.

<sup>69</sup> *Perkins v. Hays, Cooke*, 163.

<sup>70</sup> *Com. Eq. Jur.*, §§ 414; 415, 678-734; and see *Priorities, post*, §§ 73-74.

<sup>71</sup> *Hillman v. Moore*, 3 *Tenn. Ch.*, 460; *Jordan v. Everett*, 9 *Pick.*, 396.



reputation, health and capacity to labor, and his and their right to enjoy the senses of sight, smell, hearing and taste, and his and their right of speech and locomotion, and his and their right to enjoy their sense of moral propriety when normal.

As men live by their labor and property, no man is presumed to part with either without receiving or expecting an equivalent in value. Hence, whenever one person has obtained either the labor or property of another he should pay or account therefor, unless he can prove it was a gift; and so, whatever injury one person does to another's property or capacity to labor should be made good.

To declare and define the rights of property, and regulate its tenure, possession, enjoyment and transfer, is the business of the Legislature; and to protect and enforce those rights, compel atonement for their violation, and conform the tenure, possession, enjoyment and transfer of property to the requirements of law and Equity, so that each person may have his own, and no person have what is another's, is the business of the Courts.

Questions involving partisan politics, denominational religion, ecclesiastical controversies, scientific theories, mere breaches of moral rectitude and violations of criminal law, are not within the domain of Equity Jurisprudence, and the Chancery Court has no jurisdiction of them, unless they involve rights of property, and then only as to such rights.

§ 57. **Equity Regards the Beneficiary as the Real Owner.**—In a Court of law in case of an express trust, the beneficiary is not recognized, and has no rights the trustee is bound to respect. On the face of the deed the legal title is in the trustee, and the Courts of law will look no further, and will hear no proof in behalf of the beneficiary. Indeed, if the beneficiary is in possession the trustee can eject him by suit in a Court of law. In short, in the eye of the law the beneficiary is not known.<sup>72</sup>

But in Equity, where the intent of the grantor and not the form of the grant prevails, the beneficiary is regarded as the real owner; and the trustee is considered as a mere manager of the trust property for the benefit of the beneficiary,<sup>73</sup> and liable to the beneficiary for any and every breach of the trust. If the trustee fail to do his duty, the Chancery Court will remove him, on proper application.

And all this is true not only of trusts created by wills, deeds or other instruments in writing, but is also true of trusts created by law. Thus every administrator, executor, and guardian, and, to a less extent, every Court Clerk, Receiver, Sheriff, County Trustee or other public officer entrusted with the money of others, by the law, and especially where he has given bond to secure those entitled, is liable to be called by the beneficiaries to account in Chancery; and, in all such cases, the Court regards the beneficiary as the real owner of the property, although the legal title is in the officer having it in possession.

But while the Chancery Court regards the beneficiary as the real owner in order more fully to guard his interests and assert his rights, it, also, regards him the real owner as to his liabilities, and, except in cases where the trust is declared by a will or deed duly registered,<sup>74</sup> will subject his interest in the trust property to the satisfaction of his debts, on a proper bill filed for that purpose, as hereafter shown. In dealing with the beneficiary's interest in the trust property Equity follows the law, and treats such property as descendible, devisable and alienable.<sup>75</sup>

In all cases of trusts, including trust deeds, assignments for the benefit of creditors, and even constructive and resulting trusts, the Chancery Courts

<sup>72</sup> 2 Sto. Eq. Jur., § 964, 968; 2 Pom. Eq. Jur., § 970.

<sup>73</sup> 4 Kent's Com., 303-304; Lewin on Trusts, 582; 2 Pom. Eq. Jur., § 989. *Quicquid acquiritur servo acquiritur domino.* See ante, § 46.

<sup>74</sup> Code, § 4283.

<sup>75</sup> 2 Sto. Eq. Jur., § 974; 2 Pom. Eq. Jur., § 989.

are ever ready to lend a helping hand to the beneficiary as against him who holds the legal title.

§ 58. **Equity Enforces What Good Reason and Good Conscience Require.**— Whatever good reason and good conscience require a party to do or refrain from, in a matter affecting another's property or rights, that a Court of Chancery requires of him, unless the other party has forfeited his right to relief by his negligence or participation in the wrong done. Conscience itself might make too refined or too unstable a standard for the determination of human conduct in the Courts; and reason of itself might give too wide a range for sharp practices in matters of trade, or other dealings. Indeed, conscience without reason might degenerate into fanaticism, or gross eccentricity; and, on the other hand, reason without conscience might become trickery, or even downright knavery.<sup>76</sup> Hence, in the administration of justice, conscience must be conformed to reason and thus become good conscience, and reason must be conformed to conscience and thus become good reason; and whatever good conscience and good reason unite in approving is the nearest approach to perfect justice man is able to attain.<sup>77</sup> This union of good reason and good conscience is what in a general way is meant by the term Equity in the administration of justice.

Whenever anyone is about to do, or has done, any act which in good reason and good conscience he ought not to do or have done, or is about to fail or has failed to do any act which in good reason and good conscience he ought to do, or have done, whereby another person is about to be or has been injured in his estate or rights, such person has the right to invoke the aid of the Courts to prevent the injury threatened, or obtain compensation for the wrong done; and if the Courts of law are inadequate to afford a sufficient remedy the Courts of Equity have inherent power to take full jurisdiction and administer complete relief.

All obligations enforceable in Chancery, arise from contracts express or implied, or are imposed by statute. Implied contracts are both general and special. 1. *The general implied contract* is the agreement every member of the community impliedly makes with every other member of the community that in every relation he may occupy as citizen, husband, father, confidant or bargainer, he will, in every transaction connected with such relation, do whatever good reason and good conscience require. 2. *The special implied contract* is that each person who has business relations with another will, in all matters of business, do all that good reason and good conscience require; and that every person having relations of trust or confidence with another, will, in reference to all matters connected therewith, do whatever good reason and good conscience require, and will refrain from doing whatever good reason and good conscience forbid. Each party to any matter of business has both the moral and legal right to expect and require the observance of this implied contract by the other party. This just expectation constitutes the foundation of all human intercourse, on it is built the superstructure of all business dealings, and Courts of Chancery will not allow it to be disappointed.

The implied contract surrounds every express contract, and fills all the interstices thereof. As the atmosphere pervades all spaces not occupied by other substances, so the implied contract pervades the whole world of legal rights and duties not occupied by express contracts; and under this all comprehensive implied contract, conclusively presumed by law, every person is held to act, in word and deed, and to it every person is bound to conform. This implied contract is, in substance, what in the Roman or civil law is called "*bona fides*;" and

<sup>76</sup> *Judex habere debet duos sales, saltem sapientie ne sit insipidus et solem conscientie ne sit diabolus.* (A Judge ought to have two salts, the salt of wisdom that he may do nothing

foolish, and the salt of conscience that he may do nothing wicked.) Coke, 3 Inst., 147.  
<sup>77</sup> Lube's Eq. Pl., 17; 286; 1 Pom. Eq. Jur., §§ 55-57; see note 17 to § 4, ante.

it is the foundation of a large proportion of the adjudications in the Chancery Court.<sup>78</sup>

§ 59. *Stare Decisis et Non Quieta Movere*.—(Adhere to the decisions, and do not unsettle questions put at rest.) It is more important to a people to have their laws known and fixed than to have them precisely just; for our conceptions of justice differ, but what is fixed is certain, and can be conformed to.<sup>79</sup> The decisions of our Courts are like sign-boards whereby we shape our course and keep on the road of safety. The law must run on straight lines, and cannot be crooked to suit supposed exceptions.<sup>80</sup> Fluctuations of judicial decisions have an effect similar to the shifting of the magnetic needle; no one is sure that he is travelling in the right direction, and no one can give safe counsel. Hence it is that Courts deem a decision which has become a rule of property as binding on them as a legislative enactment,<sup>81</sup> and this is so whether the decision was originally correct or not,<sup>82</sup> or whether it affects property, or a point of practice.<sup>83</sup> Laws are made for the greatest good of the greatest number, and must necessarily be general. It is better that the individual conform to the law than that the law conform to the individual; and it is better that a particular case of hardship be unredressed than that the law be violated, when the violation would occasion much mischief,<sup>84</sup> and especially would unsettle the foundations of property rights, and disturb the landmarks of the law.<sup>85</sup>

But the rule of *stare decisis* is not so inflexible when the decision is recent, and has not given satisfaction.<sup>86</sup>

And what is true as to precedents about property is equally true as to precedents about pleadings, practice, proof, and procedure.<sup>87</sup> Courts abhor innovations in pleadings or procedure,<sup>88</sup> and "delight with measured step to tread the beaten path of precedent."<sup>89</sup> A Solicitor who departs from established precedents in pleadings, proofs and procedure violates his duty both to his clients and to the Court: he needlessly endangers the success of the former, and perplexes the mind of the latter. Such innovations are mischievous and should not be tolerated.

<sup>78</sup> The propositions laid down in the text in regard to implied contracts are fully sustained by the best law writers. Blackstone says, "Implied contracts are such as reason and justice dictate, and which therefore the law presumes every man undertakes to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance." Vol. 3, 153. Implied contracts arise from natural reason and from the general implication and intendments of the Courts that every man hath engaged to perform what his duty or justice requires. *Ibid.*, 161. See 1 Spence Eq. Jur., 411. Parsons, in his great work on Contracts, says, "The law of contracts in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life; \* \* \* for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, all law." 1 Parsons' Cont. 3. Whatever a man ought to do, that the law supposes him to have promised to do. \* \* \* Implied contracts form the warp and woof of actual life \* \* \* Implied contracts are co-ordinate and commensurate with duties. *Ibid.* 4. Every member of society has impliedly contracted to do whatever the law requires of him. Walker's Am. Law, 468. This implied contract arises from man's nature as a social animal, and without it society could not exist, and men would become beasts of prey. See *post*, § 932.

<sup>79</sup> *Misera est servitus ubi jus est vagum aut incertum*. (Miserable is the servitude where the law is vague or uncertain.) Atkinson v. Dance, 9 Yerg., 427.

<sup>80</sup> Bank v. Skillern, 2 Sneed, 698, 701; Franklin v. McCorkle, 16 Lea, 629. The laws of nature cause individual hardships. Rains bless

many but ruin some. The frost stays the pestilence, but shortens the crops.

<sup>81</sup> McKinney v. Stacks, 2 Heisk., 284.

<sup>82</sup> Case Co. v. Joyce, 5 Pick., 337; Steedman v. Dobbins, 9 Pick., 397; Wilkins v. Railroad, 2 Cates, 422. Where a decision lays down a rule of property, it is as much law as an Act of the Legislature, and should remain until changed by the Legislature. Courts should adhere to the old landmarks of the law, and not be swayed or confused by new decisions of other States. Jackson Ins. Co. v. Freeman, 9 Heisk., 300.

<sup>83</sup> Thompson v. French, 10 Yerg., 458; Smith v. Harris, 3 Sneed, 553, 557.

<sup>84</sup> Neal v. Cox, Peck., 449; Franklin v. McCorkle, 16 Lea, 629.

<sup>85</sup> Smith v. McCall, 2 Hum., 163; Wilkins v. Railroad Co., 2 Cates, 420. In the latter case, Neil, J., reviews the Tennessee authorities in an exhaustive opinion.

<sup>86</sup> Sherfy v. Argenbright, 1 Heisk., 143; Barton v. Shall, Peck, 233. But even in such a case it is better to let the Legislature change the law than for the Courts to change it. Coker v. McGinnis, Mart. & Yerg, 364. The Legislature can repeal statutes passed by it, but Courts are not vested with repealing power, and a decision once made is made forever. Clouston v. Barbieri, 4 Sneed, 339.

<sup>87</sup> Thompson v. French, 10 Yerg., 458; Smith v. Harris, 3 Sneed, 553, 557.

<sup>88</sup> *Omnis innovatio plus novitate perturbat quam utilitate prædest*. (Every innovation disturbs more by its novelty than benefits by its utility.)

<sup>89</sup> Coke has said, *Via trita, via tutissima*. (The road that is worn by travel is the safest.) And Chancellor Kent has declared that the old way is the safe way—*via antiqua via est tuta*. Manning v. Manning, 1 Johns, Ch. 527.

§ 60. **No One Should be Condemned without a Chance to be Heard.**<sup>90</sup>—This is a fundamental maxim of Equity jurisdiction, and has always been sacredly observed. Indeed, it is a principle founded in natural justice, and of universal application, that no man can be proceeded against in Court without notice.<sup>90a</sup> The inherent love of fair play contained in the maxim, *Audi alteram partem*,<sup>91</sup> has always and everywhere been recognized by all Judges and Courts; and the practice of all tribunals is to render judgment against no one without giving him a chance to be heard in his own behalf. The law delights in giving to every man a day in Court to make his defence.<sup>92</sup> Were the law otherwise no right would be certain, no property safe, no possession secure; fraud would revel in triumph, and trickery be supreme over good faith. No principle of the common law is more sacred than that no man shall be deprived of his property by the judgment of a Court without personal notice that he has been impleaded therein.<sup>93</sup>

Where the defendant cannot be personally notified of the suit against him, but has property within the jurisdiction of the Court, the law deems it not just that he should enjoy his property, or its proceeds, free from the just claims of his creditors, and so the Court will substitute a seizure of his property,<sup>94</sup> and a notice to him printed in a local newspaper that he has been sued, in place of direct personal notice of the suit. But even in such a case, so anxious are the Courts to do everything in their power to give the defendant actual notice of the suit against him that they require his property to be actually attached, and due publication thereof to be made, before they will dispense with the service of a subpoena upon him. In such a case the attachment of his property and the published notice are substituted for an attachment of his person in the cause, or at least substituted for actual notice by service of a subpoena,<sup>95</sup>

The notification to the defendant that he has been sued, made by service of subpoena, or by attachment of his property, and publication, or, in some specific cases, by publication without attachment, is essential to the jurisdiction of the Court over his person, and if the Court has no jurisdiction over his person, actual or constructive, it has no power to render any decree against him *in personam*, nor against his property, even when the property is within its jurisdiction; but any such decree will be absolutely void.<sup>96</sup>

<sup>90</sup> *Nemo inauditus nec summonitus condemnare debet si non sit contumax.* (No one ought to be condemned unheard and unsummoned, if he be not contumacious.) If the defendant evade or attempt to evade the service of the subpoena, the officer shall leave a copy at the usual residence of the defendant, which shall be a sufficient service. Code, § 4346. The defendant will not be allowed to take advantage of his own contumacy.

<sup>90a</sup> *Ridgeway v. Bank*, 11 Hum., 523.

<sup>91</sup> Hear the other party.

<sup>92</sup> *Peck, J.*, in *Roberts & Phillips v. Stewart*, 1 Yerg., 392.

<sup>93</sup> *Gasget & Co. v. Scott*, 9 Yerg., 244. This great principle, which has always been considered so important to the safety of the citizen, has been violated in but few instances, and in those only where the evils resulting from requiring the notice would more than counterbalance those arising from proceeding without it, as in cases of attachments of prop-

erty, motions against public officers of the State, and of sureties against their principals; and such violations are watched with great jealousy, and the statutes authorizing them are strictly construed. *Ibid.*

<sup>94</sup> A man's property is, in a sense, a part of himself, and when his property is seized by another he is presumed to know it, the property being in the possession of himself or agent, and the knowledge of the agent being considered the knowledge of the principal. See *post*, § 65, sub-sec., 2.

<sup>95</sup> *Walker v. Cottrell*, 6 Bax., 273; *Ingle v. McCurry*, 1 Heisk., 26; *Rains v. Perry*, 1 Lea, 39.

<sup>96</sup> See authorities next above cited; also, *Fogg v. Gibbs*, 8 Bax., 467; *Finley v. Gaut*, 8 Bax., 152; *Walker v. Day*, *Ibid.* 80; *Bell v. Williams*, 1 Head, 229; *Kinzer v. Helm*, 7 Heisk., 675; *Barrett v. Oppenheimer*, 12 Heisk., 302; *Sherrill v. Goodrum*, 3 Hum., 430; *Hughes v. Bryant*, 6 Yerg., 471.

## ARTICLE III.

## MAXIMS APPLICABLE TO THE COURT, AND TO ITS PRACTICE AND PLEADINGS.

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| <p>§ 61. Maxims Applicable to the Court, and its Orders.</p> <p>§ 62. Maxims Applicable to the Practice of the Court.</p> | <p>§ 63. Maxims Applicable to Pleadings.</p> <p>§ 64. Other Principles and Maxims.</p> |
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§ 61. **Maxims Applicable to the Court, and its Orders.**—The following are some of the maxims applicable to the Court, and its orders:

1. *Actus Curia neminem gravabit.* (An act of the Court injures no one.) Whenever the Court makes some order, or does some act, on its own motion, during the progress of a cause, such order or act will not be allowed to work an injury to any of the parties. Where a decree has been delayed by the act of the Court, it will, if necessary to justice, be entered *nunc pro tunc*.

2. *Actus judicarius coram non judice irritus habetur.* (A judicial act outside of the Judge's authority is null and void.)

3. *Consensus facit legem.* (Consent makes law.) Whatever the parties agree to, during the progress of a suit, is binding upon the Court, if (1) the parties consenting are under no disability, and if (2) the consent is in violation of no law. Every person *sui juris* can do what he pleases with his own, so long as he violates no law and injures no one else. The agreements of parties during the progress of a suit are favored, and the Court cannot go behind them, or revise them, or disregard them, or set them aside, except for fraud, accident or mistake. Where parties consent, they bind the Court; where they do not, or cannot consent, the Court binds them. *Conventio vincit legem.*<sup>1</sup>

4. *Cursus Curia est lex Curia.* (The practice of the Court is the law of the Court.) Rules of procedure are indispensable to the orderly administration of justice, and all Courts have such rules, and require strict obedience to them. They are a part of the means whereby the law is enforced. Law would be of no value if there were no means of enforcing it. Another maxim is, *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*<sup>2</sup> (When anything is commanded, every means of accomplishing it is also commanded.) So when Courts were created, by necessary implication, power was given them to make such rules of practice as are necessary to enable them to apply and administer the law. These rules when established have all the force and effect of law, as well upon the Courts themselves, as upon their officers and litigants, until duly changed on due notice.

5. *Fieri non debet, factum valet.* (What ought not to have been done is valid when done.) Thus, a decree that is erroneous is, unless duly reversed by the Supreme Court, as binding on the parties as though in strict accordance with the law and the facts. So, an injunction that should not have been granted must be obeyed as implicitly as though fully warranted by the facts. All irregular procedures are valid, unless the irregularities are duly questioned and corrected. In brief, every judicial act is binding so long as it is not appealed

<sup>1</sup> The agreement of the parties is stronger than the law; that is, the law cannot violate or loosen the agreement, if it be a lawful one. Courts are established to enforce contracts, not to make them. It is not even in the power of the Legislature to violate, or set aside, a contract. The inviolability of contracts is required by the Constitution of the United States. Art. I, sec. 10; and the Constitution of the State.

Art. I, sec. 20. As to the effect of consent, see *post*, § 72.

<sup>2</sup> Or, as it is otherwise expressed, *Cui jurisdictionis data est, ea quoque concessa esse videntur sine quibus jurisdictionis applicari non potest.* (When jurisdiction is given, those things, also, are deemed to be given which are necessary to the exercise of that jurisdiction.)

from, or reversed by writ of error, however irregular or full of errors the act may be. But a judgment or decree that is void binds no one, benefits no one, and protects no one: void things are no things.

6. *Omnia præsumuntur rite et solemniter esse acta.* (All things are presumed to be rightly and regularly done.) The Courts presume that whatever is done by a Court, or by an officer of the law, is properly done. Whatever is done by the Legislature is presumed to have been correctly done. The Courts presume that when a Court of general jurisdiction pronounces a decree that every necessary step preliminary thereto was duly taken. All presumptions are in favor of the regularity of the proceedings of all sworn officials.

7. *Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est.* (He who does anything by command of the Judge will not be deemed to have acted from an improper motive, because it was necessary for him to obey.) This rule protects a Clerk who pays out money, or does any other act, by order of the Court; it protects the Sheriff in the proper execution of the orders, decrees and process of the Court; and protects Receivers, Special Commissioners and others, who do any act in pursuance of an order or decree of a Court. The party dissatisfied with any such order or decree must take the proper steps to have it suspended, corrected or reversed.

§ 62. **Maxims Applicable to the Practice of the Court.**—The following are some of the principal maxims that may be applied to questions of practice:

1. *De non apparentibus et non existentibus eadem est ratio.* (What does not appear in the record, and what does not exist in fact, are one and the same in law.) Courts can act upon nothing that does not duly appear in the record. Courts of law may hear and determine, but Courts of Chancery must *see* and determine: they cannot take cognizance of oral statements unless and until reduced to writing in due form and made part of the record. The Chancellor cannot regard his personal knowledge of men, character or facts, for these are not in the record: *non refert quid notum sit judicii, si notum non sit in forma judicii.*<sup>3</sup> This maxim is sometimes more tersely expressed thus: *Quod non apparet non est.* (What does not appear [in the record] does not exist [so far as the suit is concerned].)

2. *In judicio non creditur nisi juratis.* (In a judicial proceeding, nothing is believed unless proved upon oath.) This is one reason why the Chancellor, the Clerk and Master, the Solicitors and the Sheriff are all sworn. No witness can be heard unless sworn, or unless his oath is expressly waived. Statements of fact made in Court by parties, or on behalf of parties, will not be heeded unless sworn to, or agreed to by the opposite side. The Court cannot credit anything not verified by the oath of the proponent, and this is the reason why affidavits are required in support of motions.

3. *Melior est conditio defendantis.* (The situation of defendant is preferable to that of complainant.) The reason of this rule is that the burden of proof usually rests upon the complainant; and, ordinarily, the defendant need make no proof until the complainant has made out a *prima facie* case. The complainant must satisfy the Court that he has a right to the thing in dispute; and, until he does so, the defendant can keep his arms folded, and his mouth closed.<sup>4</sup> So, where each party is equally at fault, the Court will not aid either, as a rule, for *in pari delicto potior est conditio defendantis.* Both the defendant and the possessor may stand still until the complainant has proved a right.<sup>5</sup> *Melior est conditio possidentis, et rei quam actoris.*

4. *Omnis innovatio plus novitate perturbat quam utilitate prodest.* (Every

<sup>3</sup> See *post*, §§ 451, 1141, sub-sec. 10. It matters not what is known to the Judge, if it be not known to him judicially. The Judge, as a man, may know facts pertinent to the case which do not appear of record, but he can no more consider such facts than can a juror under like circumstances. The Judge has no eyes

to see, and no ears to hear, and no mind to consider, anything not in the record of the cause. *Judicis est judicare secundum allegata et probata.*

<sup>4</sup> Pinson v. Ivey, 1 Yerg., 308. See *post*, § 64, sub-sec. 20.

<sup>5</sup> See *post*, § 453.

innovation disturbs more by its novelty than benefits by its utility.) This is especially true in matters of pleading and practice. Solicitors, from inexperience or carelessness, are constantly departing from the proper form of pleadings, orders and decrees; and are constantly making innovations on the regular practice of the Courts.<sup>6</sup> *Stare decisis et non movere quieta.*<sup>7</sup> This maxim applies as well to questions of pleading and practice as to property rights.

5. *Qui facit per alium facit per se.* (He who does any thing by another, does it himself.) The act of the agent is the act of the principal; and among partners each one is the agent of all the others. If the principal, or master, ratifies an act of his agent or servant, the effect is the same as though such act was expressly authorized before it was done; for *omnis ratihabitis retrotrahitur, et mandato æquiparatur.*<sup>8</sup> Delegated power, however, cannot be delegated. Representation in Courts is indispensable, and litigants will be as fully bound by the acts of their Solicitors as though such acts had been done by themselves in person. When the Court is once satisfied that a Solicitor is authorized to appear, it will not question his authority to bind his client in any way, or by any act, or agreement, in the progress of the cause. And as Solicitors are sworn well and truly to demean themselves in Court, the Court will presume they have authority to appear when the opposite side, or the client himself, does not dispute that authority.

6. *Quilibet potest renunciare juri pro se introducto.* (Any one can waive a law made for his benefit.) No one is obliged to act on, or make use of, all the rights he is entitled to: he may waive any of them. And the failure to exercise a right in due season will generally be deemed a waiver; and if, in consequence of a seeming waiver, the opposite party has taken a legitimate step, the party making the waiver will be concluded and estopped from recalling his waiver.<sup>9</sup> This rule is strictly enforced in practice.<sup>10</sup>

7. *Qui sentit commodum, sentire debet et onus.* (He who enjoys the benefit ought also to bear the burden.) This rule is enforced by requiring the party who obtains a benefit in a judicial proceeding, to pay a part, or all, of the costs, when they cannot be otherwise made.<sup>11</sup>

8. *Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima.* (Where the law requires any one to show cause the cause must be just and legal.) In Court a party is frequently required to show cause: (1) Why he did so and so; or, (2) why he did not do so and so; or, (3) why he should be allowed to do so and so; or (4) why the other party should not be allowed to do so and so. It may be stated generally that what is meant by "showing cause" is showing *good* cause, that is, showing a good, legal, substantial and meritorious reason or reasons, justifications, or excuses, for the action in question. The law despises trifles and quibbles,<sup>12</sup> and when the law or the Court requires a party to "show cause," such party must, in good faith, make such a showing as to demonstrate that justice is clearly on his side. If he is showing cause to be relieved, or to shield himself, he must make it clearly appear that he has been guilty of no inexcusable *laches* or negligence, and of no acts of bad faith or disregard of duty, and that he has a meritorious claim or defence. In a word he must show *good* cause.<sup>13</sup> If he is showing cause to obtain the right to do an affirmative act which should have been done or applied for in due season, he must likewise show good reason or excuse for his delay, and show that he acted

<sup>6</sup> Chancellor Kent has declared that the old way is the safe way—*via antiqua via est tuta.* Manning v. Manning, 1 Johns. Ch., 527.

<sup>7</sup> Stand by what has been decided, and do not disturb what is settled. See *ante*, § 59, where this maxim is fully considered.

<sup>8</sup> Every ratification of what has been done is equivalent to a prior command to do it.

<sup>9</sup> Brasher v. Van Cortlandt, 2 Johns. Ch., 242. *Nemo potest mutare consilium suum in alterius injuriam.* (No one can change his plan to the injury of another). So, if one has two rights or remedies, and he repudiates one or elects one, he is estopped to change his action.

O'Bryan Bros. v. Glenn Bros., 7 Pick., 106. See Article on Estoppel, *post*, § 67.

<sup>10</sup> See Article on Waiver and Consent, *post*, §§ 71-72.

<sup>11</sup> See *post*, §§ 587, 593.

<sup>12</sup> See maxims: (1) *De minimis non curat lex*; (2) *Apices juris non sunt jura*; (3) *Lex non favet delictorum votis*; (4) *Lex non præcipit inutilia*; (5) *Lex neminem cogit ad vana seu inutilia peragenda*; (6) *Aucupia verborum sunt jure indigna*; and (7) *Qui hæret in litera hæret in cortice.*

<sup>13</sup> And "good cause" means merits. Cain v. Jennings, 3 Tenn. Ch. 131; Gill v. Wyatt, 6 Heisk., 88.

as soon as he had knowledge and an opportunity. Good faith, diligence and merits must be shown by every party who comes into the Chancery Court for relief. A party applying for leave to do something in Court which should have been done before, must show not only a good excuse for his failure to act in season, but must set forth such merits as will show that he has the right on his side, and these merits must be shown not by general allegations but by specific facts.<sup>14</sup> A party required to show cause is ordinarily a suppliant for the mercy of the Court,<sup>15</sup> and he should realize his extremity and conform to every requirement of the law, the practice and good reason;<sup>16</sup> and this "cause," or "good cause," should be shown (1), *in due season*, which means at the first opportunity after its necessity became known; (2) *in due form*, that is in the manner required by the practice of the Court; and (3) *by due particularity*, that is by a full disclosure of all the facts and circumstances bearing on the matter in question. And the writing setting forth this good cause thus shown should be verified by the oath of the party, or of his Solicitor when the facts are in the latter's personal knowledge, but not otherwise.

The most usual cases where a party is required to show good cause are: (1) for not answering in season; (2) for leave to withdraw an answer and demur or plead; (3) for not amending his bill in season, or not sooner applying so to do; (4) for setting aside a *pro confesso*; (5) for amendment to answer; (6) for leave to re-examine a witness; (7) for a continuance; (8) for recommitment of a Master's report; (9) for setting aside a sale; (10) for leave to file an amended or supplemental or cross bill; (11) for extension of time to take proof; and (12) for doing or having done any act in Court out of course, or for undoing any act in Court that was done in course.

§ 63. **Maxims Applicable to Pleadings.**—The following maxims apply to pleadings, and their interpretation:

1. *Allegans contraria non est audiendus.* (He who makes assertions that are contrary to each other will not be heard.) This maxim applies both to pleadings and proof. A bill or answer containing contradictory statements becomes a nullity as to such statements; nor will the Court allow a pleading to be amended, when the amendment is contradictory or repugnant to the pleading. So, testimony that is contradictory destroys itself, and a witness who contradicts himself is not to be heard.

2. *Allegari non debuit quod probatum non relevat.* (That ought not to be alleged which, if proved, would not be relevant.) No useless allegations should be made, and no surplusage inserted, in pleadings. Poetry, rhetoric, sarcasm, pathos—all are alike irrelevant and impertinent, and will be stricken out on motion.

3. *Benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.* (Written instruments should be liberally construed so that they may stand rather than fall.) This is our rule in dealing with bills, the Court making every reasonable presumption in their favor, when assailed by a demurrer, or a motion to dismiss.<sup>17</sup> The English rule is the reverse, following the maxim, *ambiguum placitum interpretari debet contra proferentem.*<sup>18</sup> In Tennessee, a liberal interpretation is given to all writings, the purpose of the Court being to ascertain, and give effect to, the intention of the makers of the instrument. The intention is the substance, the words are but the shadow;

<sup>14</sup> See *post*, §§ 235; 511; 960-961. General allegations in such cases are mere *vox et præterea nihil*. *Montgomery v. Olwell* 1 Tenn. Ch., 172.

<sup>15</sup> *Cheatham v. Pearce & Ryan*, 5 Pick., 608.

<sup>16</sup> If you have merits, and the inclination of the Chancellor is against you, make your presentation so clear, strong and equitable that he will be obliged to yield; if his inclination is favorable, give him good grounds to grant your application.

<sup>17</sup> Code, § 2884; *Thompson v. Paul*, 8 Hum., 117; *Lincoln v. Purcell*, 2 Head, 143; *Hobbs v.*

*M. & C. Railroad*, 9 Heisk., 879; same case, 12 Heisk., 531; *French v. Dickey*, 3 Tenn. Ch., 302; *Gregory v. Hasbrook*, 1 Tenn. Ch. 218.

<sup>18</sup> An ambiguous pleading ought to be interpreted against the party pleading it. This maxim is properly applied in England, where all solicitors are thoroughly trained and skilled; but in Tennessee, where solicitors are admitted to practice without thorough preparation, a liberal interpretation of pleadings, and other legal instruments, is necessary and equitable. See *Quinn v. Leake*, 1 Tenn. Ch. 71.



and so the intention is the only infallible touchstone for the interpretation of contracts.<sup>19</sup> In construing wills, the intention of the testator is the polar star by which the Court should be guided. *Animus hominis est anima scripti*,<sup>20</sup> the intention of the writer is the soul of the writing, or, as it has otherwise been expressed, words are the body, the meaning is the soul. The office of interpretation is to deduce the true sense from the words, and not to inject a false sense into them. *Expositio, quæ ex visceribus causæ nascitur, et aptissima et fortissima in lege*.<sup>21</sup> And while the words are deemed of less importance than the meaning of the entire instrument, nevertheless it is only by means of the words that this meaning can be ascertained. *Divinatio non interpretatio est quæ omnino recedit a litera*.<sup>22</sup> Neither bad writing, bad punctuation, nor bad grammar will, in the least, prejudice the instrument, for *mala grammatica non vitiat chartam*.<sup>23</sup>

4. *Falsa demonstratio non nocet*. (A false description does no harm.) This is a maxim of frequent application, and applies to cases where the wrong name is given to a person, or thing, otherwise sufficiently described in the instrument. Where a bill is misnamed, the Court will disregard the name, if it contain an equitable ground of suit.

5. *Utile per inutile non vitiatur*. (The useful is not vitiated by the useless.) Surplusage works no injury, and may be ignored. This rule applies to unnecessary words and phrases in deeds, contracts and pleadings; they are deemed mere trifles which the law disregards. *De minimis non curat lex*. The Court will order surplus matters in pleadings to be stricken out, or will ignore them.

§ 64. **Other Principles and Maxims.**—For the convenience of Chancellors and Solicitors, the following additional maxims and principles are here inserted.

1. *Accusare nemo se debet, nisi coram Deo*. (No one is bound to criminate himself, except before his God.) No man can be forced to criminate himself in any Court, except the Court of his own conscience.

2. *Actus Dei vel legis nemini facit injuriam*. (The act of God, or of the law, causes a loss to no one.) As in cases of accident and forfeitures caused by flood, pestilence and sickness; or an act of the Legislature put in force from and after its passage operating on contracts by parties before the law was made known.

3. *Actus judicarius coram non judice irritus habetur*. (A judicial act outside of the Judge's authority is null and void.) As a decree or order not warranted by the pleadings, or a decree in a case over which the Court has no jurisdiction.

4. *Causæ dotis, vitæ, libertatis, fisci, sunt inter favorabilia in lege*. (Suits involving dower, life, liberty and revenue are favored in law.)

5. *Certum est quod certum reddi potest*. (That is deemed certain which can be made certain.) As when one instrument calls for a second, and the latter contains what was deficient in the former.

6. *Cessante ratione legis, cessat ipsa lex*. (When the reason for the law has ceased, the law itself ceases.)<sup>24</sup> As the laws in the Code of 1858, never repealed, relating to slaves and free negroes.

7. *Debitum et contractus sunt nullius loci*. (Neither a debt nor a contract are

<sup>19</sup> *Officer v. Sims*, 2 Heisk., 506.

The following are some of the principal

**Maxims of Interpretation:**

1. *Maledicta expositio quæ corruptit textum*. (Accused is the exposition which destroys the text).

2. *Ex antecedentibus et consequentibus fit optima interpretatio*. (The best interpretation is made by considering both what precedes and what follows the matter in doubt).

3. *Qui hæret in litera hæret in cortice*. (He who sticks to the letter sticks to the bark).

4. *Nimia subtilitas in jure reprobatur*. (Too much subtlety is reprobated in law).

5. *Nihil facit error nominis cum de corpore vel persona constat*. An error in the name amounts to nothing when there is certainty as to the thing or person).

6. *Verba ita sunt intelligenda ut res magis valeat quam pereat*. (Words should be so interpreted that the subject-matter may be preserved rather than destroyed).

7. *Verba relata inesse videntur*. (Words referred to are considered as inserted).

8. A meaning should be drawn out of the words and not forced into the words.

<sup>20</sup> The intention of the party is the life of the instrument.

<sup>21</sup> That interpretation, which is born of the bowels of the case, is, in law, the fittest and most powerful.

<sup>22</sup> It is a guess, not an interpretation, which disregards the words of an instrument.

<sup>23</sup> *Brown v. Hamlett*, 8 Lea, 732.

<sup>24</sup> *Battelle & Co. v. Youngstown Co.*, 16 Lea,

360.

local in their nature.) Suits to recover debts, and suits based on contracts, are called transitory actions, and may be brought wherever the debtor is found.

8. *De fide et officio judicis non recipitur quæstio: sed de scientia, sive error sit juris aut facti.* (The good faith and office of a Judge cannot be called in question, but his knowledge of the law, or facts of the case, may be.)

9. *De minimis non curat lex.* (The law pays no attention to trifles.) Very small errors are always ignored.

10. *Dies dominicus non dies juridicus.* (The Lord's day is not the Court's day).<sup>25</sup>

11. *Ex nudo pacto non oritur actio.* (No suit can be brought upon a contract without a supporting consideration.)

12. *Ex dolo malo non oritur actio.* (No suit can be brought to enforce a fraud.) A complainant must have clean hands.

13. *Ex pacto illicito non oritur actio.* (No suit can be brought to enforce a contract in violation of law.)

14. *Ex facto jus oritur.* (The law arises out of the transaction.) The law is the shadow which the facts cast.

15. *Expressio unius personæ vel rei est exclusio alterius.* (The express mention of one person or thing in a written instrument is equivalent to the express exclusion of all other persons or things.) Thus, a deed to A is a deed to him alone, and to no other person; and a devise to B in effect excludes all others.

16. *Frustra probatur quod probatum non relevat.* (It is useless to prove anything which, when proved, would be immaterial.)

17. *Hæres est eadem persona cum antecessore.* (The heir and his ancestor are one and the same person.) That is, one in right, the heir succeeding to the rights of his ancestor; just as the king never dies.

18. *Ignorantia facti excusat; ignorantia juris non excusat.* (Ignorance of the fact excuses; but ignorance of the law does not excuse.) Ignorance of the law does not excuse in criminal cases, but may excuse in civil cases.

19. *In consimili casu, consimile debet esse remedium.* (In similar cases the remedy should be similar.)

20. *In æquali jure melior est conditio possidentis.* (Where the rights of the parties are equal, the claim of the party in possession is preferred.) If neither party has any title to the property, real or personal, in dispute, the Court will refuse to disturb the possession of the defendant. Possession is a sufficient defence against every one except him who has the legal right to the possession. Possession is a sort of inchoate title, and may ripen into a perfect title, if continued.

21. *In jure, non remota causa, sed proxima spectatur.* (In law, the proximate and not the remote cause is to be considered.)

22. *Judicis est judicare secundum allegata et probata.* (It is the duty of a Judge to decide according to the allegations of the pleadings and the pertinent proof.) A decree that is not supported by the pleadings is void; a decree not supported by the evidence is voidable, on appeal or writ of error.

23. *Lex non cogit ad impossibilia.* (The law does not require any one to do what cannot be done.)

24. *Melior est conditio possidentis ubi neuter jus habet.* (The situation of the person in possession is better than that of the claimant, where neither has any title to the property.)

25. *Necessitas, quod cogit, defendit.* (The necessity is a defence to what necessity compels one to do.) As when houses are blown up to stay a conflagration.

26. *Nemo cogitur rem suam vendere, etiam justo pretio.* (No one can be forced to sell his own property even for a fair price.) But it may be taken for a public purpose on just compensation being paid therefor.

<sup>25</sup> A judgment rendered on Sunday is void. *Styles v. Harrison*, 15 Pick., 128.

27. *Noscitur a sociis.* (It is known by its associates.) Writing may be deciphered by using known letters or words in the same writing as guides. So, the meaning of doubtful words may be made plain by the context. *Ex antecedentibus et consequentibus fit optima interpretatio.* (The best interpretation is obtained by considering what goes before and what follows.)

28. *Nulla impossibilia aut inhonesta sunt presumenda; vera autem et honesta et possibilia.* (What is improbable or dishonest is never to be presumed: on the contrary, the law presumes in favor of truth, honesty and probability.)

29. *Omne majus continet in se minus.* (The greater always includes the less.) An authority to do a greater thing will authorize the doing of a less thing.

30. *Principia probant non probantur.* (Maxims have an inherent probative force, and need not to be proved.)

31. *Ratio legis est anima legis.* (The reason of the law is the soul of the law.) The reason for the law being known, its interpretation is known.

32. *Res inter alios acta alteri nocere non debet.* (No one ought to suffer because of what others have said or done.)

33. *Res per pecuniam aestimatur.* (The value of anything is estimated according to its worth in money.)

34. *Res perit suo domino.* (When property perishes the loss falls upon its owner.) When property dies, is burned, or otherwise destroyed or impaired, during litigation, without any one being to blame therefor, the owner of the property must bear the loss.<sup>26</sup>

35. *Salus populi est suprema lex.* (The welfare of the people is the supreme law.) The rights of the individual must be subordinated to the public good.

36. *Sublato fundamento cadit opus.* (When the foundation is removed the superstructure falls.)

37. *Sublato principali, tollitur adjunctum.* (When the principal is removed its adjuncts are, also, removed.) The accessory follows the principal; and what is incident to a thing goes with it.

38. *Superflua non nocent.* (What is superfluous works no injury.) Surplusage does not vitiate.

39. *Suppressio veri suggestio falsi.* (The suppression of a truth is equivalent to the suggestion of a falsehood.)

40. *Tantum bona valent quantum vendi possunt.* (Property is worth only what it can be sold for.)

41. *Ubi eadem ratio ibi idem lex; et de similibus idem est judicium.* (Where the reason is the same, the law is the same; and where the facts are alike, the decree of the Court will be the same.)

42. *Volenti non fit injuria.* (He who consents to what is done cannot complain of it.) No right of action accrues to a person who agreed to what was done, even though it injured him.

43. *Verba relata inesse videntur.* (Words referred to are considered as inserted.) When a deed, pleading, or any written instrument refers to another writing, the latter is deemed incorporated in the former.<sup>27</sup>

<sup>26</sup> *Top v. White*, 12 Heisk., 191; *Lewis v. Woodfolk*, 2 Bax., 46; *Planters' Bank v. Vanduyck*, 4 Heisk., 617.

<sup>27</sup> The maxims contained in this book are the most valuable, and those oftenest quoted. No man can ever become an accomplished lawyer unless he fully masters the leading maxims of the law, and makes them entirely his own. They constitute no inconsiderable portion of the technical nomenclature of jurisprudence; and a thorough understanding of them is indispensable to a lawyer's education. They contain not only the very quintessence of law and Equity, of good reason and good conscience; but they, also, greatly tend to broaden the comprehension, and strengthen the apprehension, of legal and equitable principles. No lawyer can readily understand much of the very best legal reasoning, found in the reports and treatises, unless he understands the mean-

ing and scope of the maxims found therein. These maxims are not, as some ignorantly affect to believe, mere ostentatious displays of pedantic lore; but, on the other hand, they are the very fountains out of which the science of jurisprudence flows, and the sources of all that is beautiful, majestic, and divine in either Law or Equity. Without the maxims, the law would be an interminable medley of disconnected cases, which no memory could hold. But great minds, by compressing multitudes of individual cases, have obtained therefrom their essence, as it were, the logic of the rulings, the rationale of the adjudication, the *rationes decidendi*, the very laws that govern the laws, the *leges legum*;—and this is the origin of maxims, by whose aid order took the place of confusion, system marshalled the cases into harmonious ranks the law became a science, and jurisprudence a philosophy.

## CHAPTER IV.

NOTICE, LIS PENDENS, ESTOPPEL, ACQUIESCENCE, NEGLIGENCE,  
LACHES, WAIVER, AND CONSENT.

ARTICLE I. Notice, Lis Pendens, Estoppel, Acquiescence, Negligence and Laches.

ARTICLE II. Waiver, and Consent.

## ARTICLE I.

NOTICE, LIS PENDENS, ESTOPPEL, ACQUIESCENCE, NEGLIGENCE AND  
LACHES.

§ 65. Notice, and its Effects.

§ 66. Rule of *Lis Pendens*.

§ 67. Estoppels, and Their Effects.

§ 68. Acquiescence, and its Effects.

§ 69. Negligence, and its Effects.

§ 70. Laches, and its Effects.

§ 65. **Notice, and Its Effects.**—No one can transfer to another a greater right to a thing than he himself possesses; and no one can, in reason and conscience, expect to acquire a greater right than the vendor could rightfully sell.<sup>1</sup> He who buys with notice of another's rights is bound in good conscience to hold what he buys, subject to those rights, for otherwise he would be taking advantage of his own wrong, and would be enriching himself at another's expense, neither of which acts is permitted by a Court of Conscience.<sup>2</sup> But the Court, imputing to the purchaser an intention to do the honest thing, will presume that he made the purchase with the intention of holding the property in subordination to those rights of which he had notice at the time of his purchase.<sup>3</sup> To presume otherwise would be to presume the purchaser was acting in bad faith, and was intending to perpetrate a fraud on the person of whose rights he had notice.

Besides, a purchaser with notice has no right to complain when the third person, of whose claims he had notice, demands his own; for the purchaser was

1 The following are some of the principal Maxims Relative to Transfers of Property:

1. *Alienatio est omnis actus per quem dominium transfertur.* (Alienation includes every act by which the right to property is transferred.)

2. *Assignatus utitur jure auctoris.* (The assignee is entitled to the rights of the assignor.)

3. *Caveat emptor: qui ignorare non debuit quod jus alienum emit.* (Let the purchaser beware: he who buys what is another's is bound to know what he is buying.) This maxim applies to Court sales. See *post*, §§ 640-641, notes.

4. *Cuiusque aliquid quid concedit concedere videtur et id sine quo res ipsa esse non potuit.* (Whoever transfers anything to another is deemed to transfer that without which the transfer would be void.)

5. *Dominium non potest esse in pendenti.* (The title to property cannot be in pendency.) The title may be in dispute, but it nevertheless rests in him who is adjudged to be the owner.

6. *Duo non possunt in solido unam rem possidere.* (Two persons cannot exclusively own the same thing.)

7. *Nemo potest plus juris ad alium transferre quam ipse habet.* (No one can transfer to another a greater right than he himself has.)

8. *Pendente lite nihil immoretur.* (While a suit is pending no change can be made in the own-

ership of the property in litigation so as to affect the rights of the parties to the suit.)

9. *Qui sentit commodum sentire debet et onus.* (He who takes the benefit must take it with its burden.) A partner who shares in the profits must share in the losses; and he who takes title to property must take it with its encumbrances.

10. *Qui in jus dominiumve alterius succedit jure ejus uti debet.* (He who takes the place of another as to any right or property holds it subject to all the rights of the assignor.)

11. *Quod meum est, sine facto meo vel defectu meo, amitti vel in alium transferri non potest.* (What is mine cannot be lost to me or transferred to another, without my deed or default.)

12. *Res accessaria sequitur rem principalem.* (Whatever belongs to a thing goes with it.) Or, as our lawyers sometimes translate it, the tail goes with the hide.

13. *Transit terra cum onere.* (He who buys land takes it subject to all liens and encumbrances resting upon it.)

14. *Ubi aliquid conceditur, conceditur et id sine quo res ipsa non potest.* (When anything is granted that also is granted without which the grant itself cannot be made effectual.)

2 Notice of the prior right cuts up by the roots any claim of the subsequent purchaser.

3 See Maxim, Equity imputes an intention to fulfil an obligation; § 44, *ante*.

under no compulsion to buy, and if he paid more than the vendor's interest in the property was worth, or if the third person's claims prove greater than he supposed when he bought, he deliberately assumed these risks, and cannot, in reason and conscience, be heard to complain. Any loss resulting from the prior and superior equities of the third party, the purchaser with notice must charge to his own negligence or wilfulness; for, when one of two persons must suffer a loss, he shall suffer whose own act or negligence occasioned such loss. It would be manifestly contrary to reason and conscience to require the innocent third person to bear this loss.

In conformity with these general doctrines, the rule is clearly established that a purchaser with notice of another's rights, in or to the thing purchased, is, in Equity, liable to the owner of those rights, to the same extent and in the same manner as the person from whom he made the purchase. On the other hand, a person, who acquires title to property in which another has an equity, and pays a valuable consideration for it, without any notice of such equity, may hold the property freed from the equity.<sup>6</sup>

1. **Notice Defined.** Notice is such information concerning a fact, actually communicated to a party by an authorized person, or actually derived by a party from a proper source, or presumed by law to have been actually acquired by him, as is equivalent in its legal effects to full knowledge of such fact. Notice, therefore, is of two kinds: 1st, that actually communicated or derived; and 2d, that presumed by law to have been acquired. The former is called *actual* notice, the latter is called *constructive* notice. Actual notice includes all those instances in which positive personal information of a matter is directly communicated to the party, and this communication proved as a fact. Constructive notice includes all other kinds of notice, being those in which the information is conclusively presumed from certain facts, or is implied as a presumption of law in the absence of contrary proof.<sup>4</sup> There is no difference in their consequences between actual and constructive notice.<sup>5</sup>

2. **Notice to an Agent when Notice to his Principal.** Notice to an agent in the business or employment which he is carrying on for his principal, is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in, or affected by, the transaction. This rule alike includes and applies to the positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein.

The general rule, that notice to the agent is notice to the principal, will operate with equal force and effect, whether the notice to the agent be actual, or constructive. Actual knowledge may be brought home to the agent by the most direct evidence, or he may be chargeable with constructive notice by a *lis pendens*, by a registration, by recitals in title deeds, by possession of the property by a stranger, or by circumstances sufficient to put a prudent man upon inquiry; in all such cases the effect upon the principal is the same as though the information or notice to the agent had been to him in person.

So, notice to one partner is notice to the other as to partnership matters;<sup>6</sup> but not as to individual matters.<sup>7</sup> And notice to one or more directors is notice to the corporation.<sup>8</sup>

3. **Effect of Being Put on Inquiry.** Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim or right; and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a

<sup>4</sup> 2 Pom. Eq. Jur., §§ 593-594; 1 Sto. Eq. Jur., §§ 399-400 a.

<sup>5</sup> Pinson v. Ivey, 1 Yerg., 339. Constructive notice is further considered, *post*, § 76.

<sup>6</sup> Arnold v. Linaweaver, 3 Head, 51.

<sup>7</sup> Bolling v. Anderson, 4 Bax., 550.

<sup>8</sup> Raht v. Mining Co., 5 Lea, 63.

knowledge of the interest, claim, or right which really exists; then the party is absolutely charged with a constructive notice of such interest, claim, or right. The presumption of knowledge is then conclusive.<sup>9</sup>

4. **Circumstances from which Notice may be Inferred.** Among the facts and circumstances from which actual notice may be inferred are the following:

1. *Close relationship*, personal intimacy, or business connections, existing between the purchaser and the party with whom he is dealing, or between him and the holder of the adverse claim.

2. *Great inadequacy of price*, which may arouse the purchaser's suspicion, and put him upon inquiry as to the reasons for selling the property at less than its apparent value; and

3. *The sight, or knowledge, of visible material objects* upon or connected with the subject-matter, which may reasonably suggest the existence of some easement, or other right, belonging to a third person.

§ 66. **Rule of Lis Pendens.**—During the pendency of a suit in Equity, neither party to the litigation can so alienate or encumber the property in dispute as to affect the rights of his opponent. This rule of *lis pendens* is based both on necessity and on notice. 1, It is based on *necessity*,<sup>10</sup> because, did it not exist, any litigation might be indefinitely prolonged in consequence of successive alienations of the property in dispute, making it necessary to be constantly bringing the successive alienees before the Court. 2, It is, also, based on *notice*; because the records of the Court are notice to the world; and it is mainly from this standpoint that the subject will be considered.<sup>11</sup>

The *lis pendens* and the consequent notice begin from the service of a subpoena or other process after the filing of the bill,<sup>12</sup> (for the Court must have acquired jurisdiction of the defendant before he can be bound,) and continue through the entire pendency of the suit, and end only when the suit is really ended by a final decree. In order, however, that a purchaser *pendente lite* may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay.<sup>13</sup>

*Lis pendens* is notice of everything averred in the pleadings pertinent to the issue or to the relief sought, and of the contents of exhibits filed and proved. In order that the notice may thus operate, the specific property to which the suit relates must be pointed out in the pleadings, in such a manner as to call the attention of all persons to the very thing, and thus warn them not to intermeddle.<sup>14</sup> It is not necessary that the land should be described by metes and bounds; certainty to a common intent, reasonable certainty, is sufficient.

§ 67. **Estoppels, and Their Effect.**—Whenever A, by acts, words, or silence, intentionally causes or permits B to do a thing he would not otherwise have done, it would be manifestly inequitable for A, by repudiating the very conduct by which he induced B to act, and by setting up rights of his own, inconsistent with his said conduct, to compel B to incur a loss by undoing the very thing A's conduct caused him to do. Courts of Equity will not permit such inequitable action on A's part, and will not allow him to set up any claims inconsistent with those acts, words, or silence, of his, which induced B to do what he did. This doctrine of Equity is termed Estoppel; and when fully considered will be found to rest upon three maxims: (1) When one of two persons must suffer a loss, it must be borne by him whose conduct occasioned it; (2) No one can take advantage of his own wrong; and (3) He is not to be heard who alleges

<sup>9</sup> 2 Pom. Eq. Jur., § 608; Covington v. Anderson, 16 Lea, 319. In this case, the rule upon the question of notice is thus laid down: Whatsoever is sufficient to put a person upon inquiry is notice of all the facts to which that inquiry will lead, when prosecuted with reasonable diligence and in good faith.

<sup>10</sup> Shelton v. Johnson, 4 Sneed, 672; 1 Sto. Eq. Jur., § 406. Mann v. Roberts, 11 Lea, 57. *Pendente lite nihil immoetur.*

<sup>11</sup> 2 Pom. Eq. Jur., § 632; see *Lis Pendens*, in *cur Digests*.

<sup>12</sup> *Tharpe v. Dunlap*, 4 Heisk., 674; *Staples v. White*, 4 Pick., 30. But in attachment suits the lien begins at the filing of the bill, if the property is mentioned in the bill. Code, §§ 3507; 4286.

<sup>13</sup> 2 Pom. Eq. Jur., § 634; *Mann v. Roberts*, 11 Lea, 57.

<sup>14</sup> *Boshear v. Lay*, 6 Heisk., 163.

what is contrary to his former statements.<sup>15</sup> It is also a principle of Equity that every person is bound to make good those intentional representations whereby he induces another to act.

It is sometimes said that equitable estoppels result from fraudulent conduct on the part of the person estopped. While this statement is rather broad, it is nevertheless true that, when B has acquired rights, or incurred liabilities, or parted with a consideration, on the faith of A's conduct, it would be fraudulent in A to repudiate such former conduct, or to set up claims inconsistent with his former conduct, to B's injury.<sup>16</sup>

The word conduct when used in reference to the person estopped means conduct in its broadest sense, and includes words and silence, positive acts and negative omissions.<sup>17</sup>

The general rule of estoppel in cases of land is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled,<sup>18</sup> and be compelled to make his representation specifically good. It applies (1) to one who denies his own title, or encumbrance, when inquired of by another who is about to purchase the land, or to loan money upon its security; (2) to one who knowingly suffers another to deal with the land as though it were his own; (3) to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like;<sup>19</sup> but in all such cases, there must be intentional deceit, or gross negligence equivalent to fraud.

The tendency of the law is to give married women enlarged rights, and disenthral them of many of the disabilities under which they formerly labored. With an extension of rights is coupled an extension of duties and liabilities. A married woman is not privileged to perpetrate frauds, or to mislead people to their hurt;<sup>20</sup> and she may be estopped by her words, silence or conduct in the same manner, and nearly to the same extent, as though she was under no disability, especially when her conduct has been both fraudulent and very injurious to the other party.<sup>21</sup>

An infant may, also, be bound by an estoppel when it would operate as a fraud upon the other party to allow the infant to repudiate his conduct, fraud not being one of the privileges of infancy.<sup>22</sup>

The measure of the operation of an estoppel is the extent of the representation made by one party and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true. With respect to the persons who are bound by, or who may claim the benefit of, the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate, or by contract.<sup>23</sup>

<sup>15</sup> *Allegans contraria non est audiendus*. So, if a person is silent when in conscience he ought to speak, Equity will not hear him speak when in conscience he ought to be silent. *Brashears' Exrs. v. Van Cortlandt*, 2 Johns. Ch., 249.

<sup>16</sup> 2 Pom. Eq. Jur., § 803; 2 Sto. Eq. Jur., § 1543. On estoppels by conduct, see *Taylor v. N. & C. Railroad Co.*, 2 Pick., 228. *Morris v. Moore*, 11 Hum., 433.

<sup>17</sup> A party having two rights or remedies is bound by his election of one of them, and estopped to repudiate his action. *O'Bryan Bros. v. Glenn Bros.*, 7 Pick., 106. *Nemo potest mutare consilium suum in alterius injuriam*. (No one can change his mind to another's injury).

*Bigelow on Estoppel*, 480, thus sums up the requisites of an estoppel by conduct:

"*First*—There must have been a representation or concealment of material facts.

"*Second*—The representation must have been made with knowledge.

"*Third*—The party to whom it was made must have been ignorant of the truth of the matter.

"*Fourth*—It must have been made with the intention that the other party should act upon it.

"*Fifth*—The other party must have been induced to act upon it." *Taylor v. Railroad Co.*, 2 Pick., 244.

A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth, 2 Sto. Eq. Jur., § 1553 b.

<sup>18</sup> *Butler v. Williams*, 5 Heisk., 241.  
<sup>19</sup> *Patton v. McClure, Mart. & Yerg.*, 339; *Moses v. Sanford*, 2 Lea, 655.

<sup>20</sup> *Pilcher v. Smith*, 2 Head, 211; *Latimer v. Rogers*, 3 Head, 692.

<sup>21</sup> *Galbraith v. Lunsford*, 3 Pick., 89; *Howell v. Hale*, 5 Lea, 405; *Hanks v. Folsom*, 11 Lea, 562; *Fogg v. Yeatman*, 6 Lea, 580; 2 Pom. Eq. Jur., § 814; 2 Sto. Eq. Jur., § 1536.

<sup>22</sup> *Barham v. Turbeville*, 1 Swan, 437, and cases there cited; *Adams v. Fite*, 3 Bax., 69; *Galbraith v. Lunsford*, 3 Pick., 103; 2 Pom. Eq. Jur., § 815. An infant who obtains money from his trustee, or guardian, by fraudulently representing himself to be of age, is estopped to recover this money when he attains his majority. *Snell's Pr. Eq.*, 39.

<sup>23</sup> 2 Pom. Eq. Jur., § 813.

§ 68. **Acquiescence, and Its Effects.**—A party who has a right of action may lose that right either (1) by a confirmation of the voidable transaction,<sup>24</sup> or (2) by acquiescing in the transaction, or (3) by mere delay, or *laches*, in bringing suit. If a party, with full knowledge of the facts and of his rights, freely and deliberately ratify a voidable transaction, such an act forever terminates any right he may ever have had to question the transaction thus ratified and confirmed. So, if a party, with like knowledge of the facts and of his rights, freely and deliberately acquiesce in a voidable transaction, and take or claim benefits under it, he will be estopped to question the validity of such transaction.

Mere delay, mere suffering time to elapse without doing anything, is not acquiescence: although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is, a ground for refusing equitable relief. In order to constitute acquiescence there must be (1) some act which, though not deliberately intended as a ratification or confirmation of the voidable transaction, nevertheless recognizes it as existing, and claims or obtains some benefit resulting from it; and (2) this act must be done with knowledge of the material facts, and of the actor's rights under those facts; and (3) without any undue influence or restraint.<sup>25</sup> Rights, once valid, are often lost by delay, and the implied acquiescence resulting from such delay.<sup>26</sup>

Acquiescence consisting of mere silence may also operate as a true estoppel in Equity, to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in Equity, rest upon the principle: "If one maintain silence when in conscience he ought to speak, Equity will debar him from speaking when in conscience he ought to remain silent." This principle includes all cases where an owner of property stands by, and knowingly, and without interposing any objections, permits another person to deal with the property as though it were his own, or as though he were rightfully dealing with it, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that the person in possession should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his dealings with the property.<sup>27</sup>

Parties who have long acquiesced in settlements of accounts, or of other mutual dealings, will not be permitted to reopen them; and this is true even though the parties stood in confidential relations toward each other, as trustee and *cestui que trust*, principal and agent, and the like, and the settlement embraced matters growing out of such relations. So, corporations may be estopped by acquiescence, like natural persons, either in their dealings with third persons or with their own stockholders; and, conversely, stockholders may, by acquiescence, be estopped from objecting to the acts of the corporation. If a mortgagor, obligor, or other debtor, by keeping silence under circumstances when he ought to speak, leads the intended assignee to believe that there is no defence, he will be estopped from afterwards setting up any defence, which might otherwise be available, as against the assignee who has thus been induced to purchase the demand.<sup>27a</sup>

In all these cases, the Courts enforce the maxim, "Equity aids the vigilant, not those who sleep upon their rights." The neglect to do a thing in proper season is called *laches*, and is one of the unpardonable sins in the sight of a Court of Equity.

<sup>24</sup> Wherever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, *Quod ab initio non valet in tractu temporis non convalescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately and upon full examination, confirmed by the parties, it

will be valid. 1 Sto. Eq. Jur., § 306; 2 Pom. Eq. Jur., § 964.

<sup>25</sup> 2 Pom. Eq. Jur., §§ 964-965.

<sup>26</sup> 2 Sto. Eq. Jur., § 1534. The cases of acquiescence in our reports are numerous. As illustrative of this fact, the following are all in 1 Pickel: *Owens v. Dunn*, 131; *Barnard v. Roane Iron Co.*, 153; *Robertson v. Winchester*, 171.

<sup>27</sup> 2 Pom. Eq. Jur., § 818.

<sup>27a</sup> 2 Pom. Eq. Jur., §§ 819-820.



§ 69. **Negligence,<sup>28</sup> and Its Effects.**—It has often been said that, in general, nothing can force a Court of Equity into activity but conscience, good faith, and reasonable diligence.

Equity aids the vigilant, not those who slumber on their rights. *Laches*, delay, indifference and passive acquiescence, when not in any way caused by the other party, are hurtful, if not fatal, to complainant's rights in a Court of Equity. The doctrine that Equity requires good works as well as good faith, is especially enforced against trustees, and all other persons, who act in a capacity of trust for others especially in a fiduciary capacity, such as executors, administrators, guardians, agents, receivers, clerks of courts and of individuals, secretaries, treasurers, and other officers of firms, societies and corporations, book-keepers, guardians *ad litem*, next friends, attorneys and confidential advisors.<sup>29</sup> Any of these persons, when acting for others in reference to matters of property or business intrusted to their care and management, is to that extent a trustee, and subject to all the obligations imposed by Courts of Equity on trustees, and held chargeable for all losses resulting from their want of due diligence, equally with losses resulting from downright bad faith. The compensation ordinarily allowed trustees will be reduced, or entirely disallowed, in case of loss resulting from their negligence. Of persons acting as trustees, Equity requires good works as well as good faith.

Equity never interferes in behalf of a party whose negligence, or delay, has caused, occasioned, or contributed to, the injury of which he complains. No one can take advantage of his own wrong; and when one of two persons must suffer a loss, that one shall suffer it whose act, or neglect, occasioned it. Clean hands, a pure heart and swift feet are required of him who seeks the aid of a Court of Conscience; and if, in any case, it appears that the injury complained of might not have happened, had the complainant, or his agents, or attorneys, been duly diligent, the Court will stay its hand and decline to interfere.<sup>30</sup>

This doctrine runs all through both the practice and the jurisprudence of the Court. The Court will not relieve against negligence in pleading, or in taking any step in Court, or in taking proof, unless upon the payment of compensatory costs. So, the Court will not relieve against a forfeiture, or an accident, or a mistake, that is the result of negligence. Equity will not relieve against a judgment at law, nor rehear nor review one of its own decrees, when the wrong complained of could have been prevented, or the new evidence brought forward could have been obtained, by reasonable diligence at, or before, the former trial. Nor can he who is put upon inquiry escape the consequences thereof, by declining to make the proper investigations. In Equity, every man is chargeable with all that due diligence, in the particular matter, would have resulted in. Equity requires a party to do all that, in good reason and good conscience, he should have done; and a failure to do what it was a party's duty to have done, will not relieve him from the penalties of his neglect.

Besides, negligence in acting when one's rights have been invaded, may be deemed evidence of an acquiescence, or may become *laches*, and thus bar a party from asserting what would, on due diligence, have been a clear right of action.<sup>31</sup>

§ 70. **Laches, and Its Effects.**—The neglect of a person to make complaint, or bring suit in due season, he being *sui juris* and knowing the facts, or having the means of knowledge, is called *laches*; and where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in adverse rights,

<sup>28</sup> Negligence is (1) the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would have done under the circumstances; or (2) the doing of something which a prudent and reasonable man would not have done under the circum-

stances. Negligence is not absolute or intrinsic, but always relative to some circumstances of time, place, or person. Broom's Leg. Max. 359.

<sup>29</sup> See *ante*, § 46.

<sup>30</sup> See *ante*, § 49.

<sup>31</sup> See Waiver, *post*, § 71.

Courts of Equity refuse to interfere, they acting either by analogy to the statutes of limitations, or upon their own inherent doctrine of discouraging antiquated demands.<sup>32</sup> The Court realizes the difficulty of doing entire justice, when the original transaction has become obscured by time and the evidence lost, and deems it good public policy to allow claims and titles long acquiesced in to remain in repose. Nevertheless, when there are circumstances excusing or justifying the delay, Courts of Equity will not refuse their aid.<sup>33</sup>

It has been said that "nothing can call a Court of Equity into activity but conscience, good faith and reasonable diligence."<sup>34</sup> The Court never lends its aid to one who, with knowledge of his rights and with opportunity to assert them, delays unreasonably so to do. Equity aids those who are vigilant, not those who sleep upon their rights, and always discourages stale demands. Time, in Equity, is a witness that, what has long been acquiesced in, must originally have been founded on some right.<sup>35</sup> In this respect, it is wholly independent of the statute of limitations.<sup>36</sup> The Court frowns upon attempts to unsettle what has long been at rest, first, because of the difficulty, if not impossibility, of making proof; second, because, in uprooting an ancient matter, innocent persons are liable to be injured; third, because the defendant, even if originally in the wrong, may, as a result of the complainant's laches, have acquired such affirmative rights that he cannot be placed *in statu quo*; and fourth, because the delay raises a presumption that originally there was, if not a good defense, at least a better one than can now be made. If a party have knowledge of his rights, his delay will not be excused because of poverty, or want of evidence.<sup>37</sup>

Laches will bar suits (1) to open accounts and settlements long acquiesced in;<sup>38</sup> (2) to change a boundary line long recognized;<sup>39</sup> (3) to correct an alleged fraud, accident or mistake long submitted to;<sup>40</sup> (4) to have a nuisance abated that has long existed;<sup>41</sup> (5) to have a contract either rescinded or specifically enforced, when by delay the parties cannot be placed *in statu quo*;<sup>42</sup> (6) or to have any transaction uprooted, or any business unravelled, when, in consequence of long acquiescence, the chances are that material evidence has been lost, that the memory of the facts has become dimmed, that parties or witnesses have died or removed, and that new rights have sprung up that should not be unsettled.<sup>43</sup>

But no delay will prejudice a defrauded party as long as he was ignorant of the fraud;<sup>44</sup> and, especially, if the defendant concealed the facts which it was his duty to disclose, or deceived the complainant by misstatements, or otherwise lulled his suspicions. The sleep of the complainant cannot be used as a defence by him who caused that sleep, for that would be to take advantage of his own wrong.<sup>45</sup>

<sup>32</sup> 2 Sto. Eq. Jur., § 1520. See maxim, Equity aids the vigilant, and not those who sleep upon their rights. *Ante*, § 49.

<sup>33</sup> 2 Sto. Eq. Jur., § 529 *Lafferty v. Turley*, 3 Sneed, 176; *Lane v. Farmer*, 11 Lea, 577. *Prewitt v. Bunch*, 17 Pick., 723.

<sup>34</sup> *Lafferty v. Turley*, 3 Sneed, 177.

<sup>35</sup> *Hammonds v. Hopkins*, 3 Yerg., 529; *Roane Co. v. Anderson Co.*, 5 Pick., 259.

<sup>36</sup> *Hammonds v. Hopkins*, 3 Yerg., 528; *Lewis v. Brooks*, 6 Yerg., 166; 185; *Haynes v. Swan*, 6 Heisk., 560; *Parke v. Clift*, 9 Lea, 531.

<sup>37</sup> 1 *Perry on Trusts*, § 230. Laches based on lapse of time alone is not generally a bar. *Parker v. Bethel*, 12 Pick., 252.

<sup>38</sup> 2 Sto. Eq. Jur., § 529; *Love v. White*, 4

*Hay*, 210; *Patton v. Cone*, 1 Lea, 14; 2 *Pom. Eq. Jur.*, § 820.

<sup>39</sup> *Roane County v. Anderson County*, 5 Pick., 259.

<sup>40</sup> *Underhill v. Nelson*, 1 Lea, 98; *Henderson v. Conway*, 9 Lea, 410; 2 *Pom. Eq. Jur.*, §§ 897; 965.

<sup>41</sup> 2 *Pom. Eq. Jur.*, §§ 817; 1359; 1 *Hlgh on Injunc.*, § 756; *Caldwell v. Knott*, 10 Yerg., 209.

<sup>42</sup> *Smith v. Christmas*, 7 Yerg., 565; 3 *Pom. Eq. Jur.*, § 1408.

<sup>43</sup> *Whitby v. Armour*, 4 Lea, 683; *Bolton v. Dickens*, 4 Lea, 577.

<sup>44</sup> 2 *Pom. Eq. Jur.*, § 917.

<sup>45</sup> *Vance v. Motley*, 8 Pick., 310; *Nicholson v. Lauderdale*, 3 Hum., 200.

## ARTICLE II.

## WAIVER AND CONSENT.

§ 71. Waiver, and Its Effects.

§ 72. Consent, and Its Effects.

§ 71. **Waiver, and Its Effects.**—A litigation is a legal combat in which each party has the right to take every lawful advantage of his adversary, and when a party fails or declines to exercise this right, in any given case, he is deemed to have waived it, for reasons satisfactory to himself.<sup>1</sup> The various steps taken, and various pleadings filed, in the progress of a litigation, are not always taken or filed in strict accordance with the practice or pleadings of the Court, and so, many errors of omission and commission, important and unimportant, often happen between the filing of a bill and the execution of the final decree. The practice of the Court allows the parties to object to any error committed by their adversaries; but inasmuch as objection made long after the error is committed causes confusion and delay in the orderly progress of a litigation, and often imposes undue hardship on the party in error, the Court requires the adverse party to interpose his objection in due season; and if he fail so to do, he will be deemed to have waived his right to object; and he will not be allowed subsequently to withdraw his waiver and claim the right waived,<sup>2</sup> on the plea that he overlooked it, for that would be to let him take advantage of his own wrong; besides Equity aids the vigilant, and not those who sleep on their rights.<sup>3</sup> A party who remains silent when he should object will not be allowed to object when he should remain silent; for silence, under such circumstances is consent, and waiver is a *quasi* consent.<sup>4</sup>

The party who is deemed to have waived his right to object has no just cause to complain of this rule of the Court; for he is conclusively presumed to know the rule, and to have intentionally ignored the error in question. What a man consents to he cannot complain of, and this consent may be inferred from silence, or from conduct.<sup>5</sup>

The doctrine of waiver is a wholesome one, and greatly facilitates the dispatch of business in the Courts, and promotes the prompt and orderly progress of a suit to final decree. If parties were allowed to go back and take advantage of a right or opportunity overlooked, neglected, or deliberately disregarded, no party could take a forward step in a litigation without danger of being compelled to retrace it in order to enable his adversary to make an attack or a defence on a ground long since passed, or to make some motion, or exercise some right or privilege he neglected to make or exercise when the opportunity was duly presented.

The doctrine of waiver promotes diligence, prevents trickery and bad faith,<sup>6</sup> and preserves rights acquired in consequence of the waiver.

The doctrine of waiver is not only applied to one party in reference to the action of the other, but it is applied to one or both parties in reference to the

<sup>1</sup> *Quilibet potest renunciare jure pro se introducto.*

<sup>2</sup> *Seifred v. Peoples' Bank*, 2 Tenn. Ch., 17; and 1 Bax., 200.

<sup>3</sup> See *ante*, § 49; and §§ 68-70.

<sup>4</sup> *Qui tacet consentire videtur.* (He who is silent [when he ought to object] is considered as consenting [to what is done].)

<sup>5</sup> *Volenti non fit injuria.* (No legal injury is

done to him who consents). *Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis.* (It matters not whether a party gives his assent by his words, or by his acts and deeds.) See *post*, § 72.

<sup>6</sup> *Brasher's Executors v. Van Cortlandt*, 2 Johns., Ch., 248. *Seifred v. Peoples' Bank*, 2 Tenn. Ch., 17.

officers of the Court; and if a party fail to object to the Chancellor,<sup>7</sup> or the Clerk and Master, or the Sheriff, acting in a matter because of the incompetency of such officer from kinship or interest, such party knowing of such incompetency, he will be deemed to have waived the incompetency, and is bound by such waiver. Indeed, any party, who with knowledge of the grounds of objection to any act or proceeding in Court by any other party, or by an officer or witness, fails in due season,<sup>8</sup> to avail himself of such grounds of objection, is deemed to have waived his objection to such act or proceeding, and to have acquiesced therein, and is estopped by his conduct.<sup>9</sup> One of the reasons of this ruling is, that if the objection is made in season the party in default may, by amendment or otherwise, correct the defect or irregularity, whereas if not then made, and especially if made at the hearing, he is absolutely deprived of such opportunity.<sup>10</sup> So the Courts rule that a party who will not object when he should, shall not object when he would.

If one party was allowed to ignore a slip, defect, or other error or omission of his adversary, in pleading, proof or procedure, until after the time or opportunity for supplying the deficiency or curing of the error had elapsed, it would not only often defeat the real justice of the case on its merits, or delay the trial by requiring the Court to continue the hearing in order to give due opportunity to supply the deficiency or cure the error, but it would also enable crafty parties to lie in ambush, as it were, and strike their opponents unawares, and in their back, after they had passed the point when attention should have been called to the error; and this, too, in a Court consecrated to good faith and fair play.<sup>11</sup>

Hence it is, that if a party fail to object to some slip, omission, defect or other error, in pleading, proof or procedure, at the proper time and in the proper manner, he will be deemed to have waived his right to make such objection; and this is especially true if after such right of objection accrued, he, himself, instead of objecting, take some step that implies his assent to or acquiescence in what his adversary has done.<sup>12</sup>

There are many small things done in Court, or left undone, which ought not to have been done or left undone, but which become valid when done,<sup>13</sup> if not duly objected to, or which if left undone do not affect the merits of the controversy. After such things have been done, or left undone, and objection waived, the Court acts on the maxim, *Stare decisis*,<sup>14</sup> and refuses to reopen them. Indeed, the Court regards with little favor the sparring of adverse parties by the wayside, and is anxious only to do what it rightfully can to facilitate a speedy determination of the controversy on its real merits, and the doctrine of waiver greatly aids the Court in so doing, and thus promotes the administration of justice.

<sup>7</sup> *Wroe v. Greer*, 2 Swan, 172; *Crozier v. Goodwin*, 1 Lea, 125; *Holmes v. Eason*, 8 Lea, 754.

<sup>8</sup> Due season, in such a case, is ordinarily at the time of the act or proceeding, or as soon as it comes to the knowledge of the party having the right to object, and before any other act done or proceeding had which would not have been done or had if such objection had been duly made.

<sup>9</sup> *Non refert an quis assensum suum operfert verbi an rebus ipsis et factis.* (It matters not whether a man gives his assent by his words, or by his acts and deeds.)

The doctrine of waiver operates somewhat as does the doctrine of *laches*, or the statute of limitations, or an estoppel. It prevents wrangles between parties, or their Solicitors, in which even the Chancellor and the officers of the Court may become involved; and thus it prevents much unseemliness. If it were not for this doctrine, all the labor and money and time expended in preparing a suit for final hearing would often be totally wasted, on the demand of one party or the other that he be allowed to go back to the beginning of the suit, and make a motion, or file or amend a pleading, or introduce some proof on a preliminary issue, which he neglected or deliberately pre-

ferred not to do, at the proper time in the orderly progress of the suit, according to the practice of the Court.

<sup>10</sup> *Seitred v. Bank*, 1 Bax., 200; *Pillow v. Shannon*, 3 Yerg., 508.

<sup>11</sup> *Brasher's Executors v. Van Cortlandt*, 2 Johns., Ch. 248; *Cowman v. Lovett*, 10 Paige, 561. Chancellor Kent, in *Brasher's Executors v. Van Cortlandt*, 2 Johns., Ch., 248, severely reprobated a party, who "laid low," so to speak, while his adversary went on step by step in the preparation of his case, and then sprang an objection he thought was fatal, (and would have been if made in due season,) and the Chancellor applied the doctrine of estoppel, and held that as the party would not object when he should, he should not object when he would; and overruled the objection.

<sup>12</sup> *Jones v. Carper*, 2 Tenn. Ch., 627; *Stadler v. Hertz*, 13 Lea, 317. A party has no right to complain of the action of the Court in holding him estopped by his conduct. *Valenti non fit injuria.* (He who consented has no right to complain of what he consented to).

<sup>13</sup> *Fieri non debet factum valet.* (What ought not to be done is valid when done.) *See ante*, § 61, sub-sec., 5.

<sup>14</sup> *Stare decisis, et non morere quieta.* (Stand

1. **Waivers when Operative on the Complainant.** A complainant is expected to be especially vigilant in his efforts to win his suit, and when he fails to take advantage of an opportunity to cripple his adversary he is deemed to have satisfactory reasons for waiving the opportunity, and so the Court holds him to his choice in the matter, and will not allow him afterward to claim what he had waived.

Thus, the failure of a complainant to object in due season (1) to a plea because not duly sworn to,<sup>15</sup> or because deficient in substance<sup>16</sup> or form, or (2) to an answer because not signed,<sup>17</sup> nor duly sworn to,<sup>18</sup> nor in proper form, nor sufficiently full, or (3) to an answer filed as a cross bill without a prosecution bond, or (4) to require money tendered to be paid into Court when the plea of tender is filed, he is deemed to have waived such deficiencies, and if he lets a plea go to issue by filing a replication, or a plea or an answer go to issue by the lapse of twenty days, and more especially if he takes proof or cross-examines a witness as to either the plea or the answer, he is conclusively deemed to have waived all deficiencies in their form or substance, and to have admitted their sufficiency.<sup>19</sup> When an insufficient defence is thus waived, the defective pleading has, at the hearing, all the force and effect of a sufficient pleading.<sup>20</sup>

So if the complainant allows an execution to be awarded to enforce a decree in an attachment suit he is deemed to have waived his right to have the attached property sold to satisfy his recovery.<sup>21</sup>

So, in case of appeals to the Supreme Court, a failure to point out errors in the record will be deemed a waiver of such errors;<sup>22</sup> and going to trial is a waiver of any deficiency in the record.<sup>23</sup>

A positive step in pleading or proof by the complainant, based on the assumption that the previous pleading is regular, waives any irregularity in such previous pleading.<sup>24</sup> Thus:

1. Allowing a cause to go to issue waives the signature to the answer,<sup>25</sup> or any other insufficiency in it.

2. Taking proof on an unsworn answer waives the oath,<sup>26</sup> or any other deficiency in it.

3. Filing a replication to a plea, or allowing it to go to issue without a replication, or taking proof on a plea, waives any insufficiency in the plea.

2. **Waivers when Operative on the Defendant.** The parties to a litigation are adversaries, and when either of them, and especially the defendant, fails to take advantage of an opportunity to weaken his adversary, or strengthen himself, the Court, acting as umpire, concludes that, for reasons satisfactory to himself, he waives such opportunities. Therefore, the failure of the defendant to have the bill dismissed because not signed,<sup>27</sup> or not properly sworn to,<sup>28</sup> or because of the want of a prosecution bond,<sup>29</sup> or some fatal defect therein, or in the pauper oath, or for want of jurisdiction of the person, or local jurisdiction of

to what has been decided, and do not disturb what has been settled.) See, § 59, *ante*, where this maxim is fully treated.

<sup>15</sup> *Seifred v. Peoples' Bank*, 1 Bax., 201; *Wilson v. Eifler*, 7 Cold., 33.

<sup>16</sup> *Harris v. Smith*, 14 Pick., 286, citing § 337, now § 332, of this Treatise. The plea in this case was that of innocent purchaser.

<sup>17</sup> *Jones v. Carper*, 2 Tenn. Ch., 627; *Stadler v. Hertz*, 13 Lea, 317.

<sup>18</sup> In such a case the answer only makes an issue. *Chester v. Canfield*, 2 Shan. Cas., 309. In New York it had the force of an answer sworn to, under a statute similar to ours. See *Reed v. Warner*, 5 Paige, 654.

<sup>19</sup> *Seifred v. Peoples' Bank*, 2 Tenn. Ch., 17; *Dan. Ch. Pr.* 512.

<sup>20</sup> The insufficiency of the defence of innocent purchaser, set up in a plea or answer, is waived by letting the cause go to issue without exception to its insufficiency. *Stainback v. Junk Bros. & Co.*, 14 Pick., 306. Issue taken on

a plea of *nil debet*, and payment to a sworn account, is a waiver of the right to have the account denied under oath. *Loeb v. Nunn*, 4 Heisk., 449. Objection to the affidavit of a divorce bill because made by a next friend, is waived if not made before the hearing. *Hackney v. Hackney*, 9 Hum., 453. But see §§ 1094-1095, *post*.

<sup>21</sup> See *post*, § 887, note.

<sup>22</sup> *Supreme Court Rule* 20, § 4. See *post*, § 1302.

<sup>23</sup> *Ibid.* Rule 26. See *post*, § 1311, note 16.

<sup>24</sup> *Harmon v. Crook*, 2 Yerg., 127; *Hargis v. Ayres*, 8 Yerg., 467; *Cooke v. Richards*, 11 Heisk., 711; and *Seifred v. Peoples' Bank*, 2 Tenn. Ch., 17; *Seifred v. Peoples' Bank*, 1 Bax., 201; *Dan. Ch. Pr.*, 512.

<sup>25</sup> *Jones v. Carper*, 2 Tenn. Ch., 627; *Stadler v. Hertz*, 13 Lea, 317.

<sup>26</sup> *Wilson v. Eifler*, 7 Cold., 33.

<sup>27</sup> *Wilson v. Eifler*, 7 Cold., 34.

<sup>28</sup> *Hackney v. Hackney*, 9 Hum., 453.

<sup>29</sup> *Hall v. Fowlkes*, 9 Heisk., 753.

the subject-matter, or because the bill is multifarious, or there is a misjoinder of parties complainant, or because of failure of complainant to comply in due season with some statutory requirement, or order or rule of the Court, or to take some step at the right time, or to do some other thing in the orderly prosecution of his suit, will be regarded as a waiver of his (the defendant's) right to do so, he not having taken advantage thereof at the proper time and in the proper manner.<sup>30</sup>

The defendant's failure to file in due season a plea in abatement, or a demurrer, or a plea in bar, or an answer,<sup>31</sup> or a cross bill, or to have a demurrer, filed with his answer, acted on at the right time, or his failure to plead payment, or an accord and satisfaction, a tender, or a set-off, or a former adjudication, or *non est factum*, or the statute of limitations,<sup>32</sup> or the statute of frauds, or that he was an innocent purchaser,<sup>33</sup> or that the suit was prematurely brought, or any other defence that must be specifically pleaded, will be deemed a waiver of his right to take any such step, or file any such pleading.<sup>34</sup>

So, a defendant may waive one right or privilege of his own, by asserting or using another right inconsistent therewith. Thus, (1) the filing of a demurrer is an abandonment or waiver of a plea in abatement to the jurisdiction;<sup>35</sup> (2) the filing of an answer is an abandonment, or waiver, of a demurrer;<sup>36</sup> (3) where a demurrer has been filed with an answer, going into a final hearing of the cause on the merits, without having previously invoked the action of the Court on the demurrer is a waiver of the demurrer;<sup>37</sup> (4) the adoption of any one of the defences set out in the Code, § 4386, is a waiver of those preceding;<sup>38</sup> (5) neglecting to rely on an injunction enjoining the suit, until the hearing, is a waiver of the injunction.<sup>39</sup>

Taking a forward step in pleading or procedure is a waiver of the right to insist on the action of the Court on the step last taken. Thus:

1. Filing a demurrer to the bill while a motion to dismiss for want of a cost bond is pending, is a waiver of the motion.<sup>40</sup>

2. Obtaining time to answer after plea to local jurisdiction is overruled, waives action on the plea in the Supreme Court.<sup>41</sup>

3. Going to trial on the merits is a waiver of the demurrer filed with the answer and not acted on.<sup>42</sup>

4. Failure to invoke the action of the Court on a demurrer incorporated in an answer, at the first term after it is filed, is a waiver of the demurrer.<sup>43</sup>

5. Filing an answer, or plea in bar, is a waiver of action on a demurrer undisposed of.<sup>44</sup>

6. Filing an answer which sets up a defence, or a denial of complainant's claim, waives action on a plea in bar previously filed, making the same defence.<sup>45</sup>

A defendant may waive his right to object to a portion of the purchase-price of his land being paid in cash when the land is sold for debt by decree

<sup>30</sup> *Wilson v. Eifler*, 7 Cold., 34; *Falls v. Association*, 21 Pick., 18. So, at law, a motion to dismiss a *certiorari* must be made at the first term or it will be considered as waived; and a motion to dismiss an appeal in the Supreme Court for irregularities is waived if not made at the first term. *Tedder v. Odom*, 2 Heisk., 50; *Snyder v. Summers*, 1 Lea, 481.

<sup>31</sup> *Mitchell v. McKinny*, 6 Heisk., 83.

<sup>32</sup> *Johnson v. Cooper*, 2 Yerg., 533; quoting the maxim, *quisquis iuri pro se introducto renunciat*.

<sup>33</sup> *Harris v. Smith*, 14 Pick., 286; citing § 337 [now § 334] of this treatise.

<sup>34</sup> Complainant's failure to take a preliminary step before filing his bill is waived by the defendant answering and not demurring. *Falls B. & L. Assn.*, 21 Pick., 18. When the notice required to fix a lien, it not given, but defendant answered, and no question as to the lien raised until the hearing, such notice is waived by the defendant. *Noll & Thompson v. Railroad*, 4 Cates, 140. A bill of interpleader claiming interest in a fund sustained because not

demurred to. *Read v. Street Ry. Co.*, 2 Cates, 316. An estoppel not relied on in the answer is waived. *Read v. Street Ry. Co.*, 2 Cates, 316.

<sup>35</sup> *Cooke v. Richards*, 11 Heisk., 711.

<sup>36</sup> *Lowe v. Morris*, 4 Sneed, 69. And was an abandonment of a plea in abatement, but see *post*, §§ 260-261.

<sup>37</sup> *Pritchett v. State*, 2 Sneed, 285; *Kyle v. Riley*, 11 Heisk., 230.

<sup>38</sup> *Cooke v. Richards*, 11 Heisk., 711. But, see *post*, §§ 260-261, as to pleas in abatement.

<sup>39</sup> *Tipton v. Bank*, 11 Heisk., 151.

<sup>40</sup> *Cowan, McClung & Co. v. Donaldson*, 11 Pick., 322.

<sup>41</sup> *Union County v. Knox County*, 6 Pick., 541.

<sup>42</sup> *Kyle v. Riley*, 11 Heisk., 230; *Stephens v. Martin*, 1 Pick., 278.

<sup>43</sup> *Caruthers v. Caruthers*, 2 Lea, 77; *Harding v. Egin*, 2 Tenn. Ch., 39.

<sup>44</sup> See *post*, § 232.

<sup>45</sup> See *post*, §§ 232; 413.

in bar of redemption;<sup>46</sup> and he may waive his right to plead over or answer, after his plea in abatement has been found against him on the facts, by failing to plead or answer, or to apply for leave so to do.<sup>47</sup>

**3. Waivers when Operative on Either Party.** Either party will be deemed to have waived his right, if, in due season, he fail to except to depositions, or to have the Clerk and Master act on his exceptions, or to appeal from his action thereon when adverse, or to have the Chancellor act on such appeal; or if either party fail to object to a question propounded to a witness, or fail to object to any answer to a question, or to any paper, deed, or other writing or other evidence offered as proof,<sup>48</sup> or fail to notify the opposite party to produce a paper at the hearing, or fail to except to the Master's report, or to have an account opened to enable him to file additional evidence; or to have the action of the Chancellor on exceptions to the Master's report, or fail to require the opposite party to file some particular paper, or do some particular act required by the practice or order of the Court;<sup>49</sup> or fail to move that some pleading, deposition, or other paper be stricken from the file because not filed in season, or not entitled to be filed for any other reason, or because not marked filed by the Clerk and Master;<sup>50</sup> or fail to demand a trial by jury,<sup>51</sup> or fail to take any action in any other matter proper in preparing for trial on his part, or proper to prevent his adversary obtaining any undue advantage, or fail at the hearing to renew exceptions to evidence, or to call the attention of the Chancellor to a particular piece of proof, or to a particular averment or admission in the pleadings or in the argument of the opposite party, or to a particular decision or point of law; or to fail, after the hearing, to see that the decree gives him all he is entitled to, or is no harder on him than the Chancellor's holding requires, or fail to file a bill of exceptions, or to pray an appeal, or give an appeal bond, or do any other act necessary to enable him to go to the Supreme Court under as favorable circumstances as possible. In each and all of these instances, if the party having the right to do the particular act, or to object to the particular act, fail to so do, or so object, in due season and proper manner, he will be deemed to have waived his right so to do, or so to object.

Indeed, it may be safely laid down as a general rule, that all pleadings, proofs, motions, exceptions, attacks, defences, and objections must be filed or made in due season and manner; and all exceptions to pleadings, proof, attacks and defences must be made in due manner and season; and all steps necessary in the litigation either to attack, defend or assert rights must be taken at the proper time and in due form; and, above all, that every objection based on technical grounds and not going to the substance of the issue involved, must be made in the right way and at the right time; and that if any of these acts are not done in due form and season they will be deemed to be waived, and the right to do them will be denied by the Court. Where a rule of Court requires a motion for a new trial to specify the grounds therefor, all grounds not so specified are deemed to be waived, and cannot be assigned in the Supreme Court.<sup>52</sup>

So, either party may waive a right or benefit (1) by taking an inconsistent right or benefit, or (2) by doing an act or taking a step inconsistent therewith, or (3) by ignoring such right or benefit until the adverse party has taken a step inconsistent therewith, as above more fully shown. Thus, cross-examining a witness is a waiver of notice, or of any defect in the notice, to take his deposition;<sup>52a</sup> and obtaining a reference to the Master is a waiver of a trial by jury previously demanded.<sup>52b</sup>

**4. Waivers when Not Operative.** But while a party may have failed to do an

<sup>46</sup> *McBee v. McBee*, 1 Heisk., 558; *Hodges v. Copely*, 11 Heisk., 335. But see *post*, § 626, notes.

<sup>47</sup> *Sewell v. Tuthill & Pattison*, 4 Cates, 271.

<sup>48</sup> Objections to testimony not made in the Chancery Court are waived, and cannot be made in the Supreme Court. *Pillow v. Shannon*, 3 Yerg., 508.

<sup>49</sup> Such as to file money in Court when tendered. *Rogers v. Tindell*, 15 Pick., 356.

<sup>50</sup> *Fanning v. Fly*, 2 Cold., 486.

<sup>51</sup> *Garrison v. Hollins*, 2 Lea, 686; *Coulter v. Sewing Machine Co.*, 3 Lea., 116.

<sup>52</sup> *Railroad v. Johnson*, 6 Cates, 632. And going into a hearing in the Supreme Court is a waiver of all defects in the record. See *post*, § 1311, note 16.

<sup>52a</sup> *Bradford v. Ingram*, 5 Hay., 155.

<sup>52b</sup> *Harris v. Bogle*, 7 Cates, 701

act in due season, he will not be deemed to have waived the right to do it, if his failure was caused by the wrongful act of the adverse party. A party will not be allowed to insist that a right to do a particular act is waived by non-action when his own conduct misled the other party, or put him to sleep,<sup>53</sup> or when he expressly agrees that the right may continue.<sup>54</sup>

It must, also, be understood that, while a waiver, or even an express consent, may be binding on a party to a suit, it may at the same time not be binding on the Court, for the Court will not allow a party, either by action or non-action, to violate a rule of the Court, or do an act contrary to law or public policy. Thus, while the failure of the defendant to object or demur, when the Court has no jurisdiction of the subject-matter of the suit,<sup>55</sup> or when the bill on its face claims usury, or seeks to enforce an illegal or immoral contract, or to obtain a *pro forma* or collusive decree, or one against public policy,<sup>56</sup> or to sell a homestead, or to sell exempt personal property,<sup>57</sup> will bind such defendant, the Chancellor may refuse to entertain the suit, and, on his own motion, dismiss the bill.

Waivers are not operative on persons of unsound mind; and are not ordinarily operative upon minors<sup>58</sup> and married women; nor are they operative upon a party who was ignorant of the right in question, especially if such ignorance was the result of the conduct of the other party, or of an officer of the Court. But if this ignorance was the result of his own negligence or mistake he will be bound, for he cannot take advantage of his own wrong.

§ 72. **Consent, and Its Effects.**—Consent<sup>59</sup> is the concurrence or agreement of two or more persons as to any matter of fact or opinion. Courts are established to provide for cases of dissent, cases where there is disagreement instead of agreement. Where there is agreement between parties there is no need of a Court, indeed when there is agreement there is no need of law,<sup>60</sup> provided always the agreement is between parties capable of contracting, in no way injures any other person, and violates no rule of law or public policy.<sup>61</sup> Laws are made to provide for cases of disagreement, and it is the business of Courts to apply these laws to the facts attending such disagreements, and thereby ascertain which of the disagreeing parties is in the wrong, and in what way, and to what extent, he shall atone therefor.

To show the force of the maxim that consent makes law, it is only necessary to recall that consent controls nine hundred and ninety-nine out of every thousand transactions between man and man, in the business world and in social life.

A formal agreement binds not only the parties thereto, but every one else, provided, of course, it interferes with no third person's rights or property, and violates no law or public policy; and it continues to bind the parties thereto until it has accomplished its purpose, or been set aside or changed by another agreement between the same parties, or their privies in estate. If, however, one or more of the parties to an agreement should violate the agreement, the other party could apply to the Courts, either to prevent any further violation, or for the damages resulting to him by reason of the violation, or for a specific performance of the agreement.

While a litigation is a sort of legal war in which the parties are the adversaries, nevertheless through the agency of counsel representing the parties, agreements are often made in the progress of a suit; and these agreements are greatly favored by the Courts, 1st, because they lessen the labors of the Judges;

<sup>53</sup> *Merchant v. Preston*, 1 Lea, 280; *Gillespie v. Goddard*, 1 Heisk., 777. See maxims, *ante*, §§ 49; 51.

<sup>54</sup> *Rogers v. O'Mary*, 11 Pick., 514.

<sup>55</sup> *Baker v. Mitchell*, 21 Pick., 610; see *post*, § 290.

<sup>56</sup> *Ottenheimer v. Cook*, 10 Heisk., 309.

<sup>57</sup> *Mills v. Bennett*, 10 Pick., 651.

<sup>58</sup> *Preston v. Golde*, 12 Lea, 271; *Farrow v. Farrow*, 13 Lea, 120. An infant cannot waive his homestead rights. *Ibid*.

<sup>59</sup> In the Latin language, (from which the word consent is derived) it means thinking together or alike, a union of minds, as to any matter.

<sup>60</sup> *Consensus facit legem*. (Consent makes law;) that is, the law for the particular matter covered by the agreement.

<sup>61</sup> *Conventio privatorum non potest publico juri derogare*. (The agreement of private persons cannot annul a public law.)



2d, because they lessen the asperities of the litigation; and 3d, because they facilitate the dispatch of business; and they are firmly enforced, except in cases of fraud, accident, or mistake, which cases very seldom happen. It is, indeed, a maxim that where parties consent they bind the Court,<sup>62</sup> and where they do not consent the Court binds them. The agreement of the parties makes the law for the contract.<sup>63</sup>

What a party agrees to in the course of a litigation is so binding upon him that he cannot appeal from it, or if an appeal should be granted, the Supreme Court will not hear him, even if his agreement is contrary to what the Court would have decided on a contest.<sup>64</sup> What a party consents to in Court he cannot complain of.<sup>65</sup> For this reason an erroneous order or decree, when consented to, will bind the parties consenting both in the Court where the consent was made, and in the Supreme Court. Indeed, the Supreme Court will not look behind a consent to see whether it was reasonable or not, if it violate no law or public policy.<sup>66</sup>

Agreements in regard to pleadings, proofs, references, reports, orders, decrees, and other proceedings in litigation, are binding and will be enforced. Consent may not only be shown by the words or writings of the parties, but may be inferred from their silence or conduct under circumstances,<sup>67</sup> for he who is silent when he ought to object, will not be allowed to object when he ought to be silent.<sup>68</sup> But, as elsewhere shown, no consent is binding on a party not *sui juris*.

There are many implied consents enforced in Court during the progress of a litigation, most of them based on the failure of the party to object to some pleading, proof or proceeding in due season, but these have already been considered in the section devoted to waivers, and will not be repeated.

<sup>62</sup> *Modus et conventio vincunt legem.* (Agreements control the law.) Neither the Courts nor the legislature can set aside a valid agreement. They are protected by the Constitution of both the State and the United States.

<sup>63</sup> *Contractus legem ex conventionione accipiunt.*

<sup>64</sup> *Consensus tollit errorem.* (Consent does away with any error in the agreement.)

<sup>65</sup> *Volenti non fit injuria.* (What a man consents to he cannot complain of.)

<sup>66</sup> A consent decree can only be changed or annulled on a bill filed for that express purpose, and on the ground of fraud, accident or mistake.

<sup>67</sup> *Non refert an quis assensum suum præfert verbis an rebus ipsis et factis.* (It makes no difference whether a man gives his assent by his words, or by his acts and deeds.)

<sup>68</sup> *Quis potest et debet vetare jubet si non vetat.* (He who can and ought to object, commands the thing to be done if he fails to object.) And there is another maxim applicable. *Qui tacet consentire videtur.* (He who is silent is considered as consenting.) There are similar maxims among all civilized nations, showing the consensus of mankind that silence gives consent when a party deliberately fails to object.

## CHAPTER V.

### PRIORITIES, AND *BONA FIDE* PURCHASERS.

§ 73. Priorities, and Equities Relating There-  
to.

§ 74. Assignments, How Affected by Priori-  
ties.

§ 75. *Bona Fide* Purchasers, and Their Equi-  
ties.

§ 76. Equities of Purchasers, How Affected  
by Notice of Prior Claims.

§ 73. **Priorities, and Equities Relating Thereto.**—When the owner of a legal estate conveys in good faith all of his interest in it to another, it is manifest that he cannot, by a second conveyance of the same estate to a third person, vest any title thereto in such third person. No one can transfer to another a greater right than he himself possesses; and, at the time of his second conveyance, the conveyor had no right or interest to convey. Hence, as between two vendees of the same property, the first in order of time prevails, except in so far as the effect of this rule is changed by the registration laws and the doctrine of notice.

A similar rule of priorities prevails in reference to the acquisition of equitable interests, the rule being expressed in the maxim, "Where there are equal equities the first in order of time shall prevail." This doctrine of priorities in Equity is based on good reason and good conscience. It is manifestly both reasonable and right that he, who first acquires an interest in any property, should be protected in his acquisition; otherwise the law of force must prevail, and instead of priority of time giving superiority of right, the maxim would read "Superiority of Might gives Superiority of Right;" and he would hold the property who could bring to bear the greatest force, or the shrewdest strategy.

The equitable doctrine of priority in time giving superiority in right applies only as between persons having equitable interests, and only then when those equitable interests are in all other respects equal; for priority in time does not give a superiority in right if the prior equity is, in other respects than in *point of time*, a superior equity.<sup>1</sup>

1. **The Fundamental Rules of Priority.** The equitable doctrine concerning priorities is embodied in the three following general rules: 1st. Among successive equitable estates, or interests, where there exists no special claim, advantage, or superiority, in any one over the others, the order of time controls. Under these circumstances, the maxim, "Among *equal* equities, the first in order of time prevails," furnishes the rule of decision.<sup>2</sup> 2d. Between a legal and an equitable title to the same subject-matter, the legal title in general prevails, in pursuance of the maxim, "Where there is equal equity the *law* must prevail." 3d. The legal title being outstanding and not involved in the controversy, where there are successive *unequal* equities in the same subject-matter, as where there is a complete or perfect equitable estate in the one party and an incomplete or imperfect equitable estate or a mere equity in the other party; or, where among equitable interests of a like intrinsic nature, one is affected by some incident or quality which renders it inferior to another, then the prece-

<sup>1</sup> 1 Pom. Eq. Jur., §§ 413-417; 678; 1 Sto. Eq. Jur., § 64 d.

<sup>2</sup> An attachment of a chose in action after assign-

ment thereof, but before notice to the debtor, will defeat the assignment. *Clodfelter v. Cox*, 1 Sneed, 330. This is a leading case.

dence resulting from order of time is defeated, and the superior equitable estate or interest prevails over the others; as is manifestedly implied in the maxim, "Where there are *equal* equities, the first in order of time must prevail."<sup>3</sup>

2. **Priorities of Attachments, Judgments, and Executions.** Priority, in order of time, prevails to the same extent when liens are acquired by the filing of attachment bills, or the levy of attachment writs. In all such cases, where the right of the complainant attached either directly by the filing of an attachment bill, or indirectly by the levy of the attachment writ for his benefit, that right operates as a *lis pendens*, and, if perfected by a sale, the title of the purchaser will relate back to the filing of the bill, or to the levy of the writ, as the case may be;<sup>4</sup> and, if there be several bills or several levies, their priorities will be in the order of time, beginning with the oldest lien, if the equities of the parties are otherwise equal. If two or more levies by attachment are made at the same time, they will be treated as one levy, and a *pro rata* distribution of the proceeds will be made.<sup>5</sup>

The priorities of judgments and decrees, and of the liens thereby created, are determined by their respective dates, or registration;<sup>6</sup> the priorities of different levies by execution on the same tract of land are regulated by the order of time in which the levies are made;<sup>7</sup> and the priorities of different levies by execution on the same personalty are determined by the priorities of the dates of their respective testes.<sup>8</sup>

And in conflicts between attachment liens, judgment liens, and execution liens, the first in order of time will prevail.

3. **Equities and Liabilities of Purchasers.** In applying these rules, it becomes important to know when one equity is superior to another. Courts of Equity recognize no inequality based on form, or mode of creation, provided the equitable interest is perfected and is based upon a valuable consideration. The following rules will aid in determining this question:

1. The equitable interest created by a trust, or by a contract *in rem*, made upon a valuable consideration, is superior to the equity arising from a mere voluntary transfer, or from the satisfaction of a pre-existing debt.<sup>9</sup>

2. The equity acquired by a party who has been misled, is superior to the interest in the same subject-matter of the one who wilfully procured or suffered him to be misled. An equity, otherwise equal or even superior, may, through the gross laches, or the intentional deceit of the holder, be postponed to the equity of another acquired as a result of such laches or deceit. Any conduct which Equity regards as constituting fraud, either an actual intention to mislead, or that gross negligence which produces all the effects, and merits all the blame, of intentional deception, will operate to postpone the equity of the person guilty thereof as against the equity of the person thereby misled.

3. A party taking an estate or interest with notice of another's equity therein, takes subject to that equity; that is, the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim or right, in or to the same subject-matter, held by a third person, is liable in Equity to the same extent, and in the same manner, as the person from whom he made the purchase.<sup>10</sup>

A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary as to the property purchased, and is bound in the same manner as the original trustee from whom he purchased. A purchaser or mortgagee with notice of the express equitable lien of a vendor for unpaid

<sup>3</sup> 2 Pom. Eq. Jur., § 682; see "Assignments" in our Digests.

<sup>4</sup> Parker v. Swan, 1 Hum., 80.

<sup>5</sup> Lea v. Maxwell, 1 Head., 365; Stone v. Abbott,

<sup>6</sup> Bax., 319; Allen v. Gilliland, 6 Lea, 534; Relfe v.

McComb, 2 Head., 558.

<sup>7</sup> Code, §§ 2980-2981.

<sup>8</sup> 7 Parker v. Swan, 1 Hum., 80; Knight v. Ogden, 2 Tenn. Ch., 476.

<sup>9</sup> Cecil v. Carson, 2 Pick., 139.

<sup>10</sup> Anderson v. Ammonett, 9 Lea, 1; 2 Pom. Eq.

Jur., § 685.

<sup>11</sup> 2 Pom. Eq. Jur., § 688; 1 Sto. Eq. Jur., §§

395-398.

purchase price, takes the land subject to that lien. A purchaser or mortgagee of the legal estate, with notice of an equitable lien by a prior defective mortgage, or by any other means from which an express equitable lien can arise, is bound by the lien. A purchaser with notice of a prior contract to sell or to lease, takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution.<sup>11</sup>

4. **Exceptions to the Rules of Priority.** While, as between successive purchasers or assignees of an assignable interest, the general rule is that he is entitled to the preference who first gives notice of the assignment to the debtor;<sup>12</sup> the following are the exceptions to the rule:

1. *All negotiable instruments*, whether negotiable by the law merchant or by statute, may be transferred either by written endorsement, by delivery, or otherwise, without any notice to the maker.<sup>13</sup>

2. *Certificates of stock* in a corporation may be assigned without notice to the corporation.<sup>14</sup>

3. *Life insurance policies* may be assigned without notice to the company, in the absence of any contract to the contrary.<sup>15</sup>

§ 74. **Assignments, How Affected by Priorities.**—What has been said in reference to the manifest equities arising out of several conveyances of the same property by the same vendor to several vendees,<sup>1</sup> applies with equal force to successive assignments of an unnegotiable *chosc in action* by the same assignor to different assignees; but, as there are facts in the latter case different from those in the former case, some important modifications of the rules of priority in sales of realty become necessary.

Where there are successive equitable assignments of a fund to different parties, it would seem, on first thought, that, as the legal estate is outstanding, and as the interests of all the successive assignees are similar in their essential nature, the first in order of time should prevail, under the maxim *Qui prior est tempore potior est jure*. On fuller deliberation, however, important considerations will appear sufficient to take such assignments out of the operation of the general rule. Where an equitable interest in land is created, the holder thereof can protect himself by having it registered. Where an equitable interest in chattels is obtained, it can be secured by a transfer of the possession, or by reducing the agreement to writing and having it registered. But no such safeguards exist in case of assignments of a *chosc in action*. The legal title, which is analogous to the possession, remains vested in the debtor, trustee or holder of the fund; while the creditor or beneficiary, even after one or more assignments of all his interest, continues clothed with full apparent right to make further assignments.

1. **Notice to Debtor when Necessary to Perfect an Assignment.** It is, therefore, settled law that, while, as against the assignor himself, no notice of the assignment of a non-negotiable *chosc in action*, or fund, need be given to the debtor, trustee or other holder of the fund, nevertheless, that, as against subsequent assignees for a valuable consideration, notice to the debtor, trustee, or holder of the fund is necessary in order to perfect the assignment and render it valid and effectual; and that, among *successive assignees* of the same thing in action who have paid a valuable consideration, the assignee in good faith and for value who *first gives notice*, obtains a precedence over the others, even though they may be earlier in time. The equities of the successive assignments being otherwise equal, the priority among them is determined by the order of the dates of the notices, rather than by the order of the dates of the assignments.

<sup>11</sup> 2 Pom. Eq. Jur., §§ 685-688; 1 Sto. Eq. Jur., §§ 395-398; see "Notice" in our Digests.

<sup>12</sup> This general rule, laid down in Clodfelter v. Cox, 1 Sneed, 330, has been uniformly followed in Tennessee.

<sup>13</sup> Code, §§ 1956-1967; Sugg v. Powell, 1 Head,

221; Perkins v. Perkins, 1 Tenn. Ch., 540; Smith v. Hubbard, 1 Pick., 312.

<sup>14</sup> Cornick v. Richards, 3 Lea, 1.

<sup>15</sup> Mutual P. Ins. Co. v. Hamilton, 5 Sneed, 269.

<sup>1</sup> Ante, § 65.

Giving notice is regarded as equivalent, or as least analogous to, the act of taking possession; and until notice is received by the debtor, payment by him to the assignor would be valid, and bind the assignee.<sup>2</sup>

It should be carefully observed, however, that to enable a subsequent assignee to obtain a priority in this manner, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith, and for a valuable consideration. If he has parted with no consideration he is a mere volunteer, and stands in the same position as his assignor. If he had notice of the earlier assignment, then he took subject thereto.<sup>3</sup>

**2. Cases Where Notice is Not Required.** The foregoing rules in reference to the need of notice in case of assignments of choses in action, do not apply in the following cases:

1. *All negotiable instruments*, whether negotiable by the law merchant, or made so by statute,<sup>4</sup> may be transferred without any notice to the makers.

2. *Certificates of stock* in a corporation may be assigned without notice to the corporation.<sup>5</sup>

3. *Life insurance policies* may be assigned without notice to the company, in the absence of any contract to the contrary.<sup>6</sup>

**3. To Whom Notice Must be Given.** Notice may be given to the debtor, trustee, or holder of the fund, either in writing, or verbally, if the latter form is explicit, definite and certain.<sup>7</sup> Notice to one of two or more co-trustees, or joint debtors is, in general, notice to all; but it ceases to be operative when such trustee, or debtor, dies, or such trustee gives up his position. No notice to the assignor is necessary to make him liable when the debtor refuses to pay the debt assigned, except in case of negotiable paper, to which the rules concerning notice do not apply. These rules, requiring notice to the debtor or holder of the fund, are confined to transfers of personal property, debts, money claims arising from contracts, accounts and the like; but not to equitable interests in land, or to negotiable paper.

The assignee must not only notify the debtor, but he must do so promptly, and obtain possession of the *chose in action* if in writing, and if not take such steps as are equivalent to actual possession. A prior assignee may lose his priority by any laches which injures a subsequent *bona fide* assignee.<sup>8</sup>

**4. Equities of the Debtor against the Assignee.** The assignee of a thing in action not negotiable, takes the interest assigned subject to all the defenses, legal and equitable, of the debtor who issued the obligation, or of the trustee or other party upon whom the obligation originally rested.<sup>9</sup> That is, when the original debtor, or trustee, in whatever form his promise or obligation is made, if it is not negotiable, is sued by the assignee, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor. This rule applies to all forms of contract not negotiable,<sup>10</sup> and to all defenses which would have been valid between the debtor party and the original creditor. These defenses may (1) arise out of, or be inherent in, the very terms or nature of the obligation itself, as that it was conditional, and the condition has not been performed by the assignor, or the failure or illegality of the consideration, and the like; or, (2) they may exist outside of the contract, as set-off, payment, release, the condition of accounts between the original parties, and the like.<sup>11</sup> It is essential, however, that the equity in favor of the debtor

<sup>2</sup> Clodfelter v. Cox, 1 Sneed, 330; and an attachment of the debt, after assignment but before notice thereof to the debtor, will defeat the assignment. *Ibid*: Trabue v. Bankhead, 2 Tenn. Ch., 412.

<sup>3</sup> 2 Pom. Eq. Jur., §§ 695-702.

<sup>4</sup> Code, §§ 1956-1967; Smith v. Hubbard, 1 Pick., 312.

<sup>5</sup> Cornick v. Richards, 3 Lea, 1.

<sup>6</sup> Mutual P. Ins. Co. v. Hamilton, 5 Sneed, 269.

<sup>7</sup> Clodfelter v. Cox., 1 Sneed, 330.

<sup>8</sup> 2 Pom. Eq. Jur., §§ 696-698.

<sup>9</sup> 2 Pom. Eq. Jur., § 703.

<sup>10</sup> It applies, also, to negotiable paper when assigned after maturity, or after notice of defence, or for a pre-existing debt. Ford v. Thompson, 1 Head., 265.

<sup>11</sup> Young v. Atkins, 4 Heisk., 531.

should exist at the time of the assignment, or before notice thereof; for, after receiving notice, he can not, by a payment, release, obtaining a set-off, or any other act, defeat or prejudice the right of the assignee. The debtor, who would have been entitled to equities under this rule, may, by actual misrepresentations, or by conduct, or even by silence, towards the assignee, estop himself from setting them up; and he may release them.<sup>12</sup>

§ 75. **Bona Fide Purchasers, and their Equities.**—Where a person owns a valid subsisting interest in property, his right thereto should be superior to another's who subsequently acquires possession of the same property, (1) without acquiring the legal title thereto; or (2) without paying any valuable consideration therefor, or (3) with notice of the prior adverse interest, or (4) without good faith. On the other hand, where a person's interests, though valid, are not so evidenced as to give notice thereof, his right thereto should be inferior to another's who acquires possession of the same property (1) with a conveyance of the legal title, (2) paying therefor a valuable consideration, (3) without any notice of the prior adverse interest, and (4) in good faith.

This defence of innocent purchaser<sup>1</sup> is founded on the maxim, "Where the equities are equal, the law will prevail;" and the defendant having both the possession and the legal title, while the complainant has only an equitable title, it is manifestly just to prefer the defendant, his equities being fully equal to complainant's, and he having in addition both the possession and the legal title. Where the equities are equal, superior is the condition of the defendant.<sup>2</sup>

Besides, the complainant was guilty of negligence in not having his interests so evidenced as to give purchasers notice of his rights; and his case consequently falls under the ban of the maxim, "When a loss must fall on one of two persons, it should be borne by him whose act or negligence caused it." Were the law otherwise, no man would ever be safe in making a purchase.

In order, then, that the defence of *bona fide* purchaser may be effectual, all of the following essentials must appear: 1, There must have been a *purchase*; 2, There must have been a *valuable consideration* paid; 3, The conveyance must have been taken and the consideration paid *before notice* of the prior adverse equity; and 4, the whole transaction must have been characterized by *good faith*.<sup>3</sup> These essentials will be considered separately.

1. **There Must Have Been a Purchase.** The very corner-stone of this defence is the fact of a purchase. The purchase must have been fully consummated before notice, so fully consummated that nothing was left to be done in order to effectuate it. If the purchase had not been completed before notice, the defendant had the right to abandon the proposed purchase, or to obtain indemnity against the alleged equity; and if he did neither, it was his own negligence or wilfulness, and he has no right to complain of any loss caused by the alleged equity, of which he had notice.<sup>4</sup> The fact that the consideration was valuable, and

<sup>12</sup> 2 Pom. Eq. Jur., § 704; Moore v. Weir, 3 Sneed, 47.

<sup>1</sup> See Plea of Innocent Purchaser, *post*, § 332. The rationale of this defence is, that the equities of the parties being equal, a Court of Conscience will not interpose to aid the complainant, there being no reason in conscience for preferring him to the defendant. 2 Pom. Eq. Jur., § 738. In such a case the Court will withhold its hand, and remit the parties to the Courts of law, where legal rights are administered without the restraints imposed by conscience. Where, however, a Court of Chancery has, also, common law jurisdiction, and can enforce legal rights, the question arises whether it will apply the maxim, Where the equities are equal the law must prevail; and deny the defence of innocent purchaser. Pomeroy seems to have reached the conclusion that this defence cannot be interposed to an ejectment bill in a Chancery Court, such as ours, having common law jurisdiction. 2 Pom. Eq. Jur., §§ 739-743. But, see Lenoir v. Mining Co., 4 Pick., 168. Snell concurs with Pomeroy. Snell's Pr. Eq., 26-28.

<sup>2</sup> *In aequali jure melior est conditio possidentis.*

(Where rights are equal the person in possession will prevail.)

<sup>3</sup> And the plea must aver that the vendor was seized in fee, or pretended to be so seized. The vendor must be in possession and the vendee must believe that he was acquiring the fee. Craig v. Leiper, 2 Yerg., 196; Rhea v. Allison, 3 Head, 177; Jarman v. Farley, 7 Lea, 141.

<sup>4</sup> Pomeroy thus qualifies the rule laid down in the text:

Where the estate subsequently purchased is the legal estate, a notice, in order to be binding, must be received before the purchaser pays the price, or parts with other valuable consideration. In other words, if he has actually paid the valuable consideration without any notice, a notice afterwards given does not preclude him from completing the transaction by obtaining a conveyance of the legal title, and thereby securing the precedence due to a *bona fide* purchaser for a valuable consideration and without notice. 2 Pom. Eq. Jur., §§ 691; 755. See, also, 1 Sto. Eq. Jur., § 64 c; Womack v. Smith, 11 Hum., 483; Livingston v. Noe, 1 Lea, 66.

that it was actually paid, will not avail if the purchaser had notice before the deed was delivered, or the purchase otherwise absolutely consummated.<sup>5</sup>

**2. There Must Have Been a Valuable Consideration Paid.** A valuable consideration means, and necessarily requires, under every form and kind of purchase, something of actual value, capable, in the estimation of the law, of pecuniary measurement, such as parting with money or money's worth, or an actual change of the purchaser's legal position for the worse. The amount of the purchase price, if otherwise there is good faith, is not generally material. As examples of what clearly amount to a valuable consideration are the following: (1) A contemporaneous advance or loan of money, (2) or a sale, transfer, or exchange of property, made at the time of the purchase, or execution of the instrument; (3) or the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its nature irrevocable. An antecedent debt is not deemed a valuable consideration, because the purchaser parts with nothing, and will lose nothing if the sale to him is set aside: he can be put *in statu quo*.<sup>6</sup>

Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character of *bona fide* purchaser.<sup>7</sup>

Where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a *bona fide* purchaser *pro tanto*; or the complainant should be permitted to enforce his claim to the whole land only upon condition of his doing equity, by re-tunding to the defendant the amount already paid before receiving the notice.<sup>8</sup>

The payment must have been actually made, or what, in law, is tantamount to actual payment, must have been done, before any notice. Payment may consist of (1) a transfer of money, property, or things in action, or (2) an absolute change of the purchaser's legal position for the worse, or (3) the assumption by him of some new irrevocable legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a *bona fide* purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in Equity, even if not at law. Payment of actual cash is not indispensable. The absolute transfer of notes, bonds, or other securities made by a third person, will, however, constitute a good consideration.<sup>9</sup>

**3. There Must Have Been no Notice of Prior Equities.** The purchaser must have completed his purchase and paid the consideration without any kind of notice, actual or constructive, of prior adverse rights in or to the subject-matter of his purchase. The rules of notice, and their underlying principles, have already been fully considered elsewhere,<sup>10</sup> and need not be repeated; and only the time and effect of notice will be stated in this section. The rule is universal that if a purchaser receive notice of prior adverse rights in and to the subject matter of his purchase, before he has completely perfected his purchase, or paid the purchase price, he is not a *bona fide* purchaser.<sup>11</sup>

If, however, a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a *bona fide*

<sup>5</sup> *Pillow v. Shannon*, 3 Yerg., 508; *Pinson v. Ivey*, 1 Yerg., 302; *Aiken v. Smith*, 1 Sneed, 305; 1 Sto. Eq. Pl., §§ 805-807; 2 Pom. Eq. Jur., 753. It would seem that the doctrine of innocent purchaser without notice, does not apply between equities; and that the purchaser of a *chose in action*, or of any equitable title, must always abide by the case of the person from whom he buys; and that, in such cases, the rule is, He who is first in time is best in right. *Pinson v. Ivey*, 1 Yerg., 302; *Craig v. Leiper*, 2 Yerg., 193, and cases cited in the head lines.

<sup>6</sup> 2 Pom. Eq. Jur., §§ 747-749; *Anderson v. Taylor*,

1 Tenn. Ch., 442; *Finnegan v. Finnegan*, 3 Tenn. Ch., 515; *O'Neal v. Smith*, 10 Lea, 340.

<sup>7</sup> *Merril v. Johnston*, 1 Yerg., 73; *High v. Batte*, 10 Yerg., 335; *Smith v. Gray*, 1 Hum., 491; *Jarman v. Farley*, 7 Lea, 141; 2 Pom. Eq. Jur., § 750.

<sup>8</sup> 2 Pom. Eq. Jur., § 750.

<sup>9</sup> 2 Pom. Eq. Jur., § 751.

<sup>10</sup> See *Notice, ante*, § 65.

<sup>11</sup> *Pillow v. Shannon*, 3 Yerg., 508; *Aiken v. Smith*, 1 Sneed, 305; *Otis v. Payne*, 2 Pick., 663; 2 Pom. Eq. Jur., § 753.

purchaser, and is entitled to protection as such. Or, if a second purchaser with notice acquires title from a first purchaser who was without notice, and *bona fide*, he succeeds to all the rights of his immediate grantor. But if a person holding a title affected with notice, conveys to a *bona fide* purchaser and afterwards takes a reconveyance to himself, he will hold the land subject to all the equities against it at the time he conveyed it.<sup>12</sup>

4. **There Must Have Been Good Faith in the Whole Transaction.** As this defense is based largely on the alleged good faith of the purchaser, and as he specially avers this good faith in his plea, it necessarily results that if any act of bad faith appear, the defense of innocent purchaser will not avail. This bad faith may consist in: (1) a completion of the purchase after notice; (2) fraudulent conduct towards the vendor in the transaction; (3) participation in an intended fraud on the creditors of the vendor; (4) or any other matter showing that in the purchase the purchaser has not kept his hands absolutely clean.<sup>13</sup>

§ 76. **Equities of Purchasers, How Affected by Notice of Prior Claims.**—The law of notice and its effects has been heretofore considered somewhat generally,<sup>1</sup> but a further consideration with special reference to the effect of notice upon purchasers is appropriate here.

Notice is either actual or constructive: 1. *Actual* notice is positive personal information of a fact directly communicated to the party, or directly acquired by him; 2. *Constructive* notice is the sort the law presumes the party to have acquired.

1. **What Constructive Notice Includes.** Constructive notice includes all kinds of notice not shown to have been actually given: it assumes that no information concerning the prior fact, claim, or right, has been directly and personally communicated to the party; or at least, that the communication of such information is not shown by evidence, but is only inferred by operation of legal presumption. It embraces all those instances, widely differing in their external features, in which either from certain extraneous facts, or from certain acts or omissions of the party himself, disclosed by the evidence, the information is conclusively presumed to have been given to or received by him, or is inferred by a *prima facie* presumption of the law in the absence of contrary proof.<sup>2</sup>

2. **What is Meant by Being Put Upon Inquiry.** A purchaser, or person obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the same property, because he thereby acquires no positive information, and obtains no tangible clue, by means whereof he may commence and successfully prosecute an inquiry into the truth. On the other hand, if the party obtained knowledge or information of facts which tend to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate, and perhaps even necessary, inference that he acquired the further information which constitutes actual notice. This inference may be defeated by proper evidence. If the party shows that he made the inquiry, and prosecuted it with reasonable diligence, but still failed to discover the conflicting claim, he thereby overcomes and destroys the inference. If, however, it appears that the party obtained knowledge or information of facts, which were sufficient to put a prudent man upon inquiry, and which were of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly have led to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry, that he made the inquiry

<sup>12</sup> 2 Pom. Eq. Jur., § 754.

<sup>13</sup> 2 Pom. Eq. Jur., § 762. Where the proof shows that the purchaser designedly abstained from making inquiry for the very purpose of avoiding notice, he

will be held to be not an innocent purchaser. Snell's Pr. Eq., 34.

<sup>1</sup> See *ante*, § 65.

<sup>2</sup> 2 Pom. Eq. Jur., § 604; 2 Sto. Eq. Jur., §§ 400-400 a.



and arrived at the truth. Finally, if it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it, fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute.<sup>2a</sup>

**3. What Facts will Put One on Inquiry.** A purchaser may be put on inquiry by visible objects, structures, or easements upon, or connected with, the land with which he is dealing. So, a purchaser or incumbrancer of an estate, who knows, or is properly informed, that it is in the possession of a person other than the vendor or mortgagor with whom he is dealing, is thereby charged with a constructive notice of all the interest, rights and equities which such possessor may have in the land. But, in order that possession may put a purchaser on inquiry and operate as notice, it must exist at the time of the transaction by which his rights and interests are created.

Possession by a lessee is constructive notice to a purchaser, not only of the tenant's rights and interests directly growing out of, or connected with, the lease itself, but also of all rights and interests which he may have acquired by other and collateral agreements, as, for example, a contract to convey the land, or to renew the lease, and the like.<sup>3</sup>

**4. Notice by Recitals in Deeds.** Whenever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate, which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title.<sup>4</sup>

Any description of the parties, as married women, trustees, executors, administrators or the like, any recital of fact, or reference to other documents, puts the purchaser upon inquiry; and he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title-deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate, is obtained.<sup>5</sup>

**5. Effect of Notice of a Deed, or Other Instrument.** If a purchaser or encumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts or matters *in pais*, sufficient to put him on inquiry respecting some unrecorded conveyance, mortgage, or encumbrance, or respecting some outstanding interest, claim, or right which is not the subject of record, and he omits to make a proper inquiry, he will be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry.<sup>6</sup>

Where a purchaser has notice of a title-deed, he is presumed to know all its contents and is bound thereby; and if any conveyance, of which he has notice, should contain a recital of, or reference to, another deed otherwise collateral and not a part of the direct series, he would by means of such recital or reference, have notice of this collateral instrument, of all its contents and of all the facts indicated by it which might be ascertained through an inquiry prosecuted with reasonable diligence. This rule applies to both registered and unregistered instruments.<sup>7</sup>

**6. Notice by Registration.** Our statutes authorize the registration of certain instruments, relating to the sale, incumbrance, lease and devise of real and personal property; and they make such instruments when duly probated and noted for registration, notice to all the world of their existence and contents.

<sup>2a</sup> 2 Pom. Eq. Jur., § 597; *Gage v. Epperson*, 2 Head, 669.

<sup>3</sup> 2 Pom. Eq. Jur., §§ 611-625.

<sup>4</sup> 1 Sto. Eq. Jur., § 400; 2 Pom. Eq. Jur., § 626.

*Verba relata in esse videntur.* (Words referred to

in an instrument are considered as incorporated in it.)

<sup>5</sup> 2 Pom. Eq. Jur., § 626.

<sup>6</sup> *Ibid.*, § 613.

<sup>7</sup> *Ibid.*, § 628.

The statutes give priority to these instruments in the order of their notation<sup>8</sup> for registration; and they declare that any registrable instrument not properly probated or registered or noted for registration, shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice.<sup>9</sup>

The objects of our registration laws are: (1) to preserve the muniments of title; (2) to perpetuate the evidence of their valid execution; (3) to give the community notice of the changes in the ownership of property; and (4) to prevent frauds both upon the bargainor and upon his creditors.<sup>10</sup>

In order, therefore, that a registered instrument may be notice to the world it must be: (1) an instrument authorized to be registered; (2) it must be properly proven, or acknowledged and certified; (3) it must be registered, or noted, for registration; and (4) this registration must be in the proper county.

The record operates as a constructive notice only when the instrument itself is one which the statute authorized to be registered. The voluntary recording, therefore, of an instrument, when not authorized by the statute, would be a mere nullity, and would not charge subsequent purchasers with any notice of its contents, or of any rights arising under it.

For the same reason, the operation of a record as constructive notice is limited territorially. A record is not a notice with respect to any tract of land situated in a different county from that in which the registration is made. The statute requires the instrument to be registered in the same county in which the land, or a part of the land, is situated; a record in a different county is, therefore, inoperative as a constructive notice.

A record is a constructive notice only when, and so far as, it is a true copy, substantially, of the instrument which purports to be registered, and of all its provisions. Any material omission or alteration will certainly prevent the record from being a constructive notice of the part omitted or altered, although the instrument may appear, on the registry books, to be perfect and operative in all its parts. Nor will the record be a notice unless it, and the original instrument of which it is a copy, correctly and sufficiently describe the premises which are to be affected.

When all the foregoing requisites to a valid registration have been complied with; when an instrument is (1) one entitled to be registered and (2) has been duly executed and acknowledged or proved and certified, and (3) has been registered or noted for registration in the proper manner, and (4) in the proper county, then such record becomes a constructive notice, not only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles and interests, legal and equitable, created or conferred by it, or arising from its provisions.<sup>11</sup>

<sup>8</sup> *Flowers v. Wilkes*, 1 Swan, 400.

<sup>9</sup> Code, §§ 2030-2075.

<sup>10</sup> *Tate v. Lawrence*, 11 Heisk., 511.

11 2 Pom. Eq. Jur., §§ 651-655; 1 Sto. Eq. Jur., §§ 403-404; Code, §§ 2072-2075. See "Registration," in our Digests.

## PART II.

## PROCEEDINGS IN A SUIT IN CHANCERY, FROM ITS PRELIMINARIES TO THE APPEARANCE OF THE DEFENDANT.

## CHAPTER VI.

## PROCEEDINGS PRELIMINARY TO A SUIT.

§ 77. The First Preliminary to a Suit in Chancery. | § 79. Matters to be Considered in Reference to the Bill.

§ 78. In What Court to Bring Suit.

§ 77. **The First Preliminary to a Suit in Chancery.**—The first step taken by a Solicitor, preliminary to filing a bill in the Chancery Court, is to obtain the probable facts of the case from his client. This is sometimes no easy matter. Clients, when they seek to bring a suit, are often so strongly prejudiced, and so indignant, as to be downright incapable of giving a trustworthy history of their case. A vigorous cross-examination is often necessary to uncover important facts in the controversy. You should know not only your client's side of the proposed suit, but, also, the defences that the other side will, in all probability, interpose.<sup>1</sup>

It is never safe to institute a suit, without knowing the facts your client will be able to prove, according to the laws of evidence. As a rule, however, complainants are in the right. A person does not ordinarily seek a Solicitor to have a suit brought, unless he feels that a great wrong has been done him; and that an appeal to the Courts is his only method of obtaining what is justly his due. For this reason, when time presses, and the suit must be brought at once, or great risk be run, a Solicitor will, as a rule, be safe in bringing the suit on a *prima facie* case being made out by his client. Injunction and attachment bills must often be drawn with the greatest possible dispatch, the success of your client, in the race of diligence, often depending on a question of a few minutes. In such case, consume no time in sifting the facts, but begin to draw the bill as soon as you discover that an attachment, or injunction, is essential to your client's success. In such a case, however, investigate the facts fully at your earliest opportunity after the bill is filed, so that, if you discover that you have omitted any matter of importance, you may make an amendment before the defendant answers, which amendment you may then make without leave of the Court, or Chancellor, and without paying any costs, except for the copy of the amendment, and for serving the same on the defendants.<sup>2</sup>

§ 78. **In What Court to Bring the Suit.**—Having obtained possession of all the facts of the case from your client, the next question for you to determine is: In what Court to bring the suit. The Chancery Court has exclusive jurisdiction of all cases of an *equitable* nature, and if the suit be of such a nature, the only question will be: In what particular Chancery Court to bring this suit. In solving this problem you must consider the law in reference to the *local*

<sup>1</sup> One of the best ways to ascertain what defence will be made to a suit, is to ask your client what plea or pretext the defendant sets up, in excuse of his conduct. Clients are so anxious to appear right in the eyes of their Solicitor that they will conceal important facts favorable to the other side, and searching questions will sometimes fail to discover

the matters so concealed. But if you ask him what plea, pretext, or excuse, the defendant sets up, he will almost invariably at once disclose the whole of the probable defence; and you will then be able to test its validity.

<sup>2</sup> Code, §§ 4332-4333.

jurisdiction of the Chancery Court, both as it respects the county where the defendant may be found, and as it respects the locality of the property, where property is sought to be attached, or where realty is sought to be reached, or affected.<sup>3</sup>

If the suit is *legal* in its nature, you will then be called on to determine whether it is better to bring it in Chancery, or in the Circuit Court. If the suit be for an injury to person, property, or character, involving unliquidated damages, you are bound to bring the suit in the Circuit Court; but, if the suit be for any other legal matter, you may sue in either Court. In deciding which Court to institute proceedings in, the following considerations are important:

1. If your case is plain, and your client is content with exact justice, unmixed and uncorrupted with local prejudice, sue in Chancery. If, on the other hand, your cause is doubtful, and you need the aid of the artifices and devices incident to a jury trial, if you sue at all, go into the Circuit Court.

2. If your case is just, but your success depends on your crushing or paralyzing a dishonest and hostile witness, whom you wish to cross-examine in presence of a jury, and whose reputation you wish to attack, it may be better to sue in the Circuit Court, although a jury trial may be had in Chancery, also.

3. If your suit involves an account, or depends upon the construction or effect of writings, the Chancery Court is the better forum.

4. If your title to land depends upon the force and effect of your title papers, sue in Chancery; but if the suit is about the location of a line, or involves the question of adverse possession, then sue in the Circuit Court, unless you wish, also, to recover rents and the value of waste committed.

5. Where the witnesses are numerous, and the question is purely one of fact, and the proof is conflicting, the Circuit Court is preferable.

6. Where the whole matter, including its incidents, cannot be ended in the Circuit Court by *one* suit, as when your client is entitled (1) to land and its rents and profits, and value of timber cut; or (2) to personal property and its hire; or (3) to a debt that is a lien on property which you can have sold in satisfaction thereof; or (4) to a partition and adjustment of equities between the tenants in common; in such cases it is better to file a bill in Chancery and have all the various matters connected with the controversy adjudicated in *one* suit.

As a rule, if your cause is just, you are more certain of success in Chancery than in the Circuit Court. You run much less risk of witnesses failing to attend or being tampered with, or suddenly forgetting the essential facts, or being inextricably confused by cross examination; and you run no risks of unaccountable verdicts, or of unexpected or controvertible evidence being sprung on you. All in all, the Chancery Court is the safer Court, much the cheaper and equally as speedy, in the disposition of suits of a *legal* nature, where the jurisdiction is concurrent. Besides, if you win in Chancery there is far less danger of reversal by the Supreme Court, many Circuit Court suits being reversed because of errors committed by the Judge in charging the jury, or in admitting or rejecting evidence on the trial, in cases where the verdict would have been the same if no such error had been committed.

§ 79. **Matters to be Considered in Reference to the Bill.**—The first question to be considered in obtaining facts for framing the bill is: Who are necessary, and who proper, parties to the suit. This is often a matter of no little perplexity, and in the next chapter is treated of at length. Where there is doubt, whether a particular person can be properly made a complainant, make him a defendant, and pray that his rights may be declared and enforced along with those of the complainants, if he is deemed thereunto entitled. If it is doubtful whether a person should be made a defendant, it is better to include him in

<sup>3</sup> The local jurisdiction of the Chancery Court will be hereafter fully considered. See, *post*, 177.

the bill, and let the Court determine the doubt: the additional cost is insignificant.

Having ascertained who are the proper parties, the next question to be ascertained is, whether the parties to the suit have any relations,<sup>4</sup> such as husband and wife; parent and child; guardian and ward; personal representative and creditor, distributee or legatee; principal and agent; landlord and tenant; bargainor and bargainee; creditor and debtor; trustee and beneficiary, and the like; and if so, the rights and duties of the parties incident to that relation, and wherein those rights have been violated, and those duties not discharged. The ascertainment of these matters will enable you to frame your bill in a logical and orderly way, by stating: (1) the relation of the parties, and the dates, and facts; (2) the obligations the defendants incurred to complainant by reason of those relations; (3) wherein, when and how, those obligations have been violated, including any circumstances of atrocity, or special iniquity; and (4) by prayers for process and appropriate relief. The subject of bills is fully treated in a subsequent chapter.

If you ascertain that there are no relations between the parties, your bill will ordinarily begin by stating fully the right and title of the complainant, and when, and wherein, and under what circumstances, that right has been violated, and that title invaded or endangered.

By keeping the doctrine of relations in mind while obtaining the facts of his case from your client, you will find it much easier to elicit the essential matters; and you can begin the drawing of the bill at once, giving its parts in the order above stated.

When the bill has been drawn, if a verification is necessary, have your client make the oath. This is well for two reasons: first, it is his duty, and not yours, to verify his bill; and second, it is evidence of your retainer. Have your client sign the prosecution bond, for like reasons. It is no part of a Solicitor's duties to swear to his client's bill, or to secure the costs of his client's suit; and, as a rule, Solicitors should do these things only in exceptional cases.

And it will be well for the complainant's Solicitor to keep in mind these general rules:

1. The case must be within the jurisdiction of the Chancery Court;
2. It must be adequately set forth in a proper bill;
3. It must be substantiated by pertinent legal evidence;
4. It must be established by an appropriate decree; and,
5. It must be enforced by adequate final process.

<sup>4</sup> The doctrine of relations is fully explained in the Chapter on Bills, *post*, §§ 165-169; 408.

## CHAPTER VII.

## PARTIES TO SUITS IN CHANCERY.

- ARTICLE I. Who May Sue in Chancery.  
 ARTICLE II. Who May be Sued in Chancery.  
 ARTICLE III. General Rules as to Parties.  
 ARTICLE IV. Who Should be Complainants.  
 ARTICLE V. Who Should be Defendants.  
 ARTICLE VI. Next Friends and Guardians *ad Litem*.  
 ARTICLE VII. Mis-joinder and Non-joinder of Parties.  
 ARTICLE VIII. Effect of Death or Marriage of Parties, or Assignment of their Interests.  
 ARTICLE IX. Parties in Particular Suits.  
 ARTICLE X. Parties in Suits by and Against the State, Counties and Corporations.

## ARTICLE I.

## WHO MAY SUE IN CHANCERY

- |   |  |
|---|--|
| § 80. General Rule as to Parties Complainant.                           | § 83. How Married Women must Sue.                |
| § 81. Suits by Alien Enemies, and Foreign Administrators and Executors. | § 84. When a Married Woman may Sue Alone.        |
| § 82. How Minors and Persons of Unsound Mind must Sue.                  | § 85. Suits by Persons under a Quasi Disability. |

§ 80. **General Rule as to Parties Complainant.**—Any person,<sup>1</sup> natural or artificial, may bring a suit in the Chancery Court, except alien enemies, foreign executors and foreign administrators. Persons of unsound mind and infants must sue, however, by their regular guardian, or by a next friend; and married women must sue by next friend, except when they sue jointly with their husbands, or sue after being deserted by their husbands, or sue for a divorce.<sup>2</sup> The term artificial persons, includes the United States, the State of Tennessee, the various counties and municipal corporations of the State, and all private corporations, and all partnerships, foreign and domestic.<sup>3</sup>

Corporations, public and private, foreign and domestic, sue in their corporate name, the name given them in the statute or charter of incorporation. Counties sue in their county name. The State of Tennessee sues in her own name, by her Attorney General, or by her District Attorney; and, where the suit concerns some individual or individuals more than the State, she sues in her own name by her Attorney General, or her District Attorney, on the relation of the individual or individuals interested: these individuals are named *relators*: they are the real complainants, and are, therefore responsible for the costs of the suit.<sup>4</sup>

<sup>1</sup> The term "person" includes corporations; the term "administrators" includes executors; the term "heirs" includes devisees and also executors when there is any interest in realty devised to the latter. See Code, §§ 50; 57.

<sup>2</sup> If an infant, or a married woman, or an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defend-

ant must take advantage of it by plea. This objection extends to the whole bill, and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief. Sto. Eq. Pl., § 494.

<sup>3</sup> Sto. Eq. Pl., §§ 49-66; 1 Dan. Ch. Pr., 5. It is one of the boasts of the Chancery Courts that their doors are open to every person who has suffered a wrong cognizable in Equity.

<sup>4</sup> Sto. Eq. Pl., §§ 49; 55; Code, §§ 3412-3414; 1 Dan. Ch. Pr., 10-15.

§ 81. **Suits by Alien Enemies, and Foreign Administrators and Executors.**—Alien enemies are the citizens of a nation with whom the United States are at war. Such enemies, while residing out of the United States, can neither sue nor be sued in any Court within the United States; but if they reside here, and are not forbidden by the General or State governments to remain, they are under no disability to sue or be sued, and have the same rights in Court as alien friends.<sup>5</sup> An executor or administrator appointed in another State can neither sue nor be sued in this State,<sup>6</sup> as such; but if he brings assets into this State he may be held liable therefor as a constructive trustee.<sup>7</sup>

§ 82. **How Minors and Persons of Unsound Mind Must Sue.**—Minors and persons of unsound mind, in consequence of their mental incapacity to attend to their business affairs, as well as their inability to bind themselves for the costs of the suit, or to make any contract relative thereto, are not allowed to institute a suit directly in their own names, and on their own motion. But as these persons frequently need the active interposition of the Court to protect their interests, the Court allows their guardians to institute suits in their behalf, to assert their rights, or to vindicate their wrongs. And if they have no guardian, or if the guardian himself neglects his duties, or is the person to be sued, the Court will permit any person who is *sui juris* to bring suit in their behalf: this person is styled the next friend, or *prochein ami*, of the infant or person of unsound mind in whose behalf he sues.<sup>8</sup> A person of unsound mind may sue by next friend, either before or after an inquisition of lunacy,<sup>9</sup> but if he have a guardian he must sue by the guardian, unless the latter has violated his trust, in which case the *non compos* may sue by next friend, making his guardian a defendant.

A bill may even be filed on behalf of an infant unborn, (*in ventre sa mere*), by its next friend, when its interests demand;<sup>10</sup> and in such a case, an injunction will be granted to stay waste on lands that will belong to the infant at its birth. A guardian appointed for a minor, or *non compos*, in another State, cannot in strict practice sue here as such.<sup>11</sup> Should he sue as such, however, the Court will not repel him, but will recognize him as the next friend, and allow the suit to proceed to final decree; and then take the proper steps to secure to the infant the recovery, if any be decreed it.<sup>12</sup>

A person of unsound mind may file a bill and prosecute a suit in his own name, if the defendant fail to object thereto at the right time, and in the right manner. The Court will not dismiss a suit brought by a person of unsound mind, at any stage, if a competent person will assume the office of next friend for him.<sup>13</sup>

§ 83. **How Married Women Must Sue.**—On her marriage, many of a married woman's rights become vested in her husband, and as to many of her interests he becomes as sort of guardian, or next friend.<sup>14</sup> Hence, in all ordinary cases, where it becomes necessary to bring suit for the protection of the wife's rights, she sues along with her husband. Besides, being unable to bind herself for the costs of the suit, it is necessary to have some one joined with her as complainant, who can be held responsible for the costs. Whenever there is no conflict between the interests of the wife and those of the husband, she must, ordinarily, sue jointly with her husband; but whenever there is a conflict, whenever the husband is asserting, or has asserted, claims inconsistent with his wife's rights, or has, by his own act, or neglect, debarred himself from protecting her rights;

<sup>5</sup> Sto. Eq. Pl., §§ 51-54; 1 Dan. Ch. Pr., 49; Rodgers v. Dibrell, 6 Lea, 69; Walker v. Day, Griswold & Co., 8 Bax., 77.

<sup>6</sup> Sto. Eq. Pl., § 179; Young v. O'Neil, 3 Sneed, 55; 2 Meigs' Dig., § 682; Campbell v. Hubbard, 11 Lea, 6.

<sup>7</sup> Beeler v. Dunn, 3 Head, 88.

<sup>8</sup> Sto. Eq. Pl., §§ 57-66.

<sup>9</sup> Parsons v. Kinzer, 3 Lea, 342. Or, he may sue in his own name, and a next friend appointed afterward. Rankin v. Warner, 2 Lea, 302.

<sup>10</sup> Maclin v. Haywood, 6 Pick., 201. See Article on NEXT FRIENDS, *post*, §§ 103-105.

<sup>11</sup> Sto. Eq. Pl., § 59, note 2; 1 Dan. Ch. Pr., 67. 12 McClelland v. McClelland, 7 Bax., 210; Hickman v. Dudley, 2 Lea, 375; Simpson v. Alexander, 6 Cold., 630.

<sup>13</sup> Rankin v. Warner, 2 Lea, 302; Davis v. Norvell, 3 Pick., 36.

<sup>14</sup> See Article on NEXT FRIENDS, *post*, §§ 103-105.

in all such cases he stands in the position of a guardian who has violated his trust duties; and his wife may file a bill by a next friend, making her husband, and all others who have wronged her, parties defendant. So, whenever the wife sues in reference to her separate property, she should sue by next friend, and her husband should be made a defendant.<sup>15</sup> When the joint right of action of husband and wife to recover land belonging to the wife is barred, she may sue by next friend, and recover, making her husband a defendant.<sup>16</sup>

But no person can act as next friend for a married woman without her consent,<sup>17</sup> unless she be a minor, also.<sup>18</sup>

**§ 84. When a Married Woman May Sue, or Be Sued, Alone.**—The law of Tennessee is liberal to married women, and has emancipated them from some burdensome bonds of servitude. By the common law, on her marriage, all her legal rights became vested in her husband, and she could do nothing without his consent and guidance.<sup>19</sup> The Court of Chancery first extended a helping hand to married women, by allowing them to sue by next friend; and now, by the aid of the statute, where a husband has deserted his family, his wife may prosecute, or defend in his name, any action, which he might have prosecuted or defended; and she may also sue, or be sued, in her own name, for any cause of action accruing subsequent to such desertion.<sup>20</sup> She may, also, sue and be sued alone, when her husband has been declared insane by the verdict of a jury;<sup>21</sup> and when it becomes necessary for her to file a bill of divorce, she may do so in her own proper person, and without any next friend.<sup>22</sup> She may, also, sue or be sued alone, if her husband has permanently left the State; or, is confined in the penitentiary, or is otherwise civilly dead.<sup>23</sup> If a married woman is engaged in the mercantile or manufacturing business in her own name, or by agent, or as partner, she may be sued as a *feme sole* for debts incurred in such business, and cannot plead her coverture in such cases.<sup>24</sup>

It would seem from a general survey of our decisions and statutes, that it may be laid down as a general rule in Tennessee, that, whenever the wife is living separate from her husband without her fault, she may sue and be sued as a single woman.<sup>25</sup> But if a married woman, who could otherwise sue or be sued alone, is a minor, or of unsound mind, she must sue by guardian or next friend, and must defend by guardian, or guardian *ad litem*, like any other minor, or *non compos*.

**§ 85. Suits by Persons under a Quasi Disability.**—Deaf and dumb persons, if also very ignorant and incapable of being fully communicated with as to their property rights, may be allowed to sue by next friend. So may persons in their dotage, or imbecile adults, or any person not strictly a *non compos* and yet not able to manage his business affairs.<sup>26</sup> If a person has religious scruples against being a party to a suit, he may sue by next friend.<sup>27</sup>

<sup>15</sup> See cases in 3 Meigs' Dig., § 1617; Sto. Eq. Pl., §§ 61-63.

<sup>16</sup> McCallum v. Pettigrew, 10 Heisk., 394; Moore v. Walker, 3 Lea, 656.

<sup>17</sup> Sto. Eq. Pl., § 61. In such a suit she cannot act under the advice or protection of her husband, and, therefore, she is allowed to seek the protection of some other person, who acts as her next friend; and the bill is accordingly exhibited in her name by such next friend. But in this respect she is differently placed from an infant; for no person can exhibit a bill as her next friend, without her consent; whereas, an infant's consent to a bill filed in his name is not necessary. Where a suit is brought by the husband in his own name and in that of his wife, it is considered as his suit only, and, accordingly, it will not be absolutely binding on her. In like manner, the husband may sue the wife in Equity, for the purpose of enforcing his own marital rights against her property, whether such rights result from her ante-nuptial agreement, or from the general principles of Law or Equity; or whenever he seeks relief upon some claim adverse to or in opposition to his wife; for (it has been well said) it is constant experience, that the husband may sue the

wife, or the wife the husband, in Equity, notwithstanding, at law, neither of them can sue the other. Sto. Eq. Pl., §§ 61-62.

<sup>18</sup> Phillips v. Hassell, 10 Hum., 198.

<sup>19</sup> 1 Dan. Ch. Pr., 87.

<sup>20</sup> Code, § 2805. But not accruing before desertion. Smith v. Smith, 14 Pick., 101.

<sup>21</sup> Code, § 2486.

<sup>22</sup> Code, § 2451.

<sup>23</sup> Bottoms v. Corley, 5 Heisk., 12.

<sup>24</sup> Acts of 1897, Ch. 82. She is liable for the rent of the store-house in which she carries on her business. Persica v. Maydwell, 18 Pick., 207. And when her interests require she may sue her husband and the parties in possession to recover her lands. Key v. Snow, 6 Pick., 663.

<sup>25</sup> Code, §§ 2485; 2486; 2451; 2805; Cooper v. Maddox, 2 Sneed, 136; Bottoms v. Corley, 5 Heisk., 12; Yeatman v. Bellmain, 1 Tenn. Ch., 589; and same case in 6 Lea, 488.

<sup>26</sup> 1 Dan. Ch. Pr., 86; Parsons v. Kinzer, 3 Lea, 342, and see Fentress v. Fentress, 7 Heisk., 428; Code, § 3683.

<sup>27</sup> Malin v. Malin, 2 John. Ch., (N. Y.), 238; 1 Dan. Ch. Pr., 86.



## ARTICLE II.

## WHO MAY BE SUED IN CHANCERY.

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|---|--|
| § 86. General Rule as to Parties Defendant. | § 89. Suits against Counties, Cities and |
| § 87. Suits against Infants and Lunatics.   | Other Corporations.                      |
| § 88. Suits against Married Women.          |  |

§ 86. **General Rule as to Parties Defendant.**—In general, it may be stated that every person, who may sue in the Chancery Court, may also be sued;<sup>1</sup> and, in addition, all persons who may or must sue, by guardian or next friend, may be sued, for they cannot plead their disability in their defense.<sup>2</sup> The only persons, natural or artificial, who cannot be sued, are (1) the State of Tennessee,<sup>3</sup> (2) alien enemies residing out of the State in time of war, (3) foreign executors and foreign administrators,<sup>4</sup> and (4) public corporations created by and in another State for governmental purposes.<sup>5</sup>

It is sometimes said that *bankrupts* cannot sue, or be sued. The reason of this is, their estate, by operation of law, has become vested in their assignees, and they, therefore, cannot legally sue, or be sued, because they have no interest in the subject-matter of the suit, and no decree can, consequently, be pronounced against them. What is meant by bankrupts not being able to sue, and not being subject to be sued is, that if they sue no decree can be rendered in their favor; and if they are sued, no decree can be rendered against them,<sup>6</sup> if the fact of their assignment or discharge duly appear. But if a defendant fail to plead the bankruptcy of the complainant, or fail to plead his own discharge in bankruptcy, the suit will proceed as though no bankruptcy existed.

§ 87. **Suits against Infants and Lunatics.**—Minors, married women, and persons of unsound mind, may be sued; but, as they are incapable of defending a suit by themselves, they must make their defense through others not under any disability. Minors and persons of unsound mind defend a suit by their regular guardians, if they have such; but if they have no guardian, or if the guardian is a complainant, or is adversely interested, they defend by a guardian *ad litem*, appointed by the Chancellor, or the Master, for that purpose.<sup>7</sup> Where a minor is, also, a married woman, it is nevertheless necessary that she should defend by a guardian *ad litem*, the practice being to appoint her husband to be her guardian *ad litem*, when he is a co-defendant, and there is no conflict of interest.<sup>8</sup>

Perhaps, however, a failure to have a guardian *ad litem* appointed for a married woman, who was a minor, but who joined with her husband in answering the bill, would not make the proceedings void as to her, if it appeared that she had full defense made for her, and was, in no way, prejudiced by not having a guardian *ad litem*. In such a case her husband would, no doubt, be deemed a *de facto* guardian *ad litem*.<sup>9</sup>

§ 88. **Suits against Married Women.**—In regard to married women, ordinarily their husbands must be joined with them as defendants in the suit,

<sup>1</sup> Sto. Eq. Pl., § 67.

<sup>2</sup> Sto. Eq. Pl., § 68.

<sup>3</sup> State v. Bank, 3 Bax., 395. See, Article on HOW THE STATE SUES AND IS SUEO, *post*, §§ 128; 815-816.

<sup>4</sup> See *Ante*, § 121. But foreign executors and foreign administrators may be sued here as trustees for effects in their hands. *Beeler v. Dunn*, 3 Head, 88.

<sup>5</sup> Board of Directors v. Bodkin Bros., 24 Pick., 700. And the jurisdiction in such cases cannot be waived, being to the subject-matter. *Ibid*.

<sup>6</sup> 1 Dan. Ch. Pr., 58; 157.

<sup>7</sup> Sto. Eq. Pl., § 70.

<sup>8</sup> 1 Dan. Ch. Pr., 163.

<sup>9</sup> See *Kindell v. Titus*, 9 Heisk., 743.

and their answer must also be joint. There are exceptions, however, to the rule, in both of its requirements. A married woman may be made a defendant, and answer as a single woman; as, for example, whenever her husband is complainant in the suit, and sues her as defendant; for, in such a case, he elects to treat her as a single woman for the purposes of the suit. But, generally, a married woman cannot answer separately, when her husband is joined, or ought to be joined, as a defendant in the suit, without an order of Court for that purpose, founded upon special circumstances. Thus, where a married woman is sued in respect to her separate estate, or where she claims as a defendant, in opposition to her husband, or lives separate from him, or disapproves of the defense which he wishes her to make, she may obtain an order of the Court for liberty to answer and defend the suit separately; and in such a case her answer may be read against her. If a married woman obstinately refuses to join in a defense with her husband, the latter may obtain an order to compel her to make a separate defense. If the husband has, upon leave, answered separately, the wife may, upon order, afterwards file her separate answer. If the husband be abroad, and not answerable to the jurisdiction, the complainant in the suit may obtain an order, that she shall answer separately. Except under circumstances of this and a similar nature, a married woman can defend a suit only jointly with her husband,<sup>10</sup> unless she is living separate from him in some of the cases stated in a preceding section.<sup>11</sup> But if she is engaged in the mercantile or manufacturing business in her own name, or by an agent, or as partner, she may be sued as a *feme sole* for the debts incurred in the conduct of such business, and no plea of coverture will avail in such cases.<sup>12</sup> Where the married woman is, also, a minor, she must defend by guardian *ad litem*, as before stated.<sup>13</sup>

But if a married woman is sued as a single woman, and fails to plead her coverture, a judgment or decree against her will be valid, and may be enforced against her general property, but not against her separate estate.<sup>14</sup>

§ 89. **Suits against Counties, Cities and other Corporations.**—Names stand for the things named, and we know things by their names. The law recognizes this, and allows all persons, natural and artificial, to be sued by those names whereby they are known.<sup>15</sup> Counties are sued by their statutory names, as “Shelby county,” “Davidson county,” “Knox county,” and the like. Cities and incorporated towns are generally sued by their corporate names, being the name given them in the Act or charter of incorporation; but, as the complainant may not know the exact corporate name of a city or town, he may sue it by the name it is generally known by. Thus, if its proper name is “The Mayor and City Council of Nashville,” the city may nevertheless be sued as “The City of Nashville.” Private corporations may be sued by their corporate names, or by the names by which they are generally known in the community where they do business.<sup>16</sup> The officers of a corporation may be made defendants along with their corporation, and required to answer under oath, when a discovery is sought.<sup>17</sup>

<sup>10</sup> Sto. Eq. Pl., § 71; 1 Dan. Ch. Pr., 178-185.

<sup>11</sup> *Ante*, § 84.

<sup>12</sup> Acts of 1897, Ch. 82.

<sup>13</sup> *Ante*, § 84.

<sup>14</sup> *Woodfolk v. Lyon*, 14 Pick., 269; *Embry v. Hoge*, 3 Shan. Cas., 101; *Jackson v. Everett*, *Ibid*, 811; *Flanagan v. Grocery Co.*, 14 Pick., 599.

<sup>15</sup> When a name is mentioned, if we know the person, or thing, his or its image, characteristics and personality, at once rise up before our mental vision. Thus, names are the symbols of things. *Nomina sunt symbola rerum*; and, as is said in Coke, *Nomina si nescis perit cognitio rerum*.—(If you know not the names of things, the knowledge of them is lost.) The law deals with things and persons by the names they are known by.

<sup>16</sup> Corporations, like other persons, are supposed to know their baptismal names, but third persons are not; and so, third persons may sue a corporation, as well as a natural person, by the name by which it, or

he, is generally known in the community, *Railroad v. Reidmond*, 11 Lea, 205; *Young v. S. Tredegar Iron Co.*, 1 Pick., 189; *E. T., V. & G. Railroad Co. v. Evans*, 6 Heisk., 607. It is sometimes said in our reports that a *misnomer* may be taken advantage of by plea in abatement in the Chancery Court. No decision to that effect can be found by the author of this work. Neither Daniel, Story, Maddock, Beames, nor Barbour refer in any way to such a plea, in the Chancery Court; on the other hand, both Daniel and Barbour give forms of titles of answers in case of the misnomer of the defendant, 2 Barb. Ch. Pr., 412; 1 Dan. Ch. Pr., 681; 731; 3 Dan. Ch. Pr., 2109. The form is as follows: The joint and several answer of J. D., in the bill called W. D., and of C. F., in the bill called G. P., defendants, to the bill of complaint of A. B. complainant.

<sup>17</sup> *Smith v. St. Louis Mutual Life Ins. Co.*, 3 Tenn. Ch., 599.

## ARTICLE III.

## GENERAL RULES AS TO PARTIES.

§ 90. Principles Applied in Determining the Proper Parties.

§ 91. General Rules as to Who Should be Parties.

§ 92. Exceptions to the General Rules as to Parties.

§ 93. Who are Proper, and who Necessary Parties.

§ 94. Who are Not Proper Parties.

§ 95. Summary of the Rules as to Parties.

§ 90. **Principles Applied in Determining the Proper Parties.**—Courts of Equity adopt two leading principles for determining the proper parties to a suit.

1. One of them is that the rights of no man shall be finally decided unless he himself is present, or at least has had a full opportunity to appear and vindicate his rights.

2. The other is, that, if the decision of any part of the subject-matter of the suit will affect the present or contingent rights or interests of any person or persons, or, if a complete decree cannot be made upon all the matters involved, without having certain persons, or the interests of certain persons, before the Court, then all such persons must be made parties, or their interests otherwise duly represented.

It is the constant aim of Courts of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it; and also, that future litigation may be prevented. Hence the maxim, that Courts of Equity delight to do complete justice, and not by halves. And hence, also, it is a general rule in Equity, (subject to certain exceptions, which will hereafter be noticed,) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties to it, either as complainants or as defendants, however numerous they may be. By this means the Court is enabled to make a complete decree between the parties, and to prevent future litigation by taking away the necessity of a multiplicity of suits. When all the parties are before the Court, the whole case may be seen; and full and complete justice done to all and in every particular, however various and conflicting their interests may be.<sup>1</sup>

§ 91. **General Rules as to Who should be Parties.**—It may, therefore, be stated as a general rule, that all persons who have any interest in the subject-matter of the suit, or who are liable to be affected by the decree prayed for, are proper parties to the suit. It matters not how small the interest, or whether that interest be legal or equitable, direct or remote,<sup>2</sup> so that it is an actual existing interest; a mere possibility or probability of a future interest will not be sufficient.<sup>3</sup> It must be borne in mind, however, that parties are necessarily made according to the charges in the bill, and not according to the result of the decree.<sup>4</sup> If the bill show the parties to be proper, that is sufficient.

All persons are proper parties who have any interest, legal or equitable, in the recovery sought, or who are in any way liable to be called on to satisfy the demands of those who complain. Persons who have the legal title to prop-

<sup>1</sup> Sto. Eq. Pl., § 72; 1 Dan. Ch. Pr., 19; *Allen v. Baugus*, 1 Swan, 404; *Browder v. Jackson*, 3 Lea, 156.

<sup>2</sup> Sto. Eq. Pl., §§ 138; 510; 1 Dan. Ch. Pr., 317; *Dechard v. Edwards*, 2 Sneed, 99.

<sup>3</sup> Dan. Ch. Pr., 316.

<sup>4</sup> *Cocke v. Evans*, 9 Yerg., 294.

erty in litigation, even though they have no beneficial interest therein, must be made parties;<sup>5</sup> and so must all persons without whom a complete decree, disposing of all the various parts of the controversy, could not be made. Equity delights to do justice in full and not by halves, and acting on this maxim, the Court requires the complainants to bring before it every person necessary to enable it to so completely determine the matters in dispute that no further litigation will be necessary.<sup>6</sup> This requirement is the price of the relief to be granted.

Whenever a person, if living, would have been a proper party, his privies in estate must be made parties; if his personal estate is involved, his personal representatives must be made parties. So, if a person would have been a proper party had his interests continued in him, his privy in estate must be made a party in his place, whether such privy be an assignee, or a purchaser at an execution, or other, sale.

Whenever a trust estate is liable to be affected by the decree, both the beneficiaries and trustee should be made parties; and whenever the rights of a wife are involved in the litigation, she and her husband must both be made parties, unless the husband has wrongfully abandoned the wife, in which case she may sue or be sued alone.

Inasmuch as the wife has an interest in the homestead, which she may assert in Court, both against her husband and his bargainees and creditors, it is always prudent to make her a defendant, along with her husband, in all suits brought to recover possession of the homestead, or to divest the title thereof out of him, or to sell the same, or to enforce any lien, claim or right thereto. If she is not made a party, no decree against her husband will bind her, and she may relitigate the question of homestead, or any other right in, or to the land, after final decree against her husband.<sup>7</sup>

A bill to affect an equity in land or personalty must make the holder of the legal title a party; and, on the other hand, a bill to affect the legal title must make the owner of the equitable title a party, if any there be.<sup>8</sup>

§ 92. **Exceptions to the General Rules as to Parties.**—In the first place, it must be always remembered that Courts of Equity observe general rules, only in so far as they contribute to the attainment of justice; and they struggle against technical rules which impede its power to do justice.<sup>9</sup> It is manifest that a general rule, established for a proper administration of justice, ought not to be adhered to in cases where it would defeat justice, for then it would destroy the very purpose for which it was established.<sup>10</sup> Therefore, the general rule that all persons interested must be made parties, is not adhered to:

1. **Where the Parties are Unknown**, and cannot be ascertained upon diligent inquiry;<sup>11</sup> in which case they must be made defendants by description, as hereafter shown.

2. **Where the Parties are Numerous**, but the general rights of those entitled to relief are the same, in which case one or more of them may sue on the behalf of all.<sup>13</sup>

3. **Where the Parties are Very Numerous**, so that it would be impracticable to make them all parties, without thereby causing almost interminable delays,<sup>12</sup> by reason of deaths, marriages and transfer of interests; but in such case provision is made to secure the rights of those not actually made parties.

<sup>5</sup> 1 Dan. Ch. Pr., 192; *Willingham v. Leake*, 7 Bax., 455.

<sup>6</sup> 1 Dan. Ch. Pr., 192.

<sup>7</sup> *Hawes on Parties*, §§ 26; 27; 66; 69; 110. See, also, *Williams v. Williams*, 7 Bax., 116; *Mash v. Russell*, 1 Lea, 543.

<sup>8</sup> *Jackson v. Coffman*, 2 Cates, 271.

<sup>9</sup> *Birdsong v. Birdsong*, 2 Head, 301; 1 Pom. Eq. Jur., §§ 59-60; *Sto. Fo. Pl.*, §§ 76 c-77.

<sup>10</sup> *Sto. Eq. Pl.*, § 96.

<sup>11</sup> *Code*, §§ 4352; 4358; *Sto. Eq. Pl.*, § 92; *McCaleb v. Crichfield* 5 Heisk., 291.

<sup>12</sup> *Sto. Eq. Pl.* § 94; 1 Dan. Ch. Pr., 272; *Lowery v. Francis*, 2 Yerg., 534; *McCaleb v. Crichfield*, 5 Heisk., 291. But in such cases the bill must allege that the suit is brought against the particular defendants, as representatives of the numerous class to which they belong. If the bill proceeds against the defendants sued, as individuals, and not as representatives of a class, then the proceedings in the cause will not bind those not made parties. *Brown v. Brown*, 2 Pick., 277.

<sup>13</sup> *Sto. Eq. Pl.* § 99; 1 Dan. Ch. Pr., 237-245; *Code*, § 4288. *Nance v. Busby*, 7 Pick., 315.

4. **Where Parties not in Being are Liable to be Affected.** It sometimes happens that persons not in being, (not *in esse*,) are interested in property which the interest of parties in being require to be brought before the Court. In such a case the bill may be filed by or against the interested persons in being, (*in esse*,) and the decree will be binding on those not in being.<sup>14</sup> All the interested persons in being must be made parties, both life-tenants and remainder-men: if no remainder-man be in being then the life-tenant must be made a party, in which case the remainder-men will be bound by the decree, they being represented by the life-tenant. Thus a decree of partition among tenants for life, with remainder to unborn sons, will be binding on the sons when born. In all such cases, however, all the parties interested who are in being must be before the Court.<sup>15</sup>

But in all these exceptional cases, so solicitous is the Court to attain the purposes of substantial justice, that it will generally require the bill to be filed, not only in behalf of the plaintiff, but also in behalf of all other persons interested, who are not directly made parties, so that they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing. The Court will go further, and in such cases: it will entertain a bill, or petition, which shall bring the rights and interests of the absent parties more distinctly before the Court, if there is any certainty, or even danger, of injury or injustice to them.<sup>16</sup>

In all the foregoing cases, the bill should show a state of facts bringing the suit within one of the exceptions to the general rule.<sup>17</sup>

It may here be remarked, that the general rule requiring all persons interested to be made parties, is not so much a right of the parties brought before the Court, as a rule prescribed by Courts of Equity, themselves, founded on their notions of public policy, on their anxiety to do justice to all persons interested in the subject-matter of the litigation, and on a desire to prevent future controversies.<sup>18</sup>

§ 93. **Who are Proper, and who Necessary Parties.**—A distinction exists between *proper* parties, and *necessary* parties: proper parties are those whose interests in the matters involved in the litigation are such that a decree may be properly pronounced without their being before the Court; whereas, necessary parties are those without whom no complete decree can be made.<sup>19</sup>

1. **Necessary Parties** are: 1, Those who are entitled to share in the benefits of the relief sought; 2, Those who are indebted to the complainants, or who are withholding from them their legal or equitable rights, or property; 3, Those who are doing, or attempting to do, complainants some injury; 4, Those who have legal or equitable titles or claims adverse to those set up by the complainants; 5, Those who hold titles or interests which, if not bound by the decree, might cloud the title of the complainants, or that of the purchaser at the Master's sale; and 6, Those having any interest in the subject-matter of the litigation, present or contingent.<sup>20</sup>

2. **Proper Parties** are: 1, Those against whom some of the defendants, if held liable to complainants, would be entitled to judgment over;<sup>21</sup> 2, Those whose rights in the subject-matter of the controversy have terminated, but no proper evidence thereof has been given, and the complainant's desire to conclude those rights by the decree;<sup>22</sup> 3, Those who, while not liable to complainants or to their co-defendants, have claims, admitted to be inferior to

14 Parker v. Peters, 2 Shan. Cas., 636.  
15 Sto. Eq. Pl., §§ 144-146; Gray v. Barnard, 1 Tenn. Ch., 198. See Wilson v. Schaefer, 23 Pick., 300.

16 Sto. Eq. Pl., § 96.  
17 Sto. Eq. Pl., § 95.  
18 Birdsong v. Birdsong, 2 Head, 291.  
19 High v. Battle, 10 Yerg., 186; 189. Cooper's Note; Rowan v. Mercer, 10 Hum., 359; Browder v. Jackson, 3 Lea, 153; Aiken v. Tuttle, 4 Lea, 103; Mullinix v. Perkins, 2 Cold., 87.

20 Katzenberger v. Weaver, 2 Cates, 620; Craig v. McKnight, 24 Pick., 690.

21 Sto. Eq. Pl., §§ 153; 169; 175; 176; Code, §§ 3620-3625.

22 As (1) where a mortgage debt has been paid, but the mortgage appears of record to be unsatisfied; and (2) where a tenant in common has conveyed his share to a complainant, but the deed has not been registered.

those of complainants, which should be bound by the decree to clear up the title, or adjust all equities.<sup>23</sup>

In determining whether a particular person is a necessary party or not, it must be considered: 1, Whether, if he should be omitted, the complainant could obtain all the relief he seeks; 2, Whether, if he should be omitted, he could relitigate any of the matters the bill seeks to have adjudicated; and, 3, Whether, if he should be omitted, and the property in dispute is sold, he could, either at law, or in Equity, disturb the title of the purchaser. If either of these questions be answered in the affirmative, such person is a necessary party; otherwise he is not.<sup>24</sup>

Where there is doubt whether a certain person is a necessary party, the safer rule is to make him a defendant, and thus leave the question to him and the Court to determine.

**§ 94. Who are Not Proper Parties.**—As a rule, a person who has no interest whatever, legal or equitable, in the subject-matter of the controversy, and for or against whom no decree in reference thereto can be pronounced, is not a proper party. To constitute a person a proper party, he must be so connected with the matter in dispute as: (1) to be entitled to have something beneficial decreed him, some relief granted him; or, (2) to be under some obligation to the complainant capable of being enforced; or, (3) to have some estate in him, legal or equitable, real or apparent, liable to be divested out of him for the complainant's benefit; or, (4) to be doing some act to complainant's injury subject to injunction; or, (5) to have some right involved in the controversy necessary for him to protect or enforce, or necessary to be determined.

Persons against whom no relief is prayed are not proper parties; nor are mere servants, agents, auctioneers, attorneys, arbitrators, sheriffs, clerks, constables, or other officers<sup>25</sup> issuing or executing process, proper parties, unless they have done, or are doing, acts entitling the complainant to affirmative relief against them.<sup>26</sup> It sometimes, however, becomes necessary to make such persons parties in order to give them authoritative notice of an injunction restraining them. Tenants claiming under a party to the suit,<sup>27</sup> and mortgagors who have conveyed all their legal and equitable interests in the estate,<sup>28</sup> are not, ordinarily, proper parties.

But there is a class of persons who have an interest in the property before the Court, and yet who are neither necessary nor proper parties to the suit. This class includes persons who have an interest in the subject-matter of the suit, but whose title is paramount to that of the complainant, and against whom, or whose title, the complainant is entitled to no relief and seeks no decree; such as (1) prior mortgagees in a foreclosure suit;<sup>29</sup> (2) owners of the fee in a suit for possession between tenants and sub-tenants;<sup>30</sup> and (3) the remainder-man in a suit between the tenants for life relative to their rights.<sup>31</sup> The persons having these paramount titles are neither necessary nor proper parties. Subsequent mortgagees are proper parties, but not necessary parties;<sup>32</sup> nevertheless, it is well to make them parties in order to conclude their rights and extinguish their claims by the decree.<sup>33</sup>

**§ 95. Summary of the Rules as to Parties.**—The following is a summary of the general rules as to parties in equitable suits:

1. All persons may sue and be sued; but persons under disability must sue

<sup>23</sup> Such as subsequent encumbrancers, and tenants of the defendants.

<sup>24</sup> Sto. Eq. Pl., § 76 a.

<sup>25</sup> Sto. Eq. Pl., § 231. But, see *post*, § 815.

<sup>26</sup> If an officer has made a levy on personalty he is a necessary party when the personalty levied on is in question. *Buckner v. Abrahams*, 9 Tenn., Ch., 348. Money in a clerk's or other officer's hands may be garnished, but in such a case the owner or claimant of the fund must be made a party. See, *post*, § 881.

<sup>27</sup> 1 Dan. Ch. Pr., 263.

<sup>28</sup> 1 Dan. Ch. Pr., 261. Nevertheless, when there is any question as to the tenancy, or as to the transfer by the mortgagor, it is prudent to make parties of the tenant, or mortgagor, as the case may be, in order to bind them by the decree.

<sup>29</sup> Sto. Eq. Pl., §§ 193; 230; *Rowan v. Mercer*, 10 Hum., 359.

<sup>30</sup> Code, § 3354.

<sup>31</sup> 1 Dan. Ch. Pr., 209.

<sup>32</sup> *Rowan v. Mercer*, 10 Hum., 359; 1 Meigs' Dig., § 560, sub-sec. 13.

<sup>33</sup> Sto. Eq. Pl., § 193.

and be sued through persons not under disability, with some exceptions in case of married women.

2. All persons having any interest or title, legal or equitable, in the subject-matter of the suit, or liable to be beneficially or injuriously affected by the relief sought, are proper parties, unless they are very numerous; in which case some may sue or be sued in behalf of all, when it can be done without injustice to any.

3. All persons beneficially interested in the relief sought may join as complainants; all other persons should be made defendants. Persons under disability should ordinarily be made defendants, unless they are specially complaining of violations of their rights.

ARTICLE IV.

WHO SHOULD BE COMPLAINANTS.

§ 96. General Rules as to Parties Complainant.  
 § 97. Who should be Complainants when the Parties are Very Numerous.

§ 98. All Parties having Concurrent Interests should be Co-complainants.  
 § 99. How Husband and Wife Sue and are Sued.

§ 96. **General Rules as to Parties Complainant.**—All persons who have a beneficial interest in the relief to be sought may join as complainants. It is not necessary that the interest of the complainants should in every instance be identical; a community of interest is, generally, all that is requisite.<sup>1</sup> There must, however, be no incongruity in their claims, for a joinder of complainants with distinct, inconsistent and hostile claims and grounds of relief, would lead to much inconvenience and confusion, and will not be allowed by the Court.<sup>2</sup> Neither can complainants join in a suit on the ground that if some of them are not entitled to recover, the others are entitled;<sup>3</sup> but the bill must show on its face that each and all of the complainants are interested in the relief sought, and have a right to the same, although their proportions of the recovery may be different. A mere spark of right in a party, without any beneficial interest whatever, will justify making him a co-complainant when the little right he has is consistent with the rights of the other complainants.<sup>4</sup>

All persons having the same interest, or seeking the same relief, may join as complainants in the same bill;<sup>5</sup> indeed, they should join, if the consent of all can be obtained, unless their number is too great, and then, as elsewhere shown,<sup>6</sup> one or more may sue in behalf of all. Whenever a person who may, or should be, a complainant refuses to join in the suit, or is out of reach so that he cannot be consulted, he must be made a defendant.<sup>7</sup>

The rule that persons claiming under different titles cannot be joined as complainants in the same suit does not apply to cases where their titles, though distinct, are not inconsistent with each other. Thus, all the creditors of a decedent may join as co-complainants to have his assets properly administered, although they claim under distinct titles.<sup>8</sup> So, two or more persons may unite to enjoin a nuisance injurious to all.<sup>9</sup>

§ 97. **Who Should be Complainants when the Parties are very Numerous.**—As already shown, the Court does not require all of the persons interested in a suit to be made parties, when it is impracticable.<sup>10</sup> If the persons interested are too numerous to be all brought before the Court, the Court will not insist on their being made parties,<sup>11</sup> but will allow one or more to sue in behalf of their entire class. Cases of this character may be divided into three classes:

1 *Tillman v. Searcy*, 5 Hum., 487.  
 2 *Ibid.*  
 3 *Sto. Eq. Pl.*, § 510.  
 4 *Henderson v. Peck*, 3 Hum., 247.  
 5 1 *Dan. Ch. Pr.*, 191.  
 6 *Post*, § 97.  
 7 1 *Dan. Ch. Pr.*, 190, notes.  
 8 1 *Dan. Ch. Pr.*, 235.  
 9 *Madison v. Copper Co.*, 5 Cates, 331.

10 *Ante*, § 92.  
 11 *Sto. Eq. Pl.*, §§ 94; 135 *a*. The question may arise: What number would be too numerous to make them all parties? No doubt the answer to this question would be governed somewhat by the magnitude

of the individual interests. If the various interests be very small, it is suggested that ten or more would be too numerous, as ten is a multitude in law, *Bouvier's L. Dic.*, "Multitude." In *McCaleb v. Crichfield*, 5 Heisk., 289., thirty-nine legatees were held to be too numerous. In an English case, twenty creditors, interested in real estate, were held not to be too numerous, 1 *Dan. Ch. Pr.*, 237; see, also, *Sto. Eq. Pl.*, § 131 *a*. *Finney v. Garner*, 2 Cates, 67. The complainant who undertakes to represent a class must have a good ground of suit, or the suit may be dismissed. *Nance v. Busby*, 7 *Pick.*, 315; 1 *Dan. Ch. Pr.*, 244.



1. **Where the Question is one of Common or General Interest.** In such a case one, or more, interested in the relief sought, may sue for the benefit of all. This class includes creditors of a decedent,<sup>12</sup> creditors of a fraudulent vendor,<sup>13</sup> creditors who are parties to a deed of trust,<sup>14</sup> legatees under a will,<sup>15</sup> distributees of the estate of a decedent,<sup>16</sup> and creditors of an insolvent partnership, or of an insolvent corporation, and indeed, all persons interested in the distribution of any fund, especially a trust fund.

2. **Where the Persons Interested are Members of a Voluntary Association.** This association may be for either public or private purposes. In cases of this sort, a few may sue for the benefit of themselves and all the others, care being taken to have a due representation of all substantial interests before the Court.<sup>17</sup> This class includes literary and social clubs, unincorporated insurance, labor, political, charitable, and religious associations; and all sorts of voluntary societies for pleasure or improvement; partaking somewhat of the character of a partnership. In cases under this sub-division, suits may be brought against a few of very many members of such societies, clubs and associations, care being taken to make defendants of those who fairly represent the interest of all. In such case it would be well to make defendants, (1) of the managers, executive committee, or other directory of the society, if any exist; or, (2) of the committee who incurred the liability sought to be enforced. The bill should charge that the members of the society are numerous, and many unknown, and should give the reason for suing the defendants in particular.<sup>18</sup>

3. **Where the Parties are Numerous, but have Common Rights or Interests.** In this class there is usually a privity of interest between the parties; but such privity is not essential. There must, however, be a common interest, or a common right, which the bill seeks to establish, and enforce, or a general claim, or privilege, which it seeks to establish, or to narrow, or to take away. In such cases, a few may sue in behalf of themselves, and all others standing in the same predicament, the Court taking care that sufficient persons are before it to fairly and fully ascertain and determine the general right in contest.<sup>19</sup>

§ 98. **All Parties Having Concurrent Interests Should Be Co-complainants.** All persons who have a right to partake of a general recovery should join as complainants in prosecuting a suit to obtain such recovery.<sup>20</sup> There are several reasons for this rule: 1, It simplifies the examination and cross-examination of witnesses to have the parties all properly marshalled, those having the same interests all standing on one side; 2, It makes the argument and the hearing more orderly; 3, It enables a decree to be drawn more logically and with less verbiage; 4, It has the effect to better apportion the burdens of the litigation, and to lessen the costs; and, 5, It enables both sides to prepare their cases with more accuracy, speed, and general satisfaction.

In suits to recover personal property, all of the joint owners must join as complainants,<sup>21</sup> and in suits to enforce any joint right, joint obligation, or joint claim, all the joint owners must join as complainants or give some good reason for not so doing, in which latter case the joint owner not suing must be made a defendant.<sup>22</sup> All the joint owners of a fund should join in a suit for its recovery; all partners, joint trustees, joint executors, and joint administrators must join in a bill filed to assert their claims as such.<sup>23</sup>

§ 99. **How Husband and Wife Sue and are Sued.**—Husband and wife, although one in law,<sup>24</sup> are two in Equity, especially when the separate property of the wife is concerned. In law the husband may sue alone, and in his own

12 Sto. Eq. Pl., § 99; Code, § 2368; *Dulles v. Read*, 6 Yerg., 53.

13 Code, § 4288.

14 Sto. Eq. Pl., § 102.

15 Sto. Eq. Pl., § 104; *McCaleb v. Crichfield*, 5 Heisk., 288.

16 Sto. Eq. Pl., § 105.

17 Sto. Eq. Pl., § 107.

18 Sto. Eq. Pl., § 116

19 Sto. Eq. Pl., § 120; *Hunter v. Justices*, 7 Cold.,

49; *Lowery v. Francis*, 2 Yerg., 534.

20 1 Dan. Ch. Pr., 190, note 5.

21 *Barrow v. Nave*, 2 Yerg., 228; *Collier v. Yearwood*, 5 Bax., 581.

22 Sto. Eq. Pl., § 159.

23 Sto. Eq. Pl., § 210; 1 Dan. Ch. Pr., 221-227.

24 1 Dan. Ch. Pr., 87.

name, for all personal property or contract rights accruing to the wife, or to the husband and wife jointly, during marriage; but in Courts of Equity, in all cases in which the husband seeks to recover the property of his wife, he should join her with him as co-complainant, whether the right to the property accrued before or during marriage. The reason of this rule is the parental care Courts of Equity exercise over persons under disability, and the necessity of guarding the wife's equity to a settlement.<sup>25</sup>

But when it is necessary for her to sue alone, as stated elsewhere,<sup>26</sup> she must sue, ordinarily, by next friend, making her husband a defendant. Whenever there is any antagonism of interest between her and her husband, whenever her husband, by his acts or negligence, is estopped or barred of his right to sue along with his wife for the assertion of her rights, she may sue by next friend, making the husband a defendant.<sup>27</sup> When the husband has deserted his wife, or has been adjudged a *non compos*, she may both sue and be sued as a single woman.<sup>28</sup>

Whenever the wife is sued, her husband must ordinarily be made a defendant along with her,<sup>29</sup> even if she is sued as an executrix,<sup>30</sup> unless he has deserted her, or is adjudged a *non compos*, or she is sued on a debt incurred by her in a mercantile or manufacturing business,<sup>31</sup> when she may be sued as a *feme sole*. And as a wife can sue her husband in the Chancery Court whenever her separate interests require, so a husband may sue his wife in the same Court when his separate interests so require.<sup>32</sup>

<sup>25</sup> 1 Dan. Ch. Pr., 89-92.

<sup>26</sup> *Ante*, §§ 83-84.

<sup>27</sup> *Ante*, § 84; see, also, cases cited in 3 Meigs' Dig., §§ 1617-1619; 1 Dan. Ch. Pr., 109.

<sup>28</sup> *Ante*, §§ 84; 88.

<sup>29</sup> 1 Dan. Ch. Pr., 178.

<sup>30</sup> 1 Dan. Ch. Pr., 253.

<sup>31</sup> Acts of 1897, Ch. 82.

<sup>32</sup> 1 Dan. Ch. Pr., 109; 179.

## ARTICLE V.

## WHO SHOULD BE DEFENDANTS.

§ 100. General Rule as to Parties Defendant.	§ 102. Suggestions as to Whom to make Defendants.
§ 101. When Parties under Disability should be made Defendants.	

§ 100. **General Rule as to Parties Defendant.**—All persons against whom relief is sought, or who are interested in resisting the relief sought, must necessarily be made defendants; as must, also, all others whose interests in the subject-matter of the suit are adverse to, or inconsistent with, the interests of the complainants. All persons claiming any title, legal or equitable, to the property in controversy, must be made defendants, if such title is in conflict with the title set up by the complainants. All persons whose rights are concurrent with those of the complainants, but who have not consented to become complainants, must be made defendants.<sup>1</sup> And, in general, all persons interested in the subject-matter of the suit, or liable to be affected in any way by the decree sought, whether their interest or liability be legal or equitable, who do not join as complainants in filing the bill, should be made defendants.<sup>2</sup>

§ 101. **When Parties under Disabilities should be made Defendants.**—Although lunatics may appear by attorney when suing or being sued,<sup>3</sup> nevertheless, when there is a choice of position in suits affecting their interests, they should be made defendants, and should defend by guardian *ad litem* when they have no regular guardian. The same rule applies to minors, with, perhaps, even greater force. The reason of this rule is, the Court can better guard the interests of minors when defendants than when complainants; and, besides, the attitude of a defendant in a suit in Equity is, in various respects, more advantageous and safe for infants than that of a complainant.<sup>4</sup> Nevertheless, it is not reversible error to join a *non compos* or a minor as complainant in a suit necessary to assert their rights, they, of course, suing by guardian, if they have one, otherwise by next friend. A lunatic may sue, or be sued, in person, and may appear or defend by a Solicitor of the Court, like a person *sui juris*;<sup>5</sup> but the more prudent course is to have them sue by next friend when they are complainants, and defend by guardian *ad litem* when defendants.

§ 102. **Suggestions as to Whom to make Defendants.**—In determining who should be made complainants and who defendants to a suit in Chancery, the draftsman of the bill should ascertain: 1, Who are the persons to be benefited by the relief sought; 2, Who are the persons against whom the relief is sought, and 3, Who are the persons, if any, having rights, legal or equitable, without beneficial interests, liable to be affected by the decree.

1. **The First Class** includes all who have a right to be benefited by the decree prayed for; and if there be no conflicts in their respective interests, they may all be joined as complainants, and should be so joined, if their consent can be obtained. If such consent cannot be had, they must be made defendants.

2. **The Second Class** includes all persons against whom relief is sought; all

<sup>1</sup> Cook v. Hadley, Cooke, 465.

<sup>2</sup> Adams' Eq., 312.

<sup>3</sup> McDowell v. Morrell, 5 Lea, 286; Rankin v. Warner, 2 Lea, 302.

<sup>4</sup> Davidson v. Bowden, 5 Sneed, 130; McGavock v.

Bell, 3 Cold., 521; Thompson v. Mebane, 4 Heisk., 379. If an infant is made a co-complainant with

others in a bill, and it appears that it will be more for his benefit that he should be made a defendant, an order to strike his name out as a complainant, and make him a defendant, may be obtained upon motion. 1 Dan. Ch. Pr., 72.

<sup>5</sup> 5 Lea, 286; 2 Lea, 302, cited above.

persons liable to the complainants' demands, primarily or secondarily; all persons charged with doing complainants some wrong, or withholding some right. This entire class must be made defendants, unless there be some special reason for not suing them, such as their death, insolvency, or absence from the State, which reason should be stated in the bill. If there be any remaindermen not in being, or any other person not in being, having a contingent interest, the life-tenant must be made a defendant to represent them.

**3. The Third Class** includes all those having dry titles, legal or equitable, without any beneficial interest, to the property in litigation; such as holders of the naked legal title; dry or naked trustees, absolute assignors of a non-negotiable thing; mortgagors, who have informally assigned their entire equity of redemption; mortgagees under an absolute deed whose debt has been fully paid, or wholly transferred; and, in short, all persons who, while in no particular default, are nevertheless so connected with the subject-matter of the litigation that they should be bound by the decree, either to wholly determine all the various branches of the controversy, or to perfect the title to the property before the Court. All persons belonging to this third class may be made defendants; if, however, there be no conflict between the rights and interests of the first and third classes the persons in the latter may be joined as co-complainants; but, as a rule, the better course is to make all persons in the third class parties defendant.

If the persons seeking benefits under the decree sought have adverse or conflicting interests in the subject-matter of the suit, or in the relief sought, they cannot join as co-complainants; and one set or the other of those having conflicting interests must be made defendants; for, in a law-suit, as in a battle, assailants cannot engage in a conflict between themselves, and make a successful assault on their adversaries, at the same time. There must be a community, or, perhaps more correctly speaking, a congruity of interests among the complainants; and their cause of action, or right of recovery, must be substantially the same, although their proportions of the recovery, or their interests therein, may be unequal. And, as a rule, there must be a common source of title or interest, or at least some bond of union, between the various complainants, such as exists between joint heirs; between partners; between tenants in common; between joint trustees; between joint executors, or joint administrators; between the creditors of the same estate; between the wards of the same guardian; between the beneficiaries under the same trust; between the legatees or devisees under the same will; between the sureties on the same instrument; between the payors or payees of the same obligations; between the parties to the same contract, bond, or deed; between members of the same association, or corporation, and, generally, between the persons subject to the same general burden, or entitled to share in the same general benefit.

On the other hand, there need be no community or congruity of interests among the defendants; they may, and often are, adversely concerned among themselves, or liable in different amounts, in different degrees, and on different accounts; indeed, some of the defendants may have the same rights of recovery and general relief as some of the complainants, or may have other affirmative rights against some of their co-defendants, and may be entitled to a decree against some of them, either in the first place, as though they were suing as complainants or, in the second place, because they are only liable to complainants in case of default by their co-defendants. To illustrate this: One of several wards, who has had several guardians, may sue all of his guardians, and all of their sureties, in one suit, and may make the other wards defendants: in such a case, the Court may decree in favor of the defendant wards, as well as the complainant; and may, also, decree the primary liability of the obligees on some of the bonds, and decree against them in favor of the obligees only secondarily liable, the pleadings so permitting.

Sometimes, it cannot be ascertained at the institution of a suit whether a certain person is a necessary party or not, his rights, or liabilities depending for their existence upon the adjudication itself: in all such cases, the person should be made a defendant.<sup>6</sup>

<sup>6</sup> Thus, on a bill to enforce a vendor's lien, after the vendee's death, the widow *may* have an interest, | because there may be a surplus after the debt and costs are paid. *Edwards v. Edwards*, 5 Heisk., 123.

ARTICLE VI.

NEXT FRIENDS AND GUARDIANS AD LITEM.

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| <p>§ 103. Next Friends, Generally Considered.<br/>         § 104. Next Friends of Married Women.<br/>         § 105. Next Friends of Minors and Lunatics.<br/>         § 106. Guardians <i>ad Litem</i> generally Considered.</p> | <p>§ 107. Powers, Duties and Liabilities of Guardians <i>ad Litem</i>.<br/>         § 108. Some Practical Suggestions to Guardians <i>ad Litem</i>.</p> |
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§ 103. **Next Friends, Generally Considered.**—A next friend, or, as he is frequently termed, a *prochein ami*, is a sort of self-appointed guardian who assumes the duty and responsibility of bringing a suit in behalf of a person under some disability, legal or natural.<sup>1</sup> The person thus under disability, is generally (1) a married woman, or (2) a minor, or (3) a person of unsound mind. These persons not being able to bind themselves by contract for costs of suit, and, in case of minors and persons of unsound mind, not being of sufficient mental capacity and business experience to comprehend their rights and how to protect them, it becomes necessary for some friend to intervene in their behalf, whenever their interests require the interposition of a Court.<sup>2</sup> This friend is called the next friend, because formerly he was the nearest (or next) kinsman of the person under disability. But, now, any person may act as next friend, provided he is acting in good faith,<sup>3</sup> and secures the costs.<sup>4</sup>

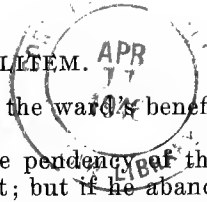
The object of the rule requiring a next friend in the prosecution of suits for the benefit of persons under disability, is to have some one responsible for costs and liable to judgment therefor; and to have some one upon and against whom the Court may make and enforce its orders, and who will be subject to punishment for contempt in case of disobedience to, or violation of, the mandates of the Court; and for the more especial purpose of having some one before the Court capable of looking after and caring for the interests of those incapable of understanding and defending their own rights.<sup>5</sup>

It is the duty of a next friend sedulously to watch and protect the interests of his ward<sup>6</sup> involved in the litigation. He is, in the conduct of the suit, subject to the control of the Court; and if he fail to do his duty, or if any other sufficient ground be brought to the knowledge of the Court, as, if he have an interest in the litigation antagonistic to the interests of his ward, the Court not only has the power, but it is its duty, to remove him, and appoint another, who may be more faithful, or not subject to a similar temptation.<sup>7</sup>

Were the rule otherwise, the ends of justice might be defeated, and iniquities perpetrated by a party, whose interests are antagonistic to those of his ward, assuming the office of next friend, and bringing his ward before the Court, in order, through the forms of law, to rob it of its just rights and at the same time accomplish his own avaricious purposes.<sup>8</sup> The next friend is deemed an officer of the Court, and the minor a ward of the Court.<sup>9</sup> If two suits are brought by different persons, acting as next friends, the Court will allow that one of them

<sup>1</sup> Kirkman, *ex parte*, 3 Head, 519.  
<sup>2</sup> Rankin *v.* Warner, 2 Lea, 302; Leftwick *v.* Hamilton, 9 Heisk., 313.  
<sup>3</sup> Sto. Eq. Pl., § 57.  
<sup>4</sup> Miles *v.* Kaigler, 10 Yerg., 17.  
<sup>5</sup> Rankin *v.* Warner, 2 Lea, 302; Leftwick *v.* Hamilton, 9 Heisk., 313.  
<sup>6</sup> The person in whose behalf a next friend sues

is not, technically, his "ward," but this word expresses their relation better, perhaps, than any other.  
<sup>7</sup> Simpson *v.* Alexander, 6 Cold., 630; 1 Dan. Ch. Pr., 75.  
<sup>8</sup> *Ibid.*: Sto. Eq. Pl., § 59.  
<sup>9</sup> Sto. Eq. Pl., § 57. Stewart *v.* Sims, 4 Cates, 296.



to be proceeded in which, on inquiry, appears most to the ward's benefit, and will stay proceedings in the other.<sup>10</sup>

If the ward's disability should terminate during the pendency of the suit, he may elect whether he will continue it, or abandon it; but if he abandons it he will be taxed with the costs, unless the Court should be of opinion that the bill was improperly filed, in which case the costs will be adjudged against the next friend.<sup>11</sup> The next friend of a minor cannot receive the money on a judgment he recovers for his ward, nor can he confess satisfaction thereof.<sup>12</sup>

A next friend cannot elect for a person under disability, and the Court will not, unless the record enables it to make an intelligent and effectual election;<sup>13</sup> nor can a next friend compromise a suit, or receive or receipt for the amount due his ward, or collect or compound the debt recovered by suit,<sup>14</sup> or submit a case, pending in Court, to arbitration.<sup>15</sup>

The next friend generally signs and swears to the bill, unless his ward better knows the facts, and then the latter may sign and swear to it.<sup>16</sup>

If a next friend dies or becomes incapacitated to act, pending a suit, a new next friend may, on motion, be substituted in his stead with the consent and approval of the Court.

§ 104. **Next Friends of Married Women.**—The general reasons already given for requiring a married woman to sue by next friend, and the reasons stated in the books, show that the principal, if not the sole, object is to secure the payment of the costs that may be adjudged against her.<sup>17</sup> A next friend of an infant may sue without obtaining the latter's consent, but the next friend of an adult married woman cannot.<sup>18</sup> The married woman may change her next friend, on giving bond to indemnify him against the costs he has incurred,<sup>19</sup> provided she be of age and the Court consent.

In view of this state of the law, and of our statutes in behalf of married women, and considering the fact that the next friend of an adult married woman is generally appointed by the wife, and is often a mere nominal party except as to costs, it is suggested that an adult married woman, who gives security for costs, may prosecute a suit in her own name, when it is necessary to do so to protect her separate interests against her husband.<sup>20</sup> Courts of Chancery regard substance, not form.

§ 105. **Next Friends of Minors and Lunatics.**—Although the practice of allowing infants and persons of unsound mind to sue by their guardian, describing him as such, prevails in this State, still he is in all respects a next friend; and is charged with all the duties and liabilities, is subject to the same restraints, and bears the same relation to the infant, or *non compos*, and to the suit, as though he had been described as his next friend.<sup>21</sup> The distinction, however, is more formal than material: if it be to the interest of the ward to have the guardian considered as a next friend, he will be so deemed. The Chancery Court of this State has full and original jurisdiction of the persons and estates of minors and persons of unsound mind, and may appoint, or remove, guardians whenever the interests of the minor, or *non compos*, require such action.<sup>22</sup>

<sup>10</sup> Sto. Eq. Pl. § 60. If the next friend of an infant does not do his duty, or if any other sufficient ground be made out, the Court will remove him. Thus, when the next friend will not proceed with the cause, the Court will change him. And although a next friend may not have been actually guilty of any impropriety or misconduct, yet if he is connected with the defendants in the cause in such a manner as to render it probable that the interest of the complainant will not be properly supported, the Court will remove such next friend and appoint another in his place. 1 Dan. Ch. Pr., 75.

<sup>11</sup> 1 Dan. Ch. Pr., 78.

<sup>12</sup> Cody v. Roan Iron Co., 21 Pick., 515. But a next friend may appeal his ward's case to the Supreme Court. Loftis v. Loftis, 10 Pick., 232.

<sup>13</sup> Parsons v. Kinzer, 3 Lea, 347.

<sup>14</sup> Miles v. Kaigler, 10 Verg., 10.

<sup>15</sup> Tucker v. Dabbs, 12 Heisk., 18.

<sup>16</sup> 2 Barb. Ch. Pr., 361.

<sup>17</sup> 1 Dan. Ch. Pr., 111.

<sup>18</sup> 1 Dan. Ch. Pr., 110; Sto. Eq. Pl., § 61.

<sup>19</sup> 1 Dan. Ch. Pr., 112; Leftwick v. Hamilton, 9 Heisk., 313; and see Phillips v. Hassell, 10 Hum., 198; Murphy v. Green, 2 Bax., 403; Cheatham v. Huff, 2 Tenn. Ch. 616.

<sup>20</sup> Under the old English practice, a wife could sue alone, and without next friend, on making affidavit that she could not get a person to act as her next friend, who was good for the costs. 1 Dan. Ch. Pr., 39; 111; and see Rankin v. Warner, 2 Lea, 305.

<sup>21</sup> Simpson v. Alexander, 6 Cold., 630.

<sup>22</sup> Code, §§ 4298-4299; Lake v. McDavitt, 13 Lea, 26.

While it is certain that a minor must sue by guardian, or next friend, the rule that the same necessity exists in case of a person of unsound mind is not so inflexible. The reason seems to be, the difficulty that sometimes exists to determine whether a particular person is of sound or unsound mind.<sup>23</sup> If no objection is interposed, a *non compos* may maintain a suit in his own name, and without guardian, or next friend; and if the objection should be made, and no one will assume the role of guardian, or next friend, the Court would hesitate long before dismissing a meritorious bill for want of a next friend,<sup>24</sup> especially if the costs were secured, and a Solicitor of the Court was acting as counsel for the *non compos* complainant.

Where a bill has been filed in the name of an infant, his coming of age is no abatement of the suit; but he may elect whether he will proceed with it, or not. If he goes on with the cause, all future proceedings may be carried on in his own name, and the bill need not be amended or altered. He will also be liable to all the costs of the suit, in the same manner that he would have been had he been of age when the bill was originally filed. If he chooses to abandon it, he may move to dismiss it on payment of costs by himself; but he cannot compel the next friend to pay the costs, unless it be established that the bill was improperly filed. Thus, when an infant, on attaining the age of twenty-one years, moved to dismiss a bill filed on his behalf, with costs to be paid by the next friend, the Court refused to make the order, but directed the bill to be dismissed on the late infant plaintiff giving an undertaking to pay the costs of the next friend.<sup>25</sup>

No doubt, the same rule would apply in case of a bill by a next friend of any other person under disability, in case such person's disability should terminate while the suit was pending.

§ 106. **Guardians ad Litem Generally Considered.**—Defendants who are minors, or of unsound mind, are the wards of the Court, which must represent them in the procurement of counsel; and in discharging this duty the Court should select men learned in the law, and capable of taking care of the interests of their wards;<sup>26</sup> and the person so chosen should, of course, have no interests antagonistic to those of his ward.<sup>27</sup> If the minor, or *non compos*, has a regular guardian, he must appear and defend by such guardian.<sup>28</sup>

No step can be taken against a minor, or *non compos*, until after the appointment of a guardian *ad litem*; the appointment must not only be made, but it must be accepted. The complainant is not a proper party to nominate a guardian *ad litem*; but he may move the Chancellor, or Master, to make an appointment.<sup>29</sup> No appointment can be made until after the minor, or *non compos*, has been duly brought into Court by service of process, or by publication;<sup>30</sup> and he is not in Court until the return day.

It is not necessary for the minor to actually appear in Court, in person, when sued, unless the bill is filed by his guardian to sell his property, and he is over fourteen years of age.<sup>31</sup> If, at the appearance term, or at the appearance rule day, no friend of the minor moves to have a guardian *ad litem* appointed for him, such guardian may be appointed by the Chancellor, or Master, on application of the complainant, supported by an affidavit that the minor has no general guardian.<sup>32</sup> Where a married woman is a minor she must defend by a guardian

<sup>23</sup> McDowell v. Morrell, 5 Lea, 286.

<sup>24</sup> Rankin v. Warner, 2 Lea, 305.

<sup>25</sup> 1 Dan. Ch. Pr., 78.

<sup>26</sup> Kerbaugh v. Vance, 5 Lea, 114.

<sup>27</sup> Elrod v. Lancaster, 2 Head, 572.

<sup>28</sup> Britain v. Cowen, 5 Hum., 315; Code, § 4420.

<sup>29</sup> 1 Dan. Ch. Pr., 162.

<sup>30</sup> Taylor v. Walker, 1 Heisk., 739; Wheatley v. Harvey, 1 Swan, 485.

<sup>31</sup> In such case the minor must answer the bill in person. Code, § 3325; see Chapter on Suits to Sell Property of Persons under Disability; *post*, §§ 972-979.

<sup>32</sup> Code, § 4420; 1 Dan. Ch. Pr., 162. If the bill alleges there is no general guardian, and it is sworn to, no further affidavit is necessary. The guardian *ad litem* ordinarily puts in a general answer, submitting the rights of the infant to the protection of the Court; but it is his duty to ascertain what these rights are, and if a special answer is necessary or advisable for the purpose of bringing such rights before the Court, he should put in such an answer. 1 Barb. Ch. Pr., 148; and may apply for leave so to do after having filed a formal answer.



*ad litem*, like any other minor, but in such case her husband may be appointed when he is an adult and a co-defendant.<sup>33</sup>

§ 107. **Powers, Duties, and Liabilities of Guardians ad Litem.**—The powers, and duties of a guardian *ad litem* are limited, and strictly confined to the defense of the particular suit in which he is appointed. He is to defend the suit in the Court from which he derives his authority, according to the rules and principles of law applicable to the case, as administered in that tribunal, and in conformity with the ordinary mode of trial and practice of the Court in similar cases. It is not within the scope of his authority, or duty, to consent to change the tribunal for the trial, or that the decision shall be upon principles other than those applicable to like cases, in the forum in which the suit is pending. He has no power to submit the case to an arbitration, but he may exercise a sound discretion in reference to mere matters preliminary to a trial, and which cannot, ordinarily, affect or prejudice the merits of the case, or the interest of the minors, such as waiving notice of copy of bill, and agreeing to a revivor.<sup>34</sup> He cannot, however, waive service of process on his wards, nor make them parties to the suit,<sup>35</sup> because there can really be no lawful appointment of a guardian *ad litem* until the return day after service of process on the minor, or *non compos*.<sup>36</sup>

A guardian *ad litem* is not expected to assume any affirmative responsibilities. His duty is to *guard* the interests and rights of his ward. The Court in appointing him gives him a shield, but no sword; and if in the progress of the suit he thinks a cross bill should be filed, or other affirmative step taken, he should by affidavit, petition, or, if the facts are already of record, by motion, take counsel of the Court in the matter, and get the Court's leave before he acts further. On filing a cross bill the guardian *ad litem*, *pro hac vice*, becomes next friend of the infant.

He cannot bind his ward by admissions,<sup>37</sup> but may consent to any hearing at Chambers, and may waive formalities.<sup>38</sup> He may consent to take evidence without the usual notice, and may consent to other matters relating to the conduct of the cause. But he should be cautious about such consents, and should submit to the Court every question involving the rights of his ward. He must make as vigorous a defense as the law, and facts, and his ward's interests will justify; and should not delay the cause by failing to put in his pleading, or his proof, or to take other proper steps. Courts expect of guardians *ad litem* a faithful and diligent compliance with their duties, and for any gross failure therein they may be held liable to their wards for all damages sustained, and may be taxed with costs.<sup>39</sup>

§ 108. **Some Practical Suggestions to Guardians ad Litem.**—The first thing a guardian *ad litem* should do, after his appointment, is to examine the subpoena or publication notice, to see whether his ward is properly in Court; because, if the ward is not properly before the Court, the appointment of the guardian *ad litem* is a nullity, and all the proceedings in the cause, so far as the ward is concerned, are absolutely void. The guardian *ad litem* owes this duty: (1) to the Court, whose trusted officer he is: (2) to his ward, whose interests he is bound to guard; and (3) to himself, as an evidence of proper diligence on his part, and as a precaution against the humiliation that would result to him from proceeding in the cause when his ward is not before the Court.

The second duty of the guardian *ad litem* is to thoroughly possess himself of the facts of the case, so that he may know what are the rights, what the duties, and what the interests of his ward. This duty is not performed by merely reading the bill, and making some general inquiries of the complainant's

<sup>33</sup> 1 Dan. Ch. Pr., 163.

<sup>34</sup> Hannum v. Wallace, 9 Hum., 129.

<sup>35</sup> Frazier v. Pankey, 1 Swan, 73; Robertson v. Robertson, 2 Swan, 199; Rucker v. Moore, 1 Heisk., 279; Taylor v. Walker, *Ibid.*, 738.

<sup>36</sup> Taylor v. Walker, 1 Heisk., 739; Hannum v. Wallace, 9 Hum., 134-135; Frazier v. Pankey, 1

Swan, 75; Bruce v. Bruce, 11 Heisk., 765; Kelley v. Kelley, 15 Lea, 199.

<sup>37</sup> Lewis & Lenoir v. Outlaw, 1 Tenn., (Overt.) 141.

<sup>38</sup> Acts of 1903, Ch. 248, sec. 1.

<sup>39</sup> 1 Dan. Ch. Pr., 160-163.

Solicitor; he should consult persons who are friendly to the ward, and who know the facts of the case. If the ward is old enough to understand the matters in litigation, and is accessible, and his interests, rights and duties are proper matters to be submitted to him considering his age and judgment, the guardian *ad litem* may consult him, especially if he is near his majority.

Having ascertained the facts, the guardian *ad litem* will then take such steps as will best promote his ward's welfare. If the object of the bill is promotive of that welfare, he should not put any obstacles in the way of the relief sought; but should rather co-operate with the Solicitor of the complainant in expediting the cause and making the costs as light as possible, especially if the ward may be liable for any part of such costs. If, on the other hand, the relief sought is detrimental to the rights and interests of the ward, the guardian *ad litem* should vigorously resist that relief, and in every proper way assert the rights and protect the interests of his ward, using for that purpose every available defense, admissible in Equity; and should rally to his aid the relatives and friends of his ward, and should take every other step that is incumbent on a faithful, diligent, skilful and zealous Solicitor and guardian.

## ARTICLE VII.

## MIS-JOINDER AND NON-JOINDER OF PARTIES.

§ 109. Who are Parties to a Suit in Chancery. | § 111. Effect of the Non-joinder of Parties.  
 § 110. General Rules as to Defect of Parties. | § 112. Effect of the Mis-joinder of Parties.

§ 109. **Who are Parties to a Suit in Chancery.**—The general rule is that no persons are considered parties to a suit except the complainants and the persons against whom the process is prayed.<sup>1</sup> The mere naming a person as a defendant does not, however, make him a party: he must also be served with a process,<sup>2</sup> unless he puts in a voluntary appearance.<sup>3</sup> In drawing bills, the names of the parties, and their position as complainants and defendants should be clearly stated. In some bills it is difficult to ascertain who are intended to be made parties. The Code form of giving the names should be adhered to: it is better than any yet devised by inexperienced draftsmen.<sup>4</sup>

§ 110. **General Rules as to Defect of Parties.**—It is manifestly impossible for a Court to do full justice in a given case, unless the proper parties are before the Court in that particular case. The Court must both have jurisdiction and must hear, before it can determine; and how can it hear or determine when the person entitled to speak has never been brought before the Court? This deficiency of proper parties is termed *non-joinder*.

On the other hand, the complainants may be setting up a joint right of recovery against the defendants when not entitled to a joint recovery. Some of the complainants may have a right of recovery in the given case, but the others may have no right whatever to share in that recovery as joint owners thereof along with their co-complainants. Or, some of the complainants may have a right to recover on one account, and other complainants may have the right to recover on another and wholly different account, neither set of complainants having any interest in the other's cause of action, and no privity or community of interest existing between them. This failure of all the complainants to have a community or congruity of interest entitling them to share in the recovery, or the relief sought, is termed *mis-joinder of parties complainant*.

Again, persons may be joined as defendants for or against whom no relief can be granted, they being neither necessary nor proper parties, having no interest of any sort and being in no way chargeable. In such case there is a *mis-joinder of parties defendant*.

The rules, therefore, are:

1. That no person should be made a complainant, who has no community or congruity of interest with the other complainants in the general relief sought.

2. That no person should be omitted as a party, when no complete decree adjudicating all the matters in controversy can be made without him, either as complainant or defendant.

3. That parties representing interests wholly inconsistent cannot join as complainants: co-complainants must have some general community of interest in the subject-matter of the suit; and

4. That no person can be properly joined as a defendant, for or against whom no relief can be granted, nor decree rendered.

1 1 Dan. Ch. Pr., 286; Sto. Eq. Pl., § 44; Majors v. McNeilly, 7 Heisk., 300.  
 2 1 Dan. Ch. Pr., 237; 390.

3 Pugsley v. Freedman, 2 Tenn. Ch., 138.  
 4 Code, § 4313.

Mis-joinder of parties is a matter closely allied to multifariousness, and will be further considered under that head.<sup>5</sup>

§ 111. **Effect of the Non-joinder of Parties.**—If all the parties, who should be before the Court, are not made parties, upon the question being raised by demurrer, plea or answer, the Court will allow the bill to be amended; or may pronounce a decree saving the rights of the parties not before the Court;<sup>6</sup> and it would be reversible error for the Court not to permit an amendment, so as to bring in the necessary parties, even after allowing a plea, or demurrer, for want of parties.<sup>7</sup> When such plea, or demurrer, is sustained, the complainant has the right, as a matter of course, to so amend his bill as to cure the defect in it.

If, at the hearing, it appears that persons interested have not been made parties, the Court, as already shown, may allow the bill to be amended, or may render a decree, saving the rights of persons not made parties.<sup>8</sup> The general rule, requiring all persons in interest to be made parties to the suit, is, in most cases, not a right of the parties brought before the Court, but rather a rule prescribed by Courts of Equity for their own government, a rule founded in their anxiety to do justice among all parties having an interest in the subject-matter, or in the object of the suit, and thereby to prevent future controversy and litigation.<sup>9</sup> Courts of Chancery struggle against technical rules which impede the attainment of substantial justice; and will allow new parties to be made at almost any stage of the suit.<sup>10</sup> Nevertheless, the Chancellor should be exceedingly slow to pronounce a decree, without having all the necessary parties before him, and should require the necessary amendments to be made to bring into Court all the parties omitted, to the end that a complete decree may be pronounced, settling all the various legal and equitable rights involved in the litigation.<sup>11</sup>

§ 112. **Effect of the Mis-joinder of Parties.**—When a defendant is mis-joined as a party, the nature of the controversy being such that no relief can be granted for or against him, he can have the suit as to himself dismissed, on motion or on demurrer; but no other party can object.<sup>12</sup>

If there is a mis-joinder of complainants, however, any or all of the defendants may demur; and the bill, under the old rule of practice, would, thereupon, have been dismissed.<sup>13</sup> But this rule is now greatly modified, and under the liberalized practice and rules of pleading of the present day, it requires a very flagrant case of multifariousness or mis-joinder of parties to defeat, on demurrer, a clear equity;<sup>14</sup> and the better practice in a doubtful case of mis-joinder of complainants now is, to retain the cause in Court until the hearing, and then dismiss it as to those complainants only not entitled to share in the recovery;<sup>15</sup> or, the Court may, in a proper case, authorize amendments, or even direct separate bills to be filed, without new process as to the parties before the Court.<sup>16</sup> It is now harshness, almost arbitrariness, for a Chancellor to dismiss a bill on a demurrer for mis-joinder of parties when a clear equity, or legal cause of action, appears on the face of the bill,<sup>17</sup> in favor of some of the complainants.

<sup>5</sup> *Post*, § 149.

<sup>6</sup> Code, §§ 4327-4338.

<sup>7</sup> *Gray v. Hays*, 7 Hum., 588; *Franklin v. Franklin*, 2 Swan, 522. See Code, § 2798.

<sup>8</sup> Code, § 4337.

<sup>9</sup> *Birdsong v. Birdsong*, 2 Head, 291.

<sup>10</sup> *Ibid.*; *Britain v. Cowen*, 5 Hum., 315.

<sup>11</sup> *Boni judicis est lites dirimere ne lis ex lite oriatur; et interest reipublicæ ut sint fines litium.*

<sup>12</sup> *Payne v. Berry*, 3 Tenn. Ch., 154.

<sup>13</sup> Sto. Eq. Pl., § 509; 1 Dan. Ch. Pr., 302, note

4; *Tillman v. Searcy*, 5 Hum., 487.

<sup>14</sup> *Dechard v. Edwards*, 2 Sneed, 99.

<sup>15</sup> *Henderson v. Peck*, 3 Hum., 248.

<sup>16</sup> Code, §§ 4325-4327; 4338; *Jefferson v. Gaines*,

7 Bax., 368.

<sup>17</sup> *Post*, § 283.

## ARTICLE VIII.

## EFFECT OF DEATH OR MARRIAGE OF PARTIES, OR ASSIGNMENT OF THEIR INTERESTS.

§ 113. Effect of the Death of a Party.

§ 114. Effect of the Marriage of a Female Party.

§ 115. General Rule Applicable to Assignments of Property in Litigation.

§ 116. Effect of Voluntary Alienation of Property Pending a Litigation.

§ 113. **Effect of the Death of a Party.**—Inasmuch as some confusion sometimes arises in the mind of junior counsel, by reason of the death, or marriage of parties, or a transfer of their interests, either before or after the bringing of a suit, it may be well to consider the effect of such occurrences. On the death of a person, who, had he lived, would have been a proper party, those who succeed to what would have been his rights or duties, must be substituted for him.<sup>1</sup> If his personal estate would have been benefited or injured by the litigation, the representative of his personal estate, (his executor or administrator,) must be made a party. If his real estate would have been lessened or increased by the litigation, the representatives of his real estate (his heirs) must be made parties; or if he left a will devising to any one the particular real estate involved in the litigation, such devisee must be made a party instead of the heirs; if the real estate be devised for any purpose to the executor he must be made a party; if the real estate is devised in trust, both the trustee (executor, or other person,) specified in the will, and the beneficiaries must be made parties. In short, if the suit is to recover a debt, or personal property only, for or from the decedent, then his personal representative, (administrator or executor) must be substituted for him;<sup>2</sup> if the suit is to recover, or clear up title to, land only, claimed by the decedent, then his real representative, (heir, devisee, or trustee and beneficiaries) must be made parties in his place. Of course, if the suit involves *both* the personal and the real estate, as it often does, then *both* the personal and the real representatives must be made parties. Thus, the heirs are necessary parties in a suit to recover the land, and the administrator is, also, a necessary party if the same suit seeks to recover rents accrued in the decedent's life. These same rules apply when a party dies pending the suit, in which case the suit must be revived against the same persons (successors in interest and estate) as would necessarily have been made defendants had the death occurred before the bringing of the suit.

When personal or real representatives are made defendants in place of a decedent, they must all be made the defendants, as less than all do not represent him.<sup>3</sup> If a party dies, whose personal estate is involved, and no one will administer on his estate, his heirs may revive if he was complainant, or the suit may be revived against his heirs if he was a defendant: when a suit is so revived all the heirs must be made parties.<sup>4</sup> But, as elsewhere shown,<sup>5</sup> a foreign administrator or foreign executor can neither sue nor be sued, as such, in this State.

Where real estate belongs to a partnership, on the death of one of the

<sup>1</sup> Such persons are frequently called his *privies*, or those who stand in his shoes. As to who are privies, see *post*, § 165.

<sup>2</sup> 1 Dan. Ch. Pr., 249; 255.

<sup>3</sup> 1 Dan. Ch. Pr., 252; Campbell v. Hubbard, 11 Lea, 6; Code, §§ 2849-2859.

<sup>4</sup> Code, § 2849; Campbell v. Hubbard, 11 Lea, 6; or the Court may appoint an administrator *od liem*. Acts of 1889, ch. 137.

<sup>5</sup> *Ante*, § 81.

partners the title vests in the survivors, and does not go to the heirs, the law regarding the partnership as a person that lives as long as any member lives.<sup>6</sup> Hence, in a suit affecting partnership realty, the death of a partner does not affect the litigation, but it proceeds without the necessity of any revivor.<sup>7</sup>

§ 114. **Effect of the Marriage of a Female Party.**—Upon the marriage of a female party, her husband, by operation of law,<sup>8</sup> becomes the owner of her personalty, and succeeds to all her rights thereto. Hence, he must be brought before the Court, in order to enable him to assert or defend those rights. If the marriage take place before the suit is brought, it is not necessary to make the wife a party, unless the property involved in dispute is of such a character that it will survive to the wife in case of the husband's death.

But as to the wife's real estate the law is quite different. Marriage alone gives the husband no legal or equitable interest in her realty, unless a live child is born of the marriage, and then the husband acquires a life estate in his wife's realty, known as a tenancy by the courtesy. While at common law the husband was, in effect, the absolute owner of his wife's realty during his life, the Courts of Chancery and the statutes have so stripped him of his common law rights, that, while his wife lives, he is but little more than her agent, or overseer. In all suits affecting her real estate, whether it be legal or equitable, the wife must be a party, and if her husband has not abandoned her, he, also, must be a party. If, however, as elsewhere shown, the husband has estopped himself by his own acts, or is debarred by lapse of time, from aiding his wife in recovering her realty, she may sue alone, by next friend, making her husband a defendant.

On the death of the husband, intestate, his widow becomes reinvested with all *choses in action* belonging to her at marriage, and not reduced to possession by the husband; and they belong to her absolutely, and do not go to his administrator: but if he die, testate, and specifically bequeaths them, they go to the legatee. Hence, in suits affecting *choses in action* not reduced to possession or bequeathed by the husband, the widow must be a party.

So, on the death of the husband, the widow becomes as completely the owner and controller of her realty as though she had never been married, and her rights and duties in reference thereto are those of a single woman.<sup>9</sup>

§ 115. **General Rule Applicable to Assignments of Property in Litigation.**—Whoever succeeds to another's rights or property, whether by contract or by operation of law, ordinarily holds such rights or property subject to all the liabilities and burdens attaching to such rights or property while belonging to the former owner.<sup>10</sup> The assignee stands in the shoes of the assignor. When a woman marries, the law assigns her personalty to her husband; when a man dies intestate the law assigns his personalty to his administrator, and his realty to his heirs; when he dies testate, his will points out the persons to whom he has assigned his estate. If a person is declared a bankrupt, under a Bankruptcy Statute, the law assigns his estate to the assignee in bankruptcy, and such assignee is alone entitled to sue and be sued as to such estate, or to continue a suit begun by a bankrupt.<sup>11</sup> So, if a person, prior to suit brought, transfer his interest in the property, or debt in dispute, he ceases to have any further interest in it, and his transferee must sue or be sued in his place. Hence, the general rule, before stated, which, when well considered, renders

<sup>6</sup> Code, § 2011; *Salomon v. Fitzgerald*, 7 Heisk., 552.

<sup>7</sup> *Hammond v. St. John*, 4 Yerg., 107. See Chapter on Abatement and Bills of Revivor, *post*, §§ 698-722.

<sup>8</sup> While the law gives the husband all of his wife's personalty, nevertheless, when her personal estate gets into Chancery before it passes into the possession of her husband, the Court will, on application of a next friend, vest it in her as a separate estate. *Phillips v. Hassell*, 10 Hum., 197; *Cheatham v. Huff*, 2 Tenn. Ch., 619; 1 Dan. Ch. Pr., 90-109.

<sup>9</sup> See Chapter on Abatement and Bills of Revivor, *post*, §§ 699-700.

<sup>10</sup> *Qui sentit commodum sentire debet et onus.* (He who takes the benefit ought to take the burden.) *Qui in jus dominiumve alterius succedit iure ejus uti debet.* (He who becomes owner of another's right or property takes it subject to his liabilities.)

<sup>11</sup> *Moffit v. Cruise*, 7 Cold., 137; *Northman v. Insurance Cos.*, 1 Tenn. Ch., 312; 1 Dan. Ch. Pr., 256-256.

all other rules on the subject mere corollaries, readily ascertained and applied by reason.<sup>12</sup>

§ 116. **Effect of Voluntary Alienation of Property Pending a Litigation.**—The voluntary alienation of property, pending a suit, by any party to it, is not permitted to affect the rights of the other parties, if the suit proceeds without a disclosure of the facts, except so far as the alienation may disable the party from performing the decree of the Court. Thus, if pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity of redemption, who can only have the benefit of a title so gained, by intervening or filing a bill for that purpose.

Generally, in cases of alienation, *pendente lite*, the alienee is bound by the proceedings in the suit after the alienation, and before the alienee becomes a party to it; and depositions of witnesses, taken after the alienation, but before the alienee became a party to the suit, may be used by the other parties against the alienee, as they might have been used against the party, under whom he claims.<sup>13</sup>

The same rule prevails where a vendee files a bill for a specific performance of a contract for the purchase of land against the vendor, and pending the suit he (the vendee) should sell to one or more sub-purchasers. In such a case, the sub-purchasers need not be made parties; and they would be bound by the decree in the suit.<sup>14</sup>

Generally speaking, an assignee, *pendente lite*, need not be made a party to a bill, or brought before the Court; for every person, purchasing *pendente lite*, is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privity.<sup>15</sup> And it will make no difference whether the assignee, *pendente lite*, be the claimant of a legal or of an equitable interest, or whether he be the assignee of the complainants or of the defendants.<sup>16</sup> Still, however, it is often important to bring such assignees before the Court, as parties, by a supplemental bill, in order to take away a cloud hanging over the title, or to compel the assignee to do some act or to join in some conveyance, or to divest the title out of him, or to enjoin him from asserting such title. So that such assignee, although not a necessary party, may, at the same time, be a proper party at the election of the complainant. And an assignee after the bill was filed, but before the subpoena was served, has been held to be a necessary party.<sup>17</sup>

So, if the interest of a defendant is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy, the defect in the suit may be supplied by a supplemental bill, or a bill in the nature of a supplemental/bill, whether the suit has become defective merely, or is abated<sup>18</sup> as well as become defective. For, in these cases, the new party comes before the Court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings, from the beginning of the suit. But in case of a voluntary alienation by a defendant, *pendente lite*, the complainant has the right to ignore the transfer, and continue the prosecution of the suit as though no change in the defendant's interest had occurred.

If the transfer is made by a complainant, and takes place after the bill was filed, the transferee may either continue the suit in the name of the original complainant for his benefit, or he may prove the transfer and have the suit revived in his name. If the transfer is made by a defendant after the bill was

<sup>12</sup> See Code, §§ 2845-2862, which are all affirmative of this general rule.

<sup>13</sup> Sto. Eq. Pl., § 351.

<sup>14</sup> Sto. Eq. Pl., § 351 a.

<sup>15</sup> Dillard & Coffin Co. v. Smith, 21 Pick., 372.

<sup>16</sup> Fitzgerald v. Cummings, 1 Lea, 239.

<sup>17</sup> Sto. Eq. Pl., § 156.

<sup>18</sup> The term *abated*, in Chancery pleading, means *suspended*. In law, it means *dead*. Sto. Eq. Pl., § 20, note; § 354.

filed, and after subpoena to answer was served on him, the complainant need pay no attention to it, the doctrine of *lis pendens* applying, as shown elsewhere.<sup>19</sup>

But while a person can, either before or after suit, transfer a right, and thus relieve himself from all obligation to protect or enforce it any longer, nevertheless he cannot assign a duty or liability, so as to escape responsibility therefor. He can transfer a right, because that belongs to him, and is his property; but he cannot transfer a duty or a liability, for they belong to another, to whom he must render them.<sup>20</sup> He may be indemnified against such liability, but the indemnifier can not be made a party, on that account alone.

A person who acquires an entirely new right or interest in the subject-matter of the suit, by purchase during the litigation, may bring such right or interest before the Court by supplemental bill, or original bill in the nature of a supplemental bill;<sup>21</sup> and unless he does so he will not be allowed to take any benefit from the suit without the consent of the parties thereto.<sup>22</sup>

When a sole complainant, suing in his own right, loses all his rights in the litigation by an event after suit brought, by alienation, or otherwise, his assignee may file an original bill in the nature of a supplemental bill in order to assert and protect his rights.<sup>23</sup>

<sup>19</sup> See, *ante*, § 66.

<sup>20</sup> Rights are what others owe us; duties are what we owe others.

<sup>21</sup> *Trabue v. Bankhead*, 2 Tenn. Ch., 412.

<sup>22</sup> 2 Dan. Ch. Pr., 1516, note.

<sup>23</sup> 2 Dan. Ch. Pr., 1518. On the subject of *Lis Pendens*, see, *ante*, § 66.



## ARTICLE IX.

## PARTIES IN PARTICULAR SUITS.

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| <p>§ 117. Parties to Suits in Cases of Trust.</p> <p>§ 118. When Administrators, Executors and Guardians, Should be Parties.</p> <p>§ 119. Parties to Suits on Official Bonds.</p> <p>§ 120. Parties in Suits concerning Mortgages, Trust Deeds and other Liens on Land.</p> <p>§ 121. Parties in Case of Assignments.</p> <p>§ 122. Parties to Suits on Written Evidences of Debt.</p> | <p>§ 123. Parties where Several are Liable for the Same Debt.</p> <p>§ 124. Parties to Suits to Collect Debts where Other Creditors have Concurrent Rights.</p> <p>§ 125. Parties to Suits to Recover Land.</p> <p>§ 126. Parties to Suits to Partition or Sell Lands.</p> <p>§ 127. Parties to Suits Affecting Equitable Property.</p> |
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§ 117. **Parties to Suits in Cases of Trust.**—There are ordinarily four constituents in a trust: 1, a duty to be performed; 2, a person expressly or impliedly charged with that duty, called a trustee; 3, a person for whose benefit the duty is to be performed, called the beneficiary; and 4, some property, the legal title to which is vested in the trustee, to enable him to effectually discharge the duty imposed on him. And in all suits affecting the trust, or the trust property, or the trustee's rights or duties, or the beneficiary's interests, both the trustee and the beneficiary must be made parties. The trustee must be made a party, first, because the legal title to the property is in him; and second, because it is his duty both to defend his title and to protect the trust and the beneficiary: and the beneficiary must be made a party because, in the eye of a Court of Equity, he is the real owner of the property, and is the person most interested in defending both the property and the trust. In suits by or against executors and administrators, (who are express trustees,) relative to the personal property vested in them, and in which the legatees, distributees, and creditors are beneficially interested, it is not ordinarily necessary to make such legatees, distributees or creditors, as the case may be, parties, if the suit relates exclusively to the personal estate, because the personal representative is authorized to sue or be sued alone;<sup>1</sup> but if the suit relates to real estate, in which the devisees or heirs have an interest, legal or equitable, then the heirs or devisees interested must be made parties.

In suits to set up and enforce an implied trust, if the implied trustee has acquired the absolute legal title his vendor need not be made a party, but if the vendor has retained either the legal title or a lien, to secure the purchase money, or for any other purpose, then the vendor must be made a defendant along with the implied trustee.

In suits by or against executors, administrators, or other express trustees, all should be joined, except such as may have declined to qualify, or have died, or left the State.

§ 118. **When Administrators, Executors, and Guardians Should be Parties.**—The general rules as to when administrators, executors, heirs, devisees, and legatees should be made parties, have been already given. Some special rules will now be given, applicable to administrators, executors, and guardians:

1. **Administrators are the Proper Persons to Sue:** (1) for all debts due their intestates, of every character whatever; (2) to recover all the personal property belonging to their intestates, at their death, and not exempt by law; (3) to

<sup>1</sup> The personal representative not only represents the estate of the decedent, but he, also, represents all who are interested in the personal assets of the estate; Sto. Eq. Pl., § 141.

enforce all mortgages, trust deeds, or other liens to secure debts to their intestates.

**2. Administrators are the Proper Persons to be Sued:** (1) when a creditor seeks to recover any debt due from the intestate; (2) when there is a dispute as to the ownership of any personal property claimed by the intestate; (3) when a creditor seeks to have the land of a decedent sold to pay debts; (4) when damages are claimed for some breach of contract by the decedent; (5) when it is claimed that they have wasted the assets of the decedent, or not accounted for all the assets, or have failed to pay the creditors and distributees the amount due them, or in other respects have failed to do their duty, in which cases the sureties, on their official bond, may, also, be joined as defendants, and charged as such.

**3. Executors are the Proper Persons to Sue and be Sued:** (1) in cases where, if there had been no will, the administrator of the same estate would have been a proper person to sue or be sued; and (2) in all cases affecting land devised to be sold where, if there had been no will, the heirs would have been the proper persons to sue or be sued. (3) If the executor fails to account for all the estate that came and should have come into his hands, fails to pay the legatees, distributees and creditors, having sufficient assets so to do, or in any other way violates his trust, he, and the sureties on his bond, are liable to the party or parties injured, and they may all be sued by such party or parties.

**4. Guardians are Necessary Parties to All Suits** affecting the real or personal estate of their wards, whether such wards be minors, or persons of unsound mind. The guardian is the proper person to bring and defend all suits to which his ward is a party. If the suit affects only money of the ward which the guardian has loaned, the guardian may sue for it without joining his ward as a co-complainant; and if the suit be against a guardian for debts by him contracted, or for necessities furnished the ward, the guardian should be sued alone, describing him as guardian.<sup>2</sup> If the suit be to recover any specific personal property, or any realty, belonging to the ward, the suit should be in the name of the ward by his guardian, who in such suits is a next friend. And if the suit be brought to recover personalty, or realty, claimed by the ward, he and his guardian should both be parties, whether the suit be by them, or against them. Sometimes one guardian is compelled to sue his predecessor: in such case he can sue alone, describing himself as guardian, and need not join his wards as co-complainants: in such suits he may sue his predecessor or predecessors, and the sureties on his or their bond, or bonds, in the same suit.

But frequently guardians violate their trust by failing to collect all of their ward's estate, or by failing properly to care for it, or failing to properly account for it. In all such cases, if the ward is a minor, he must sue by next friend, or by a new guardian, making the defaulting guardian and his sureties defendants, as shown in the next section. If the guardian has given more than one bond, the sureties on all the bonds may be made co-defendants. If the ward has attained majority, he can, of course, sue his guardian and sureties in his own name.

**§ 119. Parties to Suits on Official Bonds.**—For any breach of an official bond of any officer, executor, administrator, guardian, trustee, or other person, required to be given by law for the security of the public generally, or of particular individuals, the party aggrieved may, by statute, without assignment bring suit thereon for his use, giving security for costs, and being liable therefor as if the suit had been brought in his own name.<sup>5</sup> The effect of this statute is equivalent to an assignment of the bond to the person aggrieved to the extent of his damage, not exceeding, of course, the penalty of the bond.

By both statute and judicial interpretation, the person for whose use the

<sup>2</sup> In such cases, however, the description would be a mere *descriptio personæ*, and, therefore, not essential.

<sup>5</sup> Code, § 2797. See, also, Code, § 2231.

suit is brought is the real complainant of record,<sup>6</sup> and, in Chancery, is the real complainant in fact. While technically a suit on any of the above mentioned bonds should be in the name of the State for the use of the party aggrieved,<sup>7</sup> nevertheless the practice of suing directly in the name of the real complainant, and not in the name of the State, has long prevailed, and been directly sanctioned by the Supreme Court of the State.<sup>8</sup>

When, therefore, a ward, or a guardian or next friend for him, sues for the breach of his guardian's bond, or a distributee, legatee, or creditor sues for a breach of an executor's or administrator's bond, or any party aggrieved sues for a breach of any official bond, the party so suing will name himself as complainant, and make the party in default and the sureties on his bond defendants. If any of the sureties are dead, removed from the State, or insolvent, they may be left out of the bill, the bill so explaining, and the personal representative of a deceased surety may be made a defendant in his decedent's place.

Where a defaulting officer, executor, administrator, guardian, trustee, or other person required by law to give bond for the security of the public generally, or of particular individuals, gives more than one bond, he can in case of his default, be sued on all of his bonds, the bill describing the several bonds and dates thereof, and naming the several sureties on each, and making them defendants, so the Court may determine the relative liability, if any, of such sureties.

§ 120. **Parties in Suits Concerning Mortgages, Trust Deeds, and other Liens on Land.**—All persons having any interest, legal or equitable, in the land, or in the encumbrance thereon, are necessary parties, unless the object of the bill is a special foreclosure, in which case the complainants may omit both prior and subsequent encumbrancers. The holders of encumbrances are proper persons to sue: (1) whenever it is necessary to enforce their liens, in which case the mortgagor, vendor, or other giver of the lien, if living, and his heirs if he is dead, must be made defendants; and (2) whenever necessary to protect their liens against adverse claimants, in which case the same persons must be made defendants, and also the adverse claimants. Whenever a mortgagee of the absolute fee dies, his heir is a necessary party to a suit to enforce the mortgage debt, and his administrator is a proper party: if the mortgagor dies, his heirs are necessary parties defendant to a bill to foreclose, but his administrator is not.<sup>9</sup> On a bill to foreclose a mortgage or enforce a trust deed, neither prior nor subsequent encumbrancers are necessary parties, but subsequent encumbrancers are proper parties; and if the prior encumbrance is overdue, its holders are proper parties. If the prior encumbrancers are not made parties, their rights will remain unaffected.<sup>10</sup> As a rule, it is the better course to make parties of all encumbrancers, prior as well as subsequent, to the end that the mortgaged premises may be sold with a clear title, and the proceeds divided according to priority of interests. If prior encumbrancers object, (which they will seldom do,) the bill can be dismissed as to them, on their motion or demurrer, if the Court so adjudge. It is often necessary to make

<sup>6</sup> Code, § 2795; Wolfe v. Tyler, 1 Heisk. 313; Enly v. Nowlin, 1 Bax., 164; Kyle v. Ewing, 5 Lea. 580; 583.

<sup>7</sup> Brannon v. Wright, 5 Cates, 692. For form of commencement of such a bill, see, *post*, §§ 156, subsec. 10; 971. See other bills, §§ 927; 957.

<sup>8</sup> Johnson v. Molsbee, 5 Lea, 444, 447; Brandon v. Mason, 1 Lea, 615, 628; Brannon v. Wright, 5 Cates, 692. Courts of Chancery have regard to the substance of a bill, and not to technical forms; and the use of the name of the State in such a bill is a mere empty formality, makes the averments of the bill awkward in expression, and savors of the technicality of the old common law pleading. For forms of bills, see, *post*, §§ 927; 957; 971.

<sup>9</sup> Aiken v. Suttle, 4 Lea, 127; Harris v. Vaughn, 2 Tenn. Ch., 484; Sto. Eq. Pl., §§ 196-200. It would seem, on general principles, that, inasmuch as the mortgage debt, on the death of the mortgagee, goes

to the administrator, he would be the proper person to foreclose the mortgage, making the mortgagor, and the heirs of the mortgagee defendants, or making the heirs of the mortgagee co-complainants. In *Atchison v. Surguine*, 1 Yerg., 400, it was expressly decided that the heir of the mortgagee or his assignee, may alone, without joining the personal representative, bring a bill to foreclose a mortgage; and that if the heir of the mortgagee receive the money, he holds it as trustee for the personal representative, who may recover it by suit. The personal representative certainly has an interest in the suit, and besides, by joining him in the suit, a second suit is obviated. See 2 Jones on Mortgs., § 1388. A Court of Equity, in all cases, delights to do complete justice, and not by halves. See *ante*, §§ 38; 36.

<sup>10</sup> Sto. Eq. Pl., §§ 182-201; Rowan v. Mercer, 10 Hum., 359; Mims v. Mims, 1 Hum., 425.

prior encumbrancers parties, in order to test the *bona fides* of their lien, and to ascertain whether all, or any part of their debt, remain unpaid.

It must be borne in mind that while a suit to enforce a lien on real estate is a suit that deals with particular property, it is not a proceeding *in rem*, but *in personam*; and, therefore, no person is bound by the proceeding unless a party thereto, complainant or defendant.<sup>11</sup>

In a suit to foreclose a chattel mortgage, after the death of any party to the transaction, his administrator will, of course, stand in his shoes, whether as debtor or creditor.

When a vendor's lien is in issue, both the party or parties claiming the lien, and the party or parties claiming the land, must be made parties, the former, or some of them, being made complainants when the object of the suit is to enforce the lien. If the vendor be dead, his heirs are necessary parties where the vendor retained the legal title; otherwise, they are neither necessary nor proper parties. If the vendee be dead, his heirs<sup>12</sup> and widow<sup>13</sup> are necessary parties in any event, but his administrator is not.<sup>14</sup> The administrator is the proper person to enforce a lien on the death of the vendor, but if the legal title was in the latter at his death, his heirs must also be made parties;<sup>15</sup> if otherwise, they are not proper parties.

A recurrence to general principles will settle all doubts as to who are proper parties in case of liens, but the following general rules will aid: (1) the persons entitled to the proceeds of the debt secured by the lien are necessary parties, and should ordinarily be complainants: (2) the persons entitled to the residue of the proceeds of the sale of the property after the lien debt has been satisfied therefrom, are necessary parties; and (3) any persons interested in disputing the right of any of the complainants to the debt, or the right of any of the parties to have the land sold, are necessary parties.

In suits to enforce mortgages, trust-deeds, and other liens, it may be stated generally: (1) all of the persons in any way interested, either in the particular lien sought to be enforced, or in the property charged with the lien, must be made parties; (2) those entitled to the benefit of the lien, if their interests are harmonious, should join as complainants, making all others interested defendants; (3) if any who should be complainants do not give their consent to the suit, they must be made defendants; (4) all persons having a legal or equitable title to the property or the proceeds of the property charged with the lien, should be made parties, so that when the property is sold the purchaser may get a perfect title, and the proceeds of the sale be properly distributed among those thereunto entitled, according to their respective rights.

But in all suits to enforce mortgages, trust deeds, vendors' or other liens against real estate, whenever it is necessary to make their heirs of the debtors parties, his widow, if living, must, also, be made a party, because she has an interest in the surplus for her dower,<sup>16</sup> and also for her homestead. If the lien is on a tract of land to which homestead rights may exist, the wife should always be made a co-defendant along with her husband, so that she may be bound by the decree, and thus be precluded from relitigating her homestead rights.<sup>17</sup>

§ 121. **Parties in Case of Assignments.**—There are two sorts of assignments to be considered in this section: 1, assignments of *choses in action*; and 2, assignments for the benefit of creditors; and for convenience and clearness of statement they will be considered separately.

1. **Parties in Case of Assignments of Choses in Action.**—The general rule prevails here, as in all other cases, that every party having an interest in the

<sup>11</sup> 2 Jones on Mortg., § 1396.

<sup>12</sup> McCoy v. Broderick, 3 Sneed, 203.

<sup>13</sup> Edwards v. Edwards, 5 Heisk., 123.

<sup>14</sup> Ibid.

<sup>15</sup> Alexander v. Perry, 4 Hum., 391.

<sup>16</sup> Edwards v. Edwards, 5 Heisk., 123.

<sup>17</sup> Hawes on Parties, §§ 26; 27; 66; 69; 110; Williams v. Williams, 7 Bax., 116; Mash v. Russell, 1 Lea, 543.

assigned debt when recovered, and every person liable to pay the debt, is a necessary, or proper party. If the debt be assignable by statute, or the law merchant, the assignee may sue in his own name, and his assignor is not a proper party, unless it is sought to set aside the assignment, or to hold him expressly liable for the debt, in which case he must be made a defendant. If, however, the debt is not so assignable, the assignor must be made a party, because the legal title is in him;<sup>18</sup> and he may be joined as a complainant.<sup>19</sup> If, however, the assignment is absolute, leaving no interest or title in the assignor, he need not be made a party.<sup>20</sup>

Bills of exchange, promissory notes, bonds and bank checks, are all negotiable;<sup>21</sup> and bonds with collateral conditions, bills or note for specific articles, or for the performance of any duty, are assignable by statute: the assignees of all these instruments may sue thereon in their own names.<sup>22</sup>

**2. Parties in Case of Assignments for the Benefit of Creditors.**—Where an assignment is made by a debtor for the benefit of his creditors, if any creditor seeks to enforce the trusts, he cannot sue alone; but he must make all the other creditors, provided for in the assignment, parties, either by name, or by bringing the suit on behalf of himself and all the other creditors who may choose to come in and take the benefit of the decree. But the assignees themselves may file a bill relative to the trust estate, and to enforce its objects, without making the creditors parties; for the assignees, in such a case, are the proper representatives of them.<sup>23</sup>

§ 122. **Parties to Suits on Written Evidences of Debt.**—In an ordinary action of debt, brought by a bill in Chancery, whether such debt be based on an express, or an implied, contract; and whether the contract be verbal, or written; and whether the debt be original, or obtained by assignment from another, the person or persons entitled to recover the money must sue as complainants, and the person or persons liable to pay the money, whether principals, endorsers, guarantors, or sureties, must be made defendants.

If the debt is evidenced by a negotiable instrument, such as a promissory note, due bill, bill of exchange, or by an instrument assignable by statute, such as a bond with collateral conditions, or a bill or note for specific articles, or for the performance of any duty,<sup>24</sup> an assignee may sue thereon in his own name; but if a debt not so evidenced is assigned, the assignee must join the assignor as a co-complainant, if he consent; otherwise he must be made a defendant, for the legal title to the debt is in the assignor. If, however, there be several assignments of a non-negotiable debt, only the original assignor need be made a party, unless the suit is brought to hold an intermediate assignor liable on some independent guaranty or contract to pay, in which case such intermediate assignor must be made a defendant.

The payee of an order on another for money, may sue thereon, in his own name, either the person who drew the order, or the person on whom it is drawn. But he cannot sue the latter on the order unless he accepts it, and he cannot sue the drawer of the order, as such, without demand, protest and notice.<sup>25</sup> He may, however, sue the drawer of the order on the original liability.<sup>26</sup>

<sup>18</sup> 1 Dan. Ch. Pr., 199-201; Sto. Eq. Pl., § 158.

<sup>19</sup> *Wilson v. Davidson*, 3 Tenn. Ch., 546. If the assignment is questioned, is irregular, or insufficient, it may be prudent to join the assignor as a co-complainant, stating the question made on the assignment.

<sup>20</sup> *Ibid.* The true principle would seem to be, that, in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted, or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is a mere nominal or formal party in such a case. It is a very different question, whether he may not properly be made a party, as the legal owner, although no decree is

sought against him; for, in many cases, a person may be made a party, although he is not an indispensable party. But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, there he is not only a proper, but a necessary party. Sto. Eq. Pl., § 153.

<sup>21</sup> *Lawrence v. Dougherty*, 5 Verg., 436.  
<sup>22</sup> Code, §§ 1956-1967; 2787-2790. *Looney v. Pinkston*, 1 Tenn. (Overt.), 385; *Sugg v. Powell*, 1 Head, 221; *Perkins v. Perkins*, 1 Tenn. Ch., 540; *Smith v. Hubbard*, Pick., 312.

<sup>23</sup> Sto. Eq. Pl., § 157.

<sup>24</sup> Code §§ 1956-1967; 2787-2790.

<sup>25</sup> Code, §§ 1959-1961.

<sup>26</sup> *Harwell v. McCulloch*, 2 Tenn., (Overt.), 275.

In suits on promissory notes, due bills, checks and bills of exchange, all or any of the makers, including both principals and sureties, and all or any of the endorsers, may be sued by the holder of the instrument.<sup>27</sup> And in suits for breaches of contract, any or all of the parties in default may be sued in the same suit; but all the persons injured by such breach must be parties, those not consenting to join as complainants being made defendants.

When the obligation is to pay a sum of money to more persons than one, jointly, all of the payees must join in the suit as complainants, or if some refuse so to join, they must be made defendants; for, while the obligation is several as to the makers, it is joint as to the payees. However, in suits on obligations executed to one person for the benefit of others, such as suits on official bonds executed to the State, by officers, executors, administrators or guardians, and the like, any person belonging to the class intended to be secured by such an obligation, may sue thereon in the name of the payee, for his own use and benefit.<sup>28</sup> In suits on bonds payable to the State, any person entitled to sue thereon may sue in his own name.<sup>29</sup>

§ 123. **Parties where Several are Liable for the Same Debt.**—When several persons, either as principals or as sureties, or as both principals and sureties, are bound for the same debt, or duty, even though bound by different bonds or other instruments, they may all be sued, or any part of them may be sued, in the same suit; and all persons, or any of them, entitled to said debt or duty, or to any part thereof, may join as complainants in such suit; and if a part only of those entitled to sue, they may, (and if an account<sup>30</sup> is necessary, or if any trust is involved, should) make the remainder of those entitled defendants. Hence, in suits against trustees, executors, administrators, guardians, public officers and others who have given bonds and security for the proper discharge of their duties or contracts, all or any part of the sureties, on all or any of the bonds, on a default by the principal, may be made joint defendants to the same bill;<sup>31</sup> and any or all of the parties secured by such bonds may be joint complainants in the same bill; but if a part only of those entitled to sue by reason of the particular default join in the bill, the remainder of those entitled should be made defendants. If any of the obligors on said bonds are dead or insolvent, they, or their personal representatives need not be sued, but the fact of death or insolvency should be stated in the bill as a reason for not suing them, or their personal representatives.

§ 124. **Parties to Suits to Collect Debts, where Other Creditors have Concurrent Rights.**—In suits to collect a debt from a fund in which other creditors have concurrent rights, the parties who sue must file their bill in behalf of themselves and of all others entitled to share in the fund. This is one of the few exceptions to the general rule, requiring all persons having an interest in the subject-matter or object of the suit to be made parties. The reasons for this exception are: (1) the difficulty, and often the impossibility, of ascertaining all who are interested; (2) the increased costs that would result from allowing each creditor to institute a separate suit; and (3) inasmuch as the bill is filed in behalf of all the creditors, those not named as such can have themselves made parties on petition at any time before the fund is distributed, and, as a consequence, are not injured by the proceeding.

Accordingly, when bills are filed by a creditor or creditors (1) to sell the lands of decedent to pay debts, or (2) to distribute a trust fund, or (3) to wind up an insolvent estate, an insolvent partnership or an insolvent corporation, or (4) to set aside a fraudulent conveyance of property made by a decedent;<sup>32</sup> or (5) to have an administrator appointed, in any and all such cases, the bill

<sup>27</sup> Code, §§ 1958; 2787.

<sup>28</sup> Code, § 2797.

<sup>29</sup> *Johnson v. Molsbee*, 5 Lea, 444.

<sup>30</sup> 1 Dan. Ch. Pr., 216.

<sup>31</sup> *Johnson v. Molsbee*, 5 Lea, 444. In a suit for contribution, the insolvent principal and insolvent

sureties are not necessary parties; *Gross v. Davis*, 3 Pick., 230.

<sup>32</sup> A bill may be filed on behalf of complainant and other creditors to set aside a fraudulent conveyance by a living debtor. Code, § 4288.

must be filed on behalf of all other creditors entitled to be paid out of the proceeds of the fund, or property, sought to be thus administered in the Chancery Court.

All persons having the legal title to the said fund or property must be made defendants. 1, If the suit is brought to sell the lands of a decedent to pay debts, his heirs and administrators should be made defendants; and if the bill, also, seeks to set aside a fraudulent conveyance by the decedent, the fraudulent vendee must be made a defendant. 2, If the suit be brought to wind up an insolvent partnership or insolvent corporation, in case of a partnership all of the partners, and in the case of a corporation, all of the officers and directors, must be made defendants. 3, If the suit is brought to distribute a fund in the hands of a trustee, he should be made a defendant, and if his official sureties are sought to be charged, they, also, must be joined as defendants.

It must be remembered, however, that whenever one person sues on behalf of himself and others, care must be taken that this person has a clear right in himself; for, if he is not really entitled to sue, the suit cannot proceed, and must be dismissed. In suits of this nature, inasmuch as the complainant acts on his own motion, and at his own expense, he has the absolute control of the suit, and can dismiss it at his pleasure,<sup>33</sup> at any time before a reference to the master, or before the rights of others in the suit have vested in consequence of some affirmative act on their part approving the suit, joining in it, or accepting its benefits.

A suit by one in behalf of himself and others in the same right, will be dismissed as to all if dismissed as to the one in whose name it is brought;<sup>34</sup> unless some one in the same right, who has become a party by petition to take advantage of the bill, offers to continue the prosecution of the suit, and tenders a proper prosecution bond to cover all costs accrued and to accrue.<sup>35</sup>

§ 125. **Parties to Suits to Recover Land, and to Remove Clouds.**—The Chancery Court now having jurisdiction to determine the legal title to land, in a suit concerning the legal title only, the rule as to parties in similar suits at law will, no doubt apply in Chancery. Hence, in suits to recover land in the Chancery Court, on the strength of the complainant's legal title alone, no party having an equitable interest is a necessary party. For this reason, a trustee, he having the legal title, may sue alone to recover the land conveyed to him in trust, and the beneficiaries are unnecessary parties. If, however, he should refuse to sue in a proper case, the equitable owners may sue, using his name as complainant.<sup>36</sup> So a mortgagee may sue either the mortgagor or a stranger in order to recover the land mortgaged; but in the former case, he would probably be met by the mortgagor's equities.

In suits to recover real estate, all who claim the property under the same title should join as complainants, and those in adverse possession and all others who claim adversely to the complainants, should be made defendants. Ordinarily, a mere claimant not in possession need not be sued when not exercising any acts of ownership, but if his claim constitutes a cloud on the title of the complainant, he may be sued, even though not in possession, and not actually exercising any visible acts of ownership. So, a remainder-man may maintain a bill to remove a cloud from his title.<sup>37</sup> None but tenants in common, and their privies in estate, can join in bringing an ejectment bill. Persons claiming under conflicting titles cannot join in such a suit.<sup>38</sup> In a Court of law, a complainant, in order to avoid the question of champerty, may join his grantor, or his grantor's grantor, or both, or any other privy in estate, as co-plaintiff,

<sup>33</sup> 1 Dan. Ch. Pr., 244. The complainant is *dominus litis* (master of the suit.) 1 Sto. Eq. Jur., § 648a. But see *post*, §§ 523-524.

<sup>34</sup> *Stainback v. Junk*, 14 Pick., 306.

<sup>35</sup> *Falls v. B. & L. Association*, 21 Pick., 26.

<sup>36</sup> 1 Perry on Trusts, §§ 17; 328; 520.

<sup>37</sup> Code, § 3231; *Langford v. Love*, 3 Sneed, 308; *Wiley v. Bird*, 24 Pick., 168.

<sup>38</sup> *Slattery v. Lea*, 11 Lea, 9.

with their consent,<sup>39</sup> but this cannot be done in Chancery, as it would make the bill champertous on its face.<sup>40</sup>

In an ejectment bill, the complainants will not all suffer defeat, if it appear at the hearing that some of them have no title, or are barred, or estopped.<sup>41</sup> In such case, the bill will be dismissed only as to those who fail, and a decree will be rendered in favor of those who make out their case.<sup>42</sup> This sort of suit is both joint and several, and all the owners, if more than one, may sue, or any one or more of them may sue; and where less than all sue, it is not necessary to make the other tenants in common defendants. But if the bill seeks both to recover the possession and clear up the title, and also to have the land sued for partitioned, then all the tenants in common must join in the suit as complainants, or, those not joining as complainants must be made defendants,<sup>43</sup> the bill setting forth the rights of the latter, and praying the same relief for them as is prayed for the complainant.<sup>44</sup> This is the better practice, as it removes all grounds for any future litigation, and determines all matters of controversy in one and the same suit.<sup>45</sup>

In suits to recover land, the tenants of the defendant are not necessary parties, but they are proper parties;<sup>46</sup> and, if they are in actual possession and the landlord is not, they are necessary parties. If there is any danger of a tenant resisting the enforcement of a decree against his landlord, or if there is any doubt about his being really a tenant, he should always be made a co-defendant with the landlord.

Inasmuch as the wife has an interest in the homestead that Courts will enforce, and especially Courts of Equity, it is often prudent to join the wife as co-defendant with her husband, in any suit brought to recover land that would be a homestead if the title, legal or equitable, were in the husband. So, in suits to enforce all liens, except vendors' liens, it is the better practice to join the wife as defendant with her husband, if any homestead rights are involved.<sup>47</sup>

§ 126. **Parties to Suits to Partition or Sell Lands.**—In suits for the partition of land, or for its sale because incapable of advantageous partition, all the tenants in common must be made parties.<sup>48</sup> If any of them are married women, their husbands, also, must be made parties; and if any are minors or of unsound mind, their guardians, if they have any, must, also, be parties. In a bill for partition, or for sale for partition, persons who have liens, encumbrances, life estates, remainder interests, dower or homestead rights, or other claims on the property, must be made parties:<sup>49</sup> they or any of them may join as complainants, but if they do not consent so to do, they must be made defendants. The object the law and the Court have in requiring all persons to be made parties who have legal or equitable interests in lands to be sold, is to give a good title to the purchaser, and thereby not only realize the largest possible price for the property, but also prevent any further litigation over the title. The holder of the legal title in a case of trust, and the contingent remainder-men, if any, must be made parties.<sup>50</sup> Sales for partition, however, may be made without reference to the encumbrances and subject thereto, in which case the rights of the encumbrancers are not affected in any way by the sale.<sup>51</sup>

Those desiring to have the land partitioned, or sold for partition, should all join as complainants, making all the other parties interested, defendants. Ordinarily, minors and persons of unsound mind should be made defendants. When

<sup>39</sup> Code, § 3236; *Augusta v. Vertrees*, 4 Lea, 75.  
<sup>40</sup> *Lenoir v. Mining Co.*, 4 Pick., 168. But see, *Key v. Snow*, 6 Pick., 663.

<sup>41</sup> *Wade v. Johnson*, 5 Hum., 117.

<sup>42</sup> Code, § 3246.

<sup>43</sup> Code, § 3270.

<sup>44</sup> *Burks v. Burks*, 7 Bax., 359.

<sup>45</sup> *Leverson v. Waters*, 7 Cold., 20; *Carter v. Taylor*, 3 Head, 30.

<sup>46</sup> 1 Dan. Ch. Pr., 262-263; *Sto. Eq. Pl.* § 151.

<sup>47</sup> *Hawes on Parties*, §§ 26; 27; 66; 69; 110; *Williams v. Williams*, 7 Bax., 116; *Mash v. Russell*, 1 Lea, 543.

<sup>48</sup> Code, §§ 3270-3271. The statute is only declaratory of the general rule of Chancery practice.

<sup>49</sup> Code, § 3309. See Chapter on Suits for Partition, *post*.

<sup>50</sup> *Glasscock v. Tate*, 23 Pick., 486.

<sup>51</sup> Code, § 3314.



a married woman is *non compos*, she must be made a defendant.<sup>52</sup> Minors, however, may be complainants.<sup>53</sup>

A bill to sell the real or personal estate of a minor or married woman for their education or maintenance, or for reinvestment, and not for partition, must be filed by the husband of the married woman, and by the guardian of the minor, the wife and the ward being, respectively, made defendants. In such case the infant, if over fourteen years, and the married woman, must answer the bill in person: the married woman must be represented by next friend, and the minor by a guardian *ad litem*, both to be appointed by the Court. The Court will also appoint counsel for them, if they have none.<sup>54</sup>

§ 127. **Parties to Suits Affecting Equitable Property.**—In equitable property the legal title is generally in one person called a trustee, and the equitable title, or beneficial interest, in another person called the beneficiary; and, in all suits in Chancery to reach such property, both the trustee, (or legal owner,) and the beneficiary (or equitable owner,) must be made parties. The trustee can sue alone, generally, when it is necessary to protect the legal title; but in any suit affecting the equitable title, or the beneficial interest, he must join the beneficiary with himself as a co-complainant, or must make him a defendant. So, on the other hand, the beneficiary must always make the trustee a party in any suit he may bring affecting such property.<sup>55</sup>

A creditor who seeks to reach an equitable interest, or estate, or to enforce a lien or equitable interest of his own, must make the owner of the legal title a party, as well as the owner of the equitable interest.<sup>56</sup>

<sup>52</sup> *Stephens v. Porter*, 11 Heisk., 341.

<sup>53</sup> *Burks v. Burks*, 7 Bax., 353. It is far better practice, however, to make them defendants, as the Court can better guard their interests when they are asking its protection. See, *ante*, § 101.

<sup>54</sup> See, Code, §§ 3324-3330; and Chapter on Suits Relating to Persons under Disability, *post*, §§ 972-

984. The Code, § 3324, says the wife must be represented by "next friend," meaning, of course, by guardian *ad litem*.

<sup>55</sup> See, *ante*, § 91.

<sup>56</sup> See, generally, as to this section. *Jackson v. Coffman*, 2 Cates, 271; *Railroad v. Todd*, 11 Heisk., 556; 8 A. & E. Ency. of Law, 1116-1128; *ante*, § 91.

ARTICLE X.

PARTIES IN SUITS BY AND AGAINST THE STATE, COUNTIES, CITIES AND CORPORATIONS.

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| <p>§ 128. Parties in Suits by and against the State.</p> <p>§ 129. Parties in Suits by and against Counties.</p> | <p>§ 130. Parties in Suits by and against Municipal Corporations.</p> <p>§ 131. Parties in Suits by and against Private Corporations.</p> |
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§ 128. **Parties in Suits by and against the State.**—No court of the State has any jurisdiction of any suit against the State, or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property; and if any such suit should be brought it shall be dismissed as to the State or such officers, on motion, plea or demurrer of the law officer of the State, or counsel employed for the State.<sup>1</sup> Suits by the State are instituted in her name, by her Attorney General, or by her District Attorney, as occasion may require, without security for costs. If a suit is brought by the State in the interest of any person the bill so states, such person being named as *relator*.<sup>2</sup> Where any person has been aggrieved by the breach of any bond executed to the State to secure the performance of official duty, he may sue thereon for his use in the name of the State, on giving security for the costs.<sup>3</sup>

The State is not responsible for any of the wrongs or defaults of her officers or agents.<sup>4</sup> But officers of the State may be sued when her property is not sought to be reached;<sup>5</sup> and a county trustee may be enjoined from collecting a State tax under a void process.<sup>6</sup>

§ 129. **Parties in Suits by and against Counties.**—Every county is a corporation, and the justices in the County Court assembled are the representatives of the county, and authorized to act for it.<sup>7</sup> A county sues in its own name as does any other corporation, and does not sue in the name of its justices.<sup>8</sup>

Suits may be maintained against a county for any just claim, as against other corporations,<sup>9</sup> and process is served on the presiding officer of the County Court, who is authorized to employ counsel to defend such suits.<sup>10</sup> But a county is not liable for the neglects of duty of its officers.<sup>11</sup>

Suits for the use and benefit of a county against a delinquent officer, or his sureties, are brought in the name of the State for the use of the county.<sup>12</sup>

If the suit against a county seeks to prevent a county warrant being issued or paid, the county trustee should be made a defendant along with the chairman or county judge.

§ 130. **Parties in Suits by and against Municipal Corporations.**—Corporations are of two kinds under our laws: 1, Municipal; and, 2, Private. Both kinds are creatures of the Legislature, directly or indirectly, and neither sort

<sup>1</sup> Act of 1873, ch. 13; *Watson v. Bank*, 3 Bax., 398 and 5 Bax., 1; *Lynn v. Polk*, 8 Lea, 121.

<sup>2</sup> See, *post*, § 156, note. The relator must secure the costs.

<sup>3</sup> Code, § 2797. See, also, Code, §§ 2231-2234. *Ante*, § 119.

<sup>4</sup> *State v. E. & K. Railroad*, 6 Lea, 362; *State v. Ward*, 9 Heisk., 120; *Memphis v. Kimbrough*, 12 Heisk., 136.

<sup>5</sup> *Insurance Co. v. Craig*, 22 Pick., 621.

<sup>6</sup> *Alexander v. Henderson*, 21 Pick., 431.

<sup>7</sup> Code, § 402. The justices are to the County what the directors are to a private corporation.

<sup>8</sup> But if a suit should be instituted in the names of the justices, it would be regarded as the suit of the county, the names of the justices being regarded as surplusage. *Ezzell v. Justices of Giles county*, 3 Head, 586.

<sup>9</sup> Code, § 403. Can a county be sued in a Court of another county? See *Nashville v. Webb*, 6 Cases, 432.

<sup>10</sup> Code, § 520.

<sup>11</sup> *Wood v. Tipton*, 7 Bax., 112.

<sup>12</sup> Code, § 461 (M. & V.) Acts of 1875, ch. 27.

has any powers which the Legislature has not, directly or indirectly conferred, and, in case of municipal corporations, may not take away.<sup>13</sup>

Municipal corporations include all the cities, towns and taxing districts chartered under the laws of the State. They sue, and are sued, in their corporate name;<sup>14</sup> and their power to sue, and their liability to be sued, are fundamental.<sup>15</sup> Their power to sue is coextensive with their rights, and their liability to be sued is coextensive with their duties. When sued, the subpoena is served on the Mayor, or other head of the corporation;<sup>16</sup> and they cannot be sued out of the county in which they are situated.<sup>16a</sup>

§ 131. **Parties to Suits by and against Private Corporations.**—A private corporation is a *person* in law,<sup>17</sup> and is sometimes called an *artificial* person to distinguish it from a natural person. Its charter and the general laws circumscribe and define its rights, powers, duties and liabilities. A private corporation has a legal name, and sues and is sued by such name;<sup>18</sup> but, like a natural person, it may have another name by which it is known, and if sued by such other name the proceeding is valid.<sup>19</sup> A private corporation, like a natural person, may sue any one indebted to it, or having its property in possession, or interfering with its property, rights or duties; and may be sued by any one to whom it is liable *ex contractu* or *ex delicto*, in the same manner a natural person is sued, and the subpoena is served ordinarily upon its chief officer, if he is within the jurisdiction, and if not the statute makes other provision for service of process, as hereafter fully shown.<sup>20</sup>

<sup>13</sup> Governor *v.* McEwen, 5 Hum., 279; McCallie *v.* Chattanooga, 3 Head, 320; Memphis *v.* Water Co., 5 Heisk., 522; O'Connor *v.* Memphis, 6 Lea, 731.

<sup>14</sup> See *ante*, §§ 89; 131.

<sup>15</sup> Mayor *v.* McKee, 2 Yerg., 167.

<sup>16</sup> See, *post*, § 193.

<sup>16a</sup> Nashville *v.* Webb, 6 Cates, 432.

<sup>17</sup> Code, § 50.

<sup>18</sup> Maryville College *v.* Bartlett, 8 Bax., 232.

<sup>19</sup> E. T. & Va. R. R. *v.* Evans, 6 Heisk., 609. The defendant may in his answer call attention to the misnomer. See, *post*, § 385, sub-sec. 3. See Trustees *v.* Reman, 2 Swan, 99; Bank *v.* Burke, 1 Cold. 625; Railroad *v.* Johnson, 8 Bax., 333.

<sup>20</sup> See, *post*, § 193.

## CHAPTER VIII.

## ORIGINAL BILLS IN CHANCERY.

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## ARTICLE I.

## ORIGINAL BILLS GENERALLY CONSIDERED.

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§ 132. **Suits in Chancery Contrasted with Actions at Law.**—A litigation in the Chancery Court is properly termed a “*suit*,” while a contest in a Court of law is properly denominated an “*action*.”<sup>1</sup> The party who institutes a proceeding in a Court of law is ordinarily called “*plaintiff*,” while he who begins a suit in a Court of Chancery is generally called “*complainant*.” The person sued is called “*defendant*,” in each Court, unless he responds to a discovery in Chancery, in which case he is sometimes denominated “*respondent*.” In a Court of law an action is begun by filing a bond for costs and suing out a summons, but in a Court of Chancery a suit is commenced by filing a bill, the cost bond not being essential to the beginning of a suit, as it is in the Circuit Court. In a Court of law, the first pleading is a declaration filed at the return term, couched in formal and technical phraseology, full of bombastic verbosity, and teeming with blood-curdling descriptions of imaginary barbarities inflicted by the wicked defendant, upon the innocent and outraged plaintiff; while in Chancery, the bill is filed before the subpoena issues, and is ordinarily a plain statement, in ordinary language, of complainant’s rights in the premises, and of their retention, or violation, or threatened violation, by the defendant. Indeed, a bill would be correctly phrased which described the grounds of suit in the manner and language which one unprofessional person would use in writing about them to another; and such was the character and frame of bills in the early history of the Court.<sup>2</sup>

In an action at law, the evidence is mainly given by witnesses examined orally in open Court; whereas, in a Chancery suit, the evidence is mainly contained in depositions taken in vacation. In an action at law the issues of fact raised by the pleadings are ordinarily decided by a jury under instructions by the Judge, while in Chancery the issues of fact are ordinarily heard and determined by the Chancellor. A Court of law regards forms, rules, and prece-

<sup>1</sup> Rap. & Law. L. Dic., “*Suit*.” See Code titles to chapters preceding § 2746; and Code, §§ 2754; 4312.

<sup>2</sup> In Tennessee, and many other States, the declaration is now required to be in plain language. See forms in Code, § 2939. These forms are as different from those in Chitty as laconism is from pleonasm.

The declaration in an action at common law deals in categorical statements and technical platitudes, the bill in a suit in Chancery details the circumstances of the case in narrative style. The declaration is a graven image, the bill is a living being.

dents, while a Court of Chancery regards the circumstances of the case, ignores forms, and prefers good reason and good conscience to rules and precedents. In an action at law, the decision is termed a "judgment," and it either awards a sum of money or the possession of property to the plaintiff, or taxes the plaintiff with the costs of the suit; while the decision in a Chancery suit is called a "decree,"<sup>2a</sup> and it may not only award money or property to one or more of the complainants, but may at the same time award money or property to one or more of the defendants, or may require a party to do some particular act, or may prohibit him from doing some particular act, and may tax any of the parties with the costs, or may divide the costs among the parties. In an action at law, all property to satisfy a judgment is sold by the Sheriff under an execution, and he receives and pays over the money; but in a Chancery suit, the sales of property, and especially real property, are usually made by the Clerk and Master, and confirmed by the Chancellor, and the proceeds of the sale are paid out by the Clerk and Master. In an action at law, an equitable interest in property is not cognizable, and an equity cannot be levied on or sold: whereas, in Chancery, equitable interests are dealt with, and may be sold, or transferred, or converted into a legal estate.

And the reliefs the two Courts grant are very dissimilar. Courts of law have a distinct form of action to redress each wrong and assert each right; whereas, in Chancery several wrongs may be redressed and several rights asserted in one and the same suit. Thus, in the same suit the Chancery Court may: 1, stay waste; 2, impound the proceeds of the waste; 3, award damages for the waste committed; 4, adjudge the land to the complainant; 5, give him a decree for back rents, and 6, put him in possession of the property; whereas, a law Court would require four different actions, and an injunction in Chancery besides, to accomplish the same results. In an action at law the plaintiff must sue for either property or money; in a suit in Chancery the complainant may sue for both the property and its money value, in the alternative, and if he fail to get the property the Court will in a proper case, award a money equivalent. In an action at law you get what the law allows, in a suit in Chancery you get what is just and right, according to Equity and good conscience. The law *may be right*, Equity is *right itself*.<sup>3</sup>

§ 133. **How a Suit in Chancery is Commenced.**—A suit in Chancery is commenced, 1, by bill or petition, addressed to the Chancellor of the Division in which it is to be filed, and specifying the particular Court in which it is to be filed; or 2, by motion in open court, where that mode of procedure is allowed by law.<sup>3a</sup>

1. **By Bill, or Petition.** A bill is a complaint, in writing, addressed to the Chancellor, containing the names of the parties complaining and complained of, and their respective places of residence, and setting forth a clear and orderly statement of the complainant's rights, and how and wherein those rights have been denied, interfered with or violated, by the party complained of, and concluding with a prayer for process to bring the latter party before the Court to answer the complaint made, and a prayer for appropriate relief.<sup>4</sup>

A bill is sometimes called a petition, especially when filed to obtain; 1, a divorce; 2, dower; 3, a partition of land; 4, a sale of lands for partition; 5, a sale of lands to pay a decedent's debts; 6, the removal of a trustee; 7, a mandamus; 8, a habeas corpus; and 9, an inquisition of lunacy. A *petition*, however, is ordinarily, a written statement made to the Chancellor during the progress

<sup>2a</sup> The word "judgment," (the act of a Judge,) is a harsh word, and implies force, and has the significance of doom; whereas, the word "decree" simply means discernment, a separation of the true from the false, according to reason and conscience, and a decision in accordance therewith.

<sup>3</sup> *Aequitas lucet ipsa per se.* (Equity shines by her own light.)

<sup>3a</sup> Code, § 4312.

<sup>4</sup> Bouvier's Law Dic., "Bill;" Sto. Eq. Pl., § 7; Code, § 4314. This bill must be in the English language. Bills in Chancery have always been in the English language. When the language of the law Courts in England was in Norman French and afterwards in Latin, the language of the Chancery Court was English. Sto. Eq. Pl., § 7. This grew out of the fact that the Chancery Court began as the Court of the common people, whose language was English.

of a suit, in order to bring before the Court, or the Chancellor, some matter connected with the suit affecting the petitioner's rights, and not otherwise sufficiently appearing, or to obtain some relief in the cause not otherwise obtainable.<sup>5</sup>

When a suit is commenced by petition, the petition must contain the names and residences of the parties, and a sufficient statement of the facts to show that the petitioner is entitled to relief; and must pray for process,<sup>6</sup> and for relief.

2. **By Motion.** Suits commenced by motion in the Chancery Court are conducted in a summary way, without formal pleadings, the motion being entered on the minutes of the Court. This entry is in the nature of a pleading, and should contain sufficient facts to give the Court jurisdiction, and to authorize the judgment.

As, however, all ordinary original suits in Chancery are commenced by bill, the nature, substance and forms of bills, and the practice and pleadings consequent on the filing of a bill, will first be considered; and suits commenced by petition and by motion will be treated of hereafter.

The party who institutes the suit is generally termed the *complainant*, because he complains of some wrong done him; the party against whom the suit is instituted is called the *defendant*, because he defends against the complaint made.<sup>7</sup>

§ 134. **Necessity and Object of Pleadings.**—In every system of jurisprudence, some forms of proceeding must be established to bring the matters in controversy between parties before the tribunal by which they are to be adjudicated.<sup>8</sup> These forms of proceeding are devised in order that the litigants may have a fair opportunity of presenting their respective sides of the controversy, and to enable the Court to determine the questions in issue with accuracy and dispatch. The written complaints made by the complainant, and the written defences made thereto by the defendant, are termed *pleadings*,<sup>9</sup> and to exhibit the present system of Equity Pleading in Tennessee is one of the main purposes of the present treatise.<sup>10</sup> Such portions of the old system of pleading as are obsolete will be wholly omitted, and much of that which is unnecessary or unimportant mainly disregarded.

§ 135. **General Nature of a Bill.**—A bill is a written statement of such matters as the complainants desires to bring to the attention of the Court. These matters must be such as are within the jurisdiction of the Chancery Court. That jurisdiction generally extends to the final decision of the subject-matter of the suit; but sometimes it is only ancillary to the decision of a suit pending in the same Court, or of a suit brought, or to be brought, in another Court; sometimes it is merely of a precautionary or preventive nature, to avert a meditated or threatened wrong; and, sometimes, it is merely to require that the par-

<sup>5</sup> Winchester v. Winchester, 1 Head, 490.

<sup>6</sup> Majors v. McNeilly, 7 Heisk., 294.

<sup>7</sup> The term "complainant" is used in this book to designate the party who institutes a suit; and the term "defendant," to designate the party against whom a suit is brought. In the Code, the term, "complainant," is generally used: Code, §§ 4285; 4289-4292; 4313; 4323; 4332-4334; 4360-4361; 4366; 4372-4374; 4380; 4382; 4387; 4391-4393; 4400; 4403; 4405-4409; 4426; 4430; 4439; 4447; 4453; 4457; 4464; 4489. The term, "complainant," is uniformly used in the Chancery Rules. This may be deemed authoritative. The term "plaintiff" is, however, used in the following sections of the Code, in lieu of complainant, §§ 4292; 4317; 4324; 4328; 4336; 4369; 4393; 4401; 4432; 4444; 4492; 4494. The party who is sued, is uniformly termed "defendant," in the Code, the term, "respondent," not being used.

<sup>8</sup> Sto. Eq. Pl., § 1.

<sup>9</sup> Equity pleading is a controversial science, based on law and logic, and designed to so formulate the contentions of litigants as to best develop the issues of law and fact involved in the controversy, to the end that the Court may be thereby adequately enabled to apply the principles of Equity to their determination.

<sup>10</sup> Pleading may be defined to be the formal statement, in writing, of the matters on which a litigant relies to obtain, or to defeat, the relief sought; these matters may be matters of fact, to be established by proof; or matters of law, to be sustained by statute or precedent; Sto. Eq. Pl., § 4, and note.

The pleadings in Equity were probably borrowed from the civil law, or from the canon law, (which is a derivative from the civil law,) or from both. The early Chancellors were, for the most part, if not altogether, ecclesiastics, and many of them were bred up in the jurisprudence of the civil and canon law; and it was natural for them, in the administration of their judicial functions in the Court of Chancery, to transfer into that Court the modes of proceeding with which they were most familiar. Hence, at almost every step, we may now trace coincidences between the pleadings and practice in Chancery, and the pleadings and practice in a Roman suit, and in an ecclesiastical suit; Sto. Eq. Pl., §§ 13-14.

Story's Equity Pleadings, Daniel's Chancery Pleadings and Practice, and Barbour's Chancery Practice, being recognized as standard authorities in Tennessee, have been largely followed in this work when consistent with our statutes, and our system of pleading and practice.

ties really interested in a controversy should be compelled to litigate their rights, without peril or expense to a mere stakeholder having no interest therein. The bill may either complain of some injury, which the party, exhibiting it, suffers, and pray relief according to the injury; or, without praying relief, it may seek a discovery of matter necessary to support or defend another suit; or it may seek to preserve or perpetuate testimony; or it may complain of a threatened wrong or impending mischief, and, stating a probable ground of possible injury, it may pray the assistance of the Court to enable the party exhibiting the bill to protect or defend himself from such wrong or mischief whenever it shall be attempted or committed. Or it may relate to some defect in a pending suit in the same Court, or may seek to introduce some new or additional matter into a pending suit, or to obtain the benefit of, or change, or reverse the proceedings in, a pending suit.<sup>11</sup>

§ 136. **Different Kinds of Bills.**—Bills in Chancery are of two general kinds: 1, Original bills; and 2, Bills not original. Original bills are those which relate to some matter not before litigated in the same Court, by the same persons, standing in the same interest and making the same allegations. Bills not original are those which relate to some matter already litigated in the same Court by the same parties, or their privies, but which seek to make some addition to, or to obtain some benefit from, the original bill, or to supply some defect in it. There is another class of bills, which is of a mixed nature, and partakes of the character of both of the others. Thus, for example, bills, brought for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or of obtaining the benefit of a former decree, or of carrying it into execution, are not considered as strictly a continuance of the former bills, but in the nature of original bills. And, if these bills require new facts to be stated, or new parties to be brought before the Court, they are, so far, strictly of the nature of supplemental bills. For all the objects of the present work, this last class may be treated as included in that of bills not original.<sup>12</sup>

§ 137. **Original Bills.**—Original bills are divided into those which pray relief, and those which do not pray relief. Original bills praying relief are subdivided into two kinds: 1, Bills praying the decree or order of the Court, touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the complainant's right. This is the most common kind of bill. 2, Bills of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons, against whom the bill is exhibited, but prays the decree of the Court, touching the rights of those persons, for the safety of the person exhibiting the bill.<sup>13</sup>

Original bills, not praying relief, are also of two kinds: (1) Bills to perpetuate the testimony of witnesses, or to examine witnesses *de bene esse*; and (2) Bills of discovery, technically so called; that is to say, bills for discovery of facts, resting within the knowledge of the party against whom they are exhibited, or for the discovery of deeds, writings, or other things, in his custody or power;<sup>14</sup> and praying no relief on the merits.

§ 138. **Bills not Original.**—Bills not original are either an addition to, or a continuance of, an original bill; or they are for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or of carrying it into execution. The former kind includes: 1, A supplemental bill, which is merely an addition to the original bill, to supply some defect in its frame or structure. 2, A bill of revivor, which is a continuance of the original bill, to bring some new party before the Court, when, by death, or

<sup>11</sup> Sto. Eq. Pl., §§ 9; 20.  
<sup>12</sup> Sto. Eq. Pl., § 16.

<sup>13</sup> Sto. Eq. Pl., § 18, 1 Dan. Ch. Pr., 306.  
<sup>14</sup> Sto. Eq. Pl., § 19.

otherwise, the original party has become incapable of prosecuting or defending the suit, and the suit is, as it is in Equity technically called, abated, that is, suspended in its progress. 3, A bill both of revivor and supplement, which continues a suit upon an abatement, and supplies defects which have arisen from some event subsequent to the institution of the suit.<sup>15</sup>

Bills, not original, for the purpose of cross-litigation, or of controverting, suspending or reversing some decree or order of the Court, or carrying it into execution, are: 1, A cross bill exhibited by the defendant in the original suit against the complainant in that suit, touching some matter in litigation in the first bill; 2, A bill of review which is brought to examine and reverse a decree made upon a former bill, at a former term of the Court, and, for that reason, not subject to a change on a rehearing; 3, A bill to impeach a decree upon the ground of fraud; 4, A bill to suspend the operation of a decree in special circumstances, or to avoid it on the ground of matter which has arisen subsequent to it; 5, A bill to carry a decree, made in a former suit, into execution; 6, And lastly, a bill, partaking of the qualities of some one or more of these bills, such as a bill in the nature of a bill of revivor, or in the nature of a supplemental bill, or in the nature of a bill of review, and others of a like character.<sup>16</sup>

<sup>15</sup> Sto. Eq. Pl., § 20.

| <sup>16</sup> Sto. Eq. Pl., § 21.



## ARTICLE II.

## FRAME OF AN ORIGINAL BILL.

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| <p>§ 139. An Original Bill generally Considered.</p> <p>§ 140. What Facts Must be Alleged in a Bill.</p> <p>§ 141. How Facts Must be Alleged in a Bill.</p> <p>§ 142. Necessity for Fulness and Particularity in Alleging the Facts.</p> <p>§ 143. Complainants Must Show an Interest in the Subject-matter of the Suit.</p> <p>§ 144. Bill Must Show a Ground of Suit.</p> <p>§ 145. Bill Must Show a Case within the Jurisdiction of the Court.</p> <p>§ 146. Bill Must be Brought for the Whole Matter.</p> | <p>§ 147. Bill Must Set up Matters in Avoidance, When.</p> <p>§ 148. Bill in Case of a Tender by the Complainant.</p> <p>§ 149. Bill Must Not be Multifarious, or Repugnant.</p> <p>§ 150. Bill Must be Free from Scandal and Impertinence.</p> <p>§ 151. Prayers for a Discovery, and for Process.</p> <p>§ 152. Prayer for Relief.</p> |
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§ 139. **An Original Bill generally Considered.**—An original bill is a written statement addressed to the Chancellor of the Court in which it is to be filed, setting forth facts and circumstances, which, if true, show that the complainant is entitled to the assistance of the Court in obtaining the relief he seeks against the defendant, or defendants, and praying for such assistance and relief.<sup>17</sup> The bill sets out the complainant's rights, shows wherein those rights have been injured, denied or withheld, by the defendants, makes out a case within the jurisdiction of the Court, and invokes the Court to exercise that jurisdiction by requiring the persons complained of to do what in Equity and good conscience they ought to do towards the complainant. Every bill must show clearly, on its face, 1, that the complainant has a right to the particular relief he seeks, or to some other relief; 2, that he has this right as against the defendants; and 3, that the Court has jurisdiction to enforce this right. If the bill is defective in either of these three essentials, the defendants may have it dismissed.<sup>18</sup>

Every bill should clearly set forth a state of facts showing, not only that the complainant has a right to the relief he seeks, but that every defendant has (1) a claim, interest, or title, in or to the subject-matter of the suit, or (2) is in some way illegally interfering with, or withholding, complainant's rights or property, or (3) owes the complainant a debt or duty cognizable in a Court of Chancery.<sup>19</sup>

§ 140. **What Facts Must Be Alleged in a Bill.**—Every bill must contain a statement of facts showing that complainant is entitled (1) to equitable or legal relief, (2) in the Court in which the bill is filed, and (3) against the defendant charged. In the language of the Code, "The bill should contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or

<sup>17</sup> Sto. Eq. Pl., § 23.

<sup>18</sup> 1 Dan. Ch. Pr., 314.

<sup>19</sup> 1 Dan. Ch. Pr., 325; Sto. Eq. Pl., § 262. Nothing is properly before the Court for its determination except what is submitted to it in the pleadings; and, to entitle a complainant to a decree (1) his bill must present such a state of facts, as, if true, will give him a right to the relief sought; and (2) the material facts alleged must be proved, unless admitted. See, *post*, § 142.

A bill setting out the facts, and praying for the

relief complainant is entitled to on such facts, is sufficient, although complainant's theory of the case is faulty. *Peterson v. Turney*, 2 Ch. Apps. 519; *Dodd v. Benthal*, 4 Heisk., 601. And although he gives his bill the wrong name. See §§ 43; 269; 431, note; 681; 719; 63, sub-sec., 4. The Court will adjudicate according to the allegations, and will regard the misnomer as immaterial, and mere surplusage. See sections and cases above cited, and *Murphy v. Johnson*, 23 Pick., 552.

repetition, and conclude with a prayer for the required process and appropriate relief."<sup>20</sup> This statement of facts should contain everything necessary to entitle the complainant to the relief he seeks, and should omit everything that is immaterial or irrelevant. Nothing should be averred except what is necessary to be proved, and nothing should be omitted which is essential to sustain the case. The test of the sufficiency of the averments in a bill is: Would complainant be entitled to the special relief he prays, if all the averments should be established by proof? And a test of the materiality of a particular averment is: Can the bill be fully sustained as to the special relief sought if the averment is not proved?

Where, however, there is any doubt whether a particular averment is necessary, the pleader should insert it;<sup>21</sup> and it must always be remembered, in drawing a bill, that everything which is intended to be proved must be alleged, and that nothing can be proved which is not alleged. No facts are properly put in issue by the complainant unless charged in the bill; and, as a consequence, no proof can be offered by the complainant as to any fact, however material it may be to his case, unless such fact be stated in the bill, or unless the defendant sets it up in the answer. The Court cannot notice matter, however clearly proved, as to which there is no allegation or issue in the pleadings. A fact, neither alleged in the bill nor stated in the answer, is, therefore, not in issue, and cannot be considered by the Court, although essential to complainant's success and fully proved.<sup>22</sup> Courts can notice neither allegations of matters not proven, nor proof of matters not alleged.<sup>23</sup>

It is a general rule, that whatever is essential to the rights of the complainant, and is necessarily within his knowledge, ought to be alleged positively and with precision. On the other hand, the claims of the defendant may be stated in general terms. And, if a matter, essential to the determination of the claims of the complainant, is charged to rest in the knowledge of the defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, a precise allegation thereof is not required.<sup>24</sup> If, however, sufficient facts appear on the face of the bill to entitle the complainant to some relief, relief will be granted appropriate to the facts, even though the bill be inartificial, the terms used untechnical, and the relief prayed not specific.<sup>25</sup>

**§ 141. How Facts Must be Alleged in a Bill.**—The bill should state the complainant's cause of action with accuracy and clearness, specifying the rights of the complainant, the injury, or grievance, of which he complains, and the relief which he asks of the Court. There must be such certainty in the averments of the facts upon which the bill is founded, that the defendant may be distinctly informed of the nature of the case which he is called upon to meet. The material facts ought to be plainly, yet concisely alleged, and with all the essential circumstances of time, place manner, and other incidents. If title deeds or other instruments are referred to, they should not be set out in full; but only the substance of such portions as are necessary to a right understanding of the real matters of the bill. It is not a sufficient allegation of a fact in a bill to say that one of the defendants alleges, and the complainant believes the statement to be true; for the defendant may allege that which is quite false, and the complainant may believe it to be true; but the fact should be positively alleged.<sup>26</sup>

It is sometimes said that a bill in Chancery should be as certain and precise as a declaration at law, but the proposition is not strictly correct, the same de-

<sup>20</sup> Code, § 4314.

<sup>21</sup> Surplusage does not vitiate; or, as the maxim states it, *Utile per inutile non vitiatur*.

<sup>22</sup> But, in such a case, on motion of complainant and the payment of such costs as the Court may impose, the bill may be so amended as to aver the essential matters omitted, or a supplemental bill may be filed.

<sup>23</sup> *Turley v. Turley*, 1 Pick., 260; *Duluth, N. B., v. Knoxville F. I. Co.*, 1 Pick., 87; 1 Dan. Ch. Pr., 326.

<sup>24</sup> *Sto. Eq. Pl.*, § 255; 1 Dan. Ch. Pr., 321.

<sup>25</sup> *Dodd v. Benthall*, 4 Heisk., 601.

<sup>26</sup> *Sto. Eq. Pl.*, § 241.

cisive and categorical certainty not being required in a bill.<sup>27</sup> Nevertheless, a bill should set forth a distinct and clear cause of action entitling the complainant to the relief he prays.<sup>28</sup> All allegations should be positive, and those made on information and belief should be so stated. An allegation that "complainant is informed" so and so, or that "complainant believes" so and so, or that "complainant is informed and believes" so and so, is not sufficient; complainant must go further and allege the facts, directly, saying "that complainant is informed and believes, and so charges, that" the fact is so and so.<sup>29</sup>

But although a general charge is insufficient, yet it does not follow that the complainant in his bill is bound to set forth all the minute facts. On the contrary, the general statement of a precise fact is often sufficient; and the circumstances which go to confirm or establish it, need not be minutely charged; for they more properly constitute matters of evidence than matters of allegation. Where a bill, however, charges fraud, accident or mistake, or attacks a stated or settled account, or seeks the reformation, rescission, or re-execution of a contract, or attacks a judgment or decree, or prays an injunction or a receiver, it should set forth the circumstances and particular facts on which the relief is sought, and general charges of error or wrong-doing, or the use of general averment, is not sufficient, as will more fully appear in the next section.<sup>30</sup>

§ 142. **Necessity for Fulness and Particularity in Alleging the Facts.**—Every fact essential to the complainant's title to maintain the bill, and obtain the relief, must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill; and of course no proofs can generally be offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from evidence; for the Court pronounces its decrees *secundum allegata et probata*. The reason of this is, that the defendant may be apprised by the bill what the charges and allegations are against which he is to prepare his defense.<sup>31</sup> If the rule were otherwise, the defendant would not only not know what charges he would be required to meet, but the complainant, by thus failing to inform the defendant, would be taking advantage of his own wrong. Besides, the Court has no jurisdiction of any matter not contained in the pleadings; and if the Chancellor should assume to make an adjudication not justified by the pleadings, his decree would be *coram non iudice*, and void on the face of the proceedings; and this would be so, even though the facts proved would have abundantly supported the decree had there been pleadings justifying the proof.

In drawing bills, it must be kept in mind that there is a difference in the degrees of particularity required, between (1) bills praying ordinary relief obtainable under the concurrent jurisdiction of the Court, and praying for ordinary process, and (2) bills praying for extraordinary process, or charging fraud, or assailing presumptions.

1. **Where Relief Obtainable at Law is Prayed.** In cases of concurrent jurisdiction the allegations of the bill will resemble those in a declaration in the Circuit Court; and all that is required is a direct averment of the main facts constituting the cause of action, without any detail of circumstances or allegations of particulars.<sup>31a</sup> Such bills need no verification.

2. **Where an Injunction or a Receiver is Prayed For.** An injunction and receiver are extraordinary processes that issue before the suit is tried on its merits, and often before the defendant is heard; and, therefore, the Court re-

<sup>27</sup> *Ibid.*, notes; *Cunningham v. Wood*, 4 Hum., 417; *Walker v. Cottrell*, 6 Bax., 271.

<sup>28</sup> *Merriman v. Lacefield*, 4 Heisk. 217.

<sup>29</sup> Were the rule otherwise, a denial of the bill would be only a denial that complainant was so "informed," or so "believed" or "was so informed and believed." Neither "information," nor "belief," nor both are sufficient grounds for coming into Chancery: there must be positive averment to put the machinery of the Court in motion. *Foster v. Bradford*, 1

Tenn. Ch., 400; *Quinn v. Leake*, 1 Tenn. Ch., 71; *Sto. Eq. Pl.*, § 241-242; 1 *Dan. Ch. Pr.*, 361, notes.

<sup>30</sup> Solicitors in framing bills should keep in mind that "Equity proceeds upon circumstances," and that when equitable relief is sought the circumstances should be set forth in the bill.

<sup>31</sup> *Sto. Eq. Pl.*, § 257; 1 *Dan. Ch. Pr.*, 327; *Merriman v. Lacefield*, 4 Heisk., 217.

<sup>31a</sup> See *post*, §§ 170; 1073, note 1.

quires extraordinary particularity and fulness in the averments of the bill. General allegations of wrong-doing, and formal charges of inequitable conduct, are wholly insufficient. The particulars and circumstances must be set out, so the Chancellor may see for himself that the doings complained of are wrong, and the conduct charged is inequitable, for what may appear wrong or inequitable to the complainant, may not so appear to the Chancellor; besides the Chancellor prefers the facts and circumstances of the case to the opinion or conclusions of the complainant. Counsel in drawing such bills should keep in mind that such a bill is not only a pleading, but a special affidavit;<sup>32</sup> as a pleading, formal averments would be sufficient, no verification would be necessary, only a cost bond required and only a subpoena to answer would issue. It is on the special affidavit incorporated in the bill that the extraordinary process issues, if issued at all. So the bill, in its two-fold nature should be full, precise, definite, direct and circumstantial in its averments, and give a detailed statement of the main facts on which the injunction or receiver is prayed; and its allegations should be on the actual knowledge of the complainant, or if on information and belief, should be verified by the informant.<sup>33</sup> The bill must aver that it is the first application for the particular extraordinary process prayed for.<sup>34</sup>

**3. Where Fraud is Charged.** What is said in the preceding paragraph about particularity in averment applies fully to bills charging fraud. Fraud is generally established by proof of circumstances, and these circumstances are generally known to the complainant; so the Court requires the complainant to set out these circumstances in his bill not only that the Court may know on what grounds the charge of fraud is based, but, also, that the defendant may know the precise facts he will have to meet in framing his answer, and making his proof. A general charge of fraud is nugatory,<sup>35</sup> for fraud is not so much a fact as a conclusion deduced from facts; and a bill charging fraud in general terms as the ground of relief and setting forth no particulars showing the fraud, will be dismissed on demurrer.<sup>36</sup>

**4. Where a Presumption is Assailed.** When a presumption is attacked, the proof to overcome the presumption must be exceptionally strong. So, a bill assailing a presumption must be exceptionally strong in its averments, and precise in its particulars. A general charge of error in a deed, mortgage, note, or other written instrument, or in a stated or settled account, or in a judgment or decree, is wholly nugatory, and a bill based on such a general charge, as a ground of equitable relief, is demurrable. The bill should follow up the general charge by setting out in detail the facts and circumstances constituting the error,<sup>37</sup> and if any fraudulent or inequitable conduct in connection therewith is charged upon the defendant, the circumstances thereof must be fully specified, as shown in the preceding paragraph. And, in general, a bill seeking to undo what has been done, because of error or fraud, must specify the particulars of the error or fraud complained of.

Extraordinary process includes preliminary injunctions, *ne exeat*, attachments, receivers, publication notices, and appointments of guardians *ad litem* for persons alleged to be under disability. In these cases the bill is both a pleading and an affidavit; it is a pleading as to the ordinary process and ordinary relief prayed for; it is an affidavit as to the extraordinary process prayed; and, inasmuch as this process is sought *ex parte*, and before any sort of hearing, so much of the bill as purports to give the grounds for this extraordinary action

<sup>32</sup> See, *post*, §§ 838; 841; 1073, note 1; Furnace Co. v. Railroad, 5 Cates, 711.

<sup>33</sup> See, *post*, §§ 160-163; 788-789; 838; 841; Furnace Co. v. Railroad, 5 Cates, 711. The complainant may get an injunction without conforming to the requirements of the *txet*, but if so he will be more lucky than deserving. See, Furnace Co. v. Railroad, 5 Cates, 711; High on Injunc., §§ 34-35.

<sup>34</sup> Code, § 4435.

<sup>35</sup> Gernt v. Cusack, 22 Pick., 141; Fort v. Orn-

doff, 7 Heisk., 167; Neil v. Smith, 1 Lea, 373; Raht v. Mining Co., 5 Lea, 18; Reed F. Co. v. Thomas, 13 Pick., 478, 483.

<sup>36</sup> Borches & Co. v. Ar buckle Bros., 3 Cates, 498.

<sup>37</sup> Sto. Eq. Pl., §§ 251-252; 1 Dan. Ch. Pr., 324; Raht v. Mining Co., 5 Lea, 22; Neil v. Smith, 1 Lea, 373. Or the facts and circumstances having been fully set out, the general charge of fraud, accident, or mistake, may then be made.

should be full, precise, definite, direct, and particular, in its statements of the facts, and should be based on actual knowledge, or on reliable information; and should, also, explicitly conform to all statutory requirements. All such bills must be sworn to.

§ 143. **Complainants Must Show an Interest in the Subject-matter of the Suit.**—The complainants must show that they have an interest in the matters sought to be litigated; and this interest must be a present, subsisting interest. It is immaterial how small the interest of any of them may be in the subject-matter of the suit,<sup>38</sup> if the interest be such that its adjudication will enable the Court more completely to settle all the matters in controversy, so as to leave no roots out of which future litigation might spring. The object of a suit in Chancery is not merely to show that the defendant has been guilty of illegal or inequitable conduct, but to show, also, that the complainant has been injured thereby. The complainant must, therefore, in his bill, show that he has such an interest in the subject-matter of the suit as to entitle him to the aid of the Court in the protection or enforcement of that interest.<sup>39</sup> And if there are more than one complainant, they must all show themselves in some way interested in the subject-matter of the suit. It is perfectly immaterial, however, how minute this interest may be, or how distant the possibility of the possession of that minute interest, if it is a present interest. A mere possibility, or even probability, of a future title or interest will not be sufficient to sustain a bill: the title or interest must be present, actual and existing.<sup>40</sup>

§ 144. **Bill Must Show a Ground of Suit.**—Courts are devised for the relief of persons (1) whose legal rights have been withheld or interfered with, or (2) who have suffered actionable wrongs, or (3) who are seriously threatened with irreparable injury. They were not instituted (1) to enable litigious people to harass their neighbors with trivial suits; nor (2) are they proper places for the airing of supposed grievances, nor (3) the ventilation of supposed wrongs, nor (4) even real misdoing when the complainant has not himself suffered, or is not menaced with suffering, by reason of such wrongs or misdoing, or is himself in the wrong. According to our Constitution, Courts are opened to remedy injuries done to one's lands, goods, person or reputation,<sup>41</sup> and Courts of Equity sit to administer justice in matters of grave interest to the parties, and not to gratify their passions or their curiosity, or their spirit of vexatious litigation.<sup>42</sup>

No man has a right to set in motion the machinery of the Courts of Justice unless he has a good cause of action; and this cause he must so set forth in his bill, that the Court may see it. It is in vain that a complainant has a good ground for relief, unless he properly sets it forth in his bill, and substantiates it by proper proof.

It matters not how gross a fraud has been perpetrated, or what relations of trust and confidence have been violated, or what the disability of wards, legatees, distributees, or other persons, or what iniquitous wrongs have been done by the defendant, or what violations of right and justice have been committed, the Court will not sustain a bill setting them forth unless it appear therefrom that the complainant is entitled to some relief against the wrong-doer who is made a defendant; for the Court will not go through the form of a suit merely to enable the complainant to show forth the wrongs done by the defendant, and the disabilities and injuries of the complainant, unless it appears, from the facts stated in the bill, that the complainant will be entitled to some relief against the defendant by reason of those facts being proved to be true.

The complainant must not only show that he has some interest in the subject-

<sup>38</sup> *Henderson v. Peck*, 3 Hum., 250; *Wilson v. Davidson County*, 3 Tenn. Ch., 536; *Dechard v. Edward*, 2 Sneed, 94.

<sup>39</sup> No party is authorized to ask the aid of a Court of Chancery, actively, without showing an interest in the matter litigated; *Catron, Ch. J.*, in *Thompson v. Hill*, 5 Yerg., 419.

<sup>40</sup> 1 Dan. Ch. Pr., 314-317.

<sup>41</sup> Const. Tenn. Art 1, § 17. The words "lands, goods, person and reputation" include all property, and all rights thereto or derived therefrom. For definition of property, see *ante*, § 56.

<sup>42</sup> St. Eq. Pl., § 500.

matter of the litigation, but that he has such a title to it as against the defendant as gives him the right to sue the latter. Thus, a distributee has an interest in the personality left by his intestate, yet he cannot sue for its recovery, nor compel a debtor of his intestate to pay the debt to him, because there is no such privity between the distributee and the intestate as will authorize the former to sue a debtor of the latter. The personal representative is the only person who can bring such suits, he only being the privy of the intestate, and entitled to sue for his personality, or for the debts due him.<sup>43</sup> So, a person named as executor has an interest in all the personal property of his testator; but until he has probated the will, he has no right to sue for such property;<sup>44</sup> for, until he properly qualifies as executor, there is no privity between him and his testator.

§ 145. **Bill Must Show a Case Within the Jurisdiction of the Court.**—Not only must the complainant be interested in the subject-matter of the litigation, and be clothed with such a character as entitles him to bring the suit, and the defendant be liable to the relief sought against him, or be in some way interested in the suit, but it must also appear that the case stated in the bill is within the jurisdiction of the Court. Prior to the Act of 1877, increasing the jurisdiction of the Chancery Court, it was often a question of much nicety and perplexity whether the case presented by the bill was one of equitable or legal cognizance; but now it is generally not difficult to determine whether the Chancery Court has jurisdiction of a given case. If the debt is of less value than fifty dollars,<sup>45</sup> or is for an injury to person, property, or character, involving unliquidated damages,<sup>46</sup> the Court has no jurisdiction; but of all other suits it has jurisdiction,<sup>47</sup> provided they are brought in the proper county. The local jurisdiction of the Court will be hereafter fully considered.

§ 146. **Bill Must be Brought for the Whole Matter.**—A bill must not only be for a subject within the jurisdiction of the Court, but it must also be brought for the whole subject. The Court will not permit a bill to be brought for part of a matter only, so as to expose a defendant to be harassed by repeated litigations concerning the same thing. It, therefore, requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent any future litigation concerning it. It is upon this principle that the Court acts, in requiring in every case the presence, either as complainants or defendants, of all parties interested in the object of the suit. And upon the same principle it will not allow a complainant who has two claims upon the same defendant growing out of the same transaction, to bring separate bills for each particular claim.<sup>48</sup> Courts of Equity discourage the promotion of unreasonable litigation; and, for the purpose of preventing a multiplicity of suits, they will not permit a bill to be brought for a part of a matter only, where the whole is the proper subject of one suit. Thus, for example, they will not permit a party to bring a bill for a part of one entire account; but will compel him to unite the whole in one suit; for, otherwise, he might split it up into various suits, and promote the most oppressive litigation.<sup>49</sup>

When, however, it is laid down as a rule that the Court will not entertain a suit for a part of a matter, it must be understood as subject to this limitation, that the whole matter is capable of being immediately disposed of; for, if the situation of the matter in dispute is such that no immediate decision upon the whole matter can be come to, the Court will frequently lend its assistance to the extent which the actual state of the case, as it exists at the time of the filing of the bill, will warrant. It is upon this same principle that the Court proceeds, in

43 1 Dan. Ch. Pr., 323.

44 1 Dan. Ch. Pr., 318.

45 Code, § 4281.

46 Acts of 1877, ch. 97.

47 As to cases where the Court has jurisdiction of

matters less than fifty dollars in value, see, *ante*, § 26.

48 1 Dan. Ch. Pr., 330.

49 Sto. Eq. Pl., § 287.

all that class of cases in which it acts as ancillary to the jurisdiction of other Courts, by permitting suits for the preservation of property pending a litigation in the common law Courts, or by removing the impediments to a fair litigation before tribunals of ordinary jurisdiction. In all these cases, it is no ground of objection to a bill that it embraces only part of the matter, and that the residue is, or may be, the subject of litigation elsewhere. The preservation of the property, or the removal of the impediments, is all that a Court of Equity can effect. The bill, therefore, in seeking that description of relief, seeks the whole relief which, in such cases, a Court of Equity can give; but if a bill, praying only this description of relief, should disclose a case in which a Court of Equity is capable of taking upon itself the whole decision of the question, in such a case the bill would be defective in not seeking the relief to which the complainant is entitled.<sup>50</sup>

§ 147. **Bill Must Set up Matters in Avoidance When.**—Under our former method of pleading in Chancery, if the defendant pleaded the statute of limitations, the statute of frauds, payment, accord and satisfaction, an award, a former judgment or decree, an account stated, a release, a novation or any other matter in bar, the complainant could, in his replication, set up matters in avoidance of such defense. If the facts in avoidance of such defence are not set forth, the Code having abolished replications to answers,<sup>51</sup> the complainant has now no way of avoiding such defense except by his bill. He, therefore, must disclose in his bill these matters of defense, and then set forth his facts in avoidance of such defense. If the facts in avoidance of such defense are not set forth by complainant in his bill, he will not be allowed to prove them, or, if proved, the Court cannot consider them, because they are not alleged in the bill.<sup>52</sup> Thus, for instance, if a complainant would avoid a plea of the statute of limitations, he must in his bill give the dates and facts which disclose the bar, and then allege the fact which avoids the bar, such as disability of the complainant, non-residence of the defendant, fraudulent concealment of the cause of action, or a new promise within the statute, or such fact in avoidance, though proved, will not be considered by the Court for the reason already given, and the bill will be dismissed.<sup>53</sup> Matters thus set up by the complainant in avoidance of some bar must be proved by him as alleged.<sup>54</sup>

§ 148. **Bill in Case of a Tender by the Complainant.**—When, on a bill to redeem, or on a bill in any other case where a tender is necessary, it is alleged that a tender was made, the allegations should specify the date and amount of the tender, and to whom and on what account made, and should aver a willingness and readiness on complainant's part to have paid what was tendered at any time after such tender, down to the filing of the bill; and he should continue and repeat such tender in his bill; and the money, or thing, so tendered, should be filed in Court along with the bill, or a sufficient excuse given for not so doing. But if the defendant fail to demur to the bill, or to otherwise take proper exception, because the money, or thing, so tendered, has not been duly filed, he would be deemed to have waived such filing.<sup>55</sup> On a bill to redeem, a tender is not necessary when the right of complainant to redeem is absolutely denied by the defendant.<sup>56</sup>

§ 149. **Bill Must Not be Multifarious, or Repugnant.**—In endeavoring to avoid the error of making a bill not sufficiently particular to answer the purpose of complete justice, care must be taken not to run into the opposite defect of

<sup>50</sup> 1 Dan. Ch. Pr., 331.

<sup>51</sup> Code, §§ 4322; 4328; 4432.

<sup>52</sup> Nothing can be proved that is not alleged. *Jenkins v. De War*, 4 Cates, 684. See, *post*, § 455. But if complainant fail to allege his matter in avoidance in his bill, he may do so in an amended bill, by leave of the Court. *Barton's Suit in Eq.*, 129.

<sup>53</sup> *Jenkins v. De War*, 4 Cates, 684; *Sully v. Chil-*

*dress*, 22 Pick., 109, citing § 336, [now § 331] of this book.

<sup>54</sup> *Gross v. Disney*, 11 Pick., 592; *Sully v. Childress*, 22 Pick., 109; *Jenkins v. De War*, 4 Cates, 684. The party that alleges a material fact must prove it. See, *post*, § 444.

<sup>55</sup> *Rogers v. Tindell*, 15 Pick., 356.

<sup>56</sup> *Ibid.*

attempting to embrace in it too many objects. The offence against this rule is termed *multifariousness*.

1. **Multifariousness** is the improperly joining in one bill several matters of a distinct and independent nature against several defendants.<sup>57</sup> Such a proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the case with the statement and proof of the several claims of the other defendants with which he has no connection. Besides, the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs of one of the parties, when the others might be fully ready for hearing.<sup>58</sup>

A bill is not to be treated as multifarious, however, because it joins two good causes of complaint, growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character. Neither will a bill be deemed multifarious where it states a right to an account from A, and B, against whom it has one remedy which it seeks to enforce, and also claims a lien against A, for what is due, and seeks that separate remedy against him, for the plaintiff may well in such a bill entitle himself to each. Indeed the objection of multifariousness, and the circumstances under which it will be allowed to prevail, or not, is, in many cases, a matter of discretion, and no general rule can be laid down on the subject.<sup>59</sup>

It is not the number of the parties, nor the intricacy of the claims on the one side or the other, that renders a bill multifarious; it is their disconnection or inconsistency, or the practical inconvenience of considering them together in one suit. Whenever a series of transactions have a common root or origin, and are so connected that it is impossible to tell, in advance of the hearing, what bearing one of these transactions may have upon another, or how the respective parties may be charged in reference to each other, embracing them all in one bill would not make it multifarious.<sup>60</sup> If the interest and liability of the defendants, though separate, flow from the same fountain, or radiate from the same center, or have a common connecting link, the joinder of such defendants and matters in the same suit is admissible.<sup>61</sup> The uniting in one bill of several matters of equity distinct and unconnected, against a sole defendant, is not multifariousness.<sup>62</sup> Bills are not objected to on the ground of multifariousness as much as formerly, because, if a demurrer for multifariousness is sustained, the Court may authorize amendments by directing separate bills to be filed, without new process as to the parties before the Court.<sup>63</sup>

2. **Repugnancy** consists in setting out in the bill two or more causes of action, or two or more grounds for maintaining the same suit, which are inconsistent or contradictory, and tend to nullify each other.<sup>64</sup> Alternative grounds of relief may be set up, and alternative relief prayed, but such grounds or relief must not be antagonistic or contradictory.

§ 150. **Bill Must be Free from Scandal and Impertinence.**—Care must be taken not to overload bills by superfluous allegations, and redundant and unnecessary statements; or by scandalous and impertinent matter; for, if any bill be found such, upon due reference to, and report of, a Master, the complainant

<sup>57</sup> *Swepson v. Bank*, 9 Lea, 713.

<sup>58</sup> *Sto. Eq. Pl.*, § 271. For the tests of multifariousness, see Chapter on Demurrers, *post*, § 284.

<sup>59</sup> *Sto. Eq. Pl.* § 284; 1 *Dan. Ch. Pr.* 334, note; *Bartee v. Tompkins*, 4 Sneed, 636. Chancellors dread a complicated litigation. They yearn to have all suits present clear-cut, well-defined issues; and they abhor the confusion and complexity that result from the attempt to join disconnected matters in one suit. This same abhorrence of duplicity exists at the common law. All Courts seek to have as few issues of fact in a lawsuit as possible. The greater the number of issues, the greater the difficulty in reaching satisfactory conclusions, and in doing exact justice. If a Chancellor is of opinion that the matters alleged in the bill are so disconnected that he

will be greatly burdened by the consequent volume of proof, and greatly perplexed by the confusion incident to the complications arising from the incongruous aggregation, he will adjudge the bill to be multifarious: if he is willing to wrestle with the complex problems presented, he will sustain the bill. Hence, the question, whether a bill is multifarious or not, often depends on the willingness of the Chancellor to determine the various matters of controversy in one suit.

<sup>60</sup> *Bartee v. Tompkins*, 4 Sneed, 636.

<sup>61</sup> *Johnson v. Brown*, 2 Hum., 327.

<sup>62</sup> *Code*, § 4327; *Doherty v. Stevenson*, 1 Tenn. Ch., 518.

<sup>63</sup> *Code*, § 4326.

<sup>64</sup> *Bynum v. Ewart*, 6 Pick., 655.



and his counsel<sup>65</sup> will be liable to pay costs. Impertinence is the introduction of any matters into a bill, answer, or other pleading or proceeding in a suit, which are not properly before the Court for decision at any particular stage of the suit. One of the Ordinances of the Court of Chancery, constituting a fundamental rule of the Court, is aimed against this transgression of the good sense, as well as the good taste, of Equity pleadings. It declares, "That counsel are to take care that bills, answers, and other pleadings, be not stuffed with repetitions of deeds, writings, or records, *in hæc verba*; but that the effect and substance of so much of them only as is pertinent and material, be set down, and that in brief terms, without long and needless traverses of points, not traversable, tautologies, multiplication of words, or other impertinences, occasioning needless prolixity; to the end that the ancient brevity and succinctness in bills and other pleadings may be restored and observed. Much less may any counsel insert therein matter merely criminous or scandalous, under the penalty of good costs to be laid on such counsel."<sup>66</sup>

Scandal consists in the allegation of anything, either in a bill, answer, or any other pleading, which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous. There are many cases, however, in which, though the words in the record are very scandalous, and highly reflect upon the party, yet if they are material to the matter in dispute, they will not be considered as scandalous; for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, and yet, perhaps, without having an answer to this very matter, the party may lose his right. The Court, therefore, always judges whether, though matter be *prima facie* scandalous, it is or is not of absolute necessity to state it; and, if it materially tends to the point in question, and is a necessary part of the cause, and material to the case of either party, the Court never looks upon this to be scandalous. Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous.<sup>67</sup>

However, in cases of mere impertinence, the Court will not, because there are here and there a few unnecessary words, treat them as impertinent; for the rule is designed to prevent oppression, and is not to be so construed as to become itself oppressive. Nor will the Court in cases of alleged impertinence, order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for, if it is erroneously struck out, the error is irremediable; but if it is not struck out, the Court may set the matter right in point of costs.<sup>68</sup>

It was to prevent these glaring faults of scandal and impertinence, alike mischievous and oppressive, (which might make the records of the Courts the vehicles of slander,) that the Courts of Equity, at a very early period, required all bills to have the signature of counsel affixed to them; and if no such signature appears, or the signature is not genuine, the bill will be dismissed, or ordered to be taken off the files of the Court. If either scandal or impertinence exist in a bill, it may be objected to by the defendant in the first stages of the cause, upon a motion to refer it to the Master, to inquire into the foundation of the objection. But nothing which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous. Thus, for example, in bills to set aside deeds, or other instruments, for fraud,

<sup>65</sup> The counsel who drew, or signed, the bill, should pay such costs; 1 Dan. Ch. Pr., 347; Sto. Eq. Pl., § 47; Litton v. Armstead, 9 Bax., 514.

<sup>66</sup> Sto. Eq. Pl., § 266. As to scandal and impertinence in bills, answers and other pleadings, see Johnson v. Tucker, 2 Tenn. Ch., 244; Jones v. Spencer, 2 Tenn. Ch., 776.

<sup>67</sup> 1 Dan. Ch. Pr., 347-348. Nothing that is perti-

nent to the cause can be scandalous, and the *major* or *minus* of the relevancy is not material; Gleaves v. Morrow, 2 Tenn. Ch., 596.

<sup>68</sup> Sto. Eq. Pl., § 267; Gleaves v. Morrow, 2 Tenn. Ch., 595. The best test of impertinence is, whether the matter alleged to be impertinent would be proper to be proved as evidence; 1 Dan. Ch. Pr., 340, note; Mrzena v. Brucker, 3 Tenn., Ch., 161.

there are often to be found gross charges in relation to the matter of the asserted fraud. But these charges are not, by any rule of the Court, to be deemed scandalous. And indeed, such a proceeding might be dangerous to the cause itself, and prevent a due investigation of its merits. Hence it is, that nothing pertinent to the cause is ever deemed scandalous, and the degree of the relevancy is not deemed material.<sup>69</sup>

It is obvious that a bill may contain matter which is impertinent, without the matter being scandalous; but if, in a technical sense, it is scandalous, it must be impertinent. According to the ordinary practice of the Court, a bill cannot be referred for impertinence after the defendant has answered, or has submitted to answer. But it may be referred for scandal at any time; and, even, by leave of the Court, upon the application of a stranger to the suit. The reason of the difference seems to be, that mere impertinence is not in itself prejudicial to any one; it is but a naked superfluity. But scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders; and the Court, in aid of the public morals, is bound to interfere to suppress such indecencies, which may stain the reputation and wound the feelings of the parties, their friends and relatives.<sup>70</sup> A Court of Chancery is not a register for detraction.<sup>71</sup>

§ 151. **Prayers for a Discovery, and for Process.**—Formerly, the interrogatory part of a bill was one of its main and most distinguishing features,<sup>72</sup> but now that all parties are competent witnesses, and the Code allows the complainant to waive the defendant's answer under oath, a discovery is very seldom sought.

1. **Prayer for Discovery.** In the part of the bill, usually called the *interrogatory part*, the complainant calls on the defendant to make full, true, direct and perfect answer, upon his corporal oath, to the best of his knowledge, remembrance, information, and belief, to all and singular the matters and charges set forth in the bill, as fully as though particularly interrogated in reference thereunto. The bill, also, when seeking a discovery, specially calls on the defendant to answer certain specific matters, and, sometimes, appends to, or incorporates in, the bill searching interrogatories to probe the knowledge, exhaust the memory, and sift the conscience of the defendant, to the uttermost. In this part of the bill the defendant is also called on to file accounts, statements, deeds, books, writings, and other documents, to be used as evidence by the complainant.

A defendant, however, cannot be compelled to discover when his oath to his answer is waived; nor can he be compelled to answer an interrogatory which is not based on some antecedent matter stated or charged in the bill; nor is he bound to criminate himself, or violate professional confidence, in his answer.<sup>73</sup>

Defendants now, however, being competent witnesses in Court, and their oath to their answers being now generally waived, discoveries are seldom called for in bills, it being more satisfactory to take the deposition of the defendants, or to obtain their evidence by cross-examination.

<sup>69</sup> Sto. Eq. Pl., § 269.

<sup>70</sup> Sto. Eq. Pl., § 270; 1 Dan. Ch. Pr., 351.

<sup>71</sup> Campbell v. Taul, 3 Yerg., 564. In this case, Chief Justice Catron, in delivering the opinion of the Court, said: "If the Courts of Chancery so far forget their duty, or shrink from it, as to permit every irrelevant slander, or truth, if you please, to be proved, and harrow up every misdeed of a man's life who comes, or is brought into, the Courts, not permitting the dead to escape, or the wife, the passions of parties seeking gratification will soon make them the sinks of registered infamy, and their records a black-book and a nuisance. From such tribunals, every man, and especially every woman, who has erred, and few have not, will shrink with horror, and most justly. Justice herself will be driven out of them, and none apply for relief but such as are above and beneath detraction. It must not be. The

pruning hand of the Master must be set to work in this Court, or in the Court below. Below it should be done, and the authority of the Court exercised to suppress such libelous matter, so that it might not go down to future ages, wantonly to disgrace the party and his descendants. Furthermore, our records present piles of impertinent matter, taking up much of the time of the Court in the mere reading, and when read, so confused and overwhelming, that generally not the least difficulty is to find what is pertinent, and greatly obscuring it when found." Scandal in oral evidence in a Court of law, like a circle in the water, spreads into ultimate nothingness; but scandal in pleadings and depositions are perpetual memorials. *Vox emissa volat, litera scripta manet.* See, also, Johnson v. Tucker, 2 Tenn. Ch., 247.

<sup>72</sup> Sto. Eq. Pl., §§ 35-38; 1 Dan. Ch. Pr., 374.

<sup>73</sup> See Chapter on Bills of Discovery, *post*, § 1116.

The other prayers of a bill are for process and relief. In the old form, the prayer for process came last, but in Tennessee it precedes the prayer for relief.<sup>74</sup>

**2. Prayer for Process.** The Code says the bill should "conclude with a prayer for the required process, and appropriate relief." It is probable that where the defendants are named as such in the commencement of the bill, and the character of the process is manifest from the averments of the bill, "a prayer for the required process" would not be indispensable, especially if there be a prayer for relief and that they "be made parties by proper process," or even a prayer that they "be made parties," or "be required to answer."<sup>75</sup> Nevertheless, no risks of this sort should ever be incurred, and the bill should always pray for subpoena as to the resident defendants, and publication as to non-resident defendants.<sup>76</sup>

If any extraordinary process is sought, such as an injunction, or an attachment, it must be specially prayed for, otherwise it cannot be had;<sup>77</sup> and in such case the bill must state that it is the first application for such process. If a receiver is desired before answer, there should be a specific prayer to that effect in the bill; however, such a prayer is not indispensable, as a receiver may be appointed, on motion, at any time during the progress of a cause, on a proper case made out.<sup>78</sup>

**§ 152. Prayer for Relief.**—The prayer for relief is generally two-fold, first for particular relief, and second for general relief. The complainant should first pray specially for that particular relief appropriate to his case, and then should pray for general relief. But a prayer for some sort of relief, special or general, seems essential, except in attachment bills,<sup>79</sup> and in bills to obtain evidence.<sup>80</sup> The Code seems to contemplate that "appropriate relief" should be prayed,<sup>81</sup> from which it might be inferred that a prayer for general relief was not sufficient: the Code provision, however, is rather commendatory than mandatory.

Complainant should pray for the precise relief he desires consistent with the facts alleged in his bill; and, as he cannot foresee the result of his suit, he may pray specifically in the alternative, always, however, conforming his prayers to the case made out by him in the bill.<sup>82</sup> But when his prayer is in the alternative, its parts must not be antagonistic.<sup>83</sup> Oftentimes a bill has a double aspect; in such cases an alternative prayer adapted to each aspect becomes necessary.<sup>84</sup> A bill may pray alternately for damages if its primary prayer for equitable relief be not granted, in cases where damages are allowable, as in suits for rescission, specific performance and injunction.<sup>85</sup> No part of a bill is so difficult to draw as the prayer for relief. Ordinarily, the prayer is the necessary legal deduction from the facts alleged, and it requires a comprehensive intellectual grasp of the whole case to properly formulate the specific reliefs to which the complainant may be entitled. It should, however, be kept in mind, that under the prayer for general relief, a complainant cannot obtain a specific relief inconsistent with that particularly prayed for.<sup>86</sup> But, while praying for specific relief, the details of the particular relief sought need not be enumerated.

The prayer for general relief should never be omitted,<sup>87</sup> as under it a com-

<sup>74</sup> See Code, § 4314.

<sup>75</sup> 1 Barb. Ch. Pr., 37-38. See Code, § 4339. No prayer for process is necessary if the parties in interest actually appear and make defence. *Majors v. McNeilly*, 7 Heisk., 294, 300. No set form of words is necessary in a prayer for process. The forms of bills hereafter given will show the appropriate phraseology.

<sup>76</sup> Sto. Eq. Pl., § 44, 1 Dan. Ch. Pr., 390.

<sup>77</sup> Sto. Eq. Pl., §§ 41; 43; 1 Dan. Ch. Pr., 388.

<sup>78</sup> *Henshaw v. Wells*, 9 Hum., 562; see Chapter on Receivers, *post*, § 904.

<sup>79</sup> Sto. Eq. Pl., § 40; *Eaton v. Breatheth*, 8 Hum., 534.

<sup>80</sup> Such as (1) bills to perpetuate testimony, (2) bills to examine witnesses, *de bene esse*, and (3) bills to obtain a discovery.

<sup>81</sup> Code, § 4314.

<sup>82</sup> *Collins v. Knight*, 3 Tenn. Ch., 183.

<sup>83</sup> Sto. Eq. Pl., § 42, note.

<sup>84</sup> 1 Dan. Ch. Pr., 384-385. *Tenn. Ice Co. v. Paine*, 23 Pick., 151, citing § 183 [now § 152] of this book.

<sup>85</sup> *Hill v. Harriman*, 11 Pick., 300.

<sup>86</sup> *James v. Kennedy*, 10 Heisk., 607. The reason for this rule is that, if it were otherwise, it would enable a complainant to take a defendant by surprise. 1 Dan. Ch. Pr., 378; *Allum v. Stockbridge*, 8 Bax., 356.

<sup>87</sup> It has been a current saying at the Chancery bar, for 150 years, that the prayer for general relief was the next best to the Lord's Prayer. Sto. Eq. Pl., § 41, note. A prayer for "further and other relief" or for "further relief," is what is meant by a

plainant is entitled to any relief not specifically prayed for, appropriate to the pleadings and proof, and not inconsistent with the special prayer.<sup>88</sup> It is said that if there be no prayer for general relief, and complainant is not entitled to the particular relief prayed, his suit must fail, unless an amendment of his prayer is allowed;<sup>89</sup> but, where the case made out will justify an amendment, it will generally be allowed, on terms.

But, under a prayer for general relief, a divorce will not be granted;<sup>90</sup> a partition, or sale for partition, will not be decreed, the bill being for neither;<sup>91</sup> nor will land be sold in bar of redemption.<sup>92</sup>

prayer for "general relief." A prayer for "general relief" would be deemed equivalent to a prayer for "further and other relief," and this short form is often used.

The omission to pray for specific relief is a matter of form, and defendant may, on leave, amend his prayer at the hearing. *Quinn v. Leake*, 1 Tenn. Ch., 67. Or the specific relief may be prayed orally at the hearing.

<sup>88</sup> 1 Dan. Ch. Pr., 377-383, notes; *Arnold v. Moyers*, 1 Lea, 315.

<sup>89</sup> 1 Dan. Ch. Pr., 378, note.

<sup>90</sup> *Pillow v. Pillow*, 5 Yerg., 421.

<sup>91</sup> *Ross v. Ramsay*, 3 Head, 16.

<sup>92</sup> *Thruston v. Belote*, 12 Heisk., 249; *Merrill v. Elam*, 4 Bax., 235.

## ARTICLE III.

## FORM OF AN ORIGINAL BILL.

- |   |  |
|---|--|
| § 153. Old Form of an Original Bill.                    | § 159. Forms of the Prayers for Relief.    |
| § 154. Present Form of an Original Bill.                | § 160. Signing of a Bill.                  |
| § 155. Form of the Address of a Bill.                   | § 161. Verification of a Bill.             |
| § 156. Form of the Commencement of a Bill.              | § 162. Manner of Verifying Bills.          |
| § 157. Form of the Premises, or Statement of the Facts. | § 163. Before Whom Bills Must be Verified. |
| § 158. Forms of the Prayers for Process.                | § 164. Formal Parts of Bills.              |

§ 153. **Old Form of an Original Bill.**—What should enter into the *substance* of a bill has already been considered, and its frame has also been generally described.<sup>1</sup> The particulars entering into the *form* of a bill remain to be considered.

Bills in Chancery were formerly longer and more technical than at present; and contained nine formal parts: 1, The *direction* or *address*, indicating the Court in which it was to be filed; 2, The *introduction*, containing the names, description and residence of the complainants, and the character in which they sued; 3, The *premises* or *stating part*, which detailed the facts and circumstances of the complainant's case, stating the wrongs complained of, and by whom done; 4, The *confederating part*, which alleged a combination between the defendants and others unknown, against the complainants in order to injure and oppress them; 5, The *charging part*, which set up the defendants' excuses and the complainants' answer to them; 6, The *jurisdiction clause*, being a general averment that the acts of the defendants were contrary to Equity, and that complainants have no adequate remedy at law; 7, The *interrogatory part*, which called on the defendants to answer not only the allegations of the bill, but various interrogatories, also, according to the best of their knowledge, remembrance, information and belief; 8, The *prayer for relief*, ordinarily both special and general; and 9, The *prayer for process* to compel the defendants to appear, and answer the bill, and abide the Court's decree.<sup>2</sup>

An examination of one of these old bills will show a vast amount of matter wholly unnecessary, and a needless prolixity in the statement of what was necessary. Originally, however, bills in Chancery were plain, untechnical statements of the matters complained of,<sup>3</sup> such as an ordinary man of business would now write to his lawyer. The modern tendency is toward a plain, clear, and orderly, statement of the facts, omitting everything not material, and avoiding prolixity, and useless formalities.<sup>4</sup> The following is an

#### OLD FORM OF AN ORIGINAL BILL IN CHANCERY.

##### [1. The Direction, or Address.]

To the Honorable Seth J. W. Luckey, Chancellor, &c., holding the Chancery Court at Rogersville, for the District composed of the Counties of Hawkins, Hancock, Claiborne, &c.

##### [2. The Introduction.]

Humbly complaining show unto your Honor your orator, John Doe, and your oratrix, Jane Doe, both residents of Hawkins County,—

##### [3. The Premises, or Stating Part.]

That their father, Henry Doe, formerly a resident of Hawkins county, died intestate in said county on July 15, 1840, and Richard Roe and Robert Roe were duly appointed and

<sup>1</sup> *Ante*, §§ 139-152.  
<sup>2</sup> *Sto. Eq. Pl.*, §§ 26-45.

<sup>3</sup> *Bart. Suit in Eq.*, 39.  
<sup>4</sup> *Code*, § 4314.

qualified as his administrators, and at once entered upon the discharge of their duties as such. The said Richard Roe resides in Hancock county, and the said Robert Roe in Hawkins county. *[The bill sets out that the estate of Henry Doe, deceased, was more than sufficient to pay all of his liabilities, that the orator and oratrix are the only distributees, and that three years have elapsed since the grant of administration, but the respondents have made no settlement with the Clerk of the County Court.]*

And your orator and oratrix further show unto your Honor that they have called upon the said Richard Roe and Robert Roe to make settlement and pay over to them their respective shares of their said father's personal estate, but so it is, may it please your Honor, the said Richard Roe and Robert Roe have failed to make any settlement, or to render to your orator and oratrix any statement or account of their actings and doings as administrators aforesaid, to the very great damage, injury and loss of your orator and oratrix.

And your orator and oratrix further show and charge that said Richard Roe and Robert Roe, have, or should have, in their hands as administrators aforesaid, the sum of, at least, three thousand dollars for distribution to your orator and oratrix as distributees of their said father's estate; and your orator and oratrix well hoped that the said Richard Roe and Robert Roe would have paid the same over to them as in conscience and equity they ought to have done.

#### [4. The Confederating Part.]

But now so it is, may it please your Honor, that the said Richard Roe and Robert Roe, administrators as aforesaid, combining and confederating together to and with divers other persons at present unto your orator and oratrix unknown, whose names when discovered your orator and oratrix pray may be herein inserted, and they made parties respondent hereto, with proper and apt words to charge them, and contriving how to injure and oppress your orator and oratrix in the premises, the said confederates sometimes pretend that said Richard Roe and Robert Roe never were administrators of the father of your orator and oratrix, at other times they pretend that the father of your orator and oratrix did not die intestate, but left a will, and at still other times pretend and claim that his personal estate was very small, and that all of it has long ago been applied and consumed in paying lawful claims against said estate; and at the same time said confederates do respectively refuse to set forth and discover what said personal estate consisted of, or the items and particulars and value thereof, and how much thereof they have so applied, and to whom and for what paid, and what has become thereof particularly.

#### [5. The Charging Part.]

Whereas, your orator and oratrix expressly charge the truth to be that said Henry Doe died possessed of personal estate of value sufficient to pay all his just debts and funeral expenses, and leave at least three thousand dollars for distribution to your orator and oratrix as aforesaid, and that said Richard Roe and Robert Roe were duly appointed and qualified as his administrators and took charge of his personal estate as aforesaid, and that he left no will, all of which the said confederates at other times confess and admit.

All of which actings and doings, neglects and pretences, and other conduct on the part of said Richard Roe and Robert Roe and their said confederates, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator and oratrix in the premises.

#### [6. The Jurisdiction Clause.]

In tender consideration whereof, and forasmuch as your orator and oratrix are remediless in the premises at and by the direct and strict rules of the common law, and cannot have adequate relief save only in a Court of Equity where matters of this and a similar nature are properly cognizable and relievable.

#### [7. The Interrogating Part.]

To the end, therefore, that the said Richard Roe and Robert Roe, and their said confederates when discovered, may upon their several and respective corporal oaths, full, true, direct and perfect answers make to the best of their respective knowledge, information and belief, to all and singular the matters and things hereinbefore stated and charged, as fully and particularly in every respect as if the same were here again repeated, and they thereunto particularly and distinctly interrogated; and that not only to the best of their respective knowledge and remembrance, but also to the best of their several and respective information, hearsay and belief, answer and set forth a full, true, fair and accurate account of each and every item of property, including goods and chattels, money, accounts, notes of hand, bills single, bills of exchange, mortgages, or other evidences of debt, by them, or either of them received as administrators as aforesaid; and further that they set forth and discover on their several and respective oaths as aforesaid, and to the best of their respective knowledge, information, remembrance, hearsay and belief, an account, item by item, and date by date, of each and every payment and disbursement made by them or either of them, and to whom, and for what, on account of said administratorship.

And your orator and oratrix further show, set forth and charge, that said Richard Roe and Robert Roe have pending a bill in your Honor's Court against one John Dew to foreclose a mortgage by said John Dew, executed to the father of your orator and oratrix, for

one thousand dollars, and that said Richard Roe and Robert Roe, have removed all of their visible wealth to the State of Kentucky, and are intending speedily to remove thither, and that should they be permitted to leave the State, especially after collecting said mortgage debt, their own debt against them by reason of the premises would be greatly endangered, if not wholly lost.

[8. The Prayer for Relief.]

And that the said Richard Roe and Robert Roe may set forth each, every and all of the accounts and items whereunto they and each of them have hereinbefore been specially interogated;

And that your Honor order an account to be taken and stated, showing what property and moneys the said Richard Roe and Robert Roe, or either of them, received, and should by due diligence have received, as administrators as aforesaid, and that they be required to pay your orator and oratrix such balance as your Honor may deem them liable for by reason of the premises.

And that your orator and oratrix may have such further, or such other relief as the nature of their case shall require, and as shall be agreeable to equity.

[9. Prayers for Process.]

May it please your Honor to grant unto your orator and oratrix the State's writ of *ne exeat republica*, staying the said Richard Roe and Robert Roe, and each of them, from departing into parts beyond this State, and out of the jurisdiction of this Court, without leave first had from your Honor.

May it, also, please your Honor to grant unto your orator and oratrix the State's writ of injunction to be directed to said Richard Roe and Robert Roe, their attorneys, Solicitors and agents, therein and thereby restraining them, and each and every of them from proceeding further in said suit against John Dew, and from collecting said mortgage debt, or any part thereof, or any other debt due and owing to said intestate's estate, without leave first had. And that a receiver be appointed to collect said mortgage debt and all other debts and property due or belonging to said intestate's estate.

And may it, also, please your Honor to grant unto your orator and oratrix the State's writ of subpoena to be directed to the said Richard Roe and Robert Roe, therein and thereby commanding them and each of them on a certain day and under a certain penalty therein to be inserted, to be and appear before your Honor, in said Court of Chancery, then and there to answer the premises, and to stand to abide by and perform such order and decree therein, as to your Honor shall seem meet and proper, and as shall be agreeable to equity and good conscience.

And as in duty bound your orator and oratrix shall ever pray [for you.]

WALTER R. EVANS, Solicitor.

[*Affidavit, and jurat, as in the next form.*]

§ 154. **Present Form of an Original Bill.**—But now, by the Code, the *confederating* part, the *charging* part, the *jurisdiction* clause, and other mere formal matter, are required to be omitted,<sup>5</sup> and it is made the duty of the Court to discountenance prolixity, and unnecessary and false allegations, in all Chancery pleadings.<sup>6</sup> The result of the statute is, that in our practice, bills are becoming less and less prolix, and contain less and less unnecessary matter. Nevertheless there yet remains in them too much of the old leaven of surplusage and tautology. The following is the proper form of an original bill, under our present practice:

**FORM OF AN ORIGINAL BILL,<sup>7</sup>**

[1. The Address.<sup>8</sup>]

To the Honorable John P. Smith, Chancellor, holding the Chancery Court at Dandridge:

[2. The Commencement, or Caption, or Style.<sup>9</sup>]

John Doe, a resident of Jefferson county, complainant,	}
<i>vs.</i>	
Richard Roe, a resident of Knox county,	
Henry Johnson, a resident of Jefferson county, and John Jones, a non-resident of the State, defendants.	

The complainant respectfully shows to the Court:

<sup>5</sup> Code, § 4314.

<sup>6</sup> Code, § 4316.

<sup>7</sup> This bill is a mere pleading, and would not need to be sworn to had it not alleged the non-residence and infancy of Jones, and these facts might have been sworn to in a separate affidavit:

<sup>8</sup> Sometimes, also, called the *Direction*; but in the Code called the *Address*. Code, § 4313.

<sup>9</sup> Ordinarily, called the *Introduction*; but in the margin of the Code, termed the *Commencement*. Code, § 4313, margin. In our Reports, it is frequently referred to as the *Caption*; *Grubbs v. Colter*, 7 Bax., 432, see syllabus; *Robertson, v. Winchester*, 1 Pick., 178; *Swan v. Newman*, 3 Head, 290; *Majors v. McNeilly*, 7 Heisk., 297; *Walker v. Cottrell*, 6 Bax., 270; *Brown v. Brown*, 2 Pick., 314.

[3. The Premises, or Statement of the Facts.<sup>10</sup>]

I.

That he and the defendants are the owners in fee of a lot in the town of Dandridge, in Jefferson county, situated on Main Street, adjoining the lot of George Williams on the north, and the lot of Samuel Brown on the south, fronting one hundred feet on Main Street, and running back between parallel lines two hundred feet to an alley, being lot No. eight in the registered plan of said town.

II.

Said lot has no encumbrances on it, and no one has any interest therein, except complainant and defendants, who each own a one-fourth undivided part thereof. The deed to complainant and defendants, for said lot, made by John Brown, has never been registered: it is in possession of defendant Johnson, who refuses to have it registered.

III.

The said lot has a large and valuable mansion-house upon it, and all necessary outbuildings, making it very desirable property as one lot. It would be manifestly to the advantage of the parties to have it sold for division, as a partition cannot be made without great injury to all concerned.

[4. The Prayer for Process.<sup>11</sup>]

IV.

Complainant, therefore prays:

1st, That subpoena to answer issue against the said resident defendants, and publication be made as to John Jones, who is an infant and a non-resident of this State, and that they be required to answer this bill fully [but not on oath.]

[5. The Prayer for Relief.]

2d, That the defendant, Johnson, be required to file said unregistered deed with his answer, that it may be used as evidence, and then be registered.

3d, That a guardian *ad litem* be appointed for the defendant, John Jones, who has no general guardian in this State, to defend for him.

4th, That said lot be sold, and that the proceeds be divided between the parties to this suit, share and share alike, and that complainant may have such further and other relief as the nature of his case may require.

W. R. TURNER,  
Solicitor.<sup>12</sup>

EUGENE HOLTSINGER, Counsel.

[6. The Verification.]

State of Tennessee, }  
County of Jefferson. }

John Doe makes oath that the statements in his foregoing bill are true, to the best of his knowledge, information and belief.

JOHN DOE.

[7. The Jurat.]

Sworn to and subscribed  
before me, this Dec. 26, 1895.

G. W. HOLTSINGER, C. & M.

It will thus be seen that an ordinary original bill consists, usually, of five parts: 1, The *address* to the Chancellor; 2, The *commencement*, containing the names, character, and county residence, of the complainants and the defendants; 3, The *statement of the facts* on which the suit is founded; 4, The *prayer for process*; and, 5, The *prayer for relief*. If the bill seeks a discovery, which is not usual, it might be termed a 6th part of the bill; but a discovery is generally included in the prayer for relief.<sup>13</sup> Each of these parts will be more fully considered.

§ 155. **Form of the Address of a Bill.**—Every bill and petition must be addressed to the Chancellor of the division in which the bill or petition is to be filed, and should designate him by his name, and give his official character, and specify the particular Court in which the bill or petition is filed, or to be filed. It would, however, be not improper to omit his name, and address the bill to him as an officer, giving his official designation, (Chancellor, not Judge,) and the style of his Court. The following is the statutory form of address:<sup>14</sup>

<sup>10</sup> This part is, generally, styled the *premises*, or *stating part*; the Code, however, terms it the *statement of the facts*. Code § 4314.

<sup>11</sup> According to the English practice, the prayer for *Process* came last; but, under our practice, the prayer for *Relief* comes last; Code, § 4314. The relative order of these prayers, however, is wholly a matter of form, and, hence, absolutely immaterial.

<sup>12</sup> A bill must always be signed either by the party himself, or by a Solicitor of the Court. Code, § 3979; Sto. Eq. Pl., § 47.

<sup>13</sup> See *post*, § 159.

<sup>14</sup> Code, §§ 4312-4313. If the address fail to show the particular Court in which the bill is to be filed, the Chancellor would not know, when an injunction or attachment bill was sent to him by mail for a fiat



**THE ADDRESS OF A BILL.**

To the Hon. John P. Smith, Chancellor of the 1st Chancery Division, holding the Chancery Court at Dandridge.

But an address in the following form would not be improper, especially as it may sometimes happen that the exact name of a Chancellor in a distant part of the State, or the number of his division, may not be known, or there may be a vacancy in the office.

To the Honorable Chancellor holding the Chancery Court at Tiptonville.

The name of a public officer is, in such a case, immaterial. The bill is not addressed to the man, but to the officer. The two foregoing forms are simple, and should be substantially adhered to in drawing both bills and petitions.

§ 156. **Form of the Commencement of a Bill.**—After the address, it would seem proper that the names of the parties making the address should first be given, so that the Chancellor might know who the parties addressing him are, and in what character they sue. He should, also, know who the parties are against whom complaint is made, and whether they are sued in their own right, or otherwise. It is the practice, therefore, to set out the names, character, and county residence of all the complainants, and of all the defendants, next after the address to the Chancellor. This is not only an old practice, but it is, also, the statutory practice;<sup>15</sup> and no departure should either be made from it by a pleader, or be allowed by the Court; for it is not only the statutory practice, but it is the best possible practice, and every departure from it is a confusing innovation, alike annoying to the Court, to the defendants, and especially to the Clerk. Oftentimes, when the names and residences of the parties are not given next after the address, it is really difficult to fish them out of the body of the bill; and the Clerk is sometimes greatly perplexed to know who the parties are, and in what counties they reside.<sup>16</sup> The names, character, and county residence of the parties should be given thus:

**COMMENCEMENT, OR CAPTION, OF A BILL.**

John Smith, guardian of Henry Jones, a minor, both residents<sup>17</sup> of Knox county; Sarah Brown, a minor, who sues by her husband, George Brown, both residents of Anderson county; Eliza Jones, a minor, who sues by her next friend, Henry Williams, both residents of Knox county; and Charles Jones and James Jones, residents of Kentucky complainants.

*v/s.*

Jonathan Watson, administrator of Samuel Jones, deceased, and Isaac Jones and Thomas Jones, residents of Knox county, and Richard Jones, a non-resident of the State, defendants.

The complainants respectfully show to the Court:<sup>18</sup>

Care should always be taken to show in the commencement of the bill in what character the parties sue, or are sued; and, although this is not absolutely required to be done in this part of the bill, it is, nevertheless, a very convenient practice. But the name and county of each party should, invariably, be fully set out in this part of the bill, for the reasons above given.

The following are additional forms of the

in which one of his various Courts the bill was intended to be filed; and, as a consequence, would not know to what particular Clerk and Master to address his fiat. A bill addressed: "To, Hon. John P. Smith, Chancellor," is defectively addressed, because it fails to specify the particular Court in which it is to be filed. Code, § 4312.

<sup>15</sup> Code, § 4313; *Grubbs v. Colter*, 7 Bax., 432. Occasionally, a bill is so drawn that it would seem the draftsman himself did not really know who should be made parties, and had purposely left it to the Clerk and Master to use his best judgment in the matter. Any extra costs occasioned by the pleader's negligence in this matter should be invariably taxed against the complainant.

<sup>17</sup> The Code form (§ 4313) uses the term, "*citizen*," but the section containing the caption. (§ 4313) says: "The address should be followed by

the names and residences of the parties," and such is the uniform practice.

<sup>18</sup> The commencement, "*Humbly complaining, show unto your Honor, your orators and oratrixes,*" and all similar ones, are foreign to our republican institutions, and savor of the servility of royal courts, where "the candied tongue licks absurd pomp, and crook the pregnant hinges of the knee, where thrift may follow fawning." How much simpler, and more suitable to our times and institutions, is the form given in our Code: "*The complainant respectfully shows to the Court.*" In the old English practice, the word "*Humbly*" was omitted when a peer was the complainant. 2 Smith's Ch. Fr., 553; Lube's Eq. Pl., 268. In Tennessee, *all men are peers*; hence, even by the strict English practice, "*humbly*" should not be used in our State.

## COMMENCEMENTS OF BILLS.

**1. Bill by an Infant, Lunatic, or Married Woman, Suing by Next Friend.**

Sarah Brown, an infant [*or lunatic or married woman,*] who sues by John Brown, her next friend, both residents of Scott county, complainant,

*vs.*

Charles Brown, the guardian [*or husband*] of said Sarah Brown, a resident of Overton county, defendant; and the heirs, distributees, and assignees of William Brown, deceased, whose names and residences are unknown, and cannot be ascertained on diligent inquiry.

The complainant, Sarah Brown, an infant [*or lunatic, or married woman,*] who sues by John Brown, her next friend, respectfully shows to the Court:

**2. Bill by a Husband and Wife.**

Charles Brown and Sarah Brown, his wife, both residents of Overton county, complainants,

*vs.*

John Brown, general guardian of said Sarah Brown, and Henry Jones and Columbus Jones, his sureties as such guardian, all residents of Scott county, defendants.

**3. Bill by a Guardian, Administrator, or Executor.**

Charles Brown, general guardian [*or administrator or executor*] of Sarah Brown [*or of Sarah Brown, deceased,*] residents of Overton county, complainant,

*vs.*

John Brown and Henry Brown, both residents of Clay county, defendants.

**4. Bill by a Creditor on Behalf of Himself and all Other Creditors.**

John Doe, a resident of Knox county, complainant, who sues on behalf of himself and of all the other creditors of John Smith, deceased.

*vs.*

Samuel Smith, administrator of said John Smith, [*and all the heirs of said John Smith, naming them,*] defendants.

The complainant, John Doe, who sues in behalf of himself and of all other creditors of John Smith, deceased, respectfully shows to the Court:

**5. Bill by a County, City, or Corporation.<sup>19</sup>**

The County of Roane, complainant,

*vs.*

The County of Loudon and J. J. Duff, Trustee and resident of Loudon county, defendants.

The Mayor and City Council of Nashville

*vs.*

The Mayor and Aldermen of Edgefield.

The East Tennessee Coal Company, a corporation under the laws of Tennessee [*or, a corporation organized under the laws of Missouri, and registered in Anderson county under the laws of Tennessee,*] and whose principal office is kept at Coal Creek, in Anderson county, complainant,

*vs.*

The Knoxville and Ohio Railroad Company, a corporation whose principal office is kept in Knox county, defendant.

**6. Bill by the State of Tennessee, on relation.<sup>20</sup>**

The State of Tennessee, which sues by George W. Pickle, her Attorney General [*or, by Thomas A. R. Nelson, her District Attorney, on the relation of John Doe, a resident of Knox county,*] complainant,

*vs.*

The Mudville Turnpike Company, an alleged corporation whose chief office is kept in Clay county, and John Doe, a resident of Clay County, defendants.

The State of Tennessee, which sues by George W. Pickle, her Attorney General on the relation of John Doe, respectfully represents:

**7. Bill by Partners.**

John Smith, James Brown, and Henry Jones, partners in trade under the name of John Smith & Co., residents of Shelby county, complainant,

*vs.*

John Doe and David Doe, residents of Lake county, doing business under the name of Doe & Bro., defendants.

<sup>19</sup> Cities and incorporated towns generally sue and are sued by their mayor and aldermen, unless their charters otherwise prescribe. A town may, however, be sued by the name it is known by. Thus, a suit may be brought against "The Town of Wartrace Depot." *Town of Wartrace v. W. and B. G. Turnpike Co.*, 2 Cold., 518. See, *ante*, § 130.

<sup>20</sup> The State may sue alone, in her own name; or may sue jointly with others; or may sue on the re-

lation of some one or more persons. The suit is brought on the relation of a person, when such person is the real complainant, the suit being for his benefit, as in suits to forfeit a charter, or oust a usurper, under Code, §§ 3409-3426. The reason a relator is required in such cases is that there may be some one before the Court against whom costs may be adjudged. 1 Dan. Ch. Pr., 11; Sto. Eq. Pl., § 49.

**8. Bill by a Taxpayer on Behalf of Himself and other Taxpayers.**<sup>21</sup>

John Doe, a resident of Knox county, complainant, who sues in behalf of himself and all other taxpayers of said county,

*vs.*

The County of Knox, and Richard Roe, the county trustee, and a resident of said county, defendants.

The complainant, who sues in behalf of himself and all other taxpayers of Knox county, respectfully shows to the Court:

**9. Bill by a Legatee on Behalf of Himself and all Other Legatees.**

John Doe, a resident of Union county, complainant, who sues in behalf of himself and of all the other legatees of James Doe, deceased,

*vs.*

Richard Roe, the executor, Mary Doe, the widow, and Roland Roe, the heir and distributee, of Roland Roe, senior, deceased, all residents of Union county, defendants.

**10. Bill by the State for the Use of a Citizen.**<sup>22</sup>

The State of Tennessee, which sues for the use of John Doe, a resident of Lake county, complainant,

*vs.*

Richard Roe, guardian of said John Doe, and Roland Roe and Robert Roe, sureties of said Richard Roe, on his bond as such guardian, all residents of Lake county, defendants.

The complainant, the State of Tennessee, which sues for the use of John Doe, respectfully represents:

Some Solicitors prefer the following form for the caption, or commencement, and address of a bill, and, as it is substantially the form prescribed by the Code, there can be no legal objection to it:

**ANOTHER FORM OF CAPTION AND ADDRESS.**

The Bill of Complaint of Henry Wilson and John Smith, both residents of Hamilton county, and Charles Johnson, a resident of the State of Georgia, filed in the Chancery Court of Bradley county,

*against*

George Jones and Sarah Jones, his wife, residents of Bradley county, and William Smith, a resident of McMinn county.

To the Hon. S. A. Key, Chancellor, holding the Chancery Court at Cleveland:

Complainants respectfully show to the Court:

§ 157. **Form of the Premises,**<sup>23</sup> **or Statement of the Facts.**—This part constituting, in truth, the real substance of the bill upon which the Court is called to act, requires great skill and judgment to frame it aright; and if it has not the proper legal certainty, the defect, unless removed, may be fatal. The rules, as to the proper mode of stating the facts in this part of the bill, have already been fully considered. It must be remembered, however, that every material fact, as to which the complainant means to offer evidence, ought to be distinctly stated; for otherwise he will not be permitted to offer, or require, any evidence of such fact. A general charge, or statement, however, of the matter of fact is ordinarily sufficient; and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge;<sup>24</sup> for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs.<sup>25</sup> Nothing, however, can be proved that has not been alleged, and nothing can be decreed that has not been alleged. Neither proof nor prayers are of any avail in the absence of allegations. Nothing can be prayed, proved, or decreed, that does not rest on allegations. Allegations are, at once, (1) the foundation of the Court's jurisdiction of the case, (2) the notification to the defendant of what is to be litigated, (3) the test of the materiality and pertinency of the evidence, (4) the limitation of the bounds of the controversy, and (5) the justification of the relief granted.

<sup>21</sup> Hunter v. Justices, 7 Cold., 49.

<sup>22</sup> The party aggrieved by the breach of an official bond can sue the obligors directly, and in his own name. See, *ante*, § 119.

<sup>23</sup> These are the "premises" referred to at the be-

ginning of the prayer, "The premises considered, complainant prays."

<sup>24</sup> Thus, for instance, it is generally sufficient to say that complainant owns in fee a certain tract of land, without specifying the facts on which his title is based.

<sup>25</sup> Sto. Eq. Pl., §§ 27-28.

The Code requires that the bill should contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition, without averring any formal combination or confederacy by the defendants, or others, the insufficiency of the remedy at law, or other mere formal matter.<sup>26</sup>

The body of the bill should be divided into paragraphs consecutively numbered, each paragraph containing a separate fact and its special circumstances. Such a division not only generally makes a bill more logical, but greatly facilitates reference to its parts, and better enables the defendant to frame his answer.

§ 158. **Forms of Prayers for Process.**—As there is no set form of the premises of a bill so there can be no set form of the prayer, for the prayer varies with the premises, but the following forms will indicate the general character of the phraseology used in prayers for process:

#### PRAYERS FOR PROCESS.

1. **Prayer for Subpœna and Publication.** Complainant prays that subpœna to answer issue as to the resident defendants, and that publication be made as to the non-resident defendants, requiring them to appear, and answer the bill, [but their answer on oath is waived.]

2. **Prayer for an Attachment.** That an attachment issue [by order of your Honor] and be levied on all the above described property of the defendant, and all the other property of the defendant, or on enough thereof to satisfy complainant's said debt, and costs of this suit.

3. **Prayer for an Injunction.** That an injunction be ordered by your Honor to issue, to inhibit and restrain the defendant, his agents and servants, from committing any further waste, or destroying any timber, or in any way trespassing upon the tract of land hereinabove described; [or, from transferring, assigning, encumbering, or removing said property; or, from doing the particular act or acts complained of, or threatened, specifying such acts briefly.]

4. **Prayer for an Injunction Against a Suit at Law.** That the defendant, Richard Roe, his counsellors, attorneys and agents, be restrained by injunction from proceeding further in said suit, [or execution;] and also from instituting any new or other suit for a like purpose in said Court, or in any other Court [or from suing out any other execution or process on said judgment,] without leave of your Honor.

5. **Prayer for a Receiver.** That a receiver be appointed to take possession of the said goods, chattels, choses in action [or houses, lands, or other property in litigation, or impounded and attached, specifying such property,] and that he be authorized and directed to sell the said personal property, [or rent and collect the rents of the said houses and lands] and collect the said choses in action, and that a writ of possession issue to put him in possession thereof, if necessary.

§ 159. **Forms of Prayers for Relief.**—The forms of the prayers for relief are as various as the forms of bills, and depend entirely on the material allegations of the bills, but a careful consideration of what has been already said about prayers for relief, and of the following forms will greatly aid the pleader in formulating his prayers:

#### PRAYERS FOR RELIEF.

1. **Prayer for General Relief.** That complainant may have such further and other relief as he may be entitled to.

2. **Prayer for a Guardian ad Litem.** That a guardian *ad litem* be appointed to defend this suit, for the said Robert Roe, who is an infant without regular guardian.

3. **Prayer for an Administrator.** That an administrator be appointed to administer the estate of said Richmond Roe, deceased, in this Court; and that all necessary orders be made, and accounts taken, for that purpose.

4. **Prayer for Discovery.**<sup>27</sup> That all the defendants, [or, the defendant, Henry Jones,] be required on their several and respective oaths to make full, true, direct and perfect answer to all and singular the matters aforesaid, according to the best of their knowledge, remembrance, information and belief; and that they specially answer, and set forth, whether —[Here insert the particular interrogatories to be answered. These interrogatories may be in the form usually filed in order to take the deposition of an absent witness, omitting, of course, any caption.]

<sup>26</sup> Code, § 4314.

<sup>27</sup> For fuller prayers for discovery, see, *post*, §§ 1018; 1023; 1121.

**5. Prayer for the Production of Deeds and Papers.** That the defendant, Richard Roe, be required to file with the Clerk and Master of this Court, the said deed [*or other writing or book,*] hereinabove referred to, to the end that complainant, and your Honor, may have due opportunity to inspect the same.

**6. Prayer for an Account.** That the defendant, Richard Roe, set forth in his answer, a full, true and particular account of all moneys by him, or his agents, or servants, received, collected, or in any way obtained from the business and transactions referred to, [*or, received by him as guardian, administrator, partner, agent or trustee;*] and all the rents and profits received, or that might, by due diligence, have been received, by him from the tract of land, [*or house and lot, or business,*] hereinabove described; and all the timber, trees; [*notes, accounts, goods, wares and merchandise*] or other property, he may have sold, removed, given away, or allowed to be removed, from said premises; and that the Master be ordered to take and state an account of all the dealings between complainant and the defendant, so as to show the full and true amount due complainant, by reason of the premises.

**7. Prayers for a Money Recovery.** That the complainant may have and recover of the defendant the said sum of [six hundred] dollars, and interest thereon since the day said debt matured; [*or, recover of the defendant the value of the said work and labor done, and of the said services rendered by complainant as aforesaid; or recover of the defendant the amount due on said note, principal and interest; and also the amount due on said account, and interest thereon;*] and all the costs of this cause.

**8. Prayers for Damages.** That the complainant recover of the defendant the damages he has suffered by reason of the failure of the defendant to comply with his said contract; [*or, to make good his said covenants and warranty; or, to perform his said agreement; or, that complainant recover the damages he has sustained by reason of the said breaches of contract of the defendant; or, by reason of the quality and quantity of said goods not being as represented; or, by reason of said deficiencies in quantity, quality, and value;*] and, also, all the costs of the cause.

**9. Prayer for Sale of Land.**<sup>28</sup> That said tract of land be sold to satisfy the demand [*or debt*] of complainant [*or such decree as your Honor may pronounce in complainant's favor by reason of the premises;*] and that said sale be made by the Clerk and Master to the highest and best bidder on a credit of not less than six nor more than twenty-four months, and in bar of all right of redemption, [*or, that said sale be made for cash.*]

**10. Prayer for an Account of Money or Property Had and Received.** And that said defendant [*or defendants*] set forth in his [*or their*] answer [*or answers*] an account of each and every sum of money or piece of property received by him, [*or them, or either of them*] or by any other person or persons, by his [*or their*] order [*or the order of either of them,*] or for his [*or their*] use, [*or for the use of either of them*] for, or on account of, or by reason of, or in relation to, said agency [*partnership or other business or matter*] and when and from whom received; and for what, or on what account, each and every of said sums of money or pieces of property, were respectively received, and how all and every of said sums of money, or pieces of property, have been respectively applied or disposed of.

**11. Prayer for an Account of Rents and Profits.** And that the said defendants set forth in their answer or answers, a full, true, just and particular account of each and every sum of money received by them, or either of them, or by any other person or persons, by their order, or the order of either of them, as rents, profits or issues of said land [*or house and lot, or partnership business, or other business*] or any part thereof.

**12. Prayer for an Account of Personal Estate.** And that the said defendant [*or defendants*] discover and set forth in their answer [*or answers*] a full, true, just and particular account of all and singular the personal estate and effects of said testator, [*or intestate,*] and of every item and part thereof which has come into his [*or their*] hands, possession or control, or into the hands, possession or control of any other person or persons, by his [*or their*] order or permission, or for his or their use; and that he [*or they*] give the nature, quantities and highest values of each of the items so set forth or mentioned, and how the same have been applied and disposed of, and whether any, and what items have not been applied and disposed of, and why not; and that the defendant [*or defendants*] set forth an account of the debts of said testator [*or intestate*] and of his funeral expenses, and whether any and which of such debts and expenses have not been paid, and why.

**13. Prayer for the Production of Deeds and Papers.** And that the said defendant [*or defendants*] set forth in his [*or their*] answer [*or answers*] a list or schedule or description of each and every deed, contract, book, account, letter, paper, or other writing relating, in whole or in part, to the matters aforesaid, or to any of them, in his, [*or their*] possession or control, and that he [*or they*] deposit the same in the office of the Clerk and Master of your Honor's Court for inspection and copy; and that he [*or they*] account for such of the

<sup>28</sup> See, *post*, §§ 989; 1066; 973; 873; 1039; 1016, for various prayers to sell land.

deeds [*&c.*, *stating them*] referred to in paragraph III [*state which paragraph or paragraphs*] of the bill, as are not in his [*or their*] possession.

§ 160. **The Signing of a Bill.**—Every bill, or petition, filed in the Chancery Court must be signed by the complainant, or petitioner, in person, or by his Solicitor. A signing on the back of the bill by the Solicitor has been held sufficient.

The great object of this rule is to secure regularity, relevancy, and decency in the allegations of the bill, and the responsibility and guaranty of counsel that, upon the instructions given to them, and the case laid before them by their client, there is good ground for the suit in the manner in which it is framed. Hence it is that counsel are held responsible for the contents of the bill; and if it contains matter which is irrelevant, impertinent, or scandalous, such matter may be expunged; and the counsel may be ordered to pay costs to the party aggrieved, and this duty has often been enforced by the Courts of Chancery. So, where a bill has been filed without authority of the complainant, or of a co-complainant, the Solicitor will, on due proceedings for that purpose, be adjudged to pay accrued costs in consequence of his unauthorized action.<sup>29</sup>

It is not essential to the validity of a bill, or petition, that the complainants should sign it; it is sufficient if their names appear in the caption.<sup>30</sup> Nevertheless, it is much the better practice to require a petition to be signed and sworn to by the parties themselves, and not by their agents, or Solicitors.<sup>31</sup>

§ 161. **Verification of a Bill.**—No bill need be sworn to, unless: 1, It prays for process of injunction,<sup>32</sup> or attachment, or *ne exeat*; or 2, Unless it seeks the immediate appointment of a receiver, an administrator or a guardian *ad litem*; or 3, Unless it is a bill to sell the property of a person under disability;<sup>33</sup> or 4, To administer an insolvent estate;<sup>34</sup> or 5, To set up lost instruments;<sup>35</sup> or 6, To have an inquisition of lunacy;<sup>36</sup> or 7, To obtain a divorce;<sup>37</sup> or 8, For a mandamus,<sup>38</sup> or *habeas corpus*,<sup>39</sup> or 9, A bill in the name of the State against corporations and usurpers of office;<sup>40</sup> or 10, A bill of interpleader,<sup>41</sup> or 11, A bill of review for newly discovered evidence;<sup>42</sup> or 12, A bill to perpetuate testimony, or to take testimony *de bene esse*;<sup>43</sup> or 13, A bill or Replevin.<sup>44</sup>

It may be stated as a general rule, that, whenever a bill or petition seeks some immediate order or interposition of the Court, such as an injunction, or an attachment, or a *ne exeat*, the appointment of a receiver, administrator, guardian *ad litem*, or publication as to non-resident or unknown defendants, it must be sworn to. But the facts necessary for the appointment of a guardian *ad litem*, or for process by publication, may be sufficiently made to appear by a separate affidavit, in which case the bill need not be sworn to, unless its verification is otherwise required.

Where there is any reasonable doubt whether a bill should be sworn to or not, it is safer to verify it. But a bill that seeks no process except subpoena, seeks no order or relief until final decree, seeks no interference with parties or proceedings in any other forum, and seeks in no way to interfere with the acts, possession, or property of the defendant pending the suit, need not be sworn to, as a rule.

Petitions should always be sworn to, when they are filed pending a litigation commenced by bill. Petitions which are filed in lieu of a bill, such as petitions

<sup>29</sup> Sto. Eq. Pl., § 47, *Litton v. Armstead*, 9 Bax., 514; 1 Dan. Ch. Pr., 308, 310, 347.

<sup>30</sup> *Swan v. Newman*, 3 Head, 289.

<sup>31</sup> *Johnson v. Murray*, 12 Lea, 109. See *Stadler v. Hertz*, 13 Lea, 315.

<sup>32</sup> 1 Dan. Ch. Pr., 394, note; 1 Barb. Ch. Pr., 43-44.

<sup>33</sup> Code, § 3329.

<sup>34</sup> The Code does not expressly require this bill to be sworn to, but the extraordinary results of its being filed, such as publication and injunction, show that a verification of the bill is necessary. Code, §§ 2365; 2367; 2370-2372; 2381-2383.

<sup>35</sup> 1 Sto. Eq. Pl., § 82; Code, § 3901.

<sup>36</sup> Code, § 3691.

<sup>37</sup> Code, § 2453.

<sup>38</sup> Code, § 3567.

<sup>39</sup> Code, § 3722.

<sup>40</sup> Code, § 3417. It is probable that an affidavit to the bill would only be necessary in case immediate extraordinary process is prayed.

<sup>41</sup> Sto. Eq. Pl., § 297.

<sup>42</sup> See, *post*, § 1247.

<sup>43</sup> See, *post*, §§ 1128; 1134.

<sup>44</sup> Code, § 3376. The verification of bills is fully considered in the Article on Affidavits, *post*, §§ 788-789.

for divorce, inquisition of lunacy, mandamus, and *habeas corpus*, must also be sworn to; but a petition for partition, or for homestead, or for dower, need not be sworn to.

§ 162. **Manner of Verifying Bills.**—There is sometimes a great looseness, and sense of irresponsibility, connected with the verification of pleadings. Verification is not a matter of form, but of *substance*. It breathes into bills, otherwise inert, the breath of life and the soul of truth, and gives them immediate and sometimes far-reaching efficacy. The verification of the bill removes it from the category of apocryphal documents, and for preliminary purposes impresses it with the seal of verity.

We have no statute, or authorized rule of practice, specifying the manner and form of verifying pleadings, but the following form is so generally recognized that it may be deemed adequate, in ordinary cases:<sup>45</sup>

#### AFFIDAVITS TO BILLS.

State of Tennessee, }  
County of Morgan. }

John Smith makes oath that the statements by him in the foregoing bill are true to the best of his knowledge, information, and belief.

JOHN SMITH.

Sworn to and subscribed  
before me June 1, 1890.  
W. D. WRIGHT, C. & M.

A fuller and better form of affidavit is as follows:<sup>46</sup>

State of Tennessee, }  
County of Morgan. }

John Smith makes oath that the statements in his foregoing bill, made as of his own knowledge, are true, and those made as on information and belief, he believes to be true.

JOHN SMITH.

Sworn to and subscribed  
before me June 1, 1890.  
W. D. WRIGHT, C. & M.

When a bill is sworn to according to the latter form, and especially when it shows on its face clearly what statements are made on the complainant's own knowledge, and what on the information of others, it will have more weight on the hearing of a preliminary matter, such as a motion to dissolve an injunction,<sup>47</sup> or to appoint a receiver, than a bill less correctly drawn, and sworn to on knowledge, information and belief in an indefinite manner.

Sometimes a bill is verified by a Solicitor, or agent. This should never be done but in case of extreme necessity, especially by a Solicitor. When so verified, the Solicitor or agent should make oath to his agency and personal knowledge of the matters stated in the bill, except those stated to be on the information and belief of the complainant, and as to those matters he should make oath that he believes them to be true.<sup>48</sup> This form is suggested:

#### AFFIDAVIT TO A BILL BY THE SOLICITOR.

State of Tennessee, }  
County of Morgan. }

E. E. Young makes oath that he is the Solicitor of John Smith, the complainant in the foregoing bill, and that he personally knows that the statements in said bill are true, except those made as on the information and belief of the complainant, and those he believes to be true.

E. E. YOUNG.

Sworn to and subscribed  
before me June 1, 1890.  
W. D. WRIGHT, C. & M.

§ 163.—**Before Whom Bills Must be Verified.**—Bills required to be under

<sup>45</sup> Code, § 2453; Caruthers' Lawsuit, §§ 599; 664. For some important matters relating to the verification of bills, see Article on Affidavits, *post*, § 789.  
<sup>46</sup> This form should always be used in case of bills for injunctions or receivers.

<sup>47</sup> See Chapter on Injunctions, *post*, §§ 838-843.  
<sup>48</sup> 1 Barb. Ch. Pr., 45; see Article on Affidavits, *post*, § 789.

oath, may be sworn to, in the State, before any Judge, Clerk of a Court, Justice of the Peace, or Notary Public, whose attestation shall be deemed evidence of the fact.<sup>49</sup>

They may be sworn to, out of the State, before a Notary Public, or a Commissioner for this State, whose attestation shall be accompanied by his seal of office; or before a Judge, or Justice of the Peace, of the State, whose official character shall be attested by the Clerk of the Court in which the Judge presides, or by the Clerk of the County Court in the case of a Justice of the Peace.<sup>50</sup>

§ 164. **Formal Parts of Bills.**—To economize space and avoid repetition, the formal parts of bills in many of the forms in this book are omitted. For the convenience of the draftsman those parts are here given, and this skeleton bill will be referred to for guidance.

**The Address.**<sup>51</sup>

To the Honorable [*giving the name of the Chancellor,*] holding the Chancery Court at [*stating the name of the county town where he holds the Court.*]

**The Commencement, or Caption.**<sup>52</sup>

John Doe, a resident of.....county [*stating the county. Give the names and county of residence of each of the complainants; and if any sue by guardians, or next friends, so state, and give their names, and county of residence. For forms of commencements, see ante, § 156.*] complainant,

*vs.*

Richard Roe and Henry Roe, residents of.....county, [*stating the name of county. Give the name and county of residence of each of the defendants; and if any of them are minors, or of unsound mind, without general guardians, so state; if they have guardians, give their names and residences,*] defendants.

The complainant respectfully shows to the Court:

**The Premises, or Statement of Facts.**<sup>53</sup>

I.

That [*this part contains the grounds of complaint, giving the facts on which complainant bases his right to a decree against the defendant.*]

II.

That [*this part sets forth any ground for attachment, injunction or other extraordinary relief complainant may wish.*]

III.

**The Prayer for Process.**<sup>54</sup>

Complainant therefore prays:

1st, That subpoena to answer issue against the said defendants requiring them, and each of them, to answer this bill. [*If their oath is waived, add:*] but their oath to their answer is waived.

2d, That a guardian *ad litem* be appointed for the minor and *non compos* defendants. [*See §§ 106-108. Omit this, of course, if there be no minor or non compos defendants.*]

3d, That an attachment issue against the property of the defendants, [*naming the particular defendants liable. See §§ 869-873.*] and especially against the property above mentioned, [*if any be specified in the bill.*]

4th, That an injunction issue against the defendants, [*naming them*] enjoining them from [*doing the acts referred to in the bill; specify them. See §§ 800-823.*]

**The Prayer for Special Relief.**<sup>55</sup>

5th, That [*here state the special relief desired, consistent with the bill.*]

**The Prayer for General Relief.**<sup>56</sup>

6th, The complainant prays also for such further and other relief as the nature of his case may require. [*If any extraordinary process is prayed, add:*] This is the first application for an attachment [*or an injunction*] in this case.

JOSEPH STORY,  
Of Counsel.

Signature of Counsel.

JAMES KENT,<sup>57</sup>  
Solicitor.

<sup>49</sup> Code, § 4330; Acts of 1866-7, ch. 46; E. W. M. v. J. C. M., 2 Ch. Apps., 463. Notaries, however, must affix their seals to their certificates or jurats.

<sup>50</sup> Code, § 4331; Cheatham v. Pearce, 5 Pick., 668.

<sup>51</sup> See, *ante*, § 155.

<sup>52</sup> For various forms of captions, see, *ante*, § 156.

GENERAL NOTE.—The words in *italics* in the various forms in this book are merely words of instruction to the draughtsman, and are no part of the

forms themselves, and must be omitted in drawing pleadings, decrees, &c.

<sup>53</sup> See, *ante*, § 157. The premises are sometimes called the *body* of the bill.

<sup>54</sup> See, *ante*, § 158.

<sup>55</sup> See, *ante*, § 159.

<sup>56</sup> See, *ante*, §§ 152; 159.

<sup>57</sup> See, *ante*, § 160.



**Affidavit to the Bill.**<sup>58</sup>

State of Tennessee,

County of [*Here insert name of county wherein bill is sworn to.*]

John Doe, the complainant in the foregoing bill, makes oath, [*or affirms*] that the statements in his foregoing bill made as of his own knowledge are true, and those made as on information and belief, he believes to be true.

JOHN DOE.

**Jurat to Affidavit.**

Sworn to [*or affirmed*] and subscribed }  
 before me, August 24, 1905. }  
 JAMES C. SCRUGGS, C. & M. }

## ARTICLE IV.

## PRACTICAL SUGGESTIONS AS TO THE DRAWING OF BILLS.

- |  |  |
|--|--|
| <p>§ 165. Relations of the Parties to a Suit.<br/>         § 166. The General Rule of Law Applicable to the Case.<br/>         § 167. Application of the Law of Relations in Drawing a Bill.<br/>         § 168. General Form of a Bill Where Relations Exist.</p> | <p>§ 169. General Form of a Bill Where No Relations Exist.<br/>         § 170. Character of the Allegations in a Bill.<br/>         § 171. How Parties Should be Described.<br/>         § 172. How Lands Should be Described.<br/>         § 173. Some Miscellaneous Suggestions.</p> |
|--|--|

§ 165.—**The Relations of the Parties to a Suit.**—Whenever two or more persons have relations to, or with, each other, various legal and equitable rights and duties arise from the relation;<sup>1</sup> and for the protection of these rights, and the enforcement of these duties, Courts are established. These relations are those of family, neighborhood, society, business, commerce and government; and may be divided into: 1, Primary or original relations, being those that exist between the original parties to the transaction; 2, Secondary or derivative relations, being those that exist between an original party and the privy of the other original party, and 3, Collateral relations, being those that exist between the privies of the original parties. The principal primary, or original, relations are those of parent and child, husband and wife, guardian and ward, master and servant, attorney and client, adviser and advised, vendor and vendee, mortgagor and mortgagee, landlord and tenant, trustee and beneficiary, personal representative and distributee or legatee, principal and agent, bailor and bailee, partner and partner, tenants in common, principal and surety, debtor and creditor, assignor and assignee, creditor and surety, bargainor and bargainee, and citizen and State. The principal secondary or derivative relations are those existing between one of the original parties to the transaction and the vendee, assignee, executor, administrator, heir, devisee, widow, or other privy, of the other original party.

The legal and equitable rights and duties, arising from the relations of the parties, ordinarily become more complicated in proportion to the distance the parties are removed from the original parties; but, as a rule, a privy's rights and duties are the same as those of the person in whose shoes he stands, or to whose rights he succeeds, the principal exception to the rule being in favor of innocent purchasers for value, without notice.

§ 166.—**The General Rule of Law Applicable to the Case.**—No one can draw a logical and concise bill, without first considering the relations of the parties

<sup>58</sup> See, *ante*, §§ 161-163; and, *post*, §§ 788-789.

<sup>1</sup> *Hart v. Czapski*, 11 Lea, 154. The application of the doctrine of relations to the framing of bills

seems to have been first made in Lube's Equity Pleadings.

to the controversy and the general rule of law<sup>2</sup> applicable to the case, and then alleging the facts necessary to bring the complainant's case within this rule. This general rule of law is often termed, in our Reports, "*the theory of the bill.*"<sup>3</sup> The clearer this general rule, or theory, appears to the mind of the pleader, the more logical and concise will be the allegations of his bill.<sup>4</sup> Indeed, the obscurity and confusion and indefiniteness of a bill, almost invariably, result from the obscurity and indefiniteness of the pleader's conception of the general rule of law, applicable to the facts of his case. The law of relations enables a pleader readily to grasp these general rules of law, and thereby make his bills logical and concise, the two principal characteristics of good pleading.

To every general rule of law there are various exceptions; but these exceptions are ordinarily matters to be brought forward by the defendant. In drawing a bill, all matters which are within exceptions to the general rule, and all matters in avoidance, should generally be left for the defendant to allege and prove.

The general rule of law arises: (1) out of the relations of the parties, (2) out of the rights and duties resulting from those relations, and (3) out of the acts of the defendant in violation of those rights and duties; and (4) it defines the manner and measure of redress to which the complainant is entitled. Hence, a pleader, before beginning to draw a bill, should consider the general rule of law applicable to his client's case, and so frame his bill as to make out a case within the rule, and at the same time not within any of the exceptions to the rule. The most easy and logical way to do this, is by keeping in mind the relations of the parties, and the acts of the defendant in violation of the duties arising from those relations.

§ 167. **Application of the Law of Relations in Drawing a Bill.**—Out of the relation of the parties, certain legal or equitable duties arise on one side, and certain legal or equitable rights on the other.<sup>5</sup> These rights and duties are correlated, the duties owing by one party being the rights owned by the other.<sup>6</sup> A violation of the duties violates the correlated right, and a cause of action arises in favor of the owner of the violated right, and against the owner of the violated duty. These correlated rights and duties are, or may be, formulated into general rules of law, the knowledge of which is essential to an adequate comprehension of the case. When, therefore, a Solicitor is called on to state the law applicable to a given case, he should consider, (1) the relations of the parties, (2) the duties arising from those relations, (3) which of those duties have been violated by the defendant, (4) what remedy the general rule of law, applicable to the case, provides for such violation, and (5) in what Court that remedy can best be enforced.

The general theory of every properly drawn bill, is (1) that the defendant has done, is doing, or is attempting, or threatening to do, some wrong to, or to withhold some right from, the complainant; and (2) that the Court in which the bill

<sup>2</sup> This general rule of law is the major premise of the legal syllogism; the facts of the case are the minor premise, and the special relief prayed for is the conclusion of the syllogism. No Solicitor can become a good pleader without thoroughly mastering the logical principles set forth in this and subsequent sections; and, while these principles may, at first, appear metaphysical and abstruse, and their study uninviting, on closer attention their importance will become manifest, and their acquisition will be found a task by no means difficult, or disagreeable. Pleading is the application of logic to legal disputation.

<sup>3</sup> *Merriman v. Norman*, 9 Heisk., 270; *Day, Griswold & Co., v. Walker*, 7 Lea, 714; *Taylor v. Lincolmfelter*, 1 Lea, 86; *Norville v. Coble*, *Ibid.*, 467; *Wilcox v. Morrison*, 9 Lea, 709; *White v. Fulgum*, 3 Pick., 283; *Walsh v. Crook*, 7 Pick., 390; *Peterson v. Tarney*, 2 Ch. Apps., 519; *Comfort v. McTeer*, 7 Lea, 659. In *Bartee v. Tompkins*, 4 Sneed, 638, it is called the "idea of the bill."

<sup>4</sup> No case can be properly conducted, either in preparing the pleadings, or in taking the proof, or in making the argument at the hearing, unless the So-

licitor is prepared to state the law applicable to the case in advance of every step taken, and that theory consistent with the facts and the law. He should form this theory before he draws the bill; and conform his pleadings to that theory. The proof must correspond to the theory of his bill; his argument at the hearing must be in affirmation of this theory as shown by both pleadings and proof; and the relief he seeks by decree must be such as the theory requires and allows.

<sup>5</sup> *Hart v. Czapski*, 11 Lea, 154.

<sup>6</sup> Rights are what is due the complainant; duties are what is owing by the defendant. Every right in one party has a corresponding duty owing by the other party. When this duty is discharged, the corresponding right ceases, the party entitled has his own, justice is done and the law is satisfied. *Justitia consistit in perpetua voluntas jus suum cuique tribuendi.* (Justice is an unvarying and unceasing disposition to accord to every one what is his due.) Every duty cognizable in the Courts, and every right enforceable in the Courts, arises from some law, or some contract, express or implied. See, *ante*, § 58, note 77.

is filed has jurisdiction to remedy or prevent that wrong, or to enforce that right. The wrong complained of may (1) grow out of some act or omission of the defendant, in violation of his duties to complainant, arising from some relation between the parties, or (2) may grow out of some act or omission of the defendant, in violation of some right of complainant, existing independently of any relations.

§ 168. **General Form of Bill Where Relations Exist.**—Therefore, in drawing a bill based on relations, the first matter to be considered is, whether the alleged wrong arises from any relation, or not; and the second matter to be considered is, what is the general rule of law or Equity applicable to the facts of the case. Having settled the general rule, and ascertained that the case does not come within any of the exceptions thereto, you will, in drafting the bill, (1) begin by showing the relations of the parties, and how they arose or were created, whether by contract expressed or implied, or by operation of law; (2) then show how and wherein the duties arising from those relations have been violated by the defendants, and the extent of the injury resulting to the complainant from such violation; (3) if there are other parties, secondarily liable to complainant by reason of the other defendant's primary liability,<sup>7</sup> show how and wherein; (4) if any specific property is sought to be attached, impounded, recovered, or secured from removal or alienation, so state, specifying the property so as fully to identify it, and giving, with particularity and precision, the grounds for this procedure; (5) if the defendant is doing, or threatening, any act likely to result in irreparable injury to complainant, or any act contrary to equity and good conscience, detail such acts, and show how or wherein they will work irreparable injury, or gross iniquity; (6) if there is any matter connected with, or growing out of, the foregoing matters, necessary to be brought before the Court to enable it to make a complete decree and determine the whole controversy, here bring forward such subordinate matters, and show their connection with the principal matters in dispute; (7) if any preliminary relief is needed, any injunction, attachment, or receiver, so specially pray; (8) then pray for specific and general relief; (9) aver that this is the first application for the extraordinary process prayed; and then (10) sign the bill, and have your client make proper affidavit to it, if necessary. All of this will, perhaps, be better understood by reference to the following

**GENERAL FORM OF BILL WHERE RELATIONS EXIST.<sup>8</sup>**

[For address and caption, see ante, §§ 155; 164.]

The complainant respectfully shows to the Court:

I.

That, [at a time stated, certain specified facts existed, whereby arose between the complainant and the defendant certain relations, stating the relations.]

II.

That, [as a result of the aforesaid relations, certain specified duties or debts were imposed on, or incurred or assumed by, the defendant; and certain specified rights accrued to the complainant, setting forth these duties, or debts, and the rights claimed, with definiteness.]

III.

That, [the defendant has violated his aforesaid duties to complainant, and has withheld from the complainant his just dues or rights in the premises, showing wherein, with clearness and particularity.]

IV.

That, [as a consequence of the preceding facts, the complainant is entitled to relief, and he therefore prays (1) for proper process to bring the defendant before the Court, (2) for the particular relief he deems himself entitled to, and (3) for general relief.]

§ 169. **General Form of a Bill Where No Relations Exist.**—Bills of this kind are generally filed to assert rights to, or to secure protection for, specific property, real or personal,<sup>9</sup> as in a bill (1) to assert title to, or interest in, land or

<sup>7</sup> As surety, endorser, guarantor, purchaser with notice, voluntary vendee, or other privy.

<sup>8</sup> The commencement and caption are omitted. See, ante, § 164.

<sup>9</sup> The phrase, "property, real, or personal," is in-

tended to include every species of property, tangible and intangible, capable of ownership, and cognizable in the Courts. For definition of property, see, ante, § 56.

personalty, (2) to protect or preserve land or personalty, (3) to remove clouds on title, (4) to stay waste, prevent trespasses, and inhibit irreparable injury, (5) to enjoin or abate nuisances, and the like. These bills also lie in many other cases where injunctions are needed, as in (1) bills *quia timet*, (2) bills of peace, (3) bills to prevent a multiplicity of suits, and indeed in all other cases where the suit does not spring out of some contract, express or implied, or of some relation between the parties, but is based on some right of property in the complainant, and some actual or threatened violation of that right by the defendant.

The following general form will aid the draftsman of such bills:

**GENERAL FORM OF BILL WHERE NO RELATIONS.**

[For address and caption, see ante, §§ 155; 164.]

The complainant respectfully shows to the Court:

I.

[Here allege complainant's title to the property, or other particular right, which he seeks to assert or protect; describing the property, or right, so as fully to identify it, and if it be land, give the boundaries and location of the tract.]

II.

[If said title, or rights, are evidenced by any writing or other muniment, so state, giving its date, and otherwise describing it, and making it an exhibit to the bill.]

III.

[Show when, wherein, and by which of the defendants, the complainant's rights have been interfered with, or denied, or his said rights or property injured, or threatened, or his possession or use thereof interfered with, or denied, stating clearly the time, and main facts constituting the wrong complained of, and necessitating the application to the Court for relief.]

IV.

[If any of the defendants, especially defendants under disability, have rights or interests similar to those of complainant, and are entitled to similar relief, state, in a general way, these facts.]

V.

[If necessary to set up any special equity, or to relate any special atrocities, or gross misconduct, or other iniquitous conduct of the defendants, in order to emphasize the complainant's wrongs, here set out such matters with reasonable certainty of time, place, and circumstance; and, if there be any grounds for an injunction, attachment, or receiver, here state them fully.<sup>10</sup>]

VI.

[Here pray for the necessary process to bring the defendants into Court, and if any injunction, attachment, or receiver is necessary, or guardian *ad litem*, or administrator, pray therefor with particularity.]

VII.

[Here specify the particular relief desired, conforming your prayer to the facts alleged, praying in the alternative when necessary and proper; and praying, also, for general relief.]

VIII.

[Show that this is the first application for the particular extraordinary process prayed; and, if not the first, explain, and show why such process should now be granted.]

IX.

[The bill must be signed by counsel, or by the complainant in person; and if any extraordinary process, or any interlocutory order, not of course, is applied for, the bill must be sworn to,<sup>11</sup> and a proper jurat attached.]

§ 170. **Character of the Allegations in a Bill.**—In drawing bills, remember that the more extraordinary the relief sought, the more specific must be the allegations. In a bill to collect an ordinary debt, without extraordinary process, general allegations showing that the defendant is indebted to the complainant may suffice; and, in an ordinary ejection bill, general allegations of ownership by the complainant, and of wrongful possession by the defendant, may sustain a suit; but general allegations will not be sufficient when the bill seeks (1) to attach property, or (2) to have a receiver appointed, or (3) to obtain an injunc-

<sup>10</sup> Keep in mind that a bill for an injunction, attachment, or receiver, is both a pleading and an affidavit, and must possess all the characteristics of a special affidavit, as elsewhere fully shown. See, *ante*, § 142.

<sup>11</sup> If publication for non-residents, or a guardian *ad litem* for minors, or lunatics, is prayed for, the bill must be sworn to, or a separate affidavit of the non-residence, or disability, of the defendants filed, before such prayers can be granted.

tion, or (4) to set aside a conveyance, a settlement or a contract, or (5) to reform a written instrument, or (6) to sell, reinvest, or expend, the property of minors, or (7) to set up a resulting or constructive trust, or (8) to have a specific performance of a contract, or (9) to obtain a divorce, or (10) to obtain a new trial at law, or (11) a review of a former decree in Equity, or (12) where in any case fraud is charged, or a trust is set up. In such and all similar cases, the facts must be set forth with such distinctness, precision and particularity, that the Court may clearly see the equities complainant is seeking to raise and have enforced.<sup>12</sup> The Chancellor should not be required to grope his way through a misty indefiniteness of statement, or be left in a labyrinth of inconclusive averments, or be forced to draw deductions from unstable and uncertain premises. The facts on which the alleged equity is founded should be set forth with such orderly and specific particularity, and with such a well defined clearness of statement and certainty of averment, that the equity alleged will stand forth in the light of the facts with statue-like distinctness to the eye of the judicial mind, and not be a mere misty mental exhalation floating indistinctly amid the shadows and darkness of indefinite, inconclusive and confused general averments and semi-averments, whose meaning and bearing are inexplicable.

A party should not undertake to drag a defendant into a Court of Conscience, unless he (1) has a good cause of action in fact, and (2) has that cause clearly and sufficiently set forth in his bill. Neither "information" alone, nor mere "information and belief," will suffice to sustain a prayer for relief; the complainant must make positive and direct averments, allegations, and charges, that the facts are so and so, and that the defendant has done so and so, using his "information" merely as the ground of his charge or averment, and to show that the fact alleged is not based on the direct personal knowledge of the complainant.

§ 171. **How Parties Should be Described.**—Parties, both complainant and defendant, should be described by their proper names, if known, always giving their first name in full, and never using the initial of their first name, unless their first given name is unknown, and cannot be readily ascertained.<sup>13</sup> If, however, a defendant is sued upon a written instrument, he may be sued in the name and description used in the instrument.<sup>14</sup>

If the name of the defendant is unknown and cannot be ascertained upon diligent inquiry, the bill should so allege,<sup>15</sup> using the statutory form, and setting forth in the bill clearly the character in which he is sued, and his title or interest in the subject-matter of the litigation.<sup>16</sup>

If the name of any party is a common one in the neighborhood, so that the Sheriff may not know which one of two or more with the same name is intended, the bill should use some method of designating him, adopting the particular designation, if any, used by his neighbors.<sup>17</sup> This may be of great importance,

<sup>12</sup> Sto. Eq. Pl., §§ 241-251; 1 Dan. Ch. Pr., 361, notes. See, *ante*, § 142.

<sup>13</sup> The law knows but one Christian name; and the omission, or incorrect insertion of a middle name, or initial, is immaterial. The full Christian name of a party should always be given in a pleading, or some sufficient excuse alleged for not so doing. The use of an initial is not sufficient, except in case of suits on written instruments in which initials or contractions of the Christian name are used. Hawes on Parties, § 3.

<sup>14</sup> Code, § 2788. In such a case, however, if he signs by initials, or signs an unusual name, it would be well to describe him by his usual name, also; thus, "C. W. Smith, otherwise called George W. Smith [or Wash. Smith]."

<sup>15</sup> Code, § 4352, sub-sec. 4.

<sup>16</sup> Code, § 4358. The "character" in which an unknown defendant is generally sued is that of husband, child, grand-child, heir, devisee, legatee, vendee

or other privy, or representative, of some particular person named and described in the bill, who, if living, has an interest in the subject-matter of the litigation, and who, if dead, has possibly a living spouse and children, or other privies in estate. The bill will describe such persons as follows:

"The said Susan Jones, who, if living, is entitled to an undivided one-seventh of said tract of land, went to Arizona twenty years ago, and has not been heard from for seventeen years. Where she now resides, if living; and, if dead, whether she died testate or intestate, and whether she left any husband, children, heirs or devisees, and if so, where they reside, and what their ages and names, are all unknown to complainants, and cannot be ascertained upon diligent inquiry."

<sup>17</sup> Thus: "David Beaty, (Tinker);" "John Smith sometimes called Club-foot John;" "Henry Jones son of Thomas Jones;" and "James Brown, otherwise called Red Jim Brown."

and may prevent trouble not only in serving the subpœna, but, also, in enforcing the decree, and in divesting and vesting title.

§ 172. **How Lands should be Described.**—Every bill that seeks the sale, partition or recovery, of land, or to clear the title to land, or to redeem land, or to specifically enforce a contract in reference to land, or that, in any other way, seeks to effect the title or possession of land, or any interest therein or encumbrance thereon, should describe the land by location, corners, courses and distances,<sup>18</sup> or other appropriate description sufficient fully to identify it. A reference in the bill to exhibits, while sufficient in law, is a loose and dangerous practice, especially if the exhibit has not been registered. Exhibits are liable to be lost or mislaid, and are sometimes withdrawn by leave of the Court, in which case the description may be lost. Unless the land is adequately described in the bill and in the decree,<sup>19</sup> the purchaser may be greatly embarrassed in asserting his title to definite boundaries, and the reputation of the Solicitor, Clerk and Chancellor, for accuracy and business capacity, may be greatly impaired.

§ 173. **Some Miscellaneous Suggestions.**—In drawing a bill where the parties are numerous, always leave in the caption two or three blank lines, for the insertion of additional complainants and defendants; because, while drawing the bill, you will often find it necessary to make additional parties, or to make other changes in the parties, and these blank lines will prove serviceable, and obviate the necessity of inartificial, and oftentimes illegible, interlineations.

It must be kept in mind that, whenever a bill sets forth facts on the strength of which (1) process by publication, (2) an injunction, (3) an attachment, (4) a receiver, (5) the appointment of a guardian *ad litem*, or (6) any other extraordinary, preliminary, or *ex parte* process, or order, is prayed or sought, it is both a pleading and an affidavit, and must, therefore, be verified by the oath of the complainant, or of some one else acquainted with the facts.<sup>20</sup>

If you have no need for the evidence of the defendant, or have not full confidence in his veracity, do not fail to waive his oath to his answer, in drawing your bill. If, however, there are material facts exclusively in the personal knowledge of the defendant, or if he have material papers in his possession, or under his control, necessary to your client's success, you may require an answer on oath, and may incorporate in your bill searching interrogatories to be responded to by the defendant in his answer.<sup>21</sup> But remember, that you cannot force a defendant to discover, if you waive his oath to his answer.

Avoid all scandal, all impertinence, all literary allusions, all poetic displays, all indelicate statements—in short, all unnecessary allegations.

After the bill has been drawn, add a half sheet, (2 pages), of blank paper as a back to the bill; it will be found convenient to write a fiat on, or an order appointing a receiver, and will give the Clerk room enough to make his endorsements.<sup>22</sup>

<sup>18</sup> Thus: Said tract of land is situated in the 4th civil district of Campbell county, adjoining the lands of Jonathan S. Lindsay, William Allen, J. M. Bibee and others, and begins on a poplar tree in the Powells Valley road, north of Jacksboro, a corner of said Lindsay's home farm, running thence south sixty poles to a large persimmon tree, [and so on] to the beginning, containing sixty acres more or less.

<sup>19</sup> The bill and exhibits may be lost, or mislaid, but the minute-book is a permanent record.

<sup>20</sup> But where the bill alleges a fact necessitating a publication as to a defendant, or the appointment of a guardian *ad litem*, these facts may be shown by an affidavit filed with the bill.

<sup>21</sup> See, *post*, §§ 1018; 1023; 1121.

<sup>22</sup> Some Solicitors are very niggard with their paper. They write below the bottom lines so that the sheets can not be fastened together without covering the writing; and they do not leave enough blank paper for the Chancellor to write a fiat on, or for the Clerk to put his endorsements on. Such apparent penuriousness should be avoided. Some Solicitors have strong jackets for their pleadings, and the practice is a very commendable one. Solicitors should make the mechanical execution of their pleadings a matter of pride and solicitude. For some minor defects in pleadings, see, *post*, § 410.

## CHAPTER IX.

## PROCEEDINGS PRELIMINARY TO PROCESS.

ARTICLE I. Proceedings Preliminary to Extraordinary Process.

ARTICLE II. Filing of the Bill.

ARTICLE III. Proceedings in Reference to Costs.

## ARTICLE I.

## PROCEEDINGS PRELIMINARY TO EXTRAORDINARY PROCESS.

§ 174. Proceedings When an Injunction is Sought.	§ 176. Proceedings When a Receiver is Sought before Answer.
§ 175. Proceedings When an Attachment of Property is Sought.	

§ 174. **Proceedings When an Injunction is Sought.**—The bill of complaint praying an injunction, having been prepared and duly sworn to, as hereafter fully shown,<sup>1</sup> the next step is to present it to some Chancellor, or to some Judge of a Circuit, Criminal or Special Court, and apply for a fiat for an injunction. The Chancellor, or Judge, after reading the bill, will endorse on it his fiat, or his refusal, and transmit it, in a sealed envelope, to the Clerk and Master of the Court in which the bill is to be filed. The fiat is ordinarily as follows:

**FIAT FOR AN INJUNCTION.**

To the Clerk and Master of the Chancery Court at [naming the town where the Court is held in which the bill is to be filed.]

Issue a writ of injunction as prayed in the foregoing bill, on complainant giving bond therefor in the penalty of [naming the sum.<sup>2</sup>]

Dec. 4, 1890.

S. A. KEY, Chancellor.

Complainant must give bond, or take the pauper oath if the fiat so authorize, before the Clerk and Master can issue the writ of injunction. The forms of fiats, bonds, and oath, will be found in the Chapter on Injunctions.

§ 175. **Proceedings When an Attachment of Property is Sought.**<sup>3</sup>—If the bill seeks to have the defendant's property attached, it must contain the proper allegations and be duly sworn to. If the ground of attachment alleged in the bill is one of the grounds for which an attachment would lie in the Circuit Court, the Clerk and Master may issue the writ of attachment without a fiat; but if the ground for the attachment is of a different character, the complainant must apply to a Chancellor, or to a Circuit, Criminal or Special Judge, for a fiat. This application is made in the same way as when an injunction is sought, and the practice in granting or refusing a fiat, and in transmitting the bill to the Clerk and Master, is the same as in the case of injunction bills. Indeed, the same bill often prays for both an injunction and an attachment.

If the attachment be granted by the Clerk and Master, or by a Chancellor, or Judge, the bond required by the statute, or the pauper oath in lieu, must be filed with the Clerk before the writ can issue. The forms of fiats, bonds, and oaths, for an attachment will be found in the Chapter on Attachments.

<sup>1</sup> For the practice in injunction suits, see Chapter on Injunctions, *post*, §§ 800-863.

<sup>2</sup> If no sum is named, the statute fixes the penalty at five hundred dollars. Code, § 4440.

<sup>3</sup> See Chapter on Attachment Suits, *post*, §§ 869-890.

§ 176. **Proceedings When a Receiver is Sought before Answer.**<sup>4</sup>—It sometimes happens that the immediate appointment of a receiver is desired by the complainant. In such a case, his bill, or an accompanying affidavit, must fully and particularly set out the urgency of the necessity; the bill must be sworn to, and must be presented to some Chancellor, or to some Circuit, Criminal or Special Judge, who, if the case for an instanter appointment be made out, and good cause shown why notice of the application should not be given, will endorse on the bill, or on a paper attached thereto, an order appointing a suitable person receiver as prayed, and specifying the bond he must give, and the duties he must perform. In such a case, the Chancellor, or Judge, may require the complainant to give a bond conditioned for the faithful discharge of the duties of the receiver;<sup>5</sup> in which case this bond must be given before the receiver can act. The Chancellor, or Judge, may award a writ of possession, to put the receiver in possession of the property specified in the order appointing the receiver.

On making these orders, the Chancellor, or Judge, will transmit the papers in a sealed envelope to the Clerk and Master of the Court where the bill is to be filed. The forms of such orders, and of the bond, will be found in the Chapter on Receivers.

## ARTICLE II.

### FILING OF THE BILL.

§ 177. When and Where the Bill May be Filed. | § 178. Filing of the Bill.  
 | § 179. When a Pleading is Considered Filed.

§ 177.—**When and Where the Bill may be Filed.**—Suits are commenced in the Chancery Court by bill; and bills may be filed in the office of the Clerk and Master of the Chancery Court at any time,<sup>1</sup> whether the Court be in session or not; they may be filed at any hour of the day or night, provided the Clerk and Master, or his deputy, can be found to receive them;<sup>2</sup> and a prosecution bond, or pauper oath in lieu, is not a condition precedent.

The bill must, of course, be filed in the particular Chancery Court that has jurisdiction of the person of the defendant, or of the subject-matter of the suit; for, if the bill be filed in a Chancery Court that has no jurisdiction, the defendant can defeat the suit by plea in abatement, motion to dismiss, or demurrer. In determining the proper county in which to file the bill, the following rules must be considered:

1. **Bills to Divest, or Clear the Title to, Land;**
2. **Bills to Enforce the Specific Execution of Contracts Relating to Realty;**
3. **Bills to Foreclose a Mortgage, or Deed of Trust, by a sale of personal property or realty, must be filed in the county in which the land to be affected by the suit, or a material part of it, lies; or, in case the trust deed or mortgage is**

<sup>4</sup> See Chapter on Receivers, *post*, §§ 892-917.

<sup>5</sup> Code, §§ 3948; 4453.

<sup>1</sup> Code, § 4329. Inasmuch as a suit can be begun in the Circuit Court, or before a Justice of the Peace, on Sunday, (Code, § 2824,) it would seem that a bill might be filed in Chancery on that day, ou the complainant making affidavit that the defendant is removing, or about to remove, himself, or property, beyond the jurisdiction of the Court. The fact that our facilities for travel and transportation are

so great on Sunday, often renders it important to have the right to file bills of injunction and attachment, and obtain fiats, and process, on that day. See *2 High on Injunc.*, § 1584.

<sup>2</sup> The Clerk and Master, or his Deputy, may receive a bill at his own house, or on the street, or anywhere else in his county. In contemplation of law the Courts are always open. Const., Art. 1, § 17.



for personalty, the bill must be filed in the county in which such deed or mortgage<sup>3</sup> is registered.<sup>4</sup> So,

4. **Bills to recover land**, whether in the nature of ejectment or detainer suits,<sup>5</sup> and

5. **Bills to Sell the Lands of a Decedent to Pay Debts**, must be filed in the county where the land or a portion of it lies.<sup>6</sup>

6. **Bills for the Partition of Land**, or a sale of land for partition, must be filed in the county in which the land, or any part of it, lies, or in which the defendant resides; or, if all the claimants join in the petition, it may be filed in any county.<sup>7</sup>

7. **Bills for Dower or Homestead**, must be filed in the county where the land, or a portion of it, lies; or in the county where the husband last resided before his death.<sup>8</sup>

8. **Bills for the Sale of the Property of Persons Under Disability**, must be filed in the county where the property is, or where the person under disability resides.<sup>9</sup>

9. **Bills by One Non-resident Against Another Non-resident** to subject the real or personal property of the defendant to the satisfaction of a foreign judgment must be filed in the county where the property is situated.<sup>10</sup>

10. **Bills to Recover Possession of Personal Property**, in the nature of replevin or detinue suits, must be filed in the county in which the goods and chattels, or a material part of them, are, or in which either of the defendants may be found.<sup>11</sup>

11. **Bills to Enforce Liens of Mechanics**,<sup>11a</sup> **Liens on Boats**,<sup>11b</sup> **Liens of Employes of railroads, corporations, partnerships, and merchants**,<sup>11c</sup> **liens of contractors on railroads**,<sup>11d</sup> or other liens on property, must be filed in the county where the property, or some material part of it, sought to be attached, is situated if realty, or is found if personalty.<sup>11e</sup>

12. **Bills Against Cities and Counties**, whether local or transitory in their nature, must be filed, (1) in case of a city, in the county wherein the city is situated; and (2) in case of a county, in the Court of the county sued.<sup>11f</sup>

13. **Bills for the Appointment of Administrators** must be filed in the county in which the deceased resided at the time of his death, or in which his estate, goods and chattels, or effects, were at the time of his death.<sup>12</sup>

14. **Bills for the Transfer of the Administration of an Insolvent Estate**, from the County Court to the Chancery Court, must be filed in the county wherein the will was proved, or letters of administration granted, or where the personal representatives reside, or are served with process.<sup>13</sup>

15. **Bills Against Joint Makers of Negotiable Paper** must be filed in a county where a joint maker can be served with subpoena to answer.<sup>14</sup>

16. **If the Complainant and Defendant Both Reside in the Same County**, the bill must be filed in that county,<sup>15</sup> unless the statute *requires* the bill to be filed in

<sup>3</sup> The language of the statute is "deed of mortgage," but "of" is evidently a typographical error. The statute does not expressly confine the deed, or mortgage, to personalty, but such is, beyond doubt, the meaning of the statute.

<sup>4</sup> Acts of 1877, ch. 107. The Code, § 4311, sub-sec. 2, reads "may be filed;" the Act of 1877 reads "shall be filed;" and the 2d sec. of the Act repeals all the laws in conflict with it. The statute seems, therefore, to be mandatory; and for that reason is given precedence in the list of rules defining the local jurisdiction of the Court. See Reid, *ex parte*. 3 Sneed, 275.

<sup>5</sup> Code, §§ 2810; 2902, sub-sec. 3; Campbell v. Hampton, 11 Lea, 440.

<sup>6</sup> Code, §§ 2267-2270.

<sup>7</sup> Code, §§ 3268-3269; Todd v. Cannon, 8 Hum., 512.

<sup>8</sup> Code, § 2411; 2810.

<sup>9</sup> Code, § 3326; Williams v. Williams, 10 Heisk., 566.

<sup>10</sup> Code, § 4297; Taylor v. Badoux, 8 Pick., 249; Bank v. Motherwell, 11 Pick., 172.

<sup>11</sup> Code, § 2810; 3375.

11a Code, § 3543; Acts of 1873, ch. 19.

11b Code, § 3550.

11c Acts of 1883, ch. 18, sec. 2; Acts of 1897, ch. 78.

11d Acts of 1883, ch. 220, sec. 2.

11e Acts of 1877, ch. 107; Code, § 4311, sub-sec. 5. The attachment, in case the subpoena is served, becomes auxiliary in all of these cases to enforce statutory liens.

11f Nashville v. Webb, 6 Cates, 432. If a decree be rendered against a city outside of the county in which the city is situated, it is absolutely void for want of jurisdiction to make it. *Ibid.* Local suits must be brought in the county where the statute requires, and cannot be brought elsewhere. *Ibid.* Suits against counties must be brought in the Courts of the county sued. *Ibid.*

12 Code, § 2209.

13 Code, § 2362 a; Code (M. & V.) § 3207.

14 Code, §§ 2823; 2902, sub-sec. 5.

15 Code, §§ 2809; 2902, sub-sec. 4. These sections refer exclusively to transitory actions. § 2808 refers to transitory actions, and § 2809 refers to "such actions," and not to actions generally. See Code, §§

some other county.<sup>16</sup> This rule applies to transitory suits, and is subject to the preceding rules.<sup>17</sup>

17. **The Bill may be Filed in any County where the Defendant, or any Material Defendant, is Found,** unless otherwise prescribed by law. The Chancery Court acts ordinarily *in personam*. Unless, therefore, there be some statute expressly requiring the bill to be filed elsewhere, it may be filed in any county in which a subpoena can be served on the defendants, or on any material defendant.<sup>18</sup> This is the fundamental rule governing the personal jurisdiction of the Court, and the exceptions to it are hereinabove stated.

18. **The Bill may be Filed in any County in which the Defendant, or a Material Defendant, Resides,** unless otherwise prescribed by law; and, if, upon inquiry at his residence, he is not to be found by the officer having the subpoena, he may be proceeded against by publication or judicial attachment.<sup>20</sup> The exceptions to this rule are the same as those to the preceding rule.

19. **Bills Against Non-residents,** or persons whose names or residence are unknown, may be filed in the county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which the subject of the suit, or any material part thereof, is.<sup>21</sup>

20. **Bills to Attach Property** may be filed in any county in which the property, or any material part thereof sought to be attached, is found at the commencement of the suit.<sup>22</sup>

21. **Bills by Distributees, or Legatees,** to enforce the payment of their distributive shares, or legacies, may be filed in the county in which the estate was administered.<sup>23</sup>

22. **Bills to Enjoin Proceedings at Law** may be filed in the county in which the suit is pending, or to which execution is issued.<sup>24</sup>

23. **Bills for Divorce** may be filed in the county in which the defendant resides or is found, or in which the parties resided at the time of their separation; but if the defendant is a non-resident, or a convict, then the bill may be filed in the county where the complainant resides.<sup>25</sup>

24. **Bills by the State Against Corporations, Usurpers and Trustees,** may be filed in

2810; 2902, sub-sec. 3. These sections of the Code, (2809; 2902, sub-sec. 4.) are now considered as applicable to the Chancery Court; but, when originally enacted, they applied exclusively to suits in "the Courts of Law." Acts of 1849-50, ch. 60 § 2. The statutes localizing the Chancery jurisdiction, speak of "districts," and not "counties," Code, §§ 4308; 4311; 2209; 2267; 2451; 3649; 4236; 3412; 4297. Indeed, the statute was inapplicable, when originally passed, to all Chancery districts, including more than one county; and there were then many such districts.

When separate Chancery Courts were first established in Tennessee the State was divided into two Chancery Divisions, (*ante*, §§ 12 and 13,) and the various counties in each Division were grouped in Chancery districts, the Court being held in some one town in each district. As the State increased in population and wealth the number of Chancery Divisions was increased and the size of the Chancery districts decreased, until at last each county became a Chancery district, so that in Chancery nomenclature, county and "district" became synonymous. In codifying the statutes, the substitution of the word "county" for "Chancery district" was not always made, and some confusion has resulted therefrom, *See*, Code, §§ 2209; 2267; 2451; 3412; 3649; 4236; 4297; 4308; 4311; and, *see*, also *Armstrong v. State*, 1 Cold., 337; *State, ex rel., v. Lindsay*, 19 Pick., 625; 641.

<sup>16</sup> That is, if all the complainants, and all the defendants, live in the same county, then the bill must be filed in that county; unless the statute localizes the suit by requiring it to be brought in some specified county, and then it must be brought in the county specified. All suits affecting land must be filed in the county where the land is located; such suits are termed *local suits*.

<sup>17</sup> To make this more plain, suppose the complainant, and the defendant, both reside in Davidson

county, the bill could not be filed in Shelby county merely because the defendant happened to be found there: in such a case, the bill must be filed in Davidson county, unless there be ground of imperative local jurisdiction in Shelby (as in case of a bill to recover a tract of land situated in Shelby); then the bill must be filed in Shelby county, notwithstanding both complainant and defendant reside in Davidson.

If a *local suit* be brought in the wrong county the Court will have no jurisdiction, even by consent. *Nashville v. Webb*, 6 Cates, 432; *Mills v. Haley*, Nashville, 1906.

<sup>18</sup> Code, § 4305; *Parke v. Parke*, 3 Tenn. Ch., 647. If the defendant, or a material defendant, can be found even temporarily in a county, the bill may be filed in such county, provided process can be there served on him, and provided, further, there is no statute expressly requiring the bill to be filed elsewhere. *Roper v. Roper*, 3 Tenn. Ch., 53.

<sup>19</sup> A material defendant is one who has an interest in the matter in controversy, or a right which is to be affected by the decree, or is in possession of the property, claiming some interest in it. *Simonton v. Porter*, 1 Bax., 213. *Jackson v. Tiernan*, 10 Yerg., 175. A trustee is a material defendant. *Helm v. Barnes*, 1 Lea, 388.

<sup>20</sup> Code, § 4311, sub-sec. 1. The object of this provision was to give the Court jurisdiction of the defendant in the county of his residence, when he cannot, for any reason, be personally served with process. *Parke v. Parke*, 3 Tenn. Ch., 647. As to the judicial attachment, *see* Code, § 3466.

<sup>21</sup> Code, § 4311, sub-sec. 4.

<sup>22</sup> Code, § 4311, sub-sec. 5. *Morrow v. Fossick*, 3 Lea, 129.

<sup>23</sup> Code, § 2312; *Parke v. Parke*, 3 Tenn. Ch., 647.

<sup>24</sup> Code, § 4311, sub-sec. 3.

<sup>25</sup> Code, §§ 2451-2451 a.

the county where the office is usurped or held, or the corporation holds its meetings, or has its principal place of business, or where the trustees reside or are found.<sup>26</sup>

25. Bills for a *Mandamus* must be filed in the county where the land lies, when land is the subject of controversy; in all other cases, in the county where the defendant resides, unless he is a public officer or corporation, and then in the county in which the office is kept, or the corporation does business.<sup>27</sup>

In determining the venue, the complainant should consider:

1. Whether the suit in any way affects the title or possession of realty, or any interest in or lien on realty; if so, the bill must be filed in the county where such realty, or a material part of it, lies,<sup>28</sup> unless the statute expressly allows the bill to be filed in some other county.

2. If realty is in no way affected by the suit, and the action is transitory,<sup>29</sup> then the bill may be filed in any county where the defendant, or a material defendant resides, or may be served with subpoena, unless the statute expressly requires the bill to be filed in some other county.

3. If there be more than one county in which his bill may be filed, he may file it in either as may suit his convenience.<sup>30</sup>

§ 178. **Filing of the Bill.**—After the bill has been duly signed, and, if necessary, verified, it must then be presented to the Clerk of the Court specified in the address, and asked to be filed. If the bill has not already been endorsed, the Clerk should, thereupon, endorse it as follows:

**ENDORSEMENTS ON THE BILL.**

No. 284.<sup>31</sup>

John Jones, *et al.*,<sup>32</sup>

*vs.*

William Richardson, *et al.*

Original Bill.

Filed, June 1, 1890.<sup>33</sup>

CORAM ACUFF, C. & M.

A. L. EVANS,

Solicitor for Complainant.

If the bill has already been properly endorsed, the Clerk will merely add to the endorsement the date, and in attachment bills, the hour and minute of the filing. Bills in Chancery may be filed at any time, in term or in vacation.<sup>34</sup> On the bill being received by the Clerk, the suit is commenced.<sup>35</sup>

<sup>26</sup> Code, § 3411.

<sup>27</sup> Code, § 3568.

<sup>28</sup> All suits relating to land, or injuries to land or liens or incumbrances on land, are *local*; and the reason they are ordinarily required to be brought in the county where the land lies is the records affecting the title are, ordinarily, in such county, and should remain there.

<sup>29</sup> All suits relating to the person, whether *ex contractu* or *ex delicto* not affecting realty, are *transitory*. In transitory suits the venue follows the person of the defendant. *Debitum et contractus sunt nullius loci*. (Debt and contract are of no place.) *Actor sequitur forum rei*. (The plaintiff must sue in the Court where the defendant lives.)

<sup>30</sup> The utmost caution should be exercised in choosing the venue, as many suits are ultimately lost in consequence of the bills having been filed in the wrong county. See *Mills v. Haley*. *Mss.*, Nashville, 1906; *Nashville v. Webb*, 6 Cates, 432. A *local* suit brought in the wrong county can only result in a void decree. *Ibid.* But a *transitory* suit brought in the wrong county may be prosecuted to a valid decree unless abated by plea of the defendant. Code, § 2812.

<sup>31</sup> This should be the Rule Docket number.

<sup>32</sup> This abbreviation of the caption of the bill is termed the *title* or *style* of the cause, and all the papers filed in the cause should bear this same title

A cause is known by its *style*, as a man is known by his *name*; and any change in the style of a cause is sure to create confusion, and may cause loss. A paper or order mis-styled may be stricken from the files on motion; and, though copied into a transcript, may be ignored in the Supreme Court. Neither Solicitors nor Clerks are sufficiently careful about giving every cause its true and due style. So great has been the evil resulting, that Legislative action has been taken, prohibiting the Clerks from changing the style of any cause, or papers in the same, without permission of the Chancellor. M. & V.'s Code, § 3664. Besides, a change of style often results in the same cause being indexed under two or more different styles, in consequence of which it is difficult to find all the entries in a cause; and important matters are thus left out of a transcript, thereby causing delay, confusion and loss.

<sup>33</sup> On an attachment bill, the hour and minute, as well as the day, of the filing should be endorsed. When a paper is duly entitled and filed, and the filing verified by the Clerk's signature, it is said to have on "the wedding garment."

<sup>34</sup> Code, § 4329.

<sup>35</sup> In the Circuit Court a suit is commenced by the issuance of the summons. Code, § 2813; and no summons can issue until the costs are secured or paupered, Code, §§ 3187; 3192. But in the Chancery Court a suit is commenced by filing the bill. Code,

§ 179. **When a Pleading is Considered Filed.**—A pleading is deemed to be filed when it is delivered to the proper officer, and by him received to be kept on file.<sup>36</sup> The Clerk is required to note upon the pleadings the date of the filing,<sup>36a</sup> but this is not an absolute prerequisite,<sup>37</sup> nor is the date conclusive upon the parties: it may be shown by parol proof that the pleading was filed at some other time.<sup>38</sup> When the date of filing does not appear on the bill, it may be inferred from the date of the bond and of the issuance of the writ.<sup>39</sup> If the opposite party does not, in due time, take advantage of the fact that a pleading is not marked filed, he will be deemed to have waived such irregularity, and will not be allowed to take advantage of it, after having taken some step which recognizes the pleading as duly filed.<sup>40</sup>

In general, a pleading is deemed filed when handed to the Clerk, or to a person in the Clerk's office authorized to receive it,<sup>41</sup> and the failure of the Clerk, or deputy, to properly mark it filed should in no way prejudice the party filing it.<sup>42</sup>

ARTICLE III.

PROCEEDINGS IN REFERENCE TO COSTS.

§ 180. Securing the Costs of the Suit.

§ 181. Form of the Bond for Costs.

§ 182. Taking the Pauper Oath.

§ 183. Forms of Pauper Oaths.

§ 180. **Securing the Costs of the Suit.**—After the bill has been duly signed, and if necessary, verified, it must be presented to the Clerk of the Court specified in the address, with a request that it be filed. This request should be accompanied with security<sup>1</sup> for the costs of the suit, or a pauper oath; but the bond or oath may be filed after the bill has been filed.<sup>2</sup>

The security must undertake to pay all costs that may, at any time, be adjudged against his principal, in the event it is not paid by said principal; and no omission, or neglect, to insert this undertaking in the bond will prevent the security being held liable as stated.<sup>3</sup>

All persons who file bills or petitions, requiring a subpœna to answer, must give this security for costs, or take the pauper's oath, except the State:<sup>4</sup> counties and municipal corporations are not excepted.<sup>5</sup>

§ 4312; or by handing it to the Clerk or anyone in his office authorized to receive it. *Montgomery v. Buck*, 6 Hum., 416; 1 Dan. Ch. Pr., 399; *Collins v. N. B. & M. Insurance Co.*, 7 Pick., 432; and the cause is pending from such filing, even though process is not issued promptly, *Ibid.*; and no cost bond given until long afterwards. *Cowan, McClung & Co., v. Donaldson*, 11 Pick., 322. See *Cooper & Stockell v. Stockard*, 16 Lea, 143. See, *ante*, § 132, where suits at law and suits in Chancery are contrasted.

<sup>36</sup> *Fanning v. Fly*, 2 Cold., 486. See note 35, *supra*.

<sup>36a</sup> Chan. Rule, I, § 3; Code, § 4339.

<sup>37</sup> *Fanning v. Fly*, 2 Cold., 486.

<sup>38</sup> *Montgomery v. Buck*, 6 Hum., 416. In this case, the Clerk being absent, the bill was delivered, in June, to a person occupying the same office as the Clerk, and authorized, by the Clerk, to act for him, during his absence. The Clerk, on his return, marked the bill filed in September. The defendants, relying on the statute of limitations, which barred the suit if the bill was filed in September, the Supreme Court, on these facts, held that the bill was filed in June, and that this could be shown by parol

evidence. The defendant's plea, of the statute of limitations, was accordingly overruled. See, also, *Rush v. Rush*, 13 Pick., 279.

<sup>39</sup> *Carter v. Wolfe*, 1 Heisk., 694.

<sup>40</sup> *Fanning v. Fly*, 2 Cold., 486; *Mason v. Spurlock*, 4 Bax., 560; See *Waiver, ante*, § 71.

<sup>41</sup> *Rush v. Rush*, 13 Pick., 279.

<sup>42</sup> *Montgomery v. Buck*, 6 Hum., 416.

<sup>1</sup> Code, §§ 4339; 3187.

<sup>2</sup> The bond may be taken on the street. *Hansard v. Bank*, 5 Hum., 53; and may be given after the bill has been filed. *Cowan, McClung & Co., v. Donaldson*, 11 Pick., 322. See *ante*, § 179.

<sup>3</sup> Code, §§ 3196a-3196c; 4493; *Ogg v. Leinart*, 1 Heisk., 43; *Burson v. Mahoney*, 6 Bax., 304; *Denton v. Woods*, 11 Lea, 508.

<sup>4</sup> Code, § 2806.

<sup>5</sup> *Memphis v. Fisher*, 9 Bax., 239. The sureties on all bonds taken in the Chancery Court should be residents, and have property enough within the State subject to execution to satisfy the bond. Both the persons and the property of all sureties should be within the jurisdiction of the Court, to the end that the Court may enforce any orders, in reference to either, necessary in the progress of the cause.

§ 181. **Form of the Bond for Costs.**—The old form of prosecution bonds is not in conformity with the present statutes; but inasmuch as the statute, by its own operation, writes the proper conditions in all prosecution bonds, any omission, or neglect, to insert these conditions does not impair their validity.<sup>6</sup> The form of the bond is, therefore, immaterial, if there is enough of it to show that it was intended for a prosecution bond in the particular suit.<sup>7</sup>

To adapt the old forms to the present law, the following would be the

#### FORM OF A PROSECUTION BOND.

Whereas, John Jones has this day filed a bill, in the Chancery Court at Wartburg, against William Richardson [and others,] now we, the said John Jones, as principal, and Richard Roe, as surety, acknowledge ourselves indebted to the said William Richardson [and his co-defendants,] in the sum of two hundred and fifty dollars; but this obligation to be void if we pay all costs that may be at any time adjudged against said John Jones in said suit.

This June 1, 1890.

JOHN JONES,  
RICHARD ROE.

The following form of bond would more nearly comply with the statute,<sup>8</sup> and is more brief:

#### ANOTHER FORM OF PROSECUTION BOND.

John Jones

*vs.*

William Richardson, et al.

} In the Chancery Court at Wartburg.

We, John Jones and Richard Roe, undertake in the penal sum of two hundred and fifty dollars, to pay all costs that may at any time be adjudged against the complainant in said cause, in the event the same are not paid by him.

This June 1, 1890.

JOHN JONES,  
RICHARD ROE.

Or, the following obligation, written below the bill, will constitute a sufficient bond, and is often adopted, especially where the Solicitor himself secures the costs:

#### SHORT FORM OF A PROSECUTION BOND.

We hereby acknowledge ourselves security for all costs adjudged against the complainant, in the foregoing cause. June 1, 1890.

JOHN BROWN,  
RICHARD ROE.

It is, however, best to have the complainant himself sign the cost bond, especially when he does not sign the bill in person. Such signing is proof of the retainer. Where a suit is by a firm the bond may be signed by a member in the firm name.<sup>9</sup>

If the Clerk and Master has any doubts as to the sufficiency of the sureties tendered on any bond, he should require them to justify, on oath, in writing.<sup>10</sup> This justification may be written on, or beneath the bond, as follows:

#### AFFIDAVIT OF JUSTIFICATION BY SURETIES.

State of Tennessee, }  
County of Knox. }

John Brown and Richard Roe, the sureties on the foregoing bond, being severally sworn, John Brown says that he owns property subject to execution, worth one thousand dollars, over and above all exemptions and just debts; and Richard Roe says that he owns property, subject to execution, worth three thousand dollars, over and above all exemptions and just debts.

JOHN BROWN,  
RICHARD ROE.

[Jurat, as in the form below:]

§ 182. **Taking the Pauper Oath.**—Any person, with the exceptions stated below, may file a bill, without giving security for costs, by taking and subscribing the following oath:<sup>11</sup>

<sup>6</sup> Code, §§ 3196a-3196c. See preceding section.

<sup>7</sup> *Broyles v. Blair*, 7 Yerg., 279. For form of an injunction bond, see Chapter on Injunctions, *post*; and for attachment bonds, see Chapter on Attachments, *post*.

<sup>8</sup> Code, § 3196a.

<sup>9</sup> *Brooks & Bro. v. Hartman*, 1 Heisk., 39.

<sup>10</sup> *State v. Wilson*, 3 Pick., 693. Sureties should

have property in the State subject to execution, worth the penalty above their debts.

<sup>11</sup> Code, § 3192. The Act of 1879, ch. 94, excluding all persons from the benefit of the pauper oath except resident citizens of the State, does not apply to suits in the Chancery Court. *Hillard v. Stark*, 14 Lea, 9.

PAUPER OATH.

State of Tennessee, }  
 County of Jefferson. }

I, John Jones, do solemnly swear that I am a resident of said State, and that owing to my poverty, I am not able to bear the expenses of the suit I am about to commence, in the Chancery Court of Jefferson county, against William Richardson and Henry Johnson, and that I am justly entitled to the redress sought,<sup>13</sup> to the best of my belief. JOHN JONES.

Sworn to and subscribed,  
 before me, June 1, 1890. }  
 D. H. MEEK, C. & M. }

Where there are more than one complainant they must all take the oath, except in case of husband and wife; and then the oath of the husband, alone, is sufficient for both himself and wife.<sup>14</sup> The oath may be taken before the Clerk and Master, or before the Clerk of any Court in this State,<sup>15</sup> or before a Justice of the Peace;<sup>16</sup> but not before a notary public of another State.<sup>17</sup> The Clerk and Master is bound to accept the pauper oath, if tendered in lieu of a bond: he has no discretion in the matter.<sup>18</sup>

1. The Pauper Oath Cannot be Taken by the Following Persons:

1. Non-residents of the State.<sup>19</sup> If a resident after commencing his suit on the pauper oath becomes a non-resident he may be required to secure the subsequent costs.<sup>20</sup>
2. Persons suing for false imprisonment, malicious prosecution or slanderous words.<sup>21</sup>
3. Persons suing for an absolute divorce from the bonds of matrimony.<sup>22</sup>
4. Persons instituting in the Chancery Court suits cognizable in the Courts of Admiralty of the United States.<sup>23</sup>
5. Informers bringing *qui tam* suits.<sup>24</sup>
6. Persons filing a replevin bill.<sup>25</sup> They may take the pauper oath as to the costs, but must, notwithstanding, give bond in double the value of the property.<sup>26</sup>

2. The Pauper Oath Can be Taken by the Following Persons, on Complying with the Statutory Requirements.

1. *Next Friends of Married Women* in this State, on the next friend taking and subscribing to an oath that the married woman in whose behalf the action is begun [*sic*] is not able, and has not sufficient property, to bear the expense of an action about to be commenced; and that such married woman is justly entitled to the relief sought to the best of his belief.<sup>27</sup>

2. *Next Friends of Infants* in this State, on the next friend taking and subscribing to an oath that the infant in whose behalf the action is begun [*sic*] is not able, and has not sufficient property to bear the expenses of the action about to be commenced; and that such infant is justly entitled to the relief sought, to the best of his [affiant's] belief.<sup>28</sup>

<sup>12</sup> The pauper oath may be amended. *Adamson v. Hurt*, 3 Shan. Cas., 424.

<sup>13</sup> This statement is essential, and cannot be omitted. *McKienavy v. Pickard*, 3 Shan. Cas., 411.

<sup>14</sup> *Grills v. Hill*, 2 Sneed, 711; *McPhartridge v. Gregg*, 4 Cold., 324.

<sup>15</sup> *Knoxville Iron Co. v. Smith*, 2 Pick., 45.

<sup>16</sup> *Phipps v. Burnett*, 12 Pick., 175, overruling *Graham v. Caldwell*, 8 Baxter, 70.

<sup>17</sup> *Fawcett v. Railway Co.*, 5 Cates, 246.

<sup>18</sup> *Morris v. Smith*, 11 Hum., 134; *Snyder v. Summers*, 1 Lea, 483.

<sup>19</sup> Act of 1903, ch. 197; Acts of 1901, ch. 126.

<sup>20</sup> *Southern Ry. Co. v. Thompson*, 1 Cates, 343.

<sup>21</sup> No such suits can be brought in the Chancery Court.

<sup>22</sup> Acts of 1903, ch. 197. The proviso in this Act allowing a married woman suing for an absolute divorce to deposit six dollars in cash in lieu of a bond and security for costs is probably unconstitutional. See Const. Art. XI., sec. 8.

<sup>23</sup> Acts of 1897, ch. 100; Acts of 1901, ch. 126. Admiralty suits include all causes of action originat-

ing on, or growing out of the building, repair, supply, equipment or navigation of, boats operated for commercial purposes on our rivers, and all contracts, express or implied, between the owners or operators of such boats, or their agents, on one side, and their employes, passengers, consignors, consignees, material men, and all other persons, on the other side, in reference to employment, wages, material, freight, fares, transportation, risks, duties, liabilities and all other matters relating to such boats, or their equipment, manning, freightage, navigation or operation. See *Bouvier's Law Dic.* "Admiralty." The Act of 1897, ch. 100, is constitutional. *Kling v. Packet Co.*, 17 Pick., 99. Courts of Admiralty have jurisdiction over the waters of all navigable rivers. *Ibid.*

<sup>24</sup> *Johnson v. Hunter*, 9 Bax., 684.

<sup>25</sup> *Creamer v. Ford*, 1 Heisk., 308; *Horton v. Vowell*, 4 Heisk., 623; *Stone v. Hopkins*, 11 Heisk., 192; *Kincaid v. Bradshaw*, 6 Bax. 103.

<sup>26</sup> *Horton v. Vowell*, 4 Heisk., 623.

<sup>27</sup> Act of 1903, ch. 581.

<sup>28</sup> Acts of 1889, ch. 105. The language of the statute is followed in the text.

3. *Guardians of Idiots, Lunatics and Persons of Unsound Mind*, appointed by any Court of this State, on the guardian taking and subscribing an oath that he has no property of such idiot, lunatic or person of unsound mind out of which to bear the expenses of the suit he is about to commence, and that he verily believes that such idiot, lunatic or person of unsound mind is justly entitled to the redress sought.<sup>29</sup> But he cannot bring a suit for false imprisonment, malicious prosecution or slanderous words, on the pauper oath.<sup>30</sup>

4. *Personal Representatives of Estates of Deceased Persons* in this State, on the representative taking and subscribing an oath that he, as such personal representative, has no property belonging to the estate of the deceased, out of which to bear the expenses of the suit, and that he verily believes that the estate, for the benefit of which the action is brought, is justly entitled to the redress sought. The personal representative incurs no personal liability on account of such suit unless the Court trying the same should be of opinion and adjudge that the suit was frivolous or malicious.<sup>31</sup>

5. *A Non-Resident who Qualifies as Executor or Administrator*, in this State, of a person dying in this State, and leaving assets here.<sup>32</sup>

6. *Persons Suing for Divorce from Bed and Board*, on taking the ordinary pauper oath.<sup>33</sup>

3. **Requirements as to Taking the Pauper Oath** When the pauper oath is taken (1) by next friends of married women or of infants, or (2) by guardians of idiots, lunatics or persons of unsound mind, or (3) by personal representatives, care should be taken to comply with the respective statutory requirements, for a pauper oath that materially varies from the requirements in the particular case would be a nullity,<sup>34</sup> unless amended by leave of the Court.<sup>35</sup>

The pauper oath may be taken, not only in lieu of the ordinary prosecution bond, but it may be taken in lieu of an attachment bond,<sup>36</sup> or an injunction bond.<sup>37</sup> It cannot, however, be taken by the complainant in a replevin bill, but may be in a detinue bill.<sup>38</sup> A defendant to an inquisition of lunacy may appeal on the pauper oath.<sup>39</sup>

§ 183. **Forms of Pauper Oaths.**—In addition to the form of a pauper oath in the preceding section, the following forms are given:

**PAUPER OATH BY NEXT FRIEND.**

State of Tennessee, }  
County of ..... }

I, John Doe, as next friend of Mary Den, a married woman [or infant] do solemnly swear that we are both residents of said State, and that said Mary Den is not able, and has not sufficient property to bear the expense of the suit begun<sup>40</sup> this day [or about to be commenced] by me as her next friend, in the Chancery Court of said county, against Richard Roe, and that she is justly entitled to the relief sought to the best of my belief. JOHN DOE.

Sworn to and subscribed before me this.....day of....., 190.....

O. K., C. & M.

**PAUPER OATH BY A GUARDIAN OF A NON COMPOS.**

State of Tennessee, }  
County of ..... }

I, John Doe, by appointment of the County Court of said county, guardian of Henry Doe, an idiot, [lunatic, or person of unsound mind,] do solemnly swear that we are both residents of said State, and I have no property of said Henry Doe out of which to bear the expenses of

<sup>29</sup> Acts of 1871, ch. 111. Such guardian incurs no personal liability for such suit unless so decided by the Court in which the suit is brought or decided. *Ibid.*

<sup>30</sup> *Ibid.*  
<sup>31</sup> Acts of 1897, ch. 133. An administrator with the will annexed should not be permitted to prosecute an appeal on the pauper oath when the estate has assets. *Crocker v. Balch*, 20 Pick., 6. A non-resident administrator cannot sue under the pauper oath. *Fawcett v. Railway Co.*, 5 Cates, 246.

<sup>32</sup> *Railroad v. Maxwell*, 5 Cates, 464; Acts of 1903, ch. 501.

<sup>33</sup> Acts of 1903, ch. 197.

<sup>34</sup> *McKienavy v. Pickard*, 3 Shan. Cas., 411.

<sup>35</sup> *Adamson v. Hurt*, 3 Shan. Cas., 424.

<sup>36</sup> *Barber v. Denning*, 4 Sneed, 267.

<sup>37</sup> *Bridges v. Robinson*, 3 Tenn. Cl., 352. But to entitle a complainant to take the pauper oath in lieu of an injunction bond, the Chancellor must so direct. See Chapter on Injunctions, *post*, § 831.

<sup>38</sup> *Stone v. Hopkins*, 11 Heisk., 190. But see, *infra*.

<sup>39</sup> *Davis v. Norvell*, 3 Pick., 36.

<sup>40</sup> In the Chancery Court, the suit is begun when the bill is filed, and *before* the pauper oath or prosecution bond is filed. See, *ante*, §§ 179-180.

a suit I am about to commence, [*or* have commenced] as said guardian, against Richard Roe, in the Chancery Court of said county, and that I verily believe that said Henry Doe is justly entitled to the relief sought.

JOHN DOE,

Sworn to and subscribed before me this.....day of....., 190.....

O. K., C. & M.

**PAUPER OATH BY AN ADMINISTRATOR OR EXECUTOR.**

State of Tennessee, }  
County of ..... }

I, John Doe, as administrator of the estate, [*or* executor of the will] of Henry Doe, do solemnly swear that I am a resident of said State, and that as said administrator [*or* executor] I have no property belonging to the estate of said Henry Doe out of which to bear the expenses of the suit, which I am about to commence, [*or* have commenced] in the Chancery Court of said county against Richard Roe, and that I verily believe that said estate is justly entitled to the redress sought.

JOHN DOE,

Sworn to and subscribed before me this.....day of....., 190....

O. K., C. & M.



## CHAPTER X.

## ORIGINAL PROCESS IN CHANCERY.

ARTICLE I. Original Processes generally Considered.

ARTICLE II. Subpœna to Answer.

ARTICLE III. Process by Publication.

ARTICLE IV. Attachments to Compel an Answer.

## ARTICLE I.

## ORIGINAL PROCESSES GENERALLY CONSIDERED.

§ 184. Process Defined.

§ 185. Original Processes generally Considered.

§ 186. When Original Process May be Issued, and Executed, on Sunday.

§ 184. **Process Defined.**—Process is the means whereby a Court compels a defendant to appear before it, or comply with its commands, and is of three kinds: 1, Original; 2, Mesne, or Intermediate; and 3, Final.<sup>1</sup>

1. **Original Process** includes: (1) the subpœna to answer the original bill; (2) an attachment of the person, or of the property, of the defendant to bring him into Court; (3) notice by publication to the defendant to answer the original bill; and (4) an alternative *mandamus*.

2. **Mesne, or Intermediate, Process** includes: (1) subpœnas to answer supplemental and amended bills, and bills of revivor; (2) subpœnas for witnesses, (3) injunctions, (4) attachments for violations of injunctions or for other contempts; (5) ancillary attachments of property; (6) writs of *scire facias*, and (7) other writs occasioned by interlocutory orders.

3. **Final Process** includes: (1) writs of *feri facias*, or executions for money, (2) writs of possession in enforcement of a final decree, (3) attachments against the person, or property, of a party in enforcement of a final decree;<sup>2</sup> (4) mandatory injunctions; (5) writs of *distringas*,<sup>3</sup> (6) writs of sequestration;<sup>4</sup> (7) writs of peremptory *mandamus*; and (8) writs of restitution.

§ 185. **Original Processes generally Considered.**—Original processes in the Chancery Court are the following:

1. **Subpœna.** This is the ordinary process whereby a defendant is brought before the Court to answer a bill. It is sometimes called a subpœna to *answer*<sup>5</sup> in order to distinguish it from a subpœna to *testify*. This writ is served upon the person of the defendant by the Sheriff reading it to him.

2. **Attachment of Property.** Sometimes the defendant cannot well be personally served with process, and yet has property within the jurisdiction of the Court. In such cases, his property is seized by the Sheriff in obedience to a writ, and this fact, coupled with a notice to him to appear, is published in some newspaper, and this is called process by attachment of property and publication.<sup>6</sup>

3. **Publication.** When the person of the defendant cannot be reached for any

<sup>1</sup> Bouv. Law Dic., "Process;" Code, §§ 4348-4349. See *White v. The State*, 3 Heisk., 338; *McGavock v. Young*, 3 Tenn. Ch., 531..

<sup>2</sup> Code, §§ 4478-4488.

<sup>3</sup> Code, § 3000.

<sup>4</sup> Code, § 4487.

<sup>5</sup> Code, §§ 4339-4349.

<sup>6</sup> For proceedings in suits begun by attachment of property, see Chapter on Suits by Attachment, *post*, §§ 869-890.

reason, and he has no property that can be attached, he may be brought before the Court by a notification to appear, published in a newspaper. This sort of process is called process by publication.<sup>7</sup>

4. **Attachment of the Person.** When a defendant violates some process, order, or rule, of Court, he is in contempt. In such cases, an order is issued to bring him before the Court under arrest. This is termed process of contempt, or *attachment of the person*.<sup>8</sup> When a defendant, upon whom a subpoena has been served, fails to answer, the complainant may have his person attached, and held in custody, until he answers. This writ is not strictly original, but rather ancillary to the original writ; but, inasmuch as it compels the defendant to answer the original bill, it is here considered.

No person can be bound or affected by any judicial proceedings, unless actually, or constructively, notified thereof, previous to such proceeding.<sup>9</sup> Actual notice consists of the service of process upon him in person. Constructive notice may consist of (1) indirect service of process, by leaving a copy at his usual residence, when he evades service; or (2) of seizing his property, and by publication of the fact and of the suit in a newspaper; or (3) by publication of the suit without seizure of his property. Where a statute authorizes judgment to be taken summarily, on motion without notice, the defendant, who entered into the obligation on which the judgment is taken, is presumed to have waived notice, and consented in advance to such judgment, when he signed the obligation, he being presumed to know that the law allowed judgment in such a case, without notice to him.

5. **Alternative Mandamus.** This writ will be considered hereafter in connection with suits for a peremptory *mandamus*, of which the Chancery Court now has jurisdiction.<sup>10</sup>

§ 186. **When Original Process may be Issued, and Executed, on Sunday.**— Civil process, including subpoena to answer, may be issued on any day, and at any hour of the day; but it cannot be issued on Sunday, unless the party applying therefor, or his agent, or attorney, make oath, or affirmation, that the defendant is removing, or about to remove, himself or property beyond the jurisdiction of the Court in which the bill is filed. This affidavit should be endorsed on the back of the process; and the Clerk and Master should state under the affidavit, that the process was obtained on the affidavit.<sup>11</sup> This affidavit and statement may be as follows:

**AFFIDAVIT FOR PROCESS ON SUNDAY.**

John Doe }  
*vs.* }  
 Richard Roe. }

In this cause, John Doe [or Frank Diligent, agent, or attorney, of John Doe,] makes oath [or affirms] that the defendant, Richard Roe, is removing, or about to remove himself [or property] beyond the jurisdiction of the Court; and he prays that a subpoena to answer [or an attachment, or injunction, or *ne exeat*,<sup>12</sup>] may issue and be served instanter. JOHN DOE.

Sworn to and subscribed }  
 before me, April 5, 1891. }  
 N. H. GREER, C. & M. }

This writ was obtained on the preceding oath, and the Sheriff will execute it today. April 5, 1891. N. H. GREER, C. & M.

Upon receipt of such a writ, it is the duty of the officer to whom it is ad-

<sup>7</sup> Publication is original process. *McCavock v. Young*, 3 Tenn. Ch., 531.  
<sup>8</sup> Code, §§ 4360-4361.  
<sup>9</sup> The law delights in giving to every man a day in Court to make his defense. *Peck, J., in Roberts & Phillips v. Stewart*, 1 Yerg., 392. Notice, of some kind, actual or constructive, is necessary to vitalize the jurisdiction of the Court over the defendant; and, if there be no notice, there is no jurisdiction, and the proceedings are *coram non iudice*, and absolutely void. See *maxim, ante*, § 60.  
<sup>10</sup> See, *post*, Article on Suits of Mandamus, §§ 1084-1087.  
<sup>11</sup> Code, §§ 2824-2825.  
<sup>12</sup> The Code does not expressly authorize the issuance, and service, of attachments, injunctions, or *ne exeat*s, on Sunday; but the term, process, includes them, and they are within both the letter and the reason of the law.

dressed to execute it on Sunday, and he should use great diligence in so doing.<sup>13</sup> The Sheriff cannot, however, execute civil process on Sunday in any other case, unless it shall appear to his satisfaction that the defendant is about to leave the country, or State.<sup>14</sup>

ARTICLE II.

SUBPŒNA TO ANSWER.

- § 187. Form of the Subpœna.
- § 188. Counterpart Subpœnas.
- § 189. Requisites of a Subpœna.
- § 190. Return Day of Subpœnas.
- § 191. Issuance of Subpœnas.

- § 192. Service of Subpœnas.
- § 193. Service of Subpœnas on Corporations.
- § 194. Process against Other Defendants.
- § 195. *Alias* Process.

§ 187. **Form of the Subpœna.**—A subpœna implies a penalty, and formerly there was a pecuniary penalty prescribed in the writ for failure to obey it; but the present form of the subpœna contains no penalty. Indeed, a subpœna is now merely a summons.<sup>15</sup> The following is the

STATUTORY FORM OF A SUBPŒNA TO ANSWER.<sup>16</sup>

State of Tennessee, }  
Blount County. }

To the Sheriff of Blount County:

Summon Richard Roe and Peter Poe to appear, on or before the 19th day of April next, before the Chancery Court at Maryville, to answer the bill of John Doe; and have you then and there this writ.

This 2nd day of March, 1891.

W. C. CHUMLEA, C. & M.

This form is very similar to the form of the summons used in the Courts of law.<sup>17</sup> The form indicates that the writ should bear the date of its issuance. The practice still exists, however, of testing the subpœna of the first day of the preceding regular term; and this usage is so general and ancient as to have the force of law.<sup>18</sup> The better practice, nevertheless, is the one contemplated by the statute. Any defect in this particular, however, is cured by the statutory requirement, and consequent practice, of endorsing on the writ the date of its issuance.<sup>19</sup>

§ 188. **Counterpart Subpœnas.**—When there are defendants in another or other counties from that in which the bill is filed, the complainant may cause counterpart subpœnas to be issued to any county or counties where any of the defendants are most likely to be found.<sup>20</sup> But where the suit is brought on

<sup>13</sup> Code, §§ 2826; 4093, sub-sec. 7.

<sup>14</sup> Code, 2827; Acts of 1885, ch. 53.

<sup>15</sup> Heisk. Dig., p. 562, note. In the Code, § 4306, it is called a summons.

<sup>16</sup> The following forms are often used:

State of Tennessee, }  
County of Blount, }

To the Sheriff of Blount County:

Summon [or, you are hereby commanded to summon,] Richard Roe, Roland Roe, Robert Roe, and Peter Poe, to appear, on or before the third Monday of April next, before the Chancery Court at Maryville, [or, to appear at the next term of the Chancery Court, to be held for said county, at the Court House, in Maryville, on the third Monday in April next, then and there,] to answer the bill of complaint filed against them, and others, by John Doe; and have you then and there this writ.

As witness my hand, at office in Maryville, the third Monday in October, 1890.

W. C. CHUMLEA, C. & M.

Endorsed, "Issued, Mar. 2, 1891."

If there be a rule of Court, making the rule days return days, for original process, then the defendant may be commanded "to appear, on or before the first Monday in April next, at the office of the Clerk and Master of the Chancery Court, in Maryville, to answer the bill of John Doe, filed against him, in said Court; and have you then and there this writ."

<sup>17</sup> Code, § 2815.

<sup>18</sup> *Communis error facti jus.*

<sup>19</sup> Code, § 2819. The Code, § 2828, requires that all process, issued from any of the Circuit Courts, and returnable thereto, shall be tested of the term next preceding the issuance, but there is no such requirement as to subpœnas in Chancery. This method of testing Circuit Court writs is that existing at common law, and our Chancery Clerks have borrowed their custom from the Circuit Clerks.

<sup>20</sup> Code, §§ 2821; 4306. But where a suit is local, and must be brought in a particular county, a party cannot by a counterpart subpœna be sued in any other county. *Nashville v. Webb*, 6 Cates, 432.

negotiable paper, service of a counterpart writ on a joint drawer or maker, will not be sufficient to hold him to answer the bill, unless the original writ has been executed on a joint drawer or maker.<sup>21</sup>

When a counterpart subpoena issues, the Clerk and Master will endorse<sup>22</sup> on it the following: "This is a counterpart of an original subpoena to answer, issued in Blount county, for Richard Roe. W. C. Chumlea, C. & M." And he will, at the same time, endorse on the original subpoena the following: "A counterpart of this subpoena to answer issued to Roane county, for Peter Poe. W. C. Chumlea, C. & M." The only differences between a counterpart and an original subpoena are: (1) they are addressed to the Sheriffs of different counties; (2) they contain the names of different defendants,<sup>23</sup> and (3) their endorsements show that one is the original and the other a counterpart.

**§ 189. Requisites of a Subpœna.**—The essentials of a subpoena are as follows: 1, It must begin with the name of the State and the county: The Constitution says all writs and other process shall run in the name of the State.<sup>24</sup> 2. It must be addressed to the Sheriff of the county wherein it is to be served, or, if he is incompetent, to the Coroner. 3, It must name the defendants to be summoned, or otherwise so describe them that the officer may know them.<sup>25</sup> 4, It must specify when, and the particular Court, Chancellor, or Clerk, before whom the defendant must appear. 5, It must state the purpose for which he must appear, and give the name of the person filing the bill. 6, It must be dated, or at least must have the date of its issuance endorsed on it. 7, It must be signed by the Clerk and Master, or his deputy.<sup>26</sup>

If these requirements are substantially complied with, the subpoena will be sufficient, immaterial errors of form or substance being disregarded.<sup>27</sup>

**§ 190. Return Day of Subpœnas.**—The subpoena must show on its face when and where the defendant must appear. If the subpoena be to answer an original bill, it may require the defendant to appear before the Court on or before the first day of the next regular term, or it may require him to appear at a rule day, fixed by a rule of the Court;<sup>28</sup> but subpoenas to answer supplemental and amended bills, and bills of revivor, and all other mesne subpoenas, shall require the defendant to appear at a rule day.<sup>29</sup> When the subpoena is returnable to a rule day, it may require the defendant to appear at the office of the Clerk and Master of the Chancery Court. The Court is held in the Court room, and it would be misleading to summon the defendant to appear before the Court on a rule day, when there is no Court on that day, except such as is held by the Master in his office. The defendant, however, is expected to know that the proper place for his appearance is the Master's office.<sup>30</sup>

**§ 191. Issuance of Subpœnas.**—Upon the bill being filed and the required security given, the Clerk, after endorsing upon the bill the date of the filing, and entering the cause on his rule-docket, shall forthwith issue a subpoena to

<sup>21</sup> Code, §§ 2823; 2902, sub-sec. 5. If this law is violated, a plea in abatement will lie to the bill. See Chapter on Pleas in Abatement.

<sup>22</sup> Code, § 2821.

<sup>23</sup> Both subpoenas may, however, be for the same defendants in part, so as to get service on them in either county. Indeed, the phraseology of the statute would seem to indicate that counterpart writs might issue simultaneously to as many counties as there are defendants likely to be found in them. Code, § 4306. Of course, a material defendant must be served with the original, unless there be other grounds of jurisdiction in the county where the bill is filed. Compare Code, §§ 2821; 4306; 4343. Publication and attachment as to parties not subpoenaed are in the nature of counterpart process. Code, §§ 4307, 4352.

<sup>24</sup> Constitution, Art. VI., § 12. As in England the King was the "fountain of justice," (*ante*, §§ 2; 3;) so, in Tennessee, the people, as organized in the corporate form of a State, are the fountain of justice; and they have deputized, so to speak, the Courts

to "administer right and justice" in the counties wherein they are held. Constitution, Art. I., § 17. Hence, all Court writs run in the name of the State. It is not the Court, nor the Clerk, that issues the writ, in contemplation of law, but the State; the Court and the Clerk being merely the agents of the State. No one but the State, and those whom she has authorized to act and speak in her name, have the authority to command a person to appear anywhere, or at any time, or has the rightful power to call upon any one to give an account of his conduct.

<sup>25</sup> It would be sufficient to say, "the infant child of John and Jane Doe, under one year old."

<sup>26</sup> Code, § 4040, Constitution, Art. VI., § 12. A writ not signed by the Clerk is a nullity, and incapable of amendment. *Wiley v. Bennett*, 9 Bax., 581.

<sup>27</sup> Code, §§ 4340; 2863-2866.

<sup>28</sup> Code, § 4348.

<sup>29</sup> Code, § 4349.

<sup>30</sup> For a fuller statement of the law and practice of return days, see *Proceedings in the Master's Office, post*, §§ 1155-1157; and Ch. Rule XI, § 1200.

answer, and copy of the bill for the defendant, and all other process ordered,<sup>31</sup> such as counterpart subpœnas, writs of attachment, injunction or replevin, issuing such writs to the proper counties as shown by the bill.<sup>32</sup>

The Clerk issues only one subpœna to each county, embracing therein all the defendants in such county. The subpœna to the county in which the bill is filed, shall be accompanied by one copy of the bill, to be delivered to any one of the defendants named in the subpœna.<sup>33</sup>

The counterpart subpœna to any other county, shall be accompanied by a copy of the bill, to be delivered to some one of the defendants when the subpœna is served, and it shall be the duty of the Sheriff to read said copy to each one of the defendants, at the time he serves the subpœna.<sup>34</sup>

The Clerk shall issue, upon demand, to any one of the defendants, his agents or attorneys, to whom no copy of the bill appears by the Sheriff's return to have been delivered, a certified copy of the bill, to be charged in the bill of costs.<sup>35</sup>

Attachments, injunctions, and all other process issued to one county, shall embrace the names of all the defendants required to be served therewith residing in such county.<sup>36</sup>

Upon the proper affidavit being made, as shown in a preceding section, a subpœna to answer, injunction or attachment, may be issued and executed on Sunday.<sup>37</sup>

§ 192. **Service of the Subpœna.**—The Sheriff shall, with all reasonable speed, obey the command of the subpœna, by serving it on the persons named, and returning it on or before the day named therefor;<sup>38</sup> and in executing the subpœna he is bound to use a degree of diligence exceeding that which a prudent man employs in his own affairs.<sup>39</sup>

Subpœnas to answer are served by reading them to each defendant specified therein; and if the defendant evade, or attempt to evade, the service of such process, the Sheriff shall leave a copy of the subpœna at the usual residence of the defendant, which will be a sufficient service.<sup>40</sup>

The following are forms of returns showing how the Sheriff has executed the subpœna:

#### SHERIFF'S RETURNS ON SUBPOENAS.

Came to hand the same day issued [*or*, April 2, 1891.] Executed in full as commanded by reading the within writ to both Richard Roe and Peter Poe, and by leaving a copy of the bill with Peter Poe, [and a copy of the subpœna with each of defendants,<sup>41</sup>] this April 3, 1891.

J. M. ARMSTRONG, Sheriff.

Came to hand the same day issued. The defendant, Richard Roe, not found in my county. Peter Poe was found, but evaded the service of the writ by hiding in his house. I, therefore, left a copy of this writ, and a copy of the bill, at his usual residence, with his daughter, Jane Poe, and return this writ executed as to him. Richard Roe lives in Morgan county.

April 3, 1891.

J. M. ARMSTRONG, Sheriff.

Came to hand April 2, 1893. Search made, and the defendant, Roland Roe, not to be found in my county.<sup>42</sup> June 2, 1893.

THOS. C. HOLLOWAY, Sheriff.

All of the defendants must be served with process, whether natural persons

31 Code, § 4339.

32 Code, § 4306-4307.

33 Code, § 4341-4342.

34 Code, § 4343, as amended by Acts of 1877, ch.

45. See, also, Code, § 4306.

35 Code, § 4344, as amended by Acts of 1877, ch.

45.

36 Code, § 4345.

37 *Ante*, § 186.

38 Code, § 4347.

39 Code, § 4093, sub-sec. 7.

40 Code, § 4346. The Sheriff's return should show how he executed the subpœna, whether by reading it to the defendant when so served, or by leaving a copy at his usual place of residence when he evades service.

41 In some of the Chancery Divisions, there is a Rule of Court requiring the Clerk and Master to issue a copy of the subpœna to be left with each adult defendant: it is a good rule.

42 The Sheriff should go to the defendant's place of residence, and make diligent search and inquiry for him. Sending him notice of the writ, or even writing to him is no service. The Sheriff is forbidden to return that the defendant "is not to be found in my county," unless he shall actually have been at his place of abode. Code, § 365. If he ascertains that the defendant is an inhabitant of another county he will state the county. Code, § 366. There is a very material difference between a return that the defendant is "not found" and a return that the defendant is not to be found." See, *post*, § 870, sub-sec. 9.

or corporations, male or female, infants<sup>43</sup> or adults, married or single, sick or well, sane or insane.<sup>44</sup> The Sheriff has absolutely no discretion in executing process, but must implicitly and fully obey its command.<sup>44a</sup>

§ 193. **Service of Subpœna on Corporations, and Companies.**—If the bill is filed in the county in which the corporation sued keeps its chief office, the subpœna must be served (1) on the president or other head of the corporation; or, in his absence, (2) on the cashier; or, in his absence, (3) on the treasurer; or, in his absence, (4) on the secretary; or, in his absence, (5) on any director of such corporation; but, if neither the president, cashier, treasurer, or secretary resides within the State, then (6) the subpœna may be served on the chief agent of the corporation residing in the county where the bill is filed.<sup>45</sup>

If a corporation, company, or individual, has an office, or agency, or resident director, in any county other than that in which the chief officer or principal resides, service of process may be made on any agent or clerk employed therein, in all suits brought in such county against said corporation, company, or individual, growing out of, or connected with, the business of the corporation, company, or principal.<sup>46</sup>

If a county is sued, the subpœna may be served on the County Judge, or Chairman of the County Court.<sup>47</sup> If an incorporated town is sued, the subpœna will be served on the Mayor or other head of the corporation.<sup>48</sup>

1. **Foreign Corporations Doing Business in this State** are subject to suit here as to any transaction had, in whole or in part, within this State; or as to any cause of action arising here, but not otherwise, and are served with process in the same manner as domestic corporations, provided they have an office, agency or resident director in the county where the suit is brought.<sup>49</sup> But a foreign corporation having no office or agent in this State, can only be brought into Court by service of subpœna upon some agent or representative, and by notice mailed to it by the Clerk and Master, and by service of notice and copy of the process and return thereon by the complainant, or good excuse shown for not making such service.<sup>50</sup>

<sup>43</sup> It has been decided that service of process on the general guardian of an infant will bring the infant itself into Court, and authorize the Court to bind it by decree. *Britain v. Cowan*, 5 Hum., 315; *Cowan v. Anderson*, 7 Col., 284; *Masson v. Swan*, 6 Heisk., 450; *Scott v. Porter*, 2 Lea, 224. These decisions, however, go to the utmost verge of the law, and it is the universal practice of Solicitors to have the subpœna served upon all minors, however young, and whether they have general guardians or not. The writ should be read to the day-old babe as well as to the stalwart adult, for the babe's rights are the same as the man's, and even more jealously guarded; and the law does not vest the Sheriff with any discretion as to how old an infant must be before it shall be servable with process, nor does the law allow the Sheriff to decide whether service on a babe will be of any value or not. The law says "summon the babe;" and the Sheriff is required to obey, and he is liable on his bond for all damages arising to any one by his failure to obey. See, as to the appointment of guardians *ad litem*, ante, §§ 106-108.

<sup>44</sup> An idiot, lunatic, or deaf, or dumb person, must be served equally as though free from these infirmities. *Rodgers v. Ellison*, Meigs, 90. When, however, service of subpœna to answer upon a lunatic would be dangerous to his health, upon this fact being made clearly to appear to the Court, an order will be made allowing substituted service upon the physician in charge of him. 1 Dan. Ch. Pr., 177; *Speak v. Metcalf*, 2 Tenn. Ch., 214. The better practice, perhaps, would be to depute the physician to serve the writ.

<sup>44a</sup> As to service of subpœna in divorce suits, see, *post*, § 1090.

<sup>45</sup> Code, §§ 2831-2833.  
<sup>46</sup> Code, §§ 2834-2834b. This statute gives the complainant the right to sue a corporation, company, or individual, in any county where it, or he, has an office, agency, or resident director; and, the suit need not be confined to matters connected with such office, agency, or resident director, but may be

about any matter, or in any case. *Toppins v. Railroad*, 5 Lea, 600. Process, however, cannot be served on a mere traveling agent, or drummer. *Railroad Co. v. Walker*, 9 Lea, 475; *Lumber Co. v. Lieberman*, 22 Pick., 153. This is a salutary construction, for, otherwise, merchants might be sued in any county where their drummers might be served with process, inasmuch as the statute includes *companies*, and *individuals*, as well as corporations. Service on officers holding over is sufficient. *Parker v. Hotel Co.*, 12 Pick., 252.

<sup>47</sup> Code, §§ 402-403. *Wilson v. Davidson county*, 3 Tenn. Ch., 536.

<sup>48</sup> *Town of Wartrace v. W. & B. G. Turnpike Co.*, 2 Col., 515.

<sup>49</sup> *Telephone Co. v. Turner*, 4 Pick., 265; *Peters v. Neely*, 16 Lea, 275.

<sup>50</sup> Foreign corporations doing business in this State, but having no local office or agency here, are subject to suit here as to any transaction had, in whole, or in part, within this State, or as to any cause of action arising here, but not otherwise. To bring such a corporation before the Court process may be served upon any agent of such corporation found within the county, where the suit is brought; and, in the absence of such an agent, process may be served upon any person found within the county where the suit is brought, who represented such corporation at the time the transaction, out of which the suit arises, took place; or, if the agency, through which the transaction was had, be itself a corporation, then the process may be served upon any agent of that corporation, upon whom process might be served, if it were the defendant. But, no judgment can be taken on such service, unless: (1) the Clerk and Master mails by registered letter, to the home office of the corporation, a copy of the process; and, unless (2) the complainant lodges at the home office of the company with some person found there, a written notice, signed by him, or his attorney, stating that such a suit has been brought, accompanied by a copy of the process, and the return of the officer

The Sheriff need not show in his return, that the person served is the president, or other head of the corporation, or the cashier, treasurer, secretary, director, agent or clerk; nor need he show the absence of the officers preceding the one actually served.<sup>51</sup>

2. **Foreign Insurance Corporations** and companies, including fire, life and accident, or casualty, and all foreign fraternal beneficiary associations, are brought into Court by service of subpœna upon the State Insurance Commissioner, who is their attorney for that purpose, service being made on the Commissioner by the Sheriff of the county where the Commissioner has his office.<sup>52</sup> But foreign insurance companies doing business in this State through brokers are brought into Court by service of subpœna upon an attorney designated by the defendant corporation in the county where the complainant resides; but if the defendant corporation fail to designate such attorney within ten days after reception of a registered letter notifying it of the loss, it may be brought into Court by publication.<sup>53</sup>

§ 194. **Process against Other Defendants.**—Service of process upon a non-resident who has qualified as executor or administrator in this State, in case the Sheriff cannot find him, may be made on the County Court Clerk of the county wherein he qualified. The statute makes it the duty of the Clerk to notify the defendant by mail.<sup>54</sup>

Service of process against the owner or owners of a steamboat may be made on any captain or clerk of the owner or owners, whether captain or clerk of the boat in question or not.<sup>55</sup>

§ 195. **Alias Process.**—If a subpœna to answer is returned not executed the complainant may have an *alias* or *pluries* subpœna. If the subpœna is returned “*Not to be found in my county,*” as to any defendant who is a resident of the county, the complainant may have either an *alias* or a *pluries* subpœna for such defendant; or may, at his election, have a judicial attachment against the estate of such defendant.<sup>56</sup> Or, the complainant may have publication made to bring the defendant before the Court.<sup>57</sup> Or, the complainant may amend his bill, if the facts warrant it, and allege any of the statutory grounds for dispensing with personal service of the subpœna, and have notice given the defendant by publication; or, instead of amending his bill he may file a separate affidavit stating the necessary facts.<sup>58</sup>

*Alias* subpœnas, taken out at any time after the return of the original, may be returnable to any Monday of the term, as shown elsewhere.<sup>59</sup>

*Alias* and *pluries* subpœnas differ in form from original subpœnas only in the opening words of the command.

thereon; these facts being proved by the affidavit of the person lodging the same, stating the facts, and with whom the notice was lodged. If, however, the complainant, or his attorney, make affidavit that he was prevented from serving the notice by circumstances which reasonably excuse such service, which circumstances shall be particularly stated in the affidavit, the Court may allow judgment to be taken without affidavit of service of notice, and of the copy of the process, if satisfied that the excuse for not making such service is sufficient. Acts of 1887, ch. 226. This Act does not repeal Code, §§ 2831-2834, which apply equally to domestic and foreign corporations having an office or agency in the county where the suit is brought. The act applies exclusively to foreign corporations, doing business here, but having no local office, or resident agent, in the State. Telephone Co. v. Turner, 4 Pick., 265. See, Life Ins. Co. v. Spratley, 15 Pick., 322. Service on an agent of a foreign corporation is sufficient. *Ibid.* State v. Insurance Co., 22 Pick., 288.

<sup>51</sup> Town of Wartrace v. Wartrace Turnpike Co., 2 Cold., 515. In this case, it was by Hawkins, J., in his opinion, that if a subpœna commands the Sheriff to summon “the town of Wartrace” a return “Executed 29th November, 1858,” would be good *prima facie*, the presumption of law being that the

Sheriff had served the writ upon such officer or agent of the corporation as was necessary to the sufficient execution of the process. Nevertheless, it is better in such cases for the return to name the person on whom the subpœna was served. This return has been held sufficient, *prima facie*: “Came to hand same day issued, and executed by summoning James A. Whiteside, vice-president of the defendant, and acting president, the 20th day of December, 1858, and also, summoned Robert M. Hook, agent of defendant, at Chattanooga, the 14th of February, 1859.” N. & C. Railroad Co. v. Eakin, 6 Cold., 582. 52 D’Arcy v. Mutual Life Ins. Co., 24 Pick., 567; Acts of 1895, ch. 160, sec. 9; Acts of 1897, ch. 127, sec. 5; Acts of 1901, ch. 113, sec. 6. The complainant, in case of a suit against a foreign fraternal beneficiary association, must pay the Insurance Commissioner, at the time process is served on him, three dollars, to be taxed as costs.

<sup>53</sup> Acts of 1895, ch. 160, sec. 47.

<sup>54</sup> Acts of 1903, ch. 501.

<sup>55</sup> Acts of 1881, ch. 66.

<sup>56</sup> See, *post*, §§ 870, sub-sec. 9; 883, where the law and practice are fully treated.

<sup>57</sup> See, *post*, § 196.

<sup>58</sup> See, *post*, § 197.

<sup>59</sup> See, *post*, §§ 225-226.

## ARTICLE III.

## PROCESS BY PUBLICATION.

§ 196. When Process by Publication is Allowed.

§ 197. Proceedings Preliminary to Publication.

§ 198. Form, Manner, and Time, of Publication.

§ 199. Evidence of Publication.

§ 200. Effect of Publication.

§ 196. **When Process by Publication is Allowed.**—As Courts of Equity ordinarily act *in personam*, they require process to be served on the person of the defendant, unless otherwise prescribed by law.<sup>1</sup> But, as personal service of process cannot always be had, the statute dispenses with personal service of process on the defendant in the Chancery Court, in the following cases:

1. When the defendant is a non-resident of the State.<sup>2</sup>
2. When upon inquiry at his usual place of abode, he cannot be found so as to be served with process, and there is just ground to believe he has gone beyond the limits of the State.
3. When the Sheriff shall make return upon any leading process that he is not to be found.<sup>3</sup>
4. When the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry.<sup>4</sup>
5. When the residence of the defendant is unknown, and cannot be ascertained upon diligent inquiry.
6. When judicial and other attachments will lie, under the provisions of the Code, against the property of the defendant.<sup>5</sup>

§ 197. **Proceedings Preliminary to Publication.**—To dispense with personal service of process in any of the cases specified in the preceding section, the facts, on which such dispensation is based, must be stated under oath in the bill, or by separate affidavit, or appear by the return of the Sheriff upon the process.<sup>6</sup> And in original attachment suits, to authorize publication, there must be not only a ground of attachment alleged in the bill, but also a levy upon the property of the defendant.<sup>7</sup> If the bill alleging a statutory ground of publica-

<sup>1</sup> Code, § 4305.

<sup>2</sup> Code, § 4352. A person may be a citizen of the State and, at the same time, a non-resident of the State within the meaning of the attachment law, as when, though his family lives in Tennessee, his business keeps him in another State most of his time. *Cain v. Jennings*, 3 Tenn. Ch. 131. A citizen should be deemed a non-resident enough to warrant a publication, when he will probably be absent until after the next term of the Court after the filing of the bill.

<sup>3</sup> The meaning of this sub-section is, that if the bill is filed in the proper county under the law governing the local jurisdiction of the Court, and a subpoena has properly issued to the county where the defendant in question resides, then, on the Sheriff of that county returning that "he is not to be found," publication may be made. The law contemplates that the subpoena shall issue to the county where the defendant resides, because, if his residence is unknown and cannot be ascertained upon diligent inquiry, a publication can be made in the first instance. The law does not mean that a subpoena may issue to any county, and on being returned "not to be found" that publication may then be made. If it did, gross frauds might be practiced under it, both on the Court and on the defendants, by issuing sub-

pneas to counties where the defendant does not reside, expressly to have a return of "not to be found," and then publication, and then a *pro confesso* and final decree. See *Scovel v. Abston*, 1 Tenn. Ch. 73.

<sup>4</sup> *Bleidorn v. Pilot Mt. C. & M. Co.*, 5 Pick., 166.

<sup>5</sup> Code, § 4352. For process by attachment of property and publication, see Chapter on Suits by Attachment.

Originally the Court of Chancery acted only *in personam*; and it was necessary that process should be executed on the person. *Grace v. Hunt, Cooke* 341. But the facilities for travel are so great, our people are so migratory, and so many non-residents have business dealings in our State, that justice to our citizens imperatively required the statutory method of bringing parties before our Courts by publication in a newspaper, in the cases where personal service of process cannot be had. Nevertheless, as natural justice requires that a person should be heard before he is condemned, the Courts strictly construe the statutes allowing publication in lieu of personal service. *Grewar v. Henderson*, 1 Tenn. Ch., 76. See, *ante*, maxim, § 60.

<sup>6</sup> Code, § 4353.

<sup>7</sup> Code, § 3518; see Chapter on Attachment Suits.



tion is not sworn to, a separate affidavit may be filed, in form substantially as follows:

**AFFIDAVIT FOR PUBLICATION.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

John Doe, [*or*, Jacob S. Graves, Solicitor of John Doe,] makes oath that Charles Roe, one of the defendants in this cause, is a non-resident of the State [*or*, that the residence of Charles Roe, one of the defendants in this cause, is unknown, and cannot be ascertained upon diligent inquiry;] and that the names and residences of the parties sued as the heirs and other representatives of George Roe, deceased, are unknown, and cannot be ascertained upon diligent inquiry. He, therefore, prays that publication be made to bring said defendants before the Court.

JOHN DOE.

Sworn to and subscribed  
before me, this April 12, 1891.  
CORAM ACUFF, C. & M. }

The requirements of the Code, in reference to the procedure necessary to justify a publication, do not limit the power of the Court to order publication in any of the specified cases, when satisfied that the ground therefor exists; and, on review of such action in the Supreme Court, it will be presumed that the facts authorizing such order duly appeared, in the absence of rebutting proof.

If the defendant, when personal service of process is dispensed with, does not cause his appearance to be entered, the Clerk, as soon as the necessary affidavit or return is made, shall enter upon the rule docket an order, requiring the defendant to appear at a certain day therein named, being a rule day, and defend, or otherwise the bill will be taken for confessed.<sup>8</sup> The Code does not state where the defendant is to appear, but as he is to appear on a rule day, and as no Court will ordinarily be then in session, it is manifest that he must appear at the Master's office.

**§ 198. Form, Manner and Time, of the Publication.**—A copy of the order, entered on the rule docket, mentioned in the preceding section, is published by the Clerk for four consecutive weeks in the newspaper mentioned in the order, or designated by the general rules of the Court. This order<sup>9</sup> should contain: (1) the name of the defendant to be notified; (2) the order requiring him to appear; (3) the style of the Court before which, or before the Clerk of which, he must appear; (4) the time<sup>10</sup> when, and the place where, he must appear; (5) the purpose for which he must appear, specifying the name of the person filing the bill, or the style of the suit against which he must defend;<sup>11</sup> (6) the fact that the bill will be taken for confessed if he fails to appear and defend; (7) the date on which the order was made; (8) the name of the Clerk and Master, or his deputy, making the order,<sup>12</sup> and (9) when the suit is against an unknown defendant, the order of publication should also describe such unknown party as near as may be, both by the character in which he is sued, and by reference to his title or interest in the subject-matter of the litigation.<sup>13</sup>

It is not necessary that the foregoing constituents of the order of publication should be stated in the order of succession given above. A substantial observ-

<sup>8</sup> Code, § 4354.

<sup>9</sup> This order need not contain all the requirements of an order of publication in suits begun by an original attachment, even in cases where an attachment has issued to fix a lien. *Kyle v. Phillips*, 6 Bax., 43; *Guthrie v. Brown*, 10 Heisk., 380; *Allen v. Gilliland*, 6 Lea, 532. See Chapter on Attachment Suits.

<sup>10</sup> The time must be a rule day. Code, § 4354; *Fellows v. Cook*, 10 Heisk., 81.

<sup>11</sup> A publication for a non-resident must show who is the substantial complainant. *Donaldson v. Nealis*, 24 Pick., 638.

<sup>12</sup> Code, §§ 4354; 4357. When the jurisdiction of

the Court does not depend on an original attachment, the order of publication need not contain the requirements of Code, §§ 3521-3522. *Kyle v. Phillips*, 6 Bax., 43; *Guthrie v. Brown*, 10 Heisk., 380.

<sup>13</sup> Code, § 4358. The following description will serve as an illustration: "The unknown heirs of John Day, who once claimed an interest in lot No. 40, in the Town of Rockwood, Tenn." *Ferriss v. Lewis*, 2 Tenn. Ch., 291. To authorize such a publication, the bill, or a separate affidavit, should show that the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry. Code, § 4352, sub-sec. 4; *Bleidorn v. Pilot Mt. C. & M. Co.*, 5 Pick., 166.

ance of the requirements will be sufficient. The following is the usual form of an

**ORDER OF PUBLICATION.**<sup>14</sup>

**To Peter Poe.**

John Doe <i>vs.</i> Richard Roe and Peter Poe.	}	In the Chancery Court at Clinton, Tenn.
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In this cause, it appearing from the bill which is sworn to, [*or*, it appearing by affidavit, *or* by the Sheriff's return,] that Peter Poe, one of the defendants, is a non-resident of the State,<sup>15</sup> he is, therefore, hereby required to appear, on or before the 1st Monday of June<sup>16</sup> next, before the Clerk and Master of said Court, at his office in Clinton, and make defence to the bill filed against him in said Court, by John Doe, or otherwise the bill will be taken for confessed.

It is further ordered that this notice be published for four consecutive weeks in the Clinton Gazette.

This 7th day of May,<sup>17</sup> 1890.

J. C. SCRUGGS, C. & M.

The order for publication in lieu of personal service may be made at any time after the filing of the bill;<sup>18</sup> but, as it is in the nature of process, it should ordinarily be made as soon as the necessary affidavit or return is made,<sup>19</sup> and published forthwith.<sup>20</sup> The order must be published for four consecutive weeks, but the statute does not say how long the last publication must be before the return day. Inasmuch, however, as it takes all four publications to constitute one service, it would seem that the defendant should have at least five days after the fourth publication in which to appear and defend, and that unless five days intervene between the last publication and the return rule day, the defendant would not be bound to appear and defend, until the rule day next after the one named in the order.<sup>21</sup>

**§ 199. Evidence of Publication.**—Ordinarily the fact that publication was duly made pursuant to the order of the Court, or Clerk and Master, is proved by the affidavit of the printer, or the actual production in Court of the copies of the newspaper containing the published notices;<sup>22</sup> but any other competent evidence is admissible.<sup>23</sup> If the decree recites that publication was duly made, that is *prima facie* sufficient, in the absence of clear proof to the contrary on a direct attack.<sup>24</sup>

**§ 200. Effect of Publication.**—When publication has been duly made in pursuance of an order duly made, and the day of appearance has arrived, the defendant is in Court; and is as much liable to interlocutory orders as though actually served with subpoena; and the Court may bind him by its orders in relation to taking proof, fixing a day for the hearing, appointing receivers, and by a *pro confesso* for want of an answer.

<sup>14</sup> Instead of using this heading, or the more common heading, "Non-resident Notice," in making the publication, it should be omitted entirely, and the notice headed thus: To PETER POE. This heading will attract the attention of the defendant, or his acquaintances, while the other two headings will not. The object of the publication is to notify Peter Poe; and good faith and fair dealing require that the publication be so headed as most effectually to answer this purpose. The form of the ordinary notices almost seems to have been originally devised to conceal the name of the person to be notified as effectually as possible. See, *post*, § 877.

<sup>15</sup> The order should show, on its face, a statutory ground for publication; and should state that ground as nearly as possible, in the very language of the statute. The Courts require a strict compliance with the provisions of the law. *Ferriss v. Lewis*, 2 Tenn. Ch., 291.

<sup>16</sup> The defendant may be required to appear at a rule day. Code, § 4354; *Fellows v. Cook*, 10 Heisk., 51.

<sup>17</sup> This publication would have been in time, if actually begun on May 7th. The first publication would then have been on May 7th; the second, on May 14th; the third, on May 21st; the fourth, on May 28th, and there were five days from May 28th to June 2d, 1890, it being the first Monday of the month. See *Lowenstine v. Gillespie*, 6 Lea, 641.

<sup>18</sup> Code, § 4356.

<sup>19</sup> Code, § 4354.

<sup>20</sup> Code, §§ 4355; 4339.

<sup>21</sup> Compare Code, §§ 4354, 4344, 4350, 4351, 4369, sub-sec. 2. *Wessells v. Wessells*, 1 Tenn. Ch., 66; *McGavock v. Young*, 3 Tenn. Ch., 529.

<sup>22</sup> Code, § 4359.

<sup>23</sup> *Claybrook v. Wade*, 7 Cold., 559.

<sup>24</sup> *Allen v. Gilliland*, 6 Lea, 521.

## ARTICLE IV.

## ATTACHMENT TO COMPEL AN ANSWER.

§ 201. When an Attachment May be Had.  
 § 202. Form of an Attachment.

§ 203. Proceedings upon an Attachment.  
 § 204. Effect of a Contempt.

§ 201. **When an Attachment May be Had.**—When the complainant calls upon the defendant to make a discovery under oath as to the matters charged in the bill, he has a right to such a discovery; and the defendant, if served with subpoena, cannot lawfully deprive him of that right, by refusing to answer. Ordinarily, in such cases, the complainant is content to have his bill taken for confessed, but occasionally he cannot get full relief without a discovery. In such a case, he may proceed against the defendant by process of contempt, to compel an answer.<sup>1</sup>

This process of contempt is an attachment for the body of the defendant, and may be had either upon order of the Chancellor, at the instance of the complainant,<sup>2</sup> or from the Master direct, when the time for answering has expired.<sup>3</sup> Before an attachment can be had, however, it must appear by the return, or affidavit, of the proper officer, that the subpoena to answer was duly served on the defendant.<sup>4</sup>

If a married woman be in contempt, her husband must, also, be included in the attachment, unless she has obtained leave to answer alone, or it appears by affidavit that her husband cannot control her, or is out of the State.<sup>5</sup> But the husband, if in the State, must obtain leave to answer separately, or he will be held liable to be attached along with his wife. And so, the wife is not bound to acquiesce in her husband's answer, and may obtain an order to answer separately.<sup>6</sup>

§ 202. **Form of an Attachment.**—An attachment is in the nature of a *capias* or warrant of arrest; and requires the Sheriff to take the body of the defendant into his custody, and bring him before the Court. The following is the ordinary

## FORM OF AN ATTACHMENT FOR CONTEMPT.

The State of Tennessee, }  
 County of Knox. } To the Sheriff of Knox County:

You are hereby commanded to attach Richard Roe, so as to have him before our Chancery Court, at Knoxville, on the 4th Monday of May<sup>7</sup> next, then and there to answer touching a contempt, which he, as is alleged, has committed against the State, in not answering the bill of John Doe,<sup>8</sup> and also touching such other matters as shall then and there be laid to his

<sup>1</sup> Code, § 4360. Inasmuch as the subpoena issues in the name of the State, and the State, through her officers, commands the defendant to appear, and answer, his wilful refusal so to do is in the nature of a rebellious and contemptuous disregard of the sovereignty of the State, and the majesty of the Law; and is visited with penalties and pains adequate to enforce obedience to the command of the writ, and vindicate the authority of the State. Formerly, when a defendant failed to answer a bill, and was not arrested on the attachment, he was (1) warned to appear by public proclamation, made by the Sheriff; if he failed to appear, he was (2) declared "a rebel and a contemner of the law," and a commission of rebellion was appointed, consisting of two, three, or four, commissioners, to see that he was arrested; if these commissioners, with the aid of the Sheriff, and other peace officers, failed to arrest the defendant, then (3) process of sequestration issued, directed to four sequestrators, to take pos-

session of all the defendant's goods and chattels, lands and tenements, and hold the same subject to the order of the Court, until the defendant appeared and purged his contempt. 1 Barb. Ch. Pr., 62-74; 1 Dan. Ch. Pr., (original edition,) 572-651. In 1801, our Legislature enacted that "there should be no other process of contempt than attachment, but without proclamation." 1 Scott's Rev., 687.

<sup>2</sup> Code, § 4361; Ch. Rule, VII, § 2, does not apply to attachments for failing to answer bills.

<sup>3</sup> Chancery Rule, VII, § 5; *post*, § 1196, sub-sec. 5.

<sup>4</sup> Code, § 4361.

<sup>5</sup> 1 Barb. Ch. Pr., 54.

<sup>6</sup> 1 Dan. Ch. Pr., 499-500.

<sup>7</sup> The attachment may be made returnable to any day of the term, or to any rule day in vacation. Code, § 4362.

<sup>8</sup> The particular matter of contempt need not be stated in the writ; but it is well to do so, as our laws do not favor general warrants. Const. of Tenn.,

charge, and to perform and abide such order as said Court shall make in this behalf. Herein fail not, and have you then and there this writ. W. L. TRENT, C. & M.

This 9th day of April, 1890.

There may be *alias* and *pluries* writs of attachment, as in case of other writs. The Clerk and Master should endorse on the writ, the penalty of the bail bond to be taken by the Sheriff.<sup>9</sup> If the defendant forfeits his bond by failing to appear, an *alias* attachment will be issued, upon which no bail bond can be taken; and the penalty of the bond already given may be decreed to be forfeited, and collected by execution.<sup>10</sup>

§ 203. **Proceedings upon an Attachment.**—The attachment may be returnable to a rule day in vacation, or to some day in term time; and upon its service, bail may be taken for the appearance of the defendant at the time fixed therein.<sup>11</sup> If the Chancellor, or Master, do not specify the penalty of the bond, the law fixes it at two hundred and fifty dollars.<sup>12</sup> The following is

**THE FORM OF A BAIL BOND.**

The State of Tennessee, }  
County of Knox. }

We, Richard Roe, Henry Roe, and Robert Roe, agree to pay the State of Tennessee two hundred and fifty dollars, unless the said Richard Roe appears on the 4th Monday of May next, before the Chancery Court of said county, to answer a charge of contempt, in the case of John Doe vs. Richard Roe, in said Court, and does not depart without leave of the Court. This May 1, 1890.

Witness,  
J. K. LONES,  
Sheriff.

RICHARD ROE,  
HENRY ROE,  
ROBERT ROE.

If the defendant fails to appear, in compliance with the terms of his bail, a second attachment issues, upon which no bail can be taken;<sup>13</sup> and the penalty of the bail bond may be decreed forfeited, and collected by execution. If the defendant appears in pursuance of his bond, but refuses to answer fully, he shall be committed to jail, there to remain until he purges himself of the contempt, and complies with the requirements of the law by filing a full and complete answer.<sup>14</sup>

After the defendant has been arrested if he fail to give bond, on his petition, or on motion of the complainant, a writ of *habeas corpus* will be ordered by the Court to issue to the Sheriff ordering him to bring the defendant before the Court to answer for his said contempt. Such writ may be as follows:

**WRIT OF HABEAS CORPUS.**

The State of Tennessee, }  
County of Knox. }

To the Sheriff of said County:

You are hereby commanded to have the body of Richard Roe, now in your custody, before our Court of Chancery, at Knoxville, on the 21st day of November, 1895 [*or* forthwith] to answer for certain contempts wherewith he is charged, to be dealt with as said Court shall order. And have you then and there this writ with your return thereon.

This 20th day of November, 1895.

H. B. LINDSAY, Chancellor.

If the writ is issued in term it will be signed by the Clerk and Master.<sup>15</sup>

If the defendant is committed for contempt, the complainant may proceed with his action as if the bill had been taken for confessed, the allegations being taken as in all respects true. But in that case, all further proceedings for the

Art. 1, § 7. In the old form of attachment, there was endorsed on the writ the ground of contempt, thus: "Attachment against Richard Roe, for not answering the bill of John Doe." 1 Barb. Ch. Pr., 366.

<sup>9</sup> If there be no order fixing this penalty, the amount is two hundred and fifty dollars. Code, § 4111. The endorsement may be as follows: "In this case, the Sheriff will take a bail bond, in the penalty of two hundred and fifty dollars. W. L. Trent, C. & M."

<sup>10</sup> Code, § 4363.

<sup>11</sup> Code, § 4362.

<sup>12</sup> Code, §§ 4110-4111.

<sup>13</sup> The Clerk and Master should endorse on the second attachment, that no bail bond will be taken by the Sheriff.

<sup>14</sup> Code, §§ 4363-4364.

<sup>15</sup> Code, § 3728.

contempt shall cease, and the Court, or the Judge thereof, may discharge the defendant from custody.<sup>16</sup>

After an attachment for contempt, no plea or demurrer shall be received unless by order of the Court upon motion.<sup>17</sup> The Court, or the Clerk and Master, may, however, at any time after attachment proceedings have been instituted, and even after commitment, on good cause shown, grant the defendant further time in which to file an answer.<sup>18</sup>

Where the defendant has been attached for failing to answer the bill, the following order may be made:

**ORDER FOR DEFENDANT TO ANSWER.**

John Doe }  
*vs.* }  
 Richard Roe. }

The defendant, Richard Roe, having been attached, and being now in Court under bond, he is ordered to file a sufficient answer to the bill, and pay all the costs of the attachment, within forty-eight hours, [*or such other time as the Court may order,*] or the complainant may apply to the Court for such further order as may be just.

If the defendant continue in contempt, the Court may, on application of the complainant, make the following further order:

**ORDER COMMITTING THE DEFENDANT FOR NOT ANSWERING.**

John Doe }  
*vs.* }  
 Richard Roe. }

The defendant, Richard Roe, having failed to put in an answer [*or, a sufficient answer,*] to the bill as heretofore ordered, upon application of the complainant, it is ordered that the defendant, Richard Roe, for such his contempt, be committed to the common jail of the county of Knox, there to remain until he shall have put in a sufficient answer to the bill of complaint in this cause, unless the Court sooner orders his discharge, and the Clerk and Master will issue a certified copy of this order to the Sheriff of Knox county, such copy to operate as a *mittimus*.

§ 204. **Effect of a Contempt.**—It is a general rule, that a party in contempt is never to be heard, as to any matter connected with the merits of the suit: he is not allowed to make any motion, except for leave to clear his contempt.<sup>19</sup> His first duty is to show to the Court that he has not wilfully disobeyed its process, or, if he has, that he sincerely repents. In either case, he must file or tender a full answer,<sup>20</sup> and offer to pay the costs of the attachment, before he will be heard.

But while a defendant will not be heard on his own motion, with the exception stated, he will not be denied the right to be heard in opposition to any motion by the other side, in reference to the litigation.<sup>21</sup>

<sup>16</sup> Code, §§ 4366-4367.

<sup>17</sup> Code, § 4365.

<sup>18</sup> Code, § 4368. Good cause must, however, be shown before the Clerk and Master would be justified in granting the defendant further time in which to file an answer. Such "good cause" must be shown by affidavit. In *Gant v. Gant*, 10 Hum., 464, it was held that the Master had no authority to receive an answer from a defendant in contempt; but since then, he has been given such authority. The effect of giving further time would be to suspend all pro-

ceedings by attachment. As to showing cause, see, *ante*, § 62, sub-sec. 8.

<sup>19</sup> *Gant v. Gant*, 10 Hum., 464; 1 Smith's Ch. Pr. 62; 1 Dan. Ch. Pr., 504. He may, however, make motions in another cause. He may be in contempt in one cause, and be in good standing in another cause. 1 Dan. Ch. Pr., 505.

<sup>20</sup> Code, § 4364.

<sup>21</sup> 1 Dan. Ch. Pr., 506; 2 Barb. Ch. Pr., 281. For the practice in contempt cases, generally, see Chapter on Contempts, *post*, §§ 918-923.

CHAPTER XI.

PROCEEDINGS BETWEEN PROCESS AND APPEARANCE.

ARTICLE I. *Pro Confessos*, and Proceedings Thereon.

ARTICLE II. Motions by the Complainant.

ARTICLE I.

PRO CONFESSOS, AND PROCEEDINGS THEREON.

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| <p>§ 205. When and How a Bill May be Taken for Confessed.</p> <p>§ 206. Effect of a Judgment <i>Pro Confesso</i>.</p> <p>§ 207. When a Judgment <i>Pro Confesso</i> May be Set Aside.</p> <p>§ 208. How a Judgment <i>Pro Confesso</i> May be Set Aside.</p> <p>§ 209. When a Final Decree May be Taken on a <i>Pro Confesso</i>.</p> | <p>§ 210. When a <i>Pro Confesso</i> will not Authorize a Final Decree.</p> <p>§ 211. Effect of a Final Decree Based on a <i>Pro Confesso</i>.</p> <p>§ 212. When and How a Decree Based on a <i>Pro Confesso</i> May be Set Aside.</p> <p>§ 213. Forms of Petition and Decree to Set Aside a Decree Based on a <i>Pro Confesso</i>.</p> |
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§ 205. **When and How a Bill may be Taken for Confessed.**—A defendant is required by the subpoena, or the publication notice, as the case may be, to answer, or make defence to, the bill; and he is given reasonable time so to do: If he fails to do so in the time prescribed by law,<sup>1</sup> and the complainant desires that he shall answer under oath, and make the discovery called for in the bill, the defendant, if served with process, may be attached and compelled to answer, as already shown;<sup>2</sup> but, if no such discovery is sought, the complainant may have an order taking his bill for confessed, the failure of the defendant to make any defence being deemed *prima facie* evidence that he has no defence to make, but, on the contrary, admits the material allegations of the bill to be true.<sup>3</sup> So, if the defendant puts in a demurrer, plea, or answer, which have been adjudged insufficient, and thereafter fails to file a sufficient answer in the time allowed, he will be deemed to have abandoned all further defence, and to confess the truth of the bill; and the bill may accordingly be taken for confessed by order of the Court.<sup>4</sup> Such an order is generally called a judgment *pro confesso*. A bill may, under the Code, be taken for confessed in the following cases:

1. When, being duly served with process, as already stated, the defendant fails to plead, answer, or demur, by the time fixed by law.
2. When, an order for his appearance having been duly made and published as prescribed by law, the defendant fails to cause his appearance to be thereupon entered, and to plead, answer, or demur, or to obtain time to answer.
3. When, process of contempt having been returned executed, or the defendant having been brought into Court upon such process, he refuses to answer the complainant's bill, or puts in an insufficient answer, so adjudged by the Court.
4. When, a plea or demurrer having been overruled, and the defendant ordered to answer the bill, he fails to do so in the time fixed in the order, or, if no time be so fixed, on the next rule day.<sup>5</sup>

<sup>1</sup> As to when a defendant must make defence, see *post*, §§ 225-227.

<sup>2</sup> *Ante*, §§ 201-204.

<sup>3</sup> Every one is presumed to know the law; and the defendant is presumed to know that his failure to make defence is equivalent to an admission, on his part, that the facts set forth in the bill are true. Acting on these presumptions, the Court, accordingly, treats

the bill as confessed, and decrees the relief the confession warrants. *Qui tacet, cum loqui debet, consentire videtur.*

<sup>4</sup> *Rose v. Meek*, 19 Pick., 666.

<sup>5</sup> *Ibid.* When a demurrer is overruled, and no answer filed or time asked to make defence, a *pro confesso* and final decree may be at once entered. *Cowan, McClung & Co. v. Donaldson*, 11 Pick., 322.

5. When, exceptions to an answer having been allowed by the Clerk and Master, and the defendant or his Solicitor notified thereof, and ordered to answer, the defendant fails to file a sufficient answer within thirty days, or to appeal from the order of the Master.<sup>6</sup>

If the process be a subpœna, or a *scire facias*, the proof of its service must appear from the return of the officer serving it; if publication has been made, the fact may be shown by the affidavit of the printer, the actual production of the newspaper in Court, or by any other competent evidence.<sup>7</sup> Service of subpœna without copy of the bill will sustain a *pro confesso*.<sup>8</sup>

The following is the form of an order *pro confesso* where subpœna has been served on one defendant, and publication has been made as to another:

**ORDER PRO CONFESSO.**

John Doe,  
vs. } No. 618.  
Richard Roe, et al.

In this cause, on motion of complainant, and it duly appearing to the Court that the defendant, Robert Roe, has been regularly served with subpœna to answer the complainant's bill, and that the defendant, George Stokes, has been regularly brought before the Court and made a party to complainant's bill, by publication duly made, and that both said Robert Roe and George Stokes have failed to appear and make defense to said bill, within the time required by law; it is ordered that, as to them, complainant's bill be taken as confessed, and the cause set for hearing *ex parte*.

If a final decree is pronounced at the same time the order *pro confesso* is granted, the following addition will be made to the foregoing order:

And thereupon, this cause coming on to be further and finally heard upon the bill, the judgment *pro confesso*, heretofore taken and entered against the defendants, Robert Roe and George Stokes, [and upon the answers of the other defendants and the proof in the cause,] from all of which it duly appearing to the Court that [and so on, as in case of an ordinary decree.]

A failure to take a *pro confesso* against a proper but not a necessary party, will be treated in the Supreme Court as an informal dismissal of the bill as to him; and when a defendant is liable to a *pro confesso*, but the complainant takes a final decree without first taking a *pro confesso*, no reversible error is committed.<sup>9a</sup>

§ 206. **Effect of a Judgment Pro Confesso.**—As has been said, the failure of a defendant to answer is in the nature of a confession that the bill is true,<sup>9</sup> and that he has no defence to make; nevertheless this rule should manifestly be so modified as not to apply, 1, to persons under age, or of unsound mind, because they are unable to take care of themselves;<sup>10</sup> 2, to executors or administrators, because they often represent minors and others not parties to the suit; 3, to defendants in divorce suits, because public policy forbids divorces by consent of parties; and 4, to non-residents and persons whose names and residences are unknown, when their property has not been attached,<sup>11</sup> because they have

<sup>6</sup> Code, § 4369. As to sub-section 5, see Code, § 4407. It would seem that the complainant may elect to take the whole bill for confessed, or, only such parts as are covered by his exceptions. 1 Dan. Ch. Pr., 523-524; Lea v. Vanbibber, 6 Hum., 18; Smith v. St. Louis Ins. Co., 2 Tenn. Ch., 605.

<sup>7</sup> Code, § 4359; Claybrook v. Wade, 7 Cold., 555.

<sup>8</sup> Avery v. Warren, 12 Heisk., 559. The Chancellor, before allowing a bill to be taken as confessed, should satisfy himself that the default actually exists, and, to that end, should require the proper evidences of such default.

<sup>9a</sup> See Burnett v. Campbell Co., 1 Ch. Apps., 18; Sewell v. Tutthill & Pattison, 4 Cates, 271.

<sup>9</sup> A decree *pro confesso* is an admission of all the facts and allegations stated in the bill, and has all the force and effect of an answer admitting the complainant's rights as stated in the bill. Stone v. Duncan, 1 Head, 103; nevertheless, a *pro confesso* can neither aid nor sup-

plement defective averments, nor does it admit the legal conclusions charged: it admits facts which are well pleaded—no more. 1 Dan. Ch. Pr., 531-532; Cowan v. Wells, 5 Lea, 682. And when the allegations of the confessed bill are not definite as to the sum due, proof must be taken to establish the amount. Sewell v. Tutthill, 4 Cates, 271. When a *pro confesso* operates as an admission of the allegations of the bill, no further, or other proof of such allegations are necessary, or proper. *Confesso facta in judicio omni probatione major est*; or, as another maxim puts it, *Habemus optimum testem confitentem reum*.

<sup>10</sup> Service of subpœna upon a guardian and not on his wards, will not justify a *pro confesso* against the wards. Rutherford v. Richardson, 1 Sneed, 612.

<sup>11</sup> The effect of an attachment is to notify those having the attached property in charge, generally the owner's agents, that a suit has been brought; and notice to an agent is notice

had no actual notice<sup>12</sup> of the suit, and, therefore, cannot be deemed to have confessed the truth of the bill. It has accordingly been enacted that, whenever an order *pro confesso* is lawfully had, the allegations in the bill are not to be taken as admitted if the defendant is: (1) an infant, or (2) a person of unsound mind, or (3) an executor, or administrator, or (4) a person sued for divorce, or (5) a non-resident whose property has not been attached, or (6) a person whose name or residence is unknown. In the excepted cases of infants and persons of unsound mind, the defendant shall appear by guardian, or committee, before the complainant can proceed with his cause. In the other excepted cases, the complainant may proceed as if the allegations of the bill had been put in issue by answer not sworn to, with the right to set the cause for hearing forthwith.<sup>13</sup> On the issue thus made, the complainant may take his proof by filing interrogatories, or giving notice, as hereafter shown.<sup>14</sup>

A *pro confessoed* defendant is in *quasi* contempt, and has no right to be heard as to any matter arising out of the allegations of the bill: he can, ordinarily, be heard for one purpose only, and that is on a motion to have the *pro confesso*, and proceedings based thereon, set aside.<sup>15</sup> But he can contest any proof taken after the *pro confesso*.

§ 207. **When a Judgment Pro Confesso may be Set Aside.**—The failure of a defendant to make any defence to the bill is in the nature of a contempt of Court, as well as an implied confession that the allegations of the bill are true. For these reasons, the law gives the complainant a right to a judgment *pro confesso*, as soon as the defendant's default occurs, and the Court has no right to deny such a judgment;<sup>16</sup> and after the judgment has been taken, neither the Chancellor nor the Master has any right to deprive the complainant of the benefit thereof except within the time, in the manner, and on the grounds, specified in the law.<sup>17</sup>

The law makes the difficulty of setting aside a *pro confesso* somewhat proportionate to the negligence of the defendant.<sup>18</sup> Thus, a defendant who has been served with process, may at any time before final decree, on good cause shown, obtain from the Chancellor, or Clerk and Master, an order setting aside the decree *pro confesso*, upon filing a full and sufficient answer, and the payment of costs; and a defendant as to whom publication has been made because, (1) upon inquiry at his usual place of abode, he could not be found so as to be served with process, and there was just ground to believe that he had gone beyond the State; or because (2) the Sheriff made return upon a leading process that he was not to be found, or (3) because a judicial or original attachment had been lawfully levied on his property as a leading process,—in all such cases the defendant shall show merits in order to entitle him to appear and defend after judgment by default. On the other hand, a non-resident defendant, or one whose name or place of residence is unknown, and who is not served

to the principal. Hence, the law deems the seizure of a man's property, and a publication notice, as equivalent to personal service of process; and, for this reason, he is bound by an order *pro confesso*, and subject to a final decree thereon without further proof.

<sup>12</sup> If, however, a defendant, as to whom publication has been made without attachment of property, is in any way notified of the pendency of the suit before a *pro confesso* has been taken against him, he will be bound by such *pro confesso*, as though originally served with process. And, so, if after a *pro confesso*, he has notice thereof, and takes no steps in a reasonable time to have it set aside, he will be equally bound. In all such cases, actual notice is the essential thing, and the manner or form of the notice is non essential. Courts of Equity regard substance, and not ceremony. See *Phillips v. Hollister*, 2 Cold., 269. There is no difference, in effect, between an order *pro confesso* taken on attachment and publication, and one taken on service of subpoena. *Claybrooke v. Wade*, 7 Cold., 560.

<sup>13</sup> Code, §§ 4371-4373; *Grubb v. Browder*, 11

*Heisk.*, 302; *Scovel v. Absten*, 1 Tenn. Ch., 73. A judgment *pro confesso* against a married woman admits the allegations of the bill to be true, as charged, except in divorce cases. *Hill v. Hillman*, 6 Lea, 715; *Doherty v. Choate*, 16 Lea, 192.

<sup>14</sup> See Chapter on Depositions, *post*. Code, §§ 3856; 4374.

<sup>15</sup> He cannot except to the Master's report, as to a fact alleged in the bill. *Bank v. Andrews*, 3 Shan. Cas., 460. See note 41, *infra*.

<sup>16</sup> Anonymous, 1 Tenn. Ch., 2. The Supreme Court will not interfere with the discretion of the Chancellor in setting aside a *pro confesso*; *Buchanan v. McMann*, 3 Hum., 449; or, in refusing to do so. *Chandler v. Jobe*, 5 Lea, 593, except in extraordinary cases of great and palpable injustice, *Ibid*.

<sup>17</sup> *Post*, §§ 208-213; 238; 888-890; *Cook v. Dews*, 2 Tenn. Ch., 496.

<sup>18</sup> The defendant has no right to complain of these difficulties. Every one is bound to take care of his own rights, and to vindicate them in due season, and in proper order. *Herman on Estoppel*, § 265. See *ante*, § 71.



with process, may appear and defend at any time before final decree, as of course,<sup>19</sup> he not being deemed guilty of any negligence in failing to answer by the time fixed by law. And thus, when (1) subpoena was served, to have a *pro confesso* set aside, merits must be shown and costs paid; (2) when a subpoena was issued but not served, or when no subpoena was issued, but an attachment was levied, the *pro confesso* will be set aside on merits being shown and without costs; and (3) when no subpoena was issued, or no attachment levied, the judgment *pro confesso* will be set aside, as of course, at any time before final decree, on an answer being filed, without merits being shown, or costs paid.<sup>20</sup>

§ 208. **How a Judgment Pro Confesso may be Set Aside.**—As a general rule, a judgment *pro confesso* may be set aside at any time before final decree; and even after final decree, provided the term has not ended, or thirty days elapsed.<sup>21</sup> The rights and liabilities of defendants, in reference to judgments *pro confesso*, are widely different, as already shown, and the consideration of those rights will be simplified by dividing all defendants into three classes:

1. All defendants who have been served with process, must show good cause, file a full and sufficient answer, and pay all the accrued costs of the cause, before they are entitled to an order setting aside the decree *pro confesso*.<sup>22</sup>

2. Non-resident defendants, or those whose names or places of residence are unknown, and who are not served with process, may appear and defend at any time before final decree, as of course,<sup>23</sup> that is, on mere motion and the tendering of such an answer as the bill calls for. In such case, no affidavit accounting for the delay is required, and the merits of the answer are not considered. When, however, the *pro confesso* has been followed by a final decree, against such a defendant, the Court may require both a sufficient excuse for the delay, and a meritorious answer under oath, before setting aside both the final decree and the *pro confesso*, and may also adjudge all the costs accrued in the cause against the defendant, especially where there has been negligence.

3. All other defendants, as to whom personal service is dispensed with under the Code, § 4352, must show merits, in order to entitle them to appear and defend, after judgment by default.<sup>24</sup> By “merits” is meant, (1) a sworn answer, showing a meritorious defence, and (2) a sufficient excuse for the delay, shown by affidavit.<sup>25</sup> In such a case, no costs will be imposed. If, however, there has been a final decree, the Court may impose costs.

The Master may, on a rule day, set aside a *pro confesso*, and allow an answer to be filed;<sup>26</sup> but he has not the enlarged discretion of the Chancellor in such cases.<sup>27</sup> Before the Master can set aside the *pro confesso*, and thereby deprive the complainant of his statutory right to a *pro confesso*, the defendant must not only show good cause for his neglect, but must tender a sufficient answer:<sup>28</sup> this good cause can only be shown by affidavit. An appeal lies to the Chancellor from the action of the Master in setting aside, or in refusing to set aside, a judgment *pro confesso*.<sup>29</sup> Before a *pro confesso* is set aside, in cases where

<sup>19</sup> Code, §§ 4375-4377. A *pro confesso* may be set aside, even after final decree, provided the decree is still under the control of the Court. <sup>20</sup> The law delights in giving to every man a day in Court to make his defense. *Roberts & Phillips v. Stewart*, 1 Yerg., 392. See maxim, ante, § 60.

<sup>21</sup> *Railroad v. Johnson*, 16 Lea, 387. The Court has no power over a decree after the lapse of thirty days.

<sup>22</sup> Code, § 4375; *Thorpe v. Dunlap*, 4 Heisk., 674. In this case it was held to be error not to require the payment of costs on setting aside a *pro confesso*, under section 4375 of the Code. See *Bashaw v. Temple*, 7 Cates, 596.

<sup>23</sup> Code, § 4376.

<sup>24</sup> Code, § 4377.

<sup>25</sup> Cross affidavits, to resist the setting aside of a *pro confesso*, are of doubtful and dangerous tendency, and should not be allowed. *Buchanan v. McManus*, 3 Hum., 449; *Brown v. Brown*,

2 Pick., 304. An allegation that the defendant has a good and valid defense, without setting it out, so that the Court can judge of its merits, is *vox et preterea nihil*. It cannot be noticed at all. *Montgomery v. Olwell*, 1 Tenn. Ch., 172. *Bashaw v. Temple*, 7 Cates, 596.

<sup>26</sup> Code, § 4420, sub-sec. 3.

<sup>27</sup> Nevertheless, they generally exercise a much larger discretion, a habit the Chancellors should sternly discountenance.

<sup>28</sup> *Cook v. Dews*, 2 Tenn. Ch., 496; *Totten v. Nance*, 3 Tenn. Ch., 264.

<sup>29</sup> Code, § 4416. If, on appeal, by the complainant from the action of the Master, in setting aside a *pro confesso*, no sufficient affidavit appears to have been made, or, no sufficient sworn answer filed, the Chancellor will reverse the action of the Master, and reinstate the *pro confesso*. *Cook v. Dews*, 2 Tenn. Ch., 496. In this case, Judge Cooper held that a “press of other business,” on the part of counsel was

merits must be shown, the Chancellor or Master should not only require of the defendant an affidavit, sufficiently excusing his seeming default, but should, also, invariably require him to present his proposed answer, in order that a judgment may be formed as to the merits of the defence to be made, and not subject the complainant to the annoyance and delay that may result from any answer, however insufficient, the defendant may think proper to file.<sup>30</sup> The answer thus presented should always be verified by the oath of the defendant, even in cases where the bill waives the defendant's oath, such verification not being for the purpose of substituting a sworn pleading for one not required to be sworn, but exclusively as an evidence of the good faith of the defendant in claiming to have a meritorious defence. It is for the Chancellor, and not the defendant, to determine whether a defence is meritorious; and how can he determine that except the answer be read, and that answer properly verified? And when such an answer is presented by a corporation, it should, in like manner, and for like reason, be verified by the oath of the officer, or agent, of the corporation best acquainted with the truth of the contents.<sup>31</sup>

One defendant cannot object to the action of the Chancellor in setting aside a *pro confesso* against a co-defendant.<sup>32</sup>

The following form will indicate both the form and the substance of an

**AFFIDAVIT TO SET ASIDE A PRO CONFESSO.**

John Doe, }  
*vs.* } No. 618.  
 Richard Roe, *et al.* }

The above named defendant, Richard Roe, deposes and says that [here set out fully and particularly why the answer was not filed in due time, giving the facts on which the defendant relies to show that he was guilty of no negligence, and that his motion to set aside the *pro confesso* is made at the first opportunity possible, under the circumstances.]

Affiant further says that he is advised that he has a meritorious defence to the bill filed against him in the cause, which defence will fully and at large appear by reference to the answer he desires leave to file to said bill, which answer is true to affiant's personal knowledge, and is duly sworn to, and is made a part of this affidavit, and marked A.

Affiant, therefore, prays that the order *pro confesso* heretofore entered against him in this cause [and the final decree based thereon] be set aside, and for nought held; and that he may be allowed to file said answer, and to have due time thereafter to take his proof.

Affiant offers to do equity by paying such costs, and submitting to such orders, as the Court may deem it equitable to impose.

RICHARD ROE.

[Annex *jurat.*]

Counter affidavits will not be heard upon a motion to set aside a *pro confesso*,<sup>33</sup> but if the defendant's affidavit calls in question the conduct of the Master, the latter may be allowed to make a counter-statement to the Court.

The following is the form of an order setting aside an order *pro confesso*, upon an affidavit explaining the default, and the tender of a sworn answer showing a meritorious defence.

**ORDER SETTING ASIDE A PRO CONFESSO.**

John Doe, }  
*vs.* } No. 618.  
 Richard Roe, *et al.* }

In this cause the defendant, Robert Roe, having by affidavit shown a good excuse for his failure to answer the bill, and having tendered a sworn answer showing merits, on his motion, the judgment *pro confesso* heretofore rendered and entered against him is set aside, and he is allowed to file said answer, upon the payment of the costs of the cause. Said

not good cause for not filing an answer in due time, and that the affidavit must be made by the defendant in person, unless the facts are peculiarly within the knowledge of the person swearing to the affidavit. See, also, *Totten v. Nance*, 3 Tenn. Ch., 264. As to "good cause" see *ante*, § 62, sub-sec., 8.  
<sup>30</sup> 1 Dan. Ch. Pr., 525; *Wilson v. Waters*, 7 Cold., 323; *Lewis v. Simonton*, 8 Hum., 135. See *Bashaw v. Temple*, 7 Cates, 596.

<sup>31</sup> *In judicio non creditur nisi juratis.* (In making a decision, Courts believe nothing unless it is sworn to,) or, is a proved writing; or, is a record; or, is otherwise judicially known. See *post*, § 787.  
<sup>32</sup> *Bank v. Bradley*, 15 Lea, 279.  
<sup>33</sup> *Buchanan v. McManus*, 3 Hum., 449; but see *Wilson v. Waters*, 7 Cold., 323.

answer was, thereupon, filed accordingly. An execution will issue against said Robert Roe for said costs.<sup>34</sup>

Or, the following shorter form may be used:

In this cause, on the defendant Robert Roe's motion, supported by affidavit and a sworn answer, the judgment *pro confesso* heretofore taken against him is set aside, on the payment of the costs of the cause, and said answer allowed to be filed. The answer was, thereupon, filed accordingly. Execution is awarded for said costs.

Or, if the defendant is a non-resident, or one whose name or residence is unknown, and was brought into Court by publication alone, the order may be as follows:

In this cause, Samuel Stokes, who is a non-resident [*or*, whose name *or* residence is unknown] and who was brought before the Court by publication only, comes, and by Solicitor [*or*, in person,] enters his appearance; and, on his motion, the judgment *pro confesso* heretofore entered against him, was set aside, and he was allowed to file his answer, which answer was filed accordingly.

**§ 209. When a Final Decree May be Taken on a Pro Confesso.**—When a judgment *pro confesso* is against a defendant not belonging to one of the foregoing excepted classes,<sup>35</sup> so long as it continues in force, it is equivalent to a solemn admission in open Court that the material allegations of fact contained in the bill are true; and, for this reason, not only is no further proof of such allegations necessary,<sup>36</sup> but such proof would be immaterial, the confession of record being plenary proof of every fact alleged.<sup>37</sup>

If, therefore, the bill alleges enough facts to justify a final decree, taking the facts for admitted, the complainant may, in a case not excepted,<sup>38</sup> take a final decree on his *pro confesso* when the cause is reached on the docket for hearing.<sup>39</sup> No final decree can be taken at a special term, in an excepted case, on a *pro confesso* taken at the Master's rules since the regular term: complainant must wait until the next regular term. A final decree may, however, be taken at a special term on a *pro confesso* taken during, or prior to, the preceding regular term.<sup>40</sup> If, however, the bill does not aver sufficient facts, taking them as true, to support a final decree, as when (1) an accounting is sought, or is necessary, to ascertain the amount due from the defendant, or where (2) the allegations of the bill are indefinite, or inconclusive, or alternative, in all such cases the complainant cannot, even after a judgment *pro confesso*, have a final decree, unless he establish his demand by satisfactory evidence.<sup>41</sup> If, therefore, a final decree be based on a confessed bill, which does not aver enough facts to support such decree, it will be reversible on a bill of review for errors apparent, or on appeal, or on a writ of error.<sup>42</sup>

There are three cases, however, wherein a final decree cannot be had until the next term after the bill is taken for confessed: 1, When, process of contempt having been returned executed, or the defendant having been brought

<sup>34</sup> Interlocutory costs do not include the tax on litigation.

<sup>35</sup> For these excepted classes, see, *ante*, § 206.

<sup>36</sup> *Stone v. Duncan*, 1 Head, 103.

<sup>37</sup> A *pro confesso*, however, is an admission only of the facts which are well pleaded, and does not admit defective averments of facts, nor admit averments of law, or legal conclusions. 1 Dan. Ch. Pr., 531, note.

<sup>38</sup> The excepted cases are (1) those stated, *ante*, § 206; and (2) those stated in Code, § 4370.

<sup>39</sup> *Blake's Ch. Pr.*, 162; *Rose v. Woodruff*, 4 Johns. Ch., 547. But see, *infra*, note 44.

<sup>40</sup> *Claybrook v. Wade*, 7 Cold., 555. In strictness, it would seem that the final decree on the *pro confesso* could not be taken, until the cause was regularly reached on the docket for trial. Such a decree is absolutely final after the expiration of the term, or after the lapse of thirty days; and cannot be set aside, except upon some revisory proceeding. *Johnson v. Tomlinson*, 13 Lea, 604.

<sup>41</sup> 1 Dan. Ch. Pr., 525, note. And the defendant will be allowed to controvert any evidence produced by the complainant in aid of his deficient averments, the defendant not being bound by the *pro confesso*

any further, or otherwise, than as to the distinct and definite averments of fact set out in the bill. *Ibid.* *Sewell v. Tuthill & Pattison*, 4 Cates, 271.

<sup>42</sup> The proportion of reversible decrees, based on judgments *pro confesso*, is very large when compared with decrees resulting from a contested litigation. The demurrers, pleas, answers and other criticisms of the defendant, often occasion amendments to bills that would not, on a *pro confesso*, have entitled the complainant to any relief whatever.

Solicitors are not always proof against the temptation of taking more in their decrees *pro confesso* than the allegations of their bills would strictly warrant; and Chancellors are not always proof against the temptation to entrust the decrees in such cases wholly to the complainants' Solicitors. But in Equity, a decree on a *pro confesso* can rightfully be only such as would be authorized by the state of the pleadings, if there had been no default. No decree can rightfully be granted beyond what the allegations of the bill will warrant, and if the bill does not entitle the complainant to any relief, the fact he has a *pro confesso* will not enlarge his rights, or increase his remedies. 1 Dan. Ch. Pr., 526; *Lancaster Mills v. Merchants Co.*, 5 Pick., 32.

into Court upon such process, he refuses to answer the complainant's bill, or puts in an insufficient answer, so adjudged by the Court; 2, When, a plea or demurrer having been overruled, and the defendant ordered to answer the bill, he fails so to do upon a rule given;<sup>43</sup> and 3, When, exceptions to an answer having been allowed by the Clerk and Master, and the defendant or his Solicitor notified thereof, and ordered to answer, the defendant fails to file a sufficient answer within thirty days, or to appeal from the order of the Master.<sup>44</sup> In all other cases, where a *pro confesso* admits the truth of the bill, a final decree may be pronounced at the return term of the process.

§ 210. **When a Pro Confesso will Not Authorize a Final Decree.**—While a judgment *pro confesso*, based on service of subpœna, or on attachment of property and publication, is such an admission of the truth of the bill as renders further proof unnecessary, except in those cases where a *pro confesso* only makes an issue;<sup>45</sup> nevertheless, if proof be made by a co-defendant, that the allegations confessed are really false, the Court will dismiss the bill as to both defendants, in all cases where such defendants have a common or joint interest in the subject-matter of the suit.<sup>46</sup> Thus, (1) where a bill is filed against two partners, and one answers and disproves the complainant's whole case, while a judgment *pro confesso* is taken against the other, the Court will dismiss the bill as to both defendants,<sup>47</sup> and (2) where a beneficiary is *pro confessoed*, and the trustee makes defence;<sup>48</sup> and (3) where a vendee is *pro confessoed*, and his vendor answers;<sup>49</sup> and (4) where one personal representative defends, and the other suffers a judgment by default;<sup>50</sup> in all such cases, the defence by the defendant who answers avails the defendant who does not answer, and, if sufficient, overcomes the effect of the judgment *pro confesso* against him. This doctrine, however, is not applied to an answer by a defendant who has distinct rights or liabilities, and no joint or common interest or liability with the party who fails to answer.<sup>51</sup>

Nor will a judgment *pro confesso* authorize a decree in favor of the complainant, unless the bill shows a ground for relief against the defendant. If the complainant in his bill fails to show such a state of facts as entitles him to a decree, a *pro confesso* will avail him nothing, and his bill must be dismissed.<sup>52</sup> This is especially the case where, on a *pro confesso*, the complainant asks a decree against a public officer, private agent, or other merely nominal party, as against whom no right of recovery exists.<sup>53</sup>

§ 211. **Effect of a Final Decree Based on a Pro Confesso.**—There is no difference between the validity, force, or efficacy, of a final decree based on a *pro confesso* so far as third persons are concerned, and the validity, force, or efficacy, of a final decree based on a bill, answer and proof; and a decree based

<sup>43</sup> But see the following note.

<sup>44</sup> Code, §§ 4369-4370. The reason a *pro confessoed* defendant is allowed an indulgence in these three instances, seems to be that in the 1st instance, the pressure of the Court's hand is still endeavoring to compel a discovery from the defendant; and that in the 2d and 3d instances he has made some show, at least, of obeying the mandate in the subpœna. These reasons are hardly sufficient to warrant the indulgence; and it is hoped there are better ones, not an patent to the author: for, if there be no better ones, the statute should be repealed.

Where, however, in any of these cases, the defendant fails to tender a sufficient answer, and to fully excuse his conduct by affidavit, the Chancellor should rigidly refuse to set aside the *pro confesso*. Equity favors the diligent, and not those who slumber on their rights.

Since the above was written the Supreme Court has decided that when a demurrer is overruled at the return term a *pro confesso* and final decree can then be entered, if the defendant fails to answer next day or to obtain further time. *Rose v. Meek*, 9 Pick., 666; and if the suit is on a note or other evidence of debt both decrees may be entered simulta-

neously. *Cowan, McClung & Co. v. Donaldson*, 11 Pick., 322. This is the rule in the Circuit Court. Code, § 2954; but in Chancery, see Code, § 4370.

<sup>45</sup> See, *ante*, § 206.

<sup>46</sup> *Petty v. Hannum*, 2 Hum., 102; *Caldwell v. McFarland*, 11 Lea, 463; *Dunscob v. Wallace*, 21 Pick., 385.

<sup>47</sup> And where one partner denies the cause of action, and it is not proved, a *pro confesso* against the other partner, will not support a decree against him. *Butler v. Kinzie*, 6 Pick., 31; *Allen & Hill, exrs. v. Shanks*, 6 Pick., 359.

<sup>48</sup> *Cherry v. Clements*, 10 Hum., 552.

<sup>49</sup> *Hennessee v. Ford*, 8 Hum., 499.

<sup>50</sup> *Brien v. Patterson*, 3 Head, 499: a case at law.

<sup>51</sup> *Phillips v. Hollister*, 2 Cold., 269; *Simpson v. Moore*, 5 Lea, 376.

<sup>52</sup> *McGavock v. Elliott*, 3 Yerg., 373; *Ross v. Ramsey*, 3 Head, 15; *Chandler v. Jobe*, 5 Lea, 591; *Chadwell v. McCall*, 1 Tenn. Ch., 640; *Sewell v. Tutthill & Pattison*, 4 Cates, 271; *Lancaster Mills v. Merchants' Co.*, 5 Pick, 32; *Winham v. Crutcher*, 3 Tenn., Ch. 666.

<sup>53</sup> *McGavock v. Elliot*, 3 Yerg., 373; *Buckner v. Abrahams*, 3 Tenn. Ch., 346.

on a *pro confesso*, if executed before it is set aside under any of the foregoing provisions, will be a protection to all persons acting upon its validity, and will confer a good title to all property sold under it.<sup>54</sup>

It is no objection to the execution of a decree rendered against a defendant, that it was founded on a bill taken for confessed, without personal service; but the Court may, and generally ought to, require the complainant to give sufficient security, in such sum as the Court deems proper, to abide by and perform such order, touching the restitution of property, or repayment of money, as the Court may make, upon the defendant subsequently setting aside the decree, and successfully resisting the complainant's suit.<sup>55</sup>

And as between the complainant and the defendant, the final decree against the latter, based on the judgment *pro confesso*, is as valid as though pronounced upon answer and proof, until set aside, or reversed, in the manner prescribed by law;<sup>56</sup> and even when the defendant is brought before the Court by publication alone, a personal judgment for the debt sued on may be rendered against him, in the same manner, and to the same extent, as though he had been brought before the Court by service of subpoena.<sup>57</sup>

**§ 212. When and How a Decree based on a Pro Confesso may be Set Aside.** A final decree based on a judgment *pro confesso*, against a defendant served with subpoena, may be set aside during the term at which it was rendered, provided not more than thirty days have elapsed since its rendition. After the expiration of the term, or of said limit of thirty days, the decree cannot be set aside, except upon proper proceedings instituted for that purpose, as in case of decrees based on bill, answer and proof.<sup>58</sup> These proceedings in suits brought by original or judicial attachment or property, will be found fully considered under the head of Attachment.<sup>59</sup> In all other than attachment cases, a decree without personal service of process against a defendant who does not appear to defend, is not absolute until three years from the decree, unless a copy of the decree is served upon the defendant, in which case it becomes absolute if the defendant fails to come forward and make defence within six months after service.<sup>60</sup>

The death of the defendant proceeded against without personal service, whether the death occur before or after the filing of the bill, does not render the proceedings void, but his heirs or representatives, as the case may be, have the right, within three years from the rendition of the final decree, to make themselves parties by petition, verified by affidavit, showing merits, and contesting the complainant's bill.<sup>61</sup>

The original defendant, his heir, representative, or assignee claiming under him by virtue of any act done before the commencement of the suit, may, within six months after service of a copy of the decree, or within three years after the decree when not served with such copy, be admitted to answer the bill, upon petition showing merits, and giving security for the payments of costs; and witnesses on both sides may be examined, and such other proceedings may be had thereon, as if the cause were then newly begun.<sup>62</sup>

<sup>54</sup> Code, § 4383.

<sup>55</sup> Code, § 4382; *Scovel v. Absten*, 1 Tenn. Ch., 73; *Sexton v. Alberti*, 10 Lea, 457. This bond should be invariably exacted when the complainant takes the pauper's oath.

<sup>56</sup> *Johnson v. Tomlinson*, 13 Lea, 604.

<sup>57</sup> *Taylor v. Rountree*, 16 Lea, 725. But see, *post*, § 887, note.

<sup>58</sup> *Johnson v. Tomlinson*, 13 Lea, 604; *Pryor v. Coleman*, 2 Shan. Cas., 257.

<sup>59</sup> See Chapter on Suits by Attachment, *post*; Code, §§ 4378; 3529-3534.

<sup>60</sup> Code, § 4379. The three years, within which the application to set aside the decree must be made, begin to run from the date of the decree in the Supreme Court, in case the suit is carried to that Court by appeal. *Brown v. Brown*, 2 Pick., 277.

<sup>61</sup> Code, § 4380.

<sup>62</sup> Code, §§ 4379-4381. These sections do not refer to decrees based upon *pro confessos* in attachment cases. Code, § 4378. The petition should be filed in the Chancery Court in which the decree was rendered, even where the cause had been finally determined in the Supreme Court on appeal. *Brown v. Brown*, 2 Pick., 277. The opinion in this case by Special Judge M. M. Neil, of the Trenton bar, is a very exhaustive and able one, on the questions of practice arising on the foregoing sections of the Code. See *Metcalf v. Landers*, 3 Bax., 35, for the practice in setting aside final decrees. The petition may be filed in vacation. *Bledsoe v. Wright*, 2 Bax., 471.

If the petition show merits on its face, and is not fatally contradicted by the record, it is sufficient, and need not be accompanied by an answer.<sup>63</sup> The proper way to test the sufficiency of the petition is by a motion to dismiss, and, in deciding on the motion, the Court will look alone to the petition and to the record, and no answer to the petition will be allowed. If the motion to dismiss is overruled, the decree complained of will be set aside, and the defendant allowed to make all defences of law and fact to the bill, as if the bill had just been filed and process served.<sup>64</sup>

§ 213. **Forms of Petition and Decree to Set Aside a Decree Based on a Pro Confesso.**—The following forms of a petition and a decree will illustrate what has been said in the preceding section :

**PETITION TO SET ASIDE A DECREE BASED ON A PRO CONFESSO.**<sup>65</sup>

John Doe,  
vs.  
Richard Roe, et al. } No. 618.

To the Honorable Andrew Allison, Chancellor :

Your petitioner, the above named defendant, Richard Roe, respectfully shows to the Court.

I.

That on the.....day of [giving date,] the above named John Doe filed his bill in said cause against petitioner in this Court, alleging among other things that petitioner was a non-resident, and praying publication against petitioner. A judgment *pro confesso* was at the May term, 1890, of this Court, pronounced against petitioner, based on an alleged publication as to petitioner and a supposed default by him; and at the same term a final decree was made in the cause based on the said bill, the deposition of the complainant, and said judgment *pro confesso*, by which decree the said complainant was given a recovery of four hundred dollars, and all the costs of the cause, against petitioner, and execution awarded. Said execution was on [giving date] levied on the following tract of land, the property of petitioner: [Here describe it according to the levy; and, also, by a fuller description, if necessary.] Said land was sold, under said execution, to the complainant, for the sum of four hundred and twenty dollars; and the Sheriff made him a deed therefor accordingly, which deed has been registered, and the complainant is now holding and claiming said land by virtue of said deed, and the previous proceedings in said cause. For a fuller account of all the said proceedings, reference is made to the record in said cause now in this Court.

II.

Your petitioner positively and solemnly avers and declares that, when said bill was filed, and all the proceedings thereunder had, as herein above stated, he was a non-resident of the State of Tennessee, and a resident of the State of Indiana, that he had no knowledge, whatever, of said proceedings, or of any of them, but was absolutely and wholly ignorant of the filing of the bill, and of all of the orders, decrees, and other proceedings in said cause, until the third day of the present month, [January, 1891,] when he came to this county on other business, and, greatly to his astonishment, learned of said suit, and of the sale of his said tract of land thereunder.

III.

Your petitioner positively and solemnly avers that the cause of action set forth by said complainant in his said bill is, and was at the filing of said bill, wholly false, and without any foundation whatever in fact, or in law. Your petitioner did not owe said complainant any sum on any account whatever at the filing of said bill, or at the time of said decree; and did not owe him the account exhibited to said bill, or any part thereof. [Set forth specific denials of the cause of action alleged in the bill, and give any and all explanations, acquittances, releases, receipts, &c., the petitioner may have, making his defences as full, clear and strong as possible, according to the facts. Go into details; and remember that this petition is in the nature of an affidavit, and should be positive and specific, and adequate to the end in view.]

IV.

Your petitioner herewith exhibits his answer<sup>66</sup> to said bill, duly verified by his oath, and he makes said answer a part of this petition, and says that said answer is true on his own personal knowledge, and he prays that notice<sup>67</sup> of the filing of this petition be served on said complainant, returnable instanter; and that, on the hearing of this petition, said final decree, and said judgment *pro confesso*, and said Sheriff's deed, be set aside, and for nought

<sup>63</sup> Metcalf v. Landers, 3 Bax., 35. There is no need for an answer, until the Court has determined that the defendant has the right to answer. But a sworn answer disclosing merits will strengthen the defendant's application, and may turn the scale in his favor. 1 Barb. Ch. Pr., 367.

<sup>64</sup> Brown v. Brown, 2 Pick., 277. The effect of allowing the petition to be filed unconditionally is to annul the decrees in the cause, and to restore the defendant to the status of a defendant whose time to answer has not expired. *Ibid.*

<sup>65</sup> See, *post*, §§ 888-890, for similar proceedings in attachment suits.

<sup>66</sup> It is good practice to tender an answer, but no answer is required until the right to answer has been determined. Metcalf v. Landers, 3 Bax., 35; Brown v. Brown, 2 Pick., 277.

<sup>67</sup> Notice may be served on the complainant before the petition is presented, stating the day when it will be presented, and the motion made to set aside the decree.

held; and that he be allowed to file said answer, and to take all proper proof. He, also, prays for a writ of restitution to restore to him the said tract of land;<sup>68</sup> or else, that a receiver be appointed to take it in charge until final decree in the cause. Petitioner, also, prays for such other and general relief as he may be entitled to.

RICHARD ROE.

[Affidavit and *jurat* as in § 162, *ante*.]<sup>69</sup>

**DECREE SETTING ASIDE A DECREE AGAINST A NON-RESIDENT.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

On this 17th day of January, 1891, came the defendant, Richard Roe, and presented his petition, praying therein that the order *pro confesso* and the final decree and other proceedings in this cause be set aside, and that he be allowed to answer the bill, tendering with his said petition an answer, duly sworn to. And notice of the presentation and filing of said petition having been heretofore given the complainant, and he being present by his Solicitor, and the said petition and answer, and the original record in the cause, having been read, and argument of counsel heard, the Court is of opinion that the petitioner is entitled to have both the order taking the bill for confessed, and the final decree in this cause, set aside, vacated, and for naught held.

It is, therefore, ordered and decreed by the Court, that said order *pro confesso* and said final decree be both set aside and vacated, and the defendant is allowed to file the answer exhibited to his said petition, which answer is filed accordingly, and said petition also. And it being admitted in open Court by the complainant, through his Solicitor, that the complainant is by his tenant in possession of the tract of land sold in this cause, it is ordered by the Court, on motion of the defendant, that a writ of restitution issue to restore to the defendant the possession of said tract;<sup>70</sup> but the tenant in possession will not be ousted until the end of the present year, provided he will attorn to the defendant.<sup>71</sup>

The cause is remanded to the rules for proof generally, and the defendant is granted leave to cross-examine the complainant, whose deposition has heretofore been taken.

After the decree has been set aside, and the answer filed, witnesses on both sides may be examined, and such other proceedings may be had and taken in the cause as if the issue had been duly made up by filing the answer at the appearance term. The effect of the order, allowing the answer to be filed, is to annihilate the interval between publication and the presentation of the petition to set aside the decree; and to give the defendant every right he would have had, if his answer had been filed at the appearance term, and if the term at which it is filed was the appearance term.<sup>72</sup>

When a non-resident defendant is permitted to make defence after final decree, he must do so by an answer, and not by a demurrer.<sup>73</sup>

<sup>68</sup> If the property has been sold to a stranger, the defendant, on having the decree set aside, will not be entitled to recover back the property. *Sexton v. Alberti*, 10 Lea, 458.

<sup>69</sup> The petition should be sworn to by all the petitioners. An affidavit to the petition by their Solicitors is not sufficient. *Cook v. Dews*, 2 Tenn. Ch., 496; *Totten v. Nance*, 3 Tenn. Ch., 264; 1 Barh. Cl.

Pr. 367. But any facts specially in the knowledge of the Solicitor may be sworn to by him.

<sup>70</sup> *Sexton v. Alberti*, 10 Lea, 452.

<sup>71</sup> The tenant may be regarded as a person acting on the validity of the decree. Code, § 4383.

<sup>72</sup> Code, § 4381; *Brown v. Brown*, 2 Pick., 277.

<sup>73</sup> *Ledgerwood v. Miller*, 2 Shan. Cas., 66.

ARTICLE II.

MOTIONS BY COMPLAINANT.

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| <p>§ 214. Motions and Affidavits generally Considered.</p> <p>§ 215. Motions for Leave to Amend the Bill.</p> <p>§ 216. Motions in Reference to Defendants Under Disability.</p> <p>§ 217. Motions for Orders <i>Pro Confesso</i>.</p> | <p>§ 218. Motions for <i>Alias</i>, or <i>Mesne</i> Process.</p> <p>§ 219. Motions for Attachments for not Answering.</p> <p>§ 220. Motions by Complainants in Person.</p> <p>§ 221. Suits by Motion in Chancery.</p> |
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§ 214. **Motions and Affidavits generally Considered.**—A motion is an *oral* application to the Court in term time, or to the Chancellor or Master in vacation, for some order in relation to the suit in which the application is made. An affidavit is a statement of facts *reduced to writing*, and sworn to before some person authorized to administer the oath. Affidavits are ordinarily made in support of motions, in order to bring before the Court some fact not otherwise appearing.

The subject of motions and affidavits will be hereafter fully considered in Articles devoted thereto; but the principal motions and affidavits made in Court, or before the Chancellor, or Master, after service of process, and before the defendant has filed any pleading, will be considered here.

§ 215. **Motion for Leave to Amend the Bill.**—Although the complainant may amend his bill before defence made without application to the Court, nevertheless, if Court be in session when the necessity for an amendment appears, it is proper to move the Court for leave to amend. Such a motion may be in the following form:

**MOTION AND ORDER TO AMEND THE BILL.**

<p>John Doe, <i>vs.</i> Richard Roe, <i>et al.</i></p>	}	<p>No. 618.</p>
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In this cause, the complainant moved the Court for leave to so amend his bill as to allege that John Brown claims to own an interest in the tract of land sought to be sold for partition in this cause, but that the extent of such interest, if any, is unknown; and so as to make said John Brown a defendant, and require him to discover the nature and extent of his interest, if any, and how evidenced, which motion was by the Court allowed, and said amendment was made accordingly on the face of the bill. A subpoena, and a copy of the bill as amended, will issue, and be served on said John Brown.

When a motion to amend the bill is made after answer filed, it must ordinarily be supported by affidavit, showing (1) why the amendment was not made before, (2) specifying the substance of the proposed amendment, and (3) averring that the matter of the proposed amendment is true.

The subject of amending bills and of supplemental bills will be hereafter fully treated in a separate Chapter.

§ 216. **Motions in Reference to Defendants under Disability.**—If his bill is filed against a defendant who is a minor, or a person of unsound mind, without a general guardian, it is the duty of the complainant, at the appearance term, or on or after the appearance rule day, to have a guardian *ad litem* appointed for such minor, or *non compos*. The Chancellor, or Master, may, on motion, make the appointment in vacation; or, if the Court be in session, the appointment



may be made by the Court. The motion and order, if made in Court,<sup>1</sup> may be as follows:

**ORDER APPOINTING A GUARDIAN AD LITEM.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, the complainant moved the Court to appoint a guardian *ad litem* for Charles Jones, one of the defendants, and it appearing to the Court that said Charles Jones is a minor [*or*, person of unsound mind,] duly in Court by service of process, [*or*, by publication,] and that he has no general guardian, the Court appointed John W. Green, Esq., a Solicitor of the Court, guardian *ad litem* of said Charles Jones, to defend this suit for him; and the said John W. Green in open Court accepted said appointment, [and filed his answer as such guardian.]

A guardian *ad litem* cannot be regularly appointed until the day the person under disability is required to appear; and the appointment cannot be made at all, unless such person has been actually brought before the Court, by service of subpoena, or by publication. In contemplation of law, the infant, or lunatic, must be in Court in obedience to its process, before the Court has such jurisdiction of his person as to authorize it to appoint a guardian *ad litem* for him.<sup>2</sup>

§ 217. **Motions for Orders Pro Confesso.**—On any rule day after the time allowed for making defence has expired, the complainant may move the Court, or Master, for an order to take the bill as confessed. In vacation, the defendant has all of the appearance rule day in which to file his defence, and so a *pro confesso* cannot be entered against him until the next rule day. If the first day of the term, or any Monday of the term, is appearance day, the defendant must make his defence on appearance day, or on the first two days thereafter; or on, or after, the fourth day, he will be liable to a *pro confesso*. If the motion is made in Court, it may be as follows:

**ORDER PRO CONFESSO.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause the complainant moved the Court for a judgment *pro confesso* against the defendant Daniel Roe; and it appearing to the Court that said Daniel Roe is duly in Court, by service of subpoena [*or*, by publication,] requiring him to appear and defend on the first Monday in February, 1891, and that he has failed to make any defence to complainant's bill as required by the rules of this Court, it is ordered by the Court, that said bill be taken as confessed, as to said Daniel Roe, and the cause set for hearing *ex parte*, as to him.

The taking of *pro confessos* has, heretofore, been fully considered, and the reader is referred to the Article on that subject.<sup>3</sup>

§ 218. **Motion for Alias, or Mesne, Process.**—If the Sheriff has failed to find a defendant, or the publication is defective, the complainant should move the Court at the appearance term for *alias* process, to bring the defendant into Court; or, in a proper case, he may have a judicial attachment against the defendant's property, and an order for publication. If the Court will continue sufficiently long, such *alias*, or *mesne*, process may be made returnable to any Monday of the term.<sup>4</sup> The order for *alias* process may be as follows:

**ORDER FOR ALIAS PROCESS.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, on motion of the complainant, *alias* subpoena to answer is awarded against the defendant, George Smith, returnable to the 4th Monday of the present term, being the 24th day of the present month.

<sup>1</sup> The form of the motion, and order, when made in the Master's office, is substantially the same as when made in Court.

<sup>2</sup> Not that the person under disability must be actually and bodily in Court, but that the subpoena must have been served, or the publication made, and

the day set for his appearance must have come; until then, he is not in Court, in contemplation of law. See, *ante*, § 106; *post*, § 227.

<sup>3</sup> *Ante*, §§ 205-213.

<sup>4</sup> Ch. Rule, XI. § 4; *post*, § 1200, sub-sec. 4.

All *alias* process runs like original process, except that it commands the officer, "as he has *heretofore* been commanded," to do so and so. The following is the form of

**AN ALIAS SUBPOENA.**

State of Tennessee, }  
Blount County. }

To the Sheriff of said County:

You are hereby commanded, as you have heretofore been, to summon Peter Poe to appear [*&c., as in § 187, ante.*]

If a defendant has died, or married, since served with process, such fact may be proved in open Court, and a *scire facias* ordered by the Court, on motion, against the husband of the married defendant, or the heirs or personal representatives of the deceased defendant.<sup>5</sup> The following is the form of an

**ORDER FOR A SCIRE FACIAS.**

John Doe, }  
*vs.* } No. 618  
Richard Roe, *et al.* }

In this cause, the death of James Jones was suggested and proved in open Court. And it being suggested that Henry Jones is his administrator, [*or, that William Jones and George Jones are his heirs at law,*] it is ordered by the Court, on motion of the complainant, that a *scire facias* issue to notify said Henry Jones [*or, said William Jones and George Jones,*] to appear on [*some Monday of the term, or at some rule day, specifying the day,*] and show cause, if any he has [*or, they have,*] why this suit should not be revived against him, [*or them.*]

§ 219. **Motions for Attachments for not Answering.**—If the defendant fails to answer a bill seeking a discovery, within the time required by law, the complainant may either take an order *pro confesso* against him, or may move the Court, or Master, for an attachment against the body of the defendant to compel him to answer.<sup>6</sup> In such a case, the motion may be in the following form:

**MOTION FOR AN ATTACHMENT.**

John Doe, }  
*vs.* } No. 618  
Richard Roe, *et al.* }

In this cause, the complainant moved the Court for an attachment against the defendant, George Smith, to compel him to answer the bill; and it appearing to the Court, that the subpoena to answer the bill was duly served on the defendant, George Smith, on the 10th day of February, 1891, that he has failed to answer, or make other defence to said bill within the time required by law, and that said bill calls for a discovery from said defendant under oath, it is ordered by the Court that an attachment issue against said George Smith for not answering said bill, said attachment to be returnable to Thursday of the present week. The Sheriff may take a bail-bond in the penalty of five hundred dollars.

§ 220. **Motions by Complainants in Person.**—There are some motions best made by a complainant in person, or made by a Solicitor in his presence. Where a person's name is used as sole complainant, or as co-complainant, without authority, he must take steps to repudiate the suit as soon as he has notice of its existence. If the suit be pending, he should present an affidavit that the bill was filed without authority, and move the Court to order the bill taken from the files or dismissed as to him, and that the Solicitor filing the same be taxed with all the costs of the cause. Upon such motion the Court will hear the evidence, the burden of proof being on the Solicitor to show authority.<sup>7</sup>

Where the suit has ended before the complainant learns of its existence, and he has suffered any loss by such suit, he should file an original bill in the nature of both a bill to impeach a decree for fraud and a bill of review, setting forth the facts, and making the Solicitor and all of the parties to the original suit

<sup>5</sup> For the practice in reviving suits, see Chapter on Abatement and Revivor, *post*.

<sup>6</sup> The proceedings in such a case have already been fully detailed; see, *ante*, §§ 201-204.

<sup>7</sup> 1 Dan. Ch. Pr., 308-310; Courtney v. Dyer, 2 Shan. Cas., 360; *post*, § 1174.

defendants, and praying to be relieved from all liability under the decree complained of, and, if necessary, for an injunction against its enforcement as to him.

So, where a complainant complains of, or repudiates, any act of his Solicitor,<sup>8</sup> he should do so in person; or, at least, should be present in Court at the time his complaint is made.

§ 221. **Suits by Motion in Chancery.**—Suits may be commenced in the Chancery Court by motion,<sup>9</sup> and decrees rendered summarily, without pleadings, and generally without notice, against certain officers and attorneys, and against those indebted to certain sureties, stayors and endorsers.<sup>10</sup> The proceedings in such suits are wholly foreign to the pleadings and practice in Equity, and are purely statutory. They are seldom resorted to in the Chancery Court, and, as they are treated of in books on practice in the Circuit Courts, and would unnecessarily enlarge this volume, already cumbersome, they will not be further considered.

<sup>8</sup> *Post*, §§ 233, note 3; 1174.

<sup>9</sup> Code, § 4312.

| <sup>10</sup> Code, §§ 3583-3635.

## PART III.

### PROCEEDINGS IN A SUIT IN CHANCERY, FROM THE APPEARANCE OF THE DEFENDANT TO THE CLOSE OF THE PLEADINGS.

#### CHAPTER XII.

##### APPEARANCE AND DEFENCE.

- ARTICLE I. Appearance by the Defendant.
- ARTICLE II. Defences generally Considered.
- ARTICLE III. Preliminary Motions by the Defendant.

#### ARTICLE I.

##### APPEARANCE BY THE DEFENDANT.

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| <ul style="list-style-type: none"> <li>§ 222. What is an Appearance.</li> <li>§ 223. What Constitutes an Appearance.</li> <li>§ 224. Effect of an Appearance.</li> <li>§ 225. When a Defendant Served with Subpœna is Bound to Appear.</li> </ul> | <ul style="list-style-type: none"> <li>§ 226. When a Defendant Brought into Court by Publication is Bound to Appear.</li> <li>§ 227. When and How Defendants under Disability Appear.</li> <li>§ 228. Where a Defendant, or Other Person Summoned, is Bound to Appear.</li> </ul> |
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§ 222. **What is an Appearance.**—The subpœna and the notice by publication require the defendant to *appear*, on or before a day named, before the Chancery Court, to answer the complainant's bill. What is meant by appearing is not coming bodily into the Court House, when and where the Court is in session, but making some motion, or doing some act of record, in a cause, or filing with the Clerk and Master some written defence to complainant's suit.<sup>1</sup> This motion, act of record, or written defence the defendant ordinarily makes through his Solicitor,<sup>2</sup> but he may make it in person.<sup>3</sup> Unless a defence is made, in the manner and time required by the practice of the Court, a judgment *pro confesso* will be entered against the defendant.

An appearance is, then, any act whereby a defendant recognizes the jurisdiction of the Court, in the particular cause wherein he is a defendant. This appearance, or recognition of the Court's jurisdiction, may be: (1) a limited, or special, appearance; or (2) an unlimited, or general, appearance. A limited, or special, appearance is ordinarily made for the express purpose of disputing the jurisdiction of the Court;<sup>4</sup> and the appearance must affirmatively, or necessarily, appear to be for such limited, or special purpose, as, for instance, to plead in abatement,<sup>5</sup> or it will be deemed to be an unlimited, or general appearance. A general appearance is one that is not expressly, or necessarily, limited to the particular matter, motion, or pleading constituting the appearance. All appearances are deemed to be general, or unlimited, unless expressly declared to be special and limited, or unless its special or limited character is necessarily implied from the nature of the motion, or pleading, constituting the particular appearance in question.

A defendant may appear voluntarily as soon as the bill is filed, and without waiting for the subpœna to be served on him.<sup>6</sup> This is sometimes called appearing *gratis*, and is generally resorted to, when a defendant wishes to make

<sup>1</sup> In the eye of the law, a defendant is only seen to be present by what appears upon the records of the Court. *Strauss v. Weil*, 5 Cold., 124. And so the Code requires the defendant not only to appear, but, also, to *defend*. Code, § 4360.  
<sup>2</sup> See, *post*, § 1174.

<sup>3</sup> Code, § 3979.

<sup>4</sup> Sometimes called a conditional appearance. 1 Dan. Ch. Pr., 512; 536.

<sup>5</sup> *Friedlander v. Pollock*, 5 Cold., 490; *Sherry v. Divine*, 11 Heisk., 725; *Boon v. Rahl*, 1 Heisk., 12.

<sup>6</sup> *Strauss v. Weil*, 5 Cold., 124.

some immediate application to the Court in the cause,<sup>7</sup> or to resist some application by the complainant.<sup>8</sup> A defendant, who so appears, has every right he would have had if subpoena had been served on him, returnable on the day he voluntarily appeared.<sup>9</sup> Thus, an appearance to have *pro confesso* set aside is not such an appearance as will debar a defendant from pleading in abatement to the bill.<sup>10</sup>

§ 223. **What Constitutes Appearance.**—In practice, the service of a subpoena on the defendant is equivalent to his appearance at the time and place specified in the writ;<sup>11</sup> and it is only when there has been no personal service of subpoena, that an actual appearance by the defendant becomes important. A defendant may be brought before the Court by attachment of his property and publication in a newspaper; or, in some cases, by publication without any attachment; but such devices are only substitutes for actual notice, and are allowed only because otherwise there would often be a failure of justice.<sup>12</sup> In all such cases, Courts proceed with uneasiness and misgivings, they realizing that it is the manifest right of every one who is sued to have a reasonable notice of the suit, and a fair opportunity to make defence. For this reason, Courts yearn for some evidence that a defendant brought before the Court by publication has actual knowledge of the litigation, and they seize, with some eagerness, upon any act of the defendant recognizing the jurisdiction of the Court over him, in the particular case.

Hence, the filing of any pleading,<sup>13</sup> the making or resisting of any motion,<sup>14</sup> the filing of exceptions to a Master's report, the taking of depositions to be read in the cause, the making of any agreement with the complainant, or his Solicitor, relative to any proceeding in the cause,<sup>15</sup> or any other act in the cause, between the filing of the bill and the rendition of the final decree, whereby the pendency of the suit is recognized expressly, or by necessary implication, will, if there be record evidence of the fact, constitute a general and unlimited appearance,<sup>16</sup> unless limited by express declaration, or necessary implication, in which case the appearance will be limited.

In all cases of voluntary appearances, where no pleading is filed or motion made by the defendant, in order to avoid disputes or misconstruction, it is proper to have some entry of record in reference to the defendant's appearance. Such entry, however, is not indispensable, for the Courts will not permit a party, who appears to have had actual knowledge of the pendency of a suit against him, to complain because he was not formally notified.<sup>17</sup> Courts of Equity regard substance, not ceremony, and actual notice is the substantial thing, and not the ceremony of notification.

§ 224. **Effect of an Appearance.**—As the object of process, whether by subpoena, or by attachment of property and publication, or by publication alone, is to notify the defendant of the pendency of a suit against him in a particular Court, it follows that the actual appearance of the defendant cures any defect,

<sup>7</sup> 1 Dan. Ch. Pr., 539; Jones v. Fulghum, 3 Tenn. Ch., 193.

<sup>8</sup> As when he desires to have an injunction modified, or dissolved; or, wishes to resist the appointment of a receiver. 1 Dan. Ch. Pr., 539, note.

<sup>9</sup> Squibb v. McFarland, 11 Heisk., 567.

<sup>10</sup> Lumber Co. v. Lieberman, 22 Pick., 153.

<sup>11</sup> The Code says that service of the subpoena on the defendant shall bind him to appear. Code, §§ 4350-4351.

<sup>12</sup> The purpose of all original process is to bind the defendant to appear. See, ante, 60.

<sup>13</sup> Pugsley v. Freedman's Co., 2 Tenn. Ch., 138. But where a demurrer is filed by "the defendants," it will not be presumed to be the pleading of a defendant not served with process. Dougherty v. Shown, 1 Heisk., 302.

<sup>14</sup> McBee v. McBee, 1 Heisk., 558.

<sup>15</sup> Proudft v. Picket, 7 Cold., 563; Pugsley v. Freedman's Co., 2 Tenn. Ch., 138.

<sup>16</sup> Strauss v. Weil, 5 Cold., 124. Judge Cooper says that, doubtless, with us an entry of the Solicitor's name, either by himself, or by the Clerk at his instance, on the rule or trial docket, would be a sufficient entry of the appearance of the parties he claimed to represent. Pugsley v. Freedman's Co., 2 Tenn. Ch., 138. Livingston v. Gibbons, 4 Johns. Ch., (N. Y.), 95.

<sup>17</sup> But, on appeal to the Supreme Court, his appearance would be shown in the record only by the return on the writ, or by some order *pro confesso*, or by some pleading, or other paper, filed by him in the cause, or by some entry on the minutes, showing the fact of his appearance. For this reason, it is all-important to have some record evidence of a defendant's appearance; otherwise, the jurisdiction of the Court over the person of the defendant would appear to be wanting.

omission, or imperfection, in the process, or in its execution.<sup>17a</sup> Indeed, if the defendant actually appears, it matters not whether any process in fact ever issued at all.

And when a defendant does any act, indicating unmistakably that he recognizes himself as a party to the particular suit, he is conclusively deemed to have knowledge of the contents of the pleadings, and of the whole record in the cause, including all that has been done in it; and he conclusively waives any irregularity or informality in the process whereby he was notified of the suit; and indeed waives the process itself.

Appearance in an attachment suit gives the Court jurisdiction of the person of the defendant but not of the property sought to be attached: the latter depends on the validity of the attachment proceedings.<sup>18</sup>

A regular guardian can waive process for his ward, and so can a husband for his wife, when they are living together, and her separate estate is not involved in the litigation. A partner can, while the partnership exists, enter the appearance of his firm; but not after its dissolution. Infants and lunatics can neither enter an appearance, nor waive process; and all proceedings against them not based on proper process, properly executed, are void. There can be no guardian *ad litem* appointed for them, until after such service of process, and until the return day thereof; and, therefore, a guardian *ad litem* cannot enter their appearance, or waive process for them.<sup>19</sup>

But where the Court has no jurisdiction of the subject-matter, an appearance by the defendant does not give the Court the right to proceed and pronounce a decree.<sup>20</sup> If, however, the objection to the jurisdiction is merely local or personal, such objection is waived by appearance, and defence to the merits, except in suits relating to land.

**§ 225. When a Defendant Served with Subpœna is Bound to Appear.**—A defendant is bound to appear at the time and place<sup>21</sup> specified in the subpœna, or publication notice. This time is not uniform throughout the State, because by statute, original process may, by rule of Court applicable to the Court where made, be returnable to the rule days, and all others except final process may be so returnable.<sup>22</sup> In pursuance of this statute, in many of the counties, there is a Chancery rule providing that all process, except final process, shall be made returnable to the rule days. Where there is no such rule of Court, all original process is returnable to the first day of the regular term, and service of the original subpœna on the defendant five days before the return day, binds him to appear within the first three days of the term, if the Court hold so long, otherwise on the first day of the term.<sup>23</sup> But, if the subpœna be served upon the defendant, within five days before the first day of the term, he is not bound to appear before the first day of the second term after the service,<sup>24</sup> unless the term last longer than one week and the subpœna is made returnable to some subsequent day of the term, in which case he must make his defence within the first three days of such return day, or be liable to a *pro confesso*; and if the subpœna is made returnable to a subsequent day, as stated, but executed

<sup>17a</sup> 1 Barb. Ch. Pr., 78.

<sup>18</sup> Stewart v. Smith, 3 Shan. Cas., 686.

<sup>19</sup> Taylor v. Walker, 1 Heisk., 734.

<sup>20</sup> Agee v. Dement, 1 Hum., 332; Ferris v. Fort, 2 Tenn. Ch., 150.

<sup>21</sup> The place will, usually, be the office of the Clerk and Master, if he desires to file a pleading; or, if he desires to make his actual appearance by motion, the place for him to make such an appearance will be before the Master, in his office, or in the open Court, while the Chancellor is sitting.

<sup>22</sup> Code, § 4348.

<sup>23</sup> Service of the original subpœna on the defendant five days before the return day shall bind him to appear within the first three days of the term, if the Court hold so long; otherwise on the first day of the term; Provided, however, if the term of Court be for more than three days, and the business of the Court has been finished within three days, and

the Court is about to adjourn, *pro confesso* may be taken in any case in which defense has not been made. Acts of 1905, ch. 472.

The original act (Code, § 4350) was intended for Courts held for two or three days in certain small counties, the Chancellor holding Court in one county from Monday to Wednesday, and in the next county from Thursday to Saturday. Under this section as amended, a *pro confesso* can be taken on the second morning of the term; but, if the Court should continue until Thursday, it would be proper to retake the *pro confesso*; unless the defendant had, in the meantime, made a defense, which he might lawfully do, and have the *pro confesso*, entered on the second day of the term, set aside on motion, as, of course, without affidavit and without costs.

<sup>24</sup> Code, §§ 4351; 2830; Wessells v. Wessells, 1 Tenn. Ch., 60.

within the five days before the return day, then the Monday succeeding such return day becomes the return day, and the defendant is allowed the three succeeding days thereafter to make defense.<sup>25</sup>

Under these rules, if the subpoena is served on the defendant on the Wednesday next before the return day, such service would be in time to require the defendant to appear on such day, or on the Tuesday or the Wednesday next following; and if he failed so to appear, a judgment *pro confesso* could be entered against him, in open Court, on Thursday morning.<sup>26</sup> The defendant in such case has all the first three<sup>27</sup> days in which to appear, and make his defence, or to obtain further time for that purpose.<sup>28</sup>

But if the Court hold less than three days, the defendant is bound to appear and make his defense on the first day of the term, and if the business of the Court has been finished within three days and the Court is about to adjourn on the second or third day of the term, a *pro confesso* may be taken against him if he has made no defense. In such a case the order may be in the following form, omitting the title of the cause:

#### ORDER PRO CONFESSO ON 2ND DAY OF TERM.

In this cause, on motion of complainant's Solicitor, and it duly appearing to the Court that the defendant, Richard Roe, is duly in Court by service of subpoena, [or, by publication,] and that he has failed to appear and make defense to complainant's bill within the time required by law, and the Court being about to adjourn, it is ordered that complainant's bill be taken as confessed by him, the said Richard Roe, and the cause set for hearing *ex parte*. [And in a proper case, a final decree may be taken and entered at the same time. See ante § 205.]

When the subpoena is returnable to a rule day, by a rule of the Court, the defendant has all of the return rule day in which to file his pleading;<sup>29</sup> and, as no *pro confesso* can be entered against him until the next succeeding rule day, he has all the intermediate time in which to file his pleading. It must be remembered, however, that each day of the term, as well as the first Monday of every month in vacation, is a rule day, and, a rule day for all rule day business; and if a term of Court comes between the return rule day and the first Monday of the next month, a judgment *pro confesso* may, for want of a defence, be entered on any day of such term.

The return days of all *mesne* process in the Chancery Court, such as subpoenas to answer supplemental, and amended bills, and bills of revivor, shall be the rule days of the Court;<sup>30</sup> and, in such cases, the defendant must file his written defence with the Clerk and Master before the rule day next after the return rule day, or a *pro confesso* may be entered against him on such next rule day. But, if a term of Court should begin before such next rule day, the *pro confesso* may be entered on any day of the term, inasmuch as every day of a term is a rule day.<sup>31</sup>

But, *alias* or *mesne* process taken out at any time may be returnable to any Monday of the term, and if executed five days before the return day the defendant has the first three days of the term, if the Court hold so long, otherwise the first day of the term to make defense, or obtain time therefor; and after said three days, or one day, as the case may be, the cause stands to be proceeded in for all purposes. If such *alias* or *mesne* process be executed within the five days before the return day the succeeding Monday becomes the return day, and the cause stands to be proceeded in at that term.<sup>32</sup>

**§ 226. When a Defendant brought into Court by Publication is Bound to Appear.**—When the defendant is brought into Court by attachment of property

<sup>25</sup> Ch. Rule XI, §§ 1-3.

<sup>26</sup> Dickinson v. Lee, 2 Cold., 615.

<sup>27</sup> The allowance of three days, (called *days of grace*), in which to perform a duty that should have been done on the first day, is a very ancient custom, and grew out of the fact that "our sturdy ancestors held it beneath the condition of freemen to appear, or to do any other act, at the precise time appointed." 3 Blackstone's Com., 278, citing Tacitus, to show it was German law, before the Christian era.

<sup>28</sup> For the practice where the defendant is required to appear at a rule day, and when *pro confesso*s may be taken at rules, see Proceedings in the Master's Office, *post*, § 1157.

<sup>29</sup> Wessells v. Wessells, 1 Tenn. Ch., 60, 67.

<sup>30</sup> Code, § 4349.

<sup>31</sup> Code, § 4421.

<sup>32</sup> Cr. Rule XI, §§ 4-5; § 1200, *post*.

and publication, the last publication must be at least one week before the time fixed in the published order for the defendant's appearance.<sup>33</sup> If, therefore, the time so fixed be the first day of the term, and there be less than one week between the last publication and the first day of the term, it would seem that the defendant is not bound to appear until the first three days of the second term of the Court after such publication,<sup>34</sup> but, if the appearance day is a rule day, then the defendant need not appear until the rule day coming at least one week after the last publication; and he has all of such rule day in which to make his defence.

When the defendant is brought before the Court by publication, without any attachment of property, the fourth publication is equivalent to the service of the subpoena on the day of such fourth publication; and if five or more days elapse between the day of such last publication and the rule day specified in the published order for the defendant's appearance, then such rule day is his day for appearance,<sup>35</sup> but if less than five days elapse, then the next succeeding rule day is his appearance day. In all such cases, the defendant has all of the appearance day in which to make his defence, and no *pro confesso* can be entered against him until the rule day next succeeding the appearance day.

If, in any case, the defendant has a demurrer, plea, or answer, properly filed, no *pro confesso* can be entered against him, even though he may have been in default when such pleading was filed. And, if in any case, a term of Court comes while a defendant is in default, a *pro confesso* can be entered against him on any day of such term, unless he filed a proper pleading before the motion for such a judgment was made.

**§ 227. When and How Defendants under Disability Appear.**—As already shown, minors and persons of unsound mind must be brought into Court in the same way as defendants not under any disability; but as minors, idiots and lunatics cannot bind themselves by any contract, and, as a consequence, cannot retain counsel, and as they are incapable of making their own defence, the law of the Court requires that they should appear by regular guardian, when they have such; and, if they have none, it becomes the duty of the Court, or of the Master, if the Court be not in session, to appoint a guardian for them, for the purpose of the particular litigation. This guardian is called a guardian *ad litem*.<sup>36</sup>

Neither the Chancellor nor the Master can rightfully appoint a guardian *ad litem* unless: (1) the infant, idiot or lunatic is made a defendant to the bill; and (2) is duly in Court by service of subpoena, or publication fully made. The Court must have actually acquired jurisdiction of the person of the infant, idiot or lunatic before a guardian *ad litem* can be appointed, and this jurisdiction can be acquired only by proper service of proper process;<sup>37</sup> and not then, until the return day of such process;<sup>38</sup> for, until the return day, the process is, in contemplation of law, in the Sheriff's hands, and the Court cannot know whether it has been duly served or not; and besides, the party served is not required to appear until the return day of the process.<sup>39</sup> Hence, any appointment before the return day would be premature.<sup>40</sup> An infant without a general guardian does not become a defendant to a bill unless (1) the bill names him

<sup>33</sup> Code, § 3523.

<sup>34</sup> Code, §§ 4351; 3524-3526.

<sup>35</sup> *Wessells v. Wessells*, 1 Tenn. Ch., 60. This case holds that the four publications are equivalent to service of process on the day of the fourth and last publication, and that this last publication must be five days or more before the day the defendant is bound to appear. *McGavock v. Young*, 3 Tenn. Ch., 529.

<sup>36</sup> The Master should be very careful to appoint as guardian *ad litem* a Solicitor of good repute, and wholly disinterested, unless interested on behalf of the ward; and this guardian should deem it a point

of the highest honor, to zealously and jealously guard all the interests of his ward. As to the rights, powers, and duties, of guardians *ad litem*, see, *ante*, §§ 106-108.

<sup>37</sup> *Frazer v. Pankey*, 1 Swan, 75; *Taylor v. Walker*, 1 Heisk., 738.

<sup>38</sup> See, *ante*, § 227.

<sup>39</sup> The infant, or *non compos*, may have a regular guardian appointed for him, before the return day, and thus obviate the necessity for a guardian *ad litem*.

<sup>40</sup> Code, § 4369, sub-secs. 1 and 2; § 4372. See, *ante*, § 227, note.



as such, (2) process has been executed as to him, and (3) an answer filed for him by a guardian *ad litem* duly appointed.<sup>41</sup>

If a married female defendant is a minor, or of unsound mind, she must appear by a regular guardian, if she has one; and if none, a guardian *ad litem* must be appointed for her. In such a case, however, her husband is generally appointed her guardian, when she is a co-defendant, unless they are living apart, or her interests are antagonistic to his. If a married female defendant is of age, and of sound mind, she, ordinarily, appears with and by her husband, who must see to it that her answer is put in jointly with his. If, however, their interests or feelings are antagonistic, she may, if she or he choose, appear and answer separately.<sup>42</sup>

**§ 228. Where a Defendant, or Other Person Summoned, is Bound to Appear.** When a defendant, witness, or other person, is subpoenaed, or in any way notified by service of process, or by publication, or by an order of record, "*to appear before the Court,*" the place for him so to appear is in the office of the Clerk and Master of the Court, who is authorized by law and the practice of the Court to represent the Court, *pro hac vice*; and who will, on due inquiry, inform the person so appearing what is required of him, so that he may order his movements advisedly.<sup>43</sup> A person does not, ordinarily, appear before the Chancery Court *in propria persona*, unless he does so (1) to manage his own case,<sup>44</sup> or assist his Solicitor therein, or (2) is under arrest, or on trial, or (3) is a witness examined in open Court, or (4) is present in reference to the execution of some bond or other instrument, or the solvency of the sureties of some party.

A party appears before the Court, as a rule, in the person of his Solicitor, and whatever paper he wishes to present or file, and whatever motion or argument he wishes to make, and whatever protest or request he desires to submit, and whatever other action he feels called on to take, in reference to any matter before the Court, is, usually, done by or through his Solicitor, either in the office of the Clerk and Master, or in open Court, as the exigency may require or convenience suggest.

## ARTICLE II.

### DEFENCES GENERALLY CONSIDERED.

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|---|--|
| § 229. Proceedings Preliminary to Making Defence. | § 231. Various Modes of Defence.             |
| § 230. Defences generally Considered.             | § 232. Order in which Defences Must be Made. |

**§ 229. Proceedings Preliminary to Making Defence.**—When a defendant is notified by service of subpoena, or by publication, that a bill has been filed against him, his first duty is to employ a Solicitor of the Court, in which the bill is filed, to represent him, unless he intends to defend in person. He must be careful to make defence within the time required by law, or a judgment *pro confesso* will be entered against him. If he has not been served with a copy of the bill, he is entitled to a copy on demand;<sup>1</sup> he is, also, entitled to see the original bill, and the exhibits thereto, if any; but he has no right to take them out of the office of the Clerk and Master.

The employment of a Solicitor by the defendant is ordinarily verbal; but,

<sup>41</sup> *Miller v. Taylor*, 2 Shan. Cas., 462; *Lewis & Lenoir v. Outlaw*, 1 Tenn. (Overt.) 141. The old Equity practice required the Sheriff to bring the infant into Court. *Ibid.*

<sup>42</sup> See, *ante*, §§ 88; 99.

<sup>43</sup> See, *post*, §§ 1156-1159.

<sup>44</sup> Code, § 3979.

1 Code, § 4344.

where the defendant does not sign, or swear to, his answer, the better practice is for the Solicitor to obtain from the defendant a written authority to appear for him in the cause. However employed, the Solicitor has all the rights his client would have; and may have a copy of the bill, and an inspection of the original bill, and the exhibits; but he has no right to take any of them out of the office, without the express permission of the Court, or the Clerk and Master.

Having read the bill, or obtained a copy, the defendant, or his Solicitor, will, with all diligence, possess himself of the real facts in the case; and, especially, of the matters relied on as a defence.

1. If there be any ground for disputing the jurisdiction of the Court, a plea in abatement must be filed before any other defence is made, or offered to be made, or even before any motion is made in the case.

2. If, on inspecting the bill, it shows a manifest want of Equity on its face; or, if any prerequisite of the writ be wanting, he may enter a motion to dismiss the bill, provided the defendant is subpoenaed to appear on the first day of the term. If, however, he is subpoenaed to appear at a rule day out of term, this motion is not available, as it cannot be made except in open Court.

3. If the bill be demurrable, the demurrer must be drawn and filed, taking care not to apply it to the whole bill, unless so intended.

4. If none of these defences can be made, but the bill is liable to be defeated by a plea in bar, such a plea is the next defence in order.

5. If such a plea is not available, or if available is not advisable, then the defendant must answer the bill, or disclaim; and if an answer will be insufficient to enable him to make complete defence, or to obtain all the rights he is entitled to arising out of the controversy, or the subject-matter thereof, he may,

6. File his answer as a cross-bill; or, if it is necessary to bring new parties before the Court, he must file a separate cross-bill.

7. If the bill is made up of several distinct matters, and a demurrer will lie to a part of it, a plea in bar to another part, and an answer can be made to the remainder, the defendant may join all of these defences; and may, in addition, file a cross-bill if he needs any affirmative relief growing out of the subject-matter of the litigation.

The fact that all of the foregoing matters are involved in every defence, and that the various defences must be made in the order stated, and that the making of any of the defences is a waiver of all the defences that precede it, show how important it is for a defendant to be diligent in employing a competent Solicitor; and how diligent and cautious the Solicitor must be after his employment.

If there be any paper referred to in the bill as an exhibit and not filed, the defendant may have an order, by the Master, entered on the rule docket, requiring such exhibit to be filed, and extending the time for answering until a reasonable period after the defendant is notified of the filing.

**§ 230. Defences generally Considered.**—The bill and the subpoena require the defendant to *answer* the bill. If, however, there are sufficient reasons, either inside or outside of the bill, why he should not answer it, he may avail himself of these reasons. These reasons, if outside of the bill, are brought forward by plea, or by a motion to dismiss, which is, in such a case, in the nature of a plea. If the reasons, however, are inside of the bill, or, in other words, apparent on its face, they are brought forward by demurrer, or by a motion to dismiss, which is, in such case, in the nature of a demurrer.<sup>2</sup> If the defence thus made is sustained by the Court, the bill is dismissed, unless the defect in the bill can be cured by amendment, in which case it may be amended on proper application. Some of the defences thus set up do not reach the merits of the controversy, and though they may cause the bill to be dismissed, such dismissal

<sup>2</sup> Code, §§ 4384-4388.

will not prevent another bill being filed on the same grounds. But others of these defences do go to the merits, and, if sustained, not only cause the dismissal of the bill, but also forever terminate the matters in controversy.

The defences which merely dismiss the suit, without touching the merits, are called *dilatory defences*, because they only delay a decision on the merits; the defences, which result in the decision of the controversy on its merits, are called *peremptory, or permanent defences*, because they result in a permanent determination of the controversy.<sup>3</sup>

1. **Dilatory Defences** are those which insist: (1) that there are such irregularities in bringing the suit, or in selecting the venue, or in issuing, or executing the process, that the defendant has the right to have the suit abated; and (2) that the Court has no jurisdiction to determine the matters set forth in the bill.

2. **Peremptory Defences** are those which insist: first, that the complainant never had any right to institute the suit; or second, that if any such right ever existed, it is extinguished or ended. The defence that no right to sue ever existed includes the following: (1) that the complainant's rights are not superior to those of the defendant; (2) that the defendant has no interest in the controversy; and (3) that there is no privity between the complainant and the defendant, or any other right in complainant to maintain the suit against the defendant. The defence that if the complainant ever had any right to sue the defendant such right is extinguished, or ended, is based on the ground; (1) that the right to sue has been extinguished by the act of the parties themselves; or (2) that it has been ended by operation of some law.<sup>4</sup>

§ 231. **Various Modes of Defence.**—The mode and order in which these matters of defence may be made are:<sup>5</sup>

1. **By Disclaimer**, a species of answer whereby the defendant disclaims all interest in the subject-matter of the suit, and prays to be dismissed.

2. **By Plea in Abatement**, a pleading which (1) relies on some single fact outside of the bill itself, and also outside of the merits of the controversy, to abate the suit; or (2) denies some jurisdictional allegation.

3. **By Motion to Dismiss**, which is an informal and summary method of ending the litigation, and is based on the fact (1) that the bill is unknown to the forms of the Court; or (2) that there is no Equity on the face of the bill; or (3) that the Court has no jurisdiction of the defendant or the subject-matter; or (4) that some one or more of the prerequisites of the writ are wanting; or (5) that there is a mis-joinder or non-joinder of parties; or (6) that the bill is multifarious; or (7) that there is some other statutory ground of dismissal.<sup>6</sup>

4. **By Demurrer**, a pleading which insists that, as a matter of law, the statements in the bill do not entitle the complainant to the relief prayed by him against the demurrant.

5. **By Plea in Bar**, a pleading which raises an issue on some single matter of fact touching the merits, which issue if decided in the defendant's favor will end the suit; or, at least, end so much of the bill as the plea covers.

6. **By Answer**, a pleading which either denies the material allegations in the bill, or admits them, and sets up new matters which avoid them.

7. **By Cross Bill**, a pleading which brings such additional matters, or parties, or both, before the Court as are necessary for the defendant's full protection and defence, or for a full adjudication of all the matters in controversy.

8. **By a Joinder** of any two or more of the foregoing defences, when the bill contains distinct matters subject to distinct defences.

§ 232. **Order in Which Defences Must be Made.**—It is important for the pleader to keep in mind the order in which the various kinds of defences must be relied on, inasmuch as a mistake, in this matter, may preclude him from availing himself of the only successful ground of defence open to him. The

<sup>3</sup> Sto. Eq. Pl., § 434.  
<sup>4</sup> Sto. Eq. Pl., §§ 434-435.

<sup>5</sup> Code, § 4384.  
<sup>6</sup> Code, § 4386.

order of defence is strictly logical, beginning with the most technical, and least meritorious, kind of defence, and proceeding, by regular stages, to the least technical and most meritorious. The order of defence is prescribed by statute,<sup>7</sup> and is in strict accord with the true logic of pleading. It is as follows:

1. **Pleas in Abatement**, including, under this term, all pleas which seek to dispute the jurisdiction of the Court over the person of the defendant, or over the subject-matter of the suit.

2. **Motions to Dismiss**, including all the various grounds whereon the defendant seeks to have the bill summarily dismissed, without filing any written pleading.

3. **Demurrers**, whether to the whole bill, or only to a part thereof.

4. **Pleas in Bar**, comprising all pleas which do not dispute the jurisdiction of the Court.

5. **Answers**, which also, include **Disclaimers**,<sup>8</sup> whether the disclaimer covers the whole, or only part, of the subject-matter of the litigation.

6. **Cross Bills**, whether joined to the answer, or filed as a separate pleading.

The adoption of any one of the foregoing defences is a waiver of the right to set up any defence that precedes it;<sup>9</sup> but, where strong reasons can be shown, especially where the defendant is a person under disability, the Court will allow the answer to be withdrawn, and a demurrer filed; or a demurrer to be withdrawn, and a plea in abatement filed.<sup>10</sup> Each of these defences will be fully considered in subsequent sections.

### ARTICLE III.

#### PRELIMINARY MOTIONS BY THE DEFENDANT.

- |  |  |
|--|--|
| <p>§ 233. Motion for Complainant's Solicitor to Show his Authority.</p> <p>§ 234. Motions in Reference to Security for Costs.</p> <p>§ 235. Motions in Reference to the Filing of Exhibits.</p> <p>§ 236. Motions by Husband, or Wife, to Answer Separately.</p> | <p>§ 237. Motions for Further Time to Make Defence.</p> <p>§ 238. Motions to Set Aside Orders <i>Pro Confesso</i>.</p> <p>§ 239. Motions for Rules on Complainant to Take Steps.</p> |
|--|--|

§ 233. **Motion for Complainant's Solicitor to Show his Authority.**—If the defendant has any good reason to believe that complainant's Solicitor has no authority to institute the suit,<sup>1</sup> he may move the Court to make a rule on the Solicitor, to produce his authority.<sup>2</sup> This motion must be based on an affidavit, because the Court presumes the Solicitor has due authority.<sup>3</sup> The affidavit may be as follows:

#### AFFIDAVIT OF WANT OF AUTHORITY.

John Doe,  
*vs.*  
 Richard Roe, *et al.* } No. 618.

In this cause, the defendant, Richard Roe, makes oath that he has good reason to believe,

<sup>7</sup> Code, § 4384.

<sup>8</sup> Disclaimers are not included in the Code list of modes of defense otherwise than as included in answers.

<sup>9</sup> *Seiford v. People's Bank*, 2 Tenn. Ch., 20; *Cooke v. Richards*, 11 Heisk., 711. But see, *post*, §§ 260-261.

<sup>10</sup> *Cooke v. Richards*, 11 Heisk., 711; *Merchant v. Preston*, 1 Lea, 280; *Chestnut v. Frazier*, 6 Bax., 217; *Lowe v. Morris*, 4 Sneed, 69. These cases show that even after answer filed, the Court may, in a proper case, allow the answer to be withdrawn and a demurrer to the jurisdiction of the Court to be filed. In such cases, however, the leave should only be

granted on the payment of all the costs of the cause, accruing subsequent to the filing of the answer, unless the defendant was misled by the conduct of the complainant, as in *Merchant v. Preston*, 1 Lea, 280.

<sup>1</sup> See, *ante*, § 220; and, *post*, § 1174.

<sup>2</sup> *Lynn v. Glidwell*, 8 Yerg., 1; *Cage v. Foster*, 5 Yerg., 261; *Wright v. McLemore*, 10 Yerg., 235; *Gillespie, ex parte*, 3 Yerg., 325; *Jones v. Stockton*, 6 Lea, 133.

<sup>3</sup> *Rogers v. Park*, 4 Hum., 480; *Jones v. Williamson*, 5 Cold., 379.

The first step to be taken by a party who proposes

and does believe, [*or, has been reliably informed and believes,*] and charges, that Henry Jones, who signed the bill of complainant as Solicitor, and who brought this suit and is now prosecuting it, did not then have, and does not now have, authority so to do; and that he is acting as complainant's Solicitor in this cause, without any lawful warrant or authority so to act. Wherefore, affiant prays the Court to require said Henry Jones to produce and exhibit his authority to act as complainant's Solicitor in this cause.

[With proper jurat.]

RICHARD ROE.

On such affidavit being presented, and said motion entered, the Court will enter a rule on the Solicitor to produce his authority. The following is a form of a

**MOTION AND RULE ON A SOLICITOR TO PRODUCE AUTHORITY.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, the defendant moved the Court to make a rule on Henry Jones, Esq., a Solicitor of this Court, to show his authority, if any he have, for bringing and prosecuting this suit; and the affidavit of the defendant having been read in support of said motion, on consideration thereof, it is ordered by the Court that said motion be allowed, and the said Henry Jones, Esq., is ruled to produce his authority for prosecuting this suit within five days [*or such other time as the Court may allow, taking into consideration the distance to the place where the complainant lives, or may be found,*] or the suit will be dismissed at his personal cost.

After the lapse of a term after the filing of the bill, the rule will not be made, unless the delay is satisfactorily accounted for.<sup>4</sup> The authority need not be in writing, and, if in writing, need not be a formal power of attorney, and need not be formally probated. Satisfactory evidence of authority is all that is required.<sup>5</sup> If the authority of the principal Solicitor is undisputed, his assistant's authority cannot be questioned.<sup>6</sup> A husband can employ counsel for his wife,<sup>7</sup> and one of several joint contractors may employ counsel for all.<sup>8</sup>

§ 234. **Motions in Reference to Security for Costs.**—If the complainant has failed to give a bond for the costs, or to take and file the pauper oath in lieu, or the bond, or the oath, on file is fatally defective in substance, a motion will lie to dismiss the suit on that account; and the Court will sustain the motion, unless the deficiency is supplied before the motion is finally ruled on.<sup>9</sup> The Court will allow the complainant a reasonable time, within which to file the

to institute a suit in Chancery, is to authorize a Solicitor practicing in the Court to commence and conduct it on his behalf. It is not necessary that such authority should be in writing, although it would, perhaps, be better that Solicitors, before they commence suits, should be in possession of some written authority for that purpose; but, in either case, in order to warrant a Solicitor in filing a bill, the authority, be it in writing or by parol, ought to be special; and it has been held that a general authority to act as Solicitor for a party will not be sufficient to warrant his commencing a suit on his behalf, although, under a general authority, a Solicitor may defend a suit for his client.

The rule which requires a Solicitor to be specially authorized to commence a suit on behalf of his client, applies as well to cases where the party is to sue as a co-complainant, as to cases where he is to sue alone; and even to cases where his name is merely made use of *pro forma*.

If a Solicitor files a bill in the name of his client, without having a proper authority from him for so doing, the course for the client to pursue, if he wishes to get rid of the suit, is to move that the bill may be dismissed with costs, to be paid not by the complainant, but by the Solicitor filing the bill. If a bill be exhibited in the name of a married woman against her husband, it may, upon affidavit that she knew nothing of it, or had not consented to it, be dismissed. A motion to dismiss a bill, as having been filed without the privity or consent of the complainant himself, that the bill had been filed without any authority from him; and to avoid the effect of such an application, the Solicitor against whom it is made must show distinctly, upon affidavit, that he had a special authority from the party to insti-

tute the suit; and it will not be sufficient to assert, generally, in opposition to the complainant's affidavit, that authority had been given. Counsel must have special authority to file a bill. General authority to act as counsel is not sufficient to authorize the bringing of a suit.

If the name of a person is made use of in a bill as co-complainant with others, without his consent, such person may move that his name may be struck out, and that the Solicitor who filed the bill may be ordered to pay the costs; such a motion, however, should be made at the earliest possible opportunity after the fact has come to the complainant's knowledge; and if there has been acquiescence or *laches* on the part of the complainant making the application, it will not be granted.

The usual course, however, in such a case, is for the defendant to move that the bill may be taken off the file, and that the costs may be paid by the complainant. Upon such a motion, if any doubt arises as to whether the bill has been signed by counsel or not, the Court will refer it to the Master to inquire into the fact; and if he certifies that it was not signed by counsel, the bill will be ordered to be taken off the file and suppressed, and the complainant directed to pay the costs. 1 Dan. Ch. Pr., 306-312.

<sup>4</sup> Wilson v. Turk, 10 Verg., 247.

<sup>5</sup> Rogers v. Park, 4 Hum., 480.

<sup>6</sup> Chambers v. The State, 3 Hum., 237.

<sup>7</sup> Kindell v. Titus, 9 Heisk., 743.

<sup>8</sup> Wright v. McLemore, 10 Verg., 235.

<sup>9</sup> A motion to dismiss for want of a cost bond is waived by filing a demurrer based in part on the want of the bond. Cowan, McClung & Co. v. Donaldson, 11 Pick., 322.

bond, or take the pauper oath; such time, however, not to extend beyond the term. If the bond, or oath, is tendered at any time during the term, it will be received, and any order dismissing the suit will be set aside, and the suit reinstated.<sup>10</sup>

If the bond has been given, and the sureties to such bond are wholly insufficient, the defendant may make affidavit of such insufficiency; and, on such affidavit, make a motion for a rule on the complainant to give sufficient bond, or justify his sureties. Such affidavit and motion may be as follows:

**AFFIDAVIT OF INSUFFICIENCY OF SURETIES.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, the defendant, Richard Roe, makes oath that John Smith and George Brown, the sureties on the complainant's prosecution bond, are wholly insufficient,  
[Jurat.]

RICHARD ROE.

**MOTION FOR BETTER COST BOND.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, on motion of the defendants and for sufficient cause shown, it is ordered by the Court that the complainant give a sufficient cost bond, or justify the sureties on his present bond, on or before the last day of the present term, [*or, on or before the second day of the next term, or, on or before some other fixed day,*] or his suit will be dismissed.

If the suit is brought on the pauper's oath the suit may be dismissed on that ground, or the complainant required to secure the costs, if it be shown by disinterested persons that the allegation of poverty is probably untrue, or the cause of action frivolous or malicious.<sup>11</sup> The motion is usually made to require the complainant to secure the costs, such motion being based on an affidavit that he is able so to do; and the Court hears the evidence orally and decides summarily.<sup>12</sup>

§ 235. **Motions in Reference to the Filing of Exhibits.**—It is the duty of the complainant to file all papers and documents referred to in his bill;<sup>13</sup> and if he fails so to do, the defendant may obtain from the Master, or the Court, an order requiring such papers and documents to be filed, and extending the time for answering until such order has been complied with.

**ORDER TO FILE EXHIBITS.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

In this cause, on motion of the defendants, it is ordered by the Court that the complainant file the exhibits to his bill within two days, [*or within some other specified time,*] and the defendants are given until ten days after the filing of said exhibits in which to file their answer.

If the complainant should fail to comply with this order, the defendants may have a rule on him to file the exhibits by a given day, and, on failure so to do, may have the suit dismissed.<sup>14</sup>

§ 236. **Motions by Husband or Wife to Answer Separately.**—It is a general rule that, in a suit against husband and wife, the husband must file the joint answer of himself and wife, or the bill may be taken as confessed by both. If, therefore, either party wishes to answer separately, an order must first be obtained allowing it. The cases in which such an order will be made have

<sup>10</sup> Sharp v. Miller, 3 Sneed, 42; Irvin v. Mathis, 11 Hum., 603; Bettis v. Mansfield, 11 Hum., 604.  
<sup>11</sup> Code, § 3194.  
<sup>12</sup> See Moyers v. Moyers, 11 Heisk., 495; Heatherly v. Hill, 8 Bax., 170. The object of the law allowing paupers to sue on oath of poverty is to place the weak on a level with the strong in the Courts.

Barber v. Denning, 4 Sneed, 267, 269. So, dispaupering should be cautiously done. Brumley v. Hayworth, 3 Yerg., 423. The English law is more liberal to pauper litigants than ours. See Dan. Ch. Pr., 37-44; 111.  
<sup>13</sup> Ch. Rule, I, § 2; *post*, § 1190.  
<sup>14</sup> Code, §§ 4389-4390.

already been fully stated.<sup>15</sup> If the facts on which the motion is based do not appear in the record, they must be made to appear by affidavit.

**ORDER ALLOWING A HUSBAND OR WIFE TO ANSWER SEPARATELY.**

John Doe,  
vs. } No. 618.  
Richard Roe, et al. }

In this cause, on motion of the defendant, Richard Roe, [Rachel Roe] supported by his [her] affidavit, he [she] is allowed to answer separately from his wife [her husband.]

Such an order may be made without affidavit when not contested by the other spouse.

**§ 237. Motions for Further Time to Make Defence.**—If, for any good cause shown, the defendant is unable to answer the bill within the time required, he may obtain from the Court, Chancellor, or Master,<sup>16</sup> further time within which to file an answer. Such good cause should ordinarily be shown by affidavit. It is far more easy to get an extension of time within which to answer, than to have an order *pro confesso* set aside. If the Master grants an extension, he should enter it on his rule docket. The extension, if granted by the Court, will be entered on the minutes; and, if granted at Chambers, will be endorsed by the Chancellor on the written application, and transmitted to the Master.

**ORDER EXTENDING THE TIME FOR ANSWERING.**

John Doe,  
vs. } No. 618.  
Richard Roe, et al. }

For good cause shown by affidavit, the defendants are allowed the further time of ten days, [or, until the.....day of....., next] in which to file their answer.

**§ 238. Motions to Set Aside Orders Pro Confesso.**—If the bill has been taken as confessed by the defendant, his first and most urgent duty and task are to have the order *pro confesso* set aside. When and how this must be done has already been fully stated;<sup>17</sup> but the defendant cannot be too strongly impressed with the following facts:

1. The application should be made at the earliest possible moment, and any delay must be duly explained by affidavit.
2. The failure to file an answer, or to make other defence, must be satisfactorily accounted for by affidavit.
3. An answer must accompany the application to set aside the order *pro confesso*; and this answer must not only show a meritorious defence, but must, also, be sworn to, even though the bill waive the defendant's oath, or though the answer be by a corporation.<sup>18</sup>

**§ 239. Motions for Rules on Complainant to Take Steps.**—If a complainant fail to take any step necessary to the progress of the cause, the defendant may have a rule made by the Master, or the Court, requiring such step to be taken, or the cause dismissed. The grounds for such a rule are ordinarily: 1, failure to bring all the defendants before the Court; 2, failure to revive a suit where some necessary party has died; 3, failure to amend a bill when leave has been obtained, and the amendment is essential; 4, failure to revive when a single woman who is a party marries; 5, failure to comply with an order to file the exhibits to his bill; 6, failure to file a proper cost bond, or a proper pauper oath, in lieu; and (7) failure to supply lost papers.

**ORDINARY RULE TO TAKE STEPS.**

John Doe,  
vs. } No. 618.  
Richard Roe, et al. }

In this cause, on motion of the defendant, Richard Roe, the complainant is required to

<sup>15</sup> *Ante*, §§ 88;99; and, see, Answers, *post*, §§ 236; 383.

<sup>16</sup> Code, § 4368.

<sup>17</sup> *Ante*, §§ 205-213; *post*, 888-890.

<sup>18</sup> In such a case, the answer is sworn to, not as

a pleading, but as an affidavit, evidencing the good faith of the applicant, and the meritorious character of the defense. No Court will set aside a *pro confesso*, in order to let the defendant file an answer disclosing no defense. But see, *ante*, § 207.

take, and prosecute with due diligence, all steps necessary to bring all the defendants before the Court [*or*, all steps necessary to revive this cause against the proper representatives of Robert Roe, deceased.]

**PEREMPTORY RULE TO TAKE STEPS.**

John Doe,

*vs.*

Richard Roe, *et al.* }

No. 618.

In this cause, on motion of the defendant, Richard Roe, it is ordered by the Court that unless the complainant immediately take, and prosecute with due diligence, all steps necessary to bring all the defendants before the Court within ninety days, this suit will be dismissed at the next term.



## CHAPTER XIII.

## PLEAS IN ABATEMENT.

- ARTICLE I. Pleas in Abatement Generally Considered.  
 ARTICLE II. Pleas in Abatement to the Process.  
 ARTICLE III. Pleas in Abatement to the Bill.  
 ARTICLE IV. Frame and Form of Pleas in Abatement.  
 ARTICLE V. Pleas in Abatement in Attachment Suits.  
 ARTICLE VI. Proceedings upon a Plea in Abatement.

## ARTICLE I.

## PLEAS IN ABATEMENT GENERALLY CONSIDERED.

- |   |   |
|---|---|
| § 240. Pleas in Abatement Defined.  | § 242. Rationale of the Practice in Pleas in Abatement. |
| § 241. Pleas in Abatement and in Bar Distinguished According to Tennessee Practice. | § 243. Pleas in Abatement, How Divided in Our Practice. |

§ 240. **Pleas in Abatement Defined.**—A plea in abatement, in our practice, either (1) alleges some matter, not otherwise appearing in the record, which, if true, will abate the suit; or (2) denies some matter, appearing in the record, which, if false, will abate the suit; if the plea is successful, the Court is ousted of jurisdiction to proceed any further in the suit; and is, therefore, bound to dismiss the bill.<sup>1</sup> If a fact, which if not alleged would be a ground for a plea in abatement, be alleged in the bill it will be a ground of demurrer.<sup>2</sup>

There are only two pleadings by which the jurisdiction of the Court can be disputed: 1, pleas in abatement, and 2, demurrers. A plea in abatement disputes the jurisdiction (1) by denying some jurisdictional allegation in the record, or (2) by alleging some fact not in the record. A demurrer disputes the jurisdiction by taking advantage of some one or more material allegations set out in the bill. But, inasmuch as a demurrer politely admits the bill to be true, *pro hac vice*, and disputes the jurisdiction by argument only, while a plea in abatement peremptorily disputes the jurisdiction of the Court to try the suit on the merits, the Court requires a plea in abatement to be filed before a demurrer.

§ 241. **Pleas in Abatement and in Bar, Distinguished According to Tennessee Practice.**—All pleas in our Chancery Courts are divided by our statutes into: 1st, Pleas in Abatement; and 2d, Pleas in Bar.<sup>3</sup> All pleas that dispute the jurisdiction of the Court to try the case, and seek to have the bill dismissed without any investigation of the merits of the controversy, are pleas in abatement.<sup>4</sup> All other pleas are pleas in bar. The defences that can be set up in a plea in bar may, also, be set up in an answer, and are generally so set up, but matters proper for a plea in abatement cannot be set up in an answer.<sup>5</sup>

<sup>1</sup> The word "abatement," in the English Chancery Court practice, means "suspension" or "obstruction," whereas, in a law court, it means "destruction." The failure to note this distinction, has produced no little confusion in the text-books and reports. In Tennessee Chancery practice, the word abatement has, generally, the same meaning as in the law courts; and a plea in abatement does not seek to suspend, or obstruct, the suit, but to destroy it; to terminate it, for the time being. When the term "abatement" is used in reference to suits, whose pro-

gress has been obstructed by the death, marriage, or bankruptcy, of a party, it then has, in Tennessee, the English meaning, and is equivalent to "suspension." Bouvier's Law Dic., "Abatement;" Sto. Eq. Pl., § 354.

<sup>2</sup> Parker v. Porter, 4 Yerg., 81; Code, § 4386; 1 Dan. Ch. Pr., 605.

<sup>3</sup> Code, § 4384.

<sup>4</sup> Code, §§ 4309, 4318.

<sup>5</sup> Code, § 4318. The classification of pleas, in our Chancery practice, is quite unlike that found in Story,

§ 242. **Rationale of the Practice in Pleas in Abatement.**—Good reason suggests that if a defendant desires to dispute the jurisdiction of the Court he should do this before he makes any defense against the merits of the case stated in the bill; for (1) it would be a great waste of time and of money to contest a case on the merits, by putting in an answer, and taking the depositions of witnesses, and other proof, and going through the forms of a hearing, if the party did not intend to submit to the decision of the Court when made; and (2) it would be mere trifling with the Court and the opposite party, if not an act of bad faith, to make such a contest, when the defendant reserved the right to dispute the jurisdiction of the Court in case the decision, or the probabilities, were against him.

The uniform rule of all Courts has, therefore, required a defendant who intended to dispute the jurisdiction of the Court, to do so at the outset, and before he made any defense to the charges against him on the merits of the controversy; for, if he could show that the Court had no right to try him on the case made by the complainant, then good reason and good faith required him to show it in the very beginning, *in limine* as the books say, and thus save time, trouble and expense, and preserve good faith to the Court.

§ 243. **Pleas in Abatement, How Divided in Our Practice.**—Pleas in abatement, in our practice, may be divided into (1) Pleas in Abatement to the Process, and (2) Pleas in Abatement to the Bill.

1. **Pleas in Abatement to the Process** attack the process by showing (1) that it wrongfully issued, or (2) was wrongfully executed.

2. **Pleas in Abatement to the Bill** attack the bill by showing (1) that the Court has no jurisdiction of the person of the defendant, or (2) no jurisdiction of the subject-matter of the suit, or (3) that the bill is prematurely filed, or (4) that the complainants are not partners as they allege,<sup>6</sup> or (5) that by reason of some other matter the bill should be abated.

## ARTICLE II.

### PLEAS IN ABATEMENT TO THE PROCESS.

§ 244. Pleas in Abatement to the Process | § 245. Pleas in Abatement to the Subpcena.  
generally Considered. | § 246. Pleas in Abatement to the Attachment.

§ 244. **Pleas in Abatement to the Process Generally Considered.**—Pleas in abatement to the process are unknown to general Equity pleading, all such pleas being to the bill;<sup>7</sup> but our Chancery system of pleas is largely statutory, and our pleas in abatement in the Chancery Court are analogous to such pleas in the Circuit Court.

Daniel, Barbour, and other writers, who give the English Chancery practice. The division given in the text is the only one consistent with the logic of our statutes, and the only one that will rescue our Chancery practice, in reference to pleas, from its present disheartening confusion.

It is a fundamental maxim in pleading, that a matter in abatement cannot be incorporated in an answer, but that a matter in bar may. Our Code allows all matters to be incorporated in an answer, except objections to the jurisdiction. Hence, it follows, as an inevitable deduction of logic, that all objections to the jurisdiction are matters in abatement, and that all other defenses are in bar, and may be made in the answer. See *Nailer v. Young*, 7 Lea, 738. The line of division, between pleas in abatement and pleas in bar, in the Circuit Court, is different; and this fact has tended to increase the confusion as to the classification of pleas in the Chancery Court.

<sup>6</sup> Code, § 3779a; Acts of 1859-'60, ch. 104. See form of plea, *post*, § 254. This under our practice would not be a plea in abatement if our Legislature had not so named it. *Legitime imperanti parere necesse est.*

<sup>7</sup> Under general Equity pleading, pleas in abatement are: 1, to the jurisdiction; 2, to the person of the complainant, or defendant; and 3, to the bill.

1. *Pleas to the jurisdiction* assert that some other Court, ordinarily some other Court with equitable jurisdiction, has jurisdiction of the matter in question.

2. *Pleas to the person* of the complainant or defendant are described below. See § 252.

3. *Pleas to the bill* are (1) for want of proper parties, or misjoinder of parties, (2) for multiplicity of suits and (3) for multifariousness. See *Sto. Eq. Pl.*, §§ 705-735.

Pleas in abatement to the process may, in order to avoid confusion, be divided into: 1, Pleas in abatement to the subpoena; and 2, Pleas in abatement to the attachment; and will be considered separately.

§ 245. **Pleas in Abatement to the Subpoena.**<sup>8</sup>—Pleas in abatement to the subpoena are those that seek to terminate, or abate, the suit by reason of some fatal irregularity in the issuance or service of the subpoena.<sup>9</sup> They include the following:

1. That the process, whereby the defendant was brought before the Court, was issued or served on Sunday, in a case wherein such issuance or service is not authorized by law.<sup>10</sup>

2. That the process was served on the defendant while attending his duty at a muster of militia, or at an election, or as a witness,<sup>11</sup> or juror.

3. That the defendant is a joint drawer of negotiable paper with others, and the original writ was not served upon any one of the joint drawers.<sup>12</sup>

#### PLEA TO THE SUBPOENA.<sup>13</sup>

James Martin, }  
vs, } In the Chancery Court at Smithville.  
Richard Ramsey. }

The defendant, Richard Ramsey, for plea in abatement to the suit brought against him in this cause, says, That the subpoena to answer in the cause was executed on him by the Sheriff of De Kalb county while he, the defendant was in attendance at the Circuit Court of said De Kalb county, sitting at Smithville, the defendant being then and there in attendance as aforesaid, under summons as a witness in a suit pending in said Circuit Court between John Martin, plaintiff, and R. R. Stephens, defendant; and this the defendant is ready to verify. Therefore, he prays the judgment of the Court, whether he shall be compelled to make any other answer to the bill; and prays to be dismissed.

RICHARD RAMSEY.

State of Tennessee, }  
County of DeKalb. }

Richard Ramsey makes oath that the above plea is true in substance and in fact.

RICHARD RAMSEY.

Sworn to and subscribed before me, }  
Sept. 10, 1846. CHARLES SMITH, C. & M. }

§ 246. **Pleas in Abatement to the Attachment.**—The object of an original attachment of property is to compel the appearance of the defendant, and if the attachment is fatally defective, either (1) for want of a legal ground, or (2) for want of the prerequisites, or (3) because not levied on the defendant's property, the defendant may plead such facts in abatement to the writ; for when a complainant undertakes to obtain a decree against a man without serving a direct notice upon him, he should be required to take every preliminary step prescribed by the law as a substitute for such direct notice.<sup>14</sup> The following are the grounds of a plea in abatement to the attachment:

4. That the grounds, on which the original attachment writ issued, were false, or did not exist.<sup>15</sup>

5. That the attachment was issued without affidavit and bond.<sup>16</sup>

6. That the property, on which the attachment was levied, did not belong to the defendant.<sup>17</sup>

<sup>8</sup> See note 80 to § 264, *post*.

<sup>9</sup> Code, § 2902.

<sup>10</sup> Would publication for a non-resident, made in a newspaper published exclusively on Sunday, be a ground of abatement?

<sup>11</sup> *Martin v. Ramsey*, 7 Hum., 260. In this case, the plea, that the defendant was subpoenaed to answer the bill while attending the Circuit Court as a witness, was allowed, and the bill dismissed. This decision, in so far as it holds that such a plea, if true, operates to dismiss the bill is questionable on grounds of good practice, good reason and common justice. See, *post*, 264, note 80.

<sup>12</sup> Code, §§ 2803; 2902.

<sup>13</sup> This form has been adjudicated to be good.

*Martin v. Ramsey*, 7 Hum., 260; *Baker v. Compton*, 2 Head, 471.

<sup>14</sup> No reason occurs why a plea in abatement would not lie for want of a legal publication notice, for it takes both the levy of the attachment and the notice by publication to constitute full service of process by attachment. Code, § 3524; *Riley v. Nichols*, 1 Heisk., 19; *Bains v. Perry*, 1 Lea, 37.

<sup>15</sup> *Foster v. Hall*, 4 Hum., 346; *Isaacs v. Edwards*, 7 Hum., 465; *Norris v. Ellis*, 6 Hum., 467; *Kendrick v. Davis*, 3 Cold., 527; *Klepper v. Powell*, 6 Heisk., 503.

<sup>16</sup> Code, § 3476.

<sup>17</sup> *Harris v. Taylor*, 3 Sneed, 536; *Robb v. Parker*, 4 Heisk., 70.

ARTICLE III.

PLEAS IN ABATEMENT TO THE BILL.

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| <p>§ 247. Pleas in Abatement to the Bill generally Considered.</p> <p>§ 248. Pleas in Abatement Because of Prematurity of the Suit.</p> <p>§ 249. Pleas in Abatement to the general Jurisdiction of the Court over the Subject-Matter.</p> | <p>§ 250. Pleas in Abatement to the Local Jurisdiction of the Court over the Subject-Matter.</p> <p>§ 251. Pleas in Abatement to the Local Jurisdiction of the Court over the Person of the Defendant.</p> <p>§ 252. Pleas in Abatement to the Person under the old Practice.</p> |
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§ 247. **Pleas in Abatement to the Bill Generally Considered.**—The object of these pleas is to defeat the jurisdiction of the Court: 1, by denying some jurisdictional allegation of the bill; or 2, by alleging some matter not stated in the bill, which, if true, will defeat the jurisdiction. The principal pleas in abatement to the bill, under our system of Chancery pleading, are the following:

§ 248. **Pleas in Abatement, Because of the Prematurity of the Suit.**—If a suit is brought before the cause of action is matured, the defendant may plead such prematurity in bar of the action, or may set up the defence in his answer,<sup>18</sup> but if the suit is brought before the defendant is liable to suit, by reason of some statute exempting him from suit, for a season, he may plead that fact in abatement of the suit. Thus, if an executor or administrator is sued within six months after his qualification, unless the suit be by a surety of the deceased, the defendant is required by the statute to plead the prematurity of the suit in abatement.<sup>19</sup>

PLEA IN ABATEMENT BECAUSE OF PREMATURETY OF SUIT.

John Doe,  
*vs.*  
 John Smith, Admr., &c. } In the Chancery Court at Loudon.

The defendant, John Smith, Administrator of Richard Smith, deceased, for plea in abatement to the bill in this cause, says, That he was appointed and qualified as such administrator, by the County Court of Loudon county, on the first Monday in January, 1891, and within six months before this suit was brought. Wherefore, he prays that this suit may be abated and dismissed.

JOHN SMITH, Admr., &c.

[To be sworn to, as shown in § 254, post.]

§ 249. **Pleas in Abatement to the General Jurisdiction of the Court over the Subject Matter.**—The jurisdiction of the Chancery Court over money demands, where the suit is not in aid of a judgment creditor, is limited to debts or demands of not less value than fifty dollars.<sup>20</sup> If, therefore, it appears on the face of the bill that the debt or demand is of less value than fifty dollars, the defendant may have the bill dismissed, on motion or demurrer, unless the suit is in aid of a judgment creditor, or to recover land, or specific personal property. If the debt or demand be alleged to exceed fifty dollars, when it is in fact of less value than fifty dollars, the defendant may plead that fact in abatement of the bill.<sup>21</sup>

<sup>18</sup> Bell v. Bullion, 2 Yerg., 479; Robinson v. Grubb, 8 Bax., 19; Pigue v. Young, 1 Pick., 263, Manufacturing Co. v. Weatherly, 17 Pick., 318, citing the above section of this book, then § 268.

<sup>19</sup> Code, §§ 2274-2275; Trece v. Trece, 5 Lea, 223. It is probable that this defense may be set up in an answer, also, as it does not dispute the jurisdiction of the Court.

<sup>20</sup> See § 26, ante.

<sup>21</sup> It is a fundamental maxim in pleading, that any matter, which, if alleged, would make the bill demurrable, may, if not alleged, be set up by plea. Our Supreme Court has intimated that a plea would

lie when the value of the debt or demand is really less than fifty dollars, although alleged in the bill to be over fifty dollars. Spurlock v. Fulks, 1 Swan, 289; Wagstaff v. Braden, 1 Bax., 304. See also, Smets v. Williams, 4 Paige, (N. Y.), 364; 1 Dan. Ch. Pr., 558, note. It was held in Birmingham v. Tapscott, 4 Heisk., 382, that this defense could not be made in an answer. Such seems, also, to have been the holding in Wagstaff v. Braden, 1 Bax., 304. The plea must, therefore, be a plea to the jurisdiction, and is, consequently, in our practice, a plea in abatement.

The defendant may, also, plead in abatement any other fact that will show the subject-matter of the suit to be without the general jurisdiction of the Court.

**PLEA IN ABATEMENT TO THE GENERAL JURISDICTION OF THE COURT.**

The defendant, John Smith, for plea in abatement to the bill, says, That the amount he owes the complainant, in this cause, is less than fifty dollars; and, therefore, beneath the dignity of this Court; and he prays the judgment of the Court, whether he shall answer further.

[To be properly sworn to. See post, § 254.]

JOHN SMITH.

**§ 250. Pleas in Abatement to the Local Jurisdiction of the Court over the Subject-Matter.**—There are various provisions of the statutes requiring that suits, relating to certain specified matters, shall be brought in certain specified counties; and if a bill, dealing with these specified matters, is filed in a county other than that specified in the statute, the defendants, even though personally served with process, may file a plea in abatement to the local jurisdiction of the Court over the subject-matter of the suit.

The various requirements of the statutes, as to the local jurisdiction of the Court over the subject-matter of the suit, have already been fully stated,<sup>22</sup> and need not be repeated. In a general way, these statutes may be summarized as follows:

1. All bills to recover, or to divest, or clear, the title to land, or to foreclose mortgages or trust deeds relating to land, or to specifically execute contracts relating to land, or to sell the lands of decedents to pay debts, must be filed in the county where the land, or material part of it, is situated.

2. All bills to foreclose mortgages, or trust deeds, on personalty, must be filed in the county where such mortgage is registered.

3. All bills to sell the lands of persons under disability, or to partition, or sell for partition, lands held in common, must be filed in the county where the land, or some part of it, lies, or where the defendant resides.

4. All bills to transfer the administration of an insolvent estate from the County Court, must be filed in the county wherein the will was proved, or letters of administration were granted, or where the personal representatives reside or are served with process.

5. All bills for the appointment of administrators, must be filed in the county where the deceased resided at the time of his death, or where his estate, goods and chattels, or effects, were at the time of his death.

6. All bills against cities and counties must be filed (1) in case of cities, in the county containing the city, and (2) in case of counties, in the county sued.

If suits in reference to any of these matters are not brought in the county required by the statute, the defendant may plead that fact in abatement of the suit.

The following is the form of a plea in abatement to the local jurisdiction of the Court over the subject-matter:

**PLEA IN ABATEMENT TO THE LOCAL JURISDICTION OF THE SUBJECT-MATTER.**

John Doe,  
vs.  
John Smith. } In the Chancery Court at Knoxville.

The defendant, John Smith, for plea in abatement to the bill, says, That the tract of land sought to be recovered in this cause, [or, the title to which is sought to be divested or cleared up in this cause, or, the contract as to which is sought to be specifically executed in this cause,] lies in the county of Anderson, and no part of it lies in the county of Knox. Wherefore, this defendant says, that this Court ought not to take further jurisdiction of this cause.

[To be sworn to, as shown in § 254, post.]

JOHN SMITH.

<sup>22</sup> See, ante, § 177. If a suit be local, and imperatively required by statute to be brought in a particular county, it can be brought in no other county, and if brought in another county the whole proceeding is void, whether the jurisdiction be objected to or not. *Nashville v. Webb*, 6 Cates, 432. Nor can

this requirement be evaded or nullified by means of a counterpart subpoena. *Ibid.* See, ante, § 177, notes 17; 30. But a *transitory* suit brought in the wrong county, may be successfully prosecuted unless abated by plea of the defendant. Code, § 2812.

**§ 251. Pleas in Abatement to the Local Jurisdiction of the Court over the Person of the Defendant.**—While the Court of Chancery acts ordinarily *in personam*, and, therefore, suits may generally be instituted in any county where the defendant, or any material defendant, may be found;<sup>23</sup> nevertheless, there are some important statutory exceptions to this rule; and, if any one of these exceptions is violated, the defendants may show the fact by plea in abatement, and thus defeat the suit. The exceptions have been already set forth with particularity, in considering the local jurisdiction of the Court,<sup>24</sup> and need not be repeated here, in detail.

The following are the principal grounds for pleas in abatement to the local jurisdiction of the Court over the person of the defendant:

1. That the complainant and the defendant resided, at the time the suit was brought, in the same county, and the bill is filed in another county,<sup>25</sup> and the Court, where the suit is brought, has no local jurisdiction over the subject-matter of the suit.

2. That neither the defendant pleading in abatement, nor any other material defendant, was served with process in the county wherein the suit was brought;<sup>26</sup> nor do they reside<sup>27</sup> in such county; and the jurisdiction of the subject-matter of the suit is not in such county.

The county in which a bill must be filed has already been fully shown.<sup>28</sup> The following will serve as a guide in drawing pleas, under this section:

**PLEA IN ABATEMENT TO THE LOCAL JURISDICTION OVER THE DEFENDANT.<sup>29</sup>**

John Doe,  
vs.  
John Smith. } In the Chancery Court at Knoxville.

The defendant, John Smith, for plea in abatement to the bill, says: This suit is brought to recover an alleged debt, and the complainant and the defendant both resided in Anderson county when the bill was filed, and the defendant was not then and is not now, residing in Knox county.

Wherefore, he prays the judgment of the Court whether he shall answer further.

[To be sworn to, as shown in § 254, post.]

JOHN SMITH.

**§ 252. Pleas in Abatement to the Person under the Old Practice.**—Under the old Equity practice pleas to the person were in abatement. These pleas included,

1. Pleas to the Person of the Complainant, that he is an infant, idiot or lunatic, or a bankrupt, or that she is a married woman, or that the complainant is not the person he claims to be, or does not sustain the character in which he sues; and,

2. Pleas to the Person of the Defendant, that he does not possess the character in which he is sued, as for instance that the defendant is not an unmarried woman, or is not an executor, administrator, guardian or heir, or that he is a bankrupt.<sup>30</sup>

Under the Tennessee practice all of these defences can be set up in the answer, as they do not dispute the jurisdiction of the Court, and are, therefore, not matters for a plea in abatement. But the Legislature having enacted that, whenever two or more persons sue as *partners* upon an account, bill of exchange, bond or note, it shall not be necessary for them to prove their partnership, unless the defendant files a plea *in abatement* denying the partnership on oath,<sup>31</sup> of course such a plea by this *ipse dixit* becomes a plea in abatement, and due

<sup>23</sup> Code, § 4305. This section applies to actions of a transitory nature, and not to actions referred to in the preceding section.

<sup>24</sup> See, *ante*, § 177.

<sup>25</sup> Code, § 2902, sub-sec. 4; 2809; 2812.

<sup>26</sup> Code, § 4305. See *Rogers v. O'Mary*, 11 Pick., 514.

<sup>27</sup> Code, § 4311, sub-sec. 1.

<sup>28</sup> See, *ante*, § 177. If a local suit be brought in the wrong county the Court has no jurisdiction, and

all the proceedings are void. *Nashville v. Webb*, 6 Cates, 432. But if a transitory suit be brought in the wrong county it may be prosecuted to a termination unless abated by plea of the defendant. Code, § 2812. See, *ante*, § 177, notes, 28-30.

<sup>29</sup> For another form, see § 254, post.

<sup>30</sup> See *Sto. Eq. Pl.*, §§ 722-732.

<sup>31</sup> Acts of 1859-1860, ch. 104. If this defense is made in an answer it must be sworn to, or so much of the answer sworn to as denies the partnership.

courtesy to a co-ordinate department of the State requires that it shall wear that cognomen.<sup>32</sup> The following is a form of

**PLEA DENYING COMPLAINANTS ARE PARTNERS.**

John Doe and Henry Doe, partners under the name of Doe & Bro., vs. Richard Roe.	}	In Chancery at Huntsville.
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The defendant, Richard Roe, for plea in abatement to the bill, says that the complainants are not partners as by them alleged in their bill.

RICHARD ROE.

[To be sworn to. See post, § 254.]

**ARTICLE IV.**

**FRAME AND FORM OF PLEAS IN ABATEMENT.**

§ 253. Requisites of a Plea in Abatement,  
under General Equity Practice.

§ 254. Frame and Form of Pleas in Abate-  
ment.

**§ 253. Requisites of a Plea in Abatement under General Equity Practice.** A plea in abatement must possess all of the requisites of a plea in bar, stated in subsequent sections;<sup>33</sup> except,

1. The ground of a plea in abatement must be sufficient to merely dismiss the suit, and not to bar it.

2. A plea in abatement must not touch upon any matters affecting the merits of the controversy.<sup>34</sup>

The requisites of an affirmative plea in abatement, under the general Equity practice, are: 1, it must be based on matter outside of the bill; 2, such matter must reduce the decision of the cause to a single point, on which issue can be taken; 3, this point must be one that, if decided for the defendant, will dismiss the bill, and not bar it; 4, the plea must be direct and positive, and not argumentative, or inferential; 5, it must be verified by the direct and positive oath of the defendant, unless it is proved by a Court record, and then it is verified by the record;<sup>35</sup> and (6) it must be filed and determined, before any other mode of defence is resorted to. A negative plea in abatement merely denies the jurisdictional allegations of the bill. If, after a plea in abatement has been filed, and while it is pending, any other defence is made, such as a demurrer, motion to dismiss, plea in bar, or answer, the plea in abatement will be deemed to be waived, and will be treated as abandoned, under the general practice, but not in this State.

Pleas in abatement are not favored by the Courts, because they do not go to the merits of the case; and no latitude in practice is extended to them. They must always be filed in the right time, in the right form, and with the right verification;<sup>36</sup> they are strictly construed and strictly dealt with, and intentions in their favor are not allowed to supply defects.<sup>37</sup> A party, who relies on a technicality to defeat an equity, must not present an untechnical techni-

<sup>32</sup> *Ita lex scripta est.*

<sup>33</sup> *Post*, §§ 335-340.

<sup>34</sup> If, however, the plea intended to be in abatement, was really in bar, the Court would not dismiss it on that account, if it presented a sufficient ground of defense on the merits. The Court will properly name any pleading, that has enough substance in it to merit consideration, and will give it full force and effect regardless of its name. See, *ante*, § 43.

<sup>35</sup> Code, § 2901; *Grove v. Campbell*, 9 Yerg., 7. This is the leading case. See, also, *Wrompelmier v.*

*Moses*, 3 Bax., 467. In the latter case, the verification on "knowledge, information, and belief," was held insufficient, but an amended verification that the plea was "true in substance and in fact," was sustained by the Supreme Court. See Digests, under Pleas in Abatement, for many cases as to verification.

<sup>36</sup> *Grove v. Campbell*, 9 Yerg., 7. The Chancery Court, however, will not regard the form, if the substance of the plea is good.

<sup>37</sup> *Friedlander v. Pollock*, 5 Cold., 490.

cality, for a Court of Justice will not aid or favor him in his efforts to defeat justice. Nevertheless, the Court will give him the full benefit of the law, and will not violate its own rule of regarding substance rather than form. If, therefore, a plea in abatement is good in substance, the Court will not overrule it, merely because it is bad in form,<sup>38</sup> but will allow the form to be amended.<sup>39</sup>

§ 254. **Frame and Form of Pleas in Abatement.**—An affirmative plea in abatement must contain a succinct statement of the facts<sup>40</sup> relied on to abate the suit; and the forms given in the Code,<sup>41</sup> being models of brevity and certainty, can be safely followed in Chancery pleading.<sup>42</sup> A negative plea in abatement merely denies the jurisdictional allegations of the bill. The forms of the commencement and conclusion of pleas in abatement and in bar are substantially the same.<sup>43</sup>

**AFFIRMATIVE PLEA IN ABATEMENT.**

John Doe, }  
*vs.* } In Chancery at Sevierville.  
 Richard Roe. }

The defendant, Richard Roe, for plea in abatement to the bill in said cause, says, That he and the complainant both resided in the same county, to-wit, in the county of Blount, when the bill in this case was filed, and that the said bill is filed in the county of Sevier. Wherefore, he prays to be dismissed with his costs.

State of Tennessee, }  
 County of Sevier. }

RICHARD ROE.

Richard Roe makes oath that his foregoing plea is true in substance and in fact.

RICHARD ROE.

Sworn to and subscribed before me,

July 1, 1890. A. T. MARSHALL, C. & M.

A negative plea in abatement merely denies the allegation, or allegations, in the bill on which the jurisdiction of the Court over the person, or property of the defendant depends, as will be seen by the following form, and by other forms in this book:

**NEGATIVE PLEA IN ABATEMENT.**

John Doe, }  
*vs.* } In Chancery at Sevierville.  
 Richard Roe. }

The defendant, Richard Roe, for plea in abatement to the bill in said cause, says, That the tract of land sought to be recovered by the bill does not lie, nor does any part of it lie, in the county of Sevier.

RICHARD ROE.

[To be signed and sworn to as above.]

The statute provides that no plea in abatement shall be received in any Court, unless its truth is verified by the oath of the party, or otherwise,<sup>44</sup> and if the proper verification is wanting, the plea may be struck out of the files, on motion.<sup>45</sup>

<sup>38</sup> Friedlander v. Pollock, 5 Cold., 495.

<sup>39</sup> The statutes allowing amendments, apply to pleas in abatement with as much force as to any other pleading. Code, §§ 2863-2871. See Wrompelmair v. Moses, 3 Bax., 467.

No reason occurs why a plea in abatement should be disfavored by Courts. Surely, a Court does not want to exercise an unlawful jurisdiction, and all a plea in abatement undertakes to do is to show the Court that it has no lawful jurisdiction in the case; and this showing a defendant has the right to make, and when made the Court should impartially consider it. The plea is no impeachment of the integrity of the Chancellor, but the mere assertion of a legal right, one that it is the duty of a Solicitor to assert when the facts justify. The Act of 1897, ch. 121, gives this plea a standing in Court equal to any other defense.

<sup>40</sup> Code, § 2906.

<sup>41</sup> Code, § 2940.

<sup>42</sup> Code, § 2894. The fact whether a plea is in bar or abatement, is ascertained by the subject-matter. Code, § 2908; and not by its form, nor by the form of its conclusion. Friedlander v. Pollock, 5 Cold., 495. If a party has a right to file a plea,

such plea should be judged by the rules of reason, and in the liberal spirit of our statutory system of pleading; Stewart v. Magness, 2 Cold., 312; not by the harsh rules of an arbitrary system, now obsolete. See Battelle v. Youngstown R. M. Co., 16 Lea, 358; 365. A plea that is good in form at law, ought certainly to be good in form in Equity.

<sup>43</sup> What is said in this book about the forms of pleas in bar is fully applicable to pleas in abatement, Post, §§ 335-340.

<sup>44</sup> Code, § 2901. It must be verified by oath, if proof outside of a record is necessary to sustain it; but when the plea is verified by a record, no oath is necessary. Grove v. Campbell, 9 Yerg., 7.

<sup>45</sup> Friedlander v. Pollock, 5 Cold., 490. The oath must be positive, and not on information and belief. Seifreid v. People's Bank, 2 Tenn. Ch., 17; Wrompelmair v. Moses, 3 Bax., 467. The plea may be verified by one of two partners, or by their Solicitor, if his affidavit shows that he is acquainted with the facts set out in the plea. Cheatham v. Pearce, 5 Pick., 668. As to verification of pleadings, see, Post, §§ 788-789. A verification that the plea is "true" is good, without adding "in substance and in fact." Armstrong v. State, 17 Pick., 389.



## ARTICLE V.

## PLEAS IN ABATEMENT IN ATTACHMENT SUITS.

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| <p>§ 255. When a Plea in Abatement Should be Supported by an Answer.</p> <p>§ 256. Pleas in Abatement in Attachment Suits generally Considered.</p> <p>§ 257. Objects of Pleas in Abatement in Attachment Suits.</p> | <p>§ 258. Pleas in Abatement in Attachment Suits not Overruled by Defences on the Merits.</p> <p>§ 259. Forms of Pleas in Abatement in Attachment Suits.</p> |
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§ 255. **When a Plea in Abatement Should be Supported by an Answer.** When an attachment bill charges a fraudulent transfer of property, both as a ground of equitable relief and as a ground for an attachment of property, and alleges particulars of the fraud charged, a plea in abatement denying the alleged fraudulent transfer should be supported by answer denying the specifications of fraudulent conduct, when the defendant is called on to answer unto them on oath; because complainant is entitled to the discovery he seeks in aid of his charge of fraud.<sup>46</sup> The bill in such a case combines (1) a pleading alleging indebtedness, (2) an affidavit of fraudulent transfer and (3) a call upon the defendant for a discovery.

But when an attachment bill charges a single fraudulent disposition of property, both as a ground of attachment and as a ground of equitable relief, without averring any matters of evidence in support of the charge of fraud, and the defendant by plea in abatement denies the fraudulent transfer, no answer in support of such plea is necessary: 1st, because there is no discovery to be made in the answer; and 2d, because all the answer could do would be to deny the fraudulent transfer, and that had already been done by the plea in abatement. Hence, an answer under these circumstances would overrule the plea, under the old practice;<sup>47</sup> but not under the present practice.<sup>48</sup>

A plea in abatement need not be supported by an answer when the defendant's oath to his answer is waived, for that is a waiver of any discovery.<sup>49</sup>

§ 256. **Pleas in Abatement in Attachment Suits Generally Considered.**—Proceedings in Court by attachment of property are purely statutory. Attachments are of two kinds, original and ancillary; but, while both are obtained and executed in the same way, and both alike impound the defendant's estate, their objects are different. The primary object of the original writ is to aid in compelling the defendant to appear in Court and defend the suit wherein the writ issued; and the secondary object is impound enough of his property to secure the debt sued for; while the only object of the ancillary writ is the seizure of the defendant's property as security for the complainant's demand, the defendant being brought into Court by service of subpoena.

All attachment suits, therefore, have a two-fold object, (1) a decree for the debt of demand claimed, and (2) the seizure, at the beginning of the suit, of enough of the defendant's property to satisfy the decree when obtained.<sup>50</sup>

<sup>46</sup> *Seifred v. People's Bank*, 1 Bax., 200; *Pique v. Young*, 1 Pick., 263. An answer in support of a plea is no part of the defense. The defense is contained in the plea; the answer is the discovery the complainant has called for. 1 Barb. Ch. Pr., 129; 1 Dan. Ch. Pr., 624. The answer in such a case, must expressly show that it is in support of the plea. If the oath to the answer is waived, the plea need not be supported by an answer. *Cheatham v. Pearce*, 5 Pick., 668.

See Article on Pleas supported by an answer, *post*, §§ 341-349, where forms are given, which are good for pleas in abatement.

<sup>47</sup> *Cheatham v. Pearce & Ryan*, 5 Pick., 668.

<sup>48</sup> Acts of 1897, ch. 121; see, *post*, §§ 260-261.

<sup>49</sup> *Cheatham v. Pearce & Ryan*, 5 Pick., 668.

<sup>50</sup> An original attachment suit has a third object: to compel the appearance of defendant by the seizure of his property.

So, an attachment bill has a twofold nature: it is (1) a *pleading* setting forth a cause of action, and (2) an *affidavit* of some statutory ground or grounds for the preliminary seizure of the defendant's property to satisfy the anticipated recovery.

As a result of this twofold attack upon him the defendant has a twofold defence: he has a defence to make to the bill as a *pleading*, and another defence to the bill as an *affidavit*. His defence to the bill as a pleading is made by demurrer, plea in bar, or answer; and his defence to the bill as an affidavit is made by a plea in abatement; or, in some cases, by a motion to dismiss.

§ 257. **Objects of Pleas in Abatement in Attachment Suits.**—The objects of the bill in all attachment suits are: (1) to obtaining a decree for the demand sued on, and (2) to impound enough property to satisfy it; and in case of an original attachment suit, (3) to compel the appearance of the defendant.

The object of a plea in abatement to the attachment whether original or ancillary, is to abate the writ, and discharge the levy made under it, thereby restoring the possession and title of the property to the defendant. And, in case of an original attachment, the abatement of the writ also abates the suit, for the suit being bottomed on the writ falls with the writ.<sup>51</sup>

And when the attachment is abated, and the levy thereunder discharged, any transfer of, or lien on, the attached property obstructed by the levy becomes operative as though such levy had never been made.

§ 258. **Pleas in Abatement Not Overruled by Defences on the Merits.**—Pleas in abatement in attachment suits differ so materially from such pleas in ordinary Equity pleading that considerable discrimination is necessary to avoid confusion and error. In ordinary Equity pleading the defendant is brought before the Court by subpoena, served upon his person; but in an original attachment suit he is brought before the Court by a seizure of his property, and notice of that fact, and of the suit, given him by publication. So, in an attachment suit the defendant may have two very different defences, one to the merits of the suit, and another to the merits of the attachment; and may wish to set them both up by pleading in abatement to the attachment, and by demurring, pleading in bar, or answering, to the bill. But inasmuch as under the general rules of Equity pleading, a demurrer, plea, or answer, overrules a plea in abatement to the bill, it was once thought that they would, also, overrule a plea in abatement to the writ of attachment, whether such writ was original or ancillary,<sup>52</sup> not considering the great difference between pleas in abatement to the *bill* in ordinary Equity pleading and pleas in abatement to the *attachment* under our Code pleading.

It is, however, now settled, after much controversy and contrariety of decisions, that a defendant may, at the same time, plead in abatement to the attachment, whether original or ancillary, and demur, plead in bar, or answer to the bill, and that there is no inconsistency in the two simultaneous defences;<sup>53</sup> and the Legislature has recently confirmed this adjudication by enacting that a defendant can plead in abatement, and plead or answer to the merits at the same time, and that his plea in bar or answer is no waiver of his plea in abatement.<sup>54</sup>

In case of either an original or an ancillary attachment, the defence to the attachment may fail, and the defence to the bill may succeed, or *vice versa*. The defendant is often benefitted by defeating the attachment even when he fails to defeat the bill on the merits, because, when the attachment is defeated, the lien

<sup>51</sup> *Sublata fundamento cadit apus*. (When the foundation is removed what is built upon it tumbles down.)

<sup>52</sup> An original attachment becomes ancillary whenever a subpoena is served on the defendant. *Templeton v. Mason*, 23 Pick., 625; or whenever the defendant enters his appearance.

<sup>53</sup> *Bank v. Foster*, 6 Pick., 735. When a defendant in an original attachment both pleads in abatement and answers, the attachment thereby becomes ancillary. *Templeton v. Mason*, 23 Pick., 625.

<sup>54</sup> Acts of 1877, Ch. 121.

is discharged *ab initio*, and any intervening sale or lien becomes operative and valid.

§ 259. **Forms of Pleas in Abatement in Attachment Suits.**—There is no technical difficulty in drawing pleas in abatement in attachment suits. The attachment writ is grounded on the causes of attachment alleged in the bill, and the plea in abatement merely denies each and all of the causes alleged.

**PLEA IN ABATEMENT IN ATTACHMENT SUITS.**<sup>55</sup>

John Doe,  
*vs.*  
 Richard Roe. } In Chancery at Trenton.

The defendant for plea in abatement to the writ of attachment in this cause, says, That he did not reside out of the State at the time the bill in this cause was filed, and has not since resided out of the State; and says, that he had not removed himself or property, or any part thereof, out of the State when the bill in this cause was filed, nor has he since removed himself or property, or any part thereof, out of the State; and says that he had not fraudulently disposed of, nor was he about to fraudulently dispose of, his property or any part thereof, when the bill in this cause was filed, as said bill alleges. Wherefore, he prays that the attachment be abated, [*If it is an original attachment, add:*] and the bill dismissed.

[*To be sworn to as in § 254.*]

RICHARD ROE.

**PLEA IN ABATEMENT TO ORIGINAL AND ANCILLARY ATTACHMENTS.**<sup>56</sup>

Mary Rahl,  
*vs.*  
 William Boon. } In Chancery at Knoxville.

The defendant, William Boon, for the plea in abatement to the original and ancillary writs of attachment in this cause says, That he had not fraudulently disposed of his property, or of any part thereof, nor was he about fraudulently to dispose of his property or any part thereof, at the time of the issuance of such writs or either of them, or at any other time before or since that time, as in and by the bill of complaint is most falsely and erroneously alleged.

[*To be sworn to as in § 254.*]

WILLIAM BOON.

**ARTICLE VI.**

**PROCEEDINGS UPON A PLEA IN ABATEMENT.**<sup>57</sup>

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| <p>§ 260. When a Plea in Abatement Must be Filed under General Equity Practice.</p> <p>§ 261. When a Plea in Abatement May be Filed and Heard under the Tennessee Practice.</p> | <p>§ 262. Setting a Plea Down for Argument.</p> <p>§ 263. Taking Issue upon a Plea.</p> <p>§ 264. Effect of the Decision of a Plea in Abatement.</p> <p>§ 265. Effect of the Trial of a Plea in Abatement in Attachment Suits.</p> |
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§ 260. **When a Plea in Abatement must be Filed under General Equity Practice.**—Inasmuch as a plea in abatement undertakes to dispute the right of the Court, to take any step in the suit, the Court requires the plea to be filed before any step is taken. If a defendant intends to dispute the jurisdiction of the Court, on any ground, common reason requires that he should do so, at the threshold of the litigation; and the practice of the Court accordingly is, that he must file his plea in abatement before making any other sort of defence whatsoever.<sup>58</sup> And not only must he file his plea in abatement, before either moving to dismiss, or demurring, or pleading in bar, or answering, but he must have his plea finally disposed of, before making any other sort of defence; for if, after

<sup>55</sup> This plea is on the hypothesis of the several causes of attachment having been alleged in the bill.

<sup>56</sup> This plea was held good in *Boon v. Rahl*, 1 Heisk., 12.

<sup>57</sup> The proceedings upon a plea in abatement are

substantially the same as proceedings upon a plea in bar; and, to save repetition, reference is made to the Article on that subject in the Chapter on Pleas in Bar, *post*.

<sup>58</sup> *Cooke v. Richards*, 11 Heisk., 711.

filing a plea in abatement, he moves to dismiss, or demurs, or pleads in bar, or answers, such a step is deemed an abandonment of his plea in abatement, and he will not be allowed to return to it. The Court will not, ordinarily, allow a plea in abatement to be filed, after a *pro confesso* has been set aside.<sup>59</sup>

The party who contests the right of the Court to take jurisdiction, because of some fatal irregularity in the issuance or service of process, or because of the locality of his residence, or of the subject-matter, must do no act that recognizes or acquiesces in that jurisdiction. He must dispute the jurisdiction, (1) in the right way, (2) at the right time, and (3) in the right form. (1) The right way is, by a plea in abatement. (2) The right time is, at the appearance term, and before any other defence is made, or any leave is asked or obtained in reference to any other defence. (3) The right form is a plea containing the requisite substance, and a sufficient verification.

But under the Act of 1897, a plea in abatement and a plea in bar, or an answer, may be filed at the same time; and the filing of a plea in bar or an answer will not overrule a plea in abatement.

§ 261. **When a Plea in Abatement May be Filed and Heard Under the Tennessee Practice.**—Down to the passage of the Act of 1897,<sup>60</sup> there was great contention at the bar, and no little difference of opinion on the bench,<sup>61</sup> (1) as to when a plea in abatement might be filed, (2) as to the effect of filing a plea in bar or an answer on a plea in abatement, and (3), as to the effect of a decision against a plea in abatement upon an issue of fact; and these contentions between Solicitors and differing opinions among Chancellors were greatly increased and aggravated by the impossible endeavors to reconcile pleas in abatement in attachment cases with pleas in abatement in ordinary Equity pleading, complicated as the former pleas were by pleas in abatement to the subpoena, a plea utterly unknown to Equity pleading, and injected into our Chancery pleading by the ill-considered act of the Courts making the statutes in reference to grounds for pleas in abatement in the Circuit Courts applicable to the Chancery Courts.

The Act of 1877 changes all this, and not only makes a plea in abatement equal in favor with a plea in bar or an answer, but in some respects makes it the most favored, thereby reversing all former rules of pleading, for the Act not only allows a plea in abatement to be filed along with an answer, thitherto the most favored of all pleadings by a defendant, but provides that if at the trial the plea in abatement is found true the Court is bound to sustain it and dismiss the bill, even though the answer fail to set up a good defence, or, setting up a good defence, is proved to be false and the bill proved to be true; the result being that a plea in abatement, if found to be true, overrules the answer.<sup>62</sup>

By the Act of 1897, the defendant may plead over to the merits of the bill after judgment against his plea in abatement rendered either upon motion to strike out, or upon argument as to its sufficiency, or upon demurrer, or upon an issue of fact, as to its merits.<sup>63</sup> In other words, no act of the defendant in unsuccessfully filing or relying upon a plea in abatement, and no adverse action of the Court in reference to the sufficiency or truthfulness of such plea, will debar him from making any defence to the merits he could have made if no plea in abatement had ever been filed by him.

But the statute goes further, and authorizes the defendant to plead in abatement, and, at the same time, to plead in bar to the merits or to answer to

<sup>59</sup> See *Lumber Co. v. Lieberman*, 22 Pick., 153.

<sup>60</sup> Acts of 1897, ch. 121.

<sup>61</sup> See, notably, *Battelle & Co. v. Youngstown R. M. Co.*, 16 Lea, 355; and *Simpson v. Railway Co.*, 5 Pick., 304.

<sup>62</sup> Query: suppose the answer confesses the debt,

under the Act of 1897 would the defendant be entitled to have the bill dismissed if his plea in abatement should be found true on trial?

<sup>63</sup> *Thach v. Accident Association*, 6 Cates, 271; *Sewell v. Tuthill & Pattison*, 4 Cates, 271; *Railroad v. McCollum*, 21 Pick., 623.

merits; and, in such plea in bar or answer, to rely on any defenses he might have made had no plea in abatement been interposed.<sup>64</sup>

The act of the defendant in filing a plea in bar, or an answer, after pleading in abatement, is not to be deemed a waiver of his plea in abatement, but both defenses shall stand, and the issues of fact raised by both shall be heard at the same time,<sup>65</sup> and if the plea in abatement is found to be true, the suit will be abated and the bill dismissed, even though complainant may be entitled to a decree on the merits;<sup>66</sup> but if, at the hearing, the plea in abatement is found to be false, the Court will then adjudicate the case upon the merits in favor of the complainant or defendant as Equity may require.<sup>67</sup>

Where a defendant unsuccessfully relies upon a plea in abatement, the issue of fact being found against him, and he fails to plead over, or apply for leave to plea over, a *pro confesso* can be entered against him, and then a final decree on the *pro confesso*.<sup>68</sup>

In case of either an original or an ancillary attachment, the defendant, without the aid of the statute, may plead in abatement to it, and at the same time answer the bill on the merits.<sup>69</sup>

§ 262. **Setting a Plea Down for Argument.**—The first question for the complainant to consider when a plea is filed, whether it be a plea in abatement or in bar, is its sufficiency. If he deem the plea insufficient, either in form or substance, he must set it down with the Clerk to be argued.<sup>70</sup> He may do this by an entry upon the minutes of the Court, if in session; or upon the rule docket, or by filing with the Clerk a paper containing the substance of such entry, if Court be not in session. The following is a

#### FORM OF SETTING DOWN A PLEA FOR ARGUMENT.

John Doe,

vs.

Richard Roe.

The complainant says the defendant's plea in abatement is insufficient.

1st. Because it is not properly verified.<sup>71</sup>

2d. Because, if true, it presents no ground for abating the suit.

Wherefore he sets said plea down for argument.

EDWARD T. SANFORD, Solicitor.

The plea must be set for argument at the first term after it is filed;<sup>72</sup> and, if on argument, it is judged to be sufficient, the complainant must take issue upon it, instanter; if, however, the plea is overruled, the defendant must answer the bill by the next rule day,<sup>73</sup> which will be the next day if the term continues; he may, however, obtain further time<sup>74</sup> from the Court, on application.

§ 263. **Taking Issue upon a Plea.**—Issue is taken upon a plea,<sup>75</sup> whether it be a plea in abatement or in bar, by filing the statutory replication thereto, as follows:

<sup>64</sup> Acts of 1897, ch. 121, § 2; *Sewell v. Tuthill & Pattison*, 4 Cates, 271.

<sup>65</sup> But by consent the hearing of the issues raised by the answer may be continued until the plea in abatement is disposed of.

<sup>66</sup> It would seem that if the Act of 1897 is given full effect a defendant might by plea in abatement deny the jurisdiction and at the same time by answer admit the debt, and if successful on his plea the complainant's bill would have to be dismissed. But the Court might allow the complainant to take any money tendered by the defendant. *Railroad v. McCollum*, 21 Pick., 623.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Sewell v. Tuthill & Pattison*, 4 Cates, 271. In this case a final decree was rendered without any *pro confesso*; the Supreme Court held this was not a reversible error, but as the allegations of the bill did not make clear the amount of the claim sued

for, the case was remanded for proof on that point.

<sup>69</sup> *Bank v. Foster*, 6 Pick., 735.

<sup>70</sup> Code, § 4393.

<sup>71</sup> If not properly verified, the plea may be stricken from the files, on motion. *Seifreid v. People's Bank*, 1 Bax., 200.

<sup>72</sup> Code, § 4394.

<sup>73</sup> Code, § 4395.

<sup>74</sup> This further time should not extend beyond the adjournment of the term. If a defendant delays a suit, by an insufficient dilatory pleading, he should not reap the reward of a delay, which is often all he expects; he should be required to answer next day, or if given more time, he should be given it only on payment of the costs of the cause. This ruling is within the spirit of Code, § 2938, authorizing the costs of the cause to be adjudged, for filing a frivolous demurrer.

<sup>75</sup> Code, § 4393; *Cheatham v. Pearce*, 5 Pick., 668.

REPLICATION OF A PLEA.

John Doe, }  
 vs. }  
 Richard Roe. }

The complainant joins issue on the plea filed in this cause.<sup>76</sup>

EDWARD T. SANFORD, Solicitor.

This replication may be written immediately under the plea, on the same paper; but whether so written, or put in on a separate sheet of paper, it should be duly filed by the Clerk.

A negative plea makes an issue without a replication,<sup>77</sup> and the practice is to treat an affirmative plea as at issue without a replication after complainant has had twenty days' notice of its filing, and has taken no action thereon.<sup>78</sup>

If the complainant has ground for a special replication, he may file the same, in addition to his general replication, on obtaining leave of the Court.<sup>79</sup> A replication to a plea should be filed, or the plea set down for argument as to its sufficiency, before the lapse of twenty days after the filing of the plea.

§ 264.—Effect of the Decision of a Plea in Abatement.—If a plea in abatement is good, both in form and substance, the complainant must dismiss his bill, or take issue upon the plea, and have the issue tried upon the evidence. If, on the trial of this issue of fact, the plea be found true, the Court will order the bill to be dismissed.<sup>80</sup> Such dismissal, however, cannot be pleaded in bar of a second suit on the same cause of action. If the plea in abatement is overruled upon argument,<sup>81</sup> the order of the Court is, that the defendant pay the statutory costs<sup>82</sup> and answer the bill.<sup>83</sup> The following is the form of an

ORDER RULING ON A PLEA IN ABATEMENT.

John Doe, }  
 vs. } No. 314.  
 Richard Roe. }

The plea in abatement filed by the defendant, having been set down by the complainant to be argued, and having been read, and argument as to its sufficiency having been heard, the Court is of the opinion that the plea is sufficient. It is, therefore, ordered by the Court that the complainant reply to said plea within ten days [*If the plea be found insufficient, omit all after the word "opinion," and add, in lieu.:*] that the plea is insufficient in law. It is, therefore, ordered by the Court that said plea be overruled and disallowed, and that the defendant answer the bill within two days,<sup>84</sup> and that he pay the statutory costs, for which an execution will issue.

If the defendant wished to rely on his plea in abatement to the jurisdiction, in the Supreme Court, under the old practice he had to decline to answer the bill and make no further defense, for any further defense was deemed an

<sup>76</sup> Code, § 2390. This is the form used in the Circuit Court, but it is equally good in the Chancery Court.

<sup>77</sup> Bank v. Foster, 6 Pick., 735.

<sup>78</sup> See Seifreid v. People's Bank, 2 Tenn. Ch., 20; 1 Bax., 200; Wilson v. Eifler, 7 Cold., 31.

<sup>79</sup> Code, §§ 2931-2932.

<sup>80</sup> This rule is not to be understood as applying to pleas to ancillary attachments; but it applies to pleas to all other writs.

It is easily seen, how, on principle, the sustaining of a plea in abatement will result in the dismissal of a suit at law; because a suit at law is commenced by summons, Code, § 2813; and if the summons becomes null for any reason, the suit grounded on it must become null also; for, *sublato fundamento cadit opus*. But a suit in Chancery is begun by the filing of the bill, Code, § 4312, and not by the issuance of the subpoena; and it is hard to see how abating the subpoena will abate the bill, in those cases where the plea is founded on an illegal issuance or service of process, to say nothing of the injustice of punishing the complainant for a wrong done by a Clerk, or Sheriff, himself an officer of the law. Nevertheless, it has been adjudged that such is the effect. Martin v. Ramsey, 7 Hum., 260. The Code, treating of pleas in abatement to the process, evidently refers

to suits at law, using the term, "actions;" Code, § 2502; while the pleas in abatement under the head of Chancery practice are pleas to the local and personal jurisdiction of the Court; Code, §§ 4309: 4384-4385; and not pleas to the process. Parker v. Porter, 4 Yerg., 81. Pleas in abatement to the process are unknown in Equity pleading, and the practice of abating suits in Equity, by plea in abatement to the process, is an anomaly; but it may be law. Baker v. Compton, 2 Head, 471. But, see Grove v. Campbell, 9 Yerg., 7; Wilson v. Scruggs, 7 Lea, 639; Battelle v. Youngstown R. M. Co., 16 Lea, 364; Rogers v. O'Mary, 11 Pick., 514.

<sup>81</sup> Whittaker v. Whittaker, 10 Lea, 97; Parmlee v. Railroad, 13 Lea, 602; Code, § 4395.

<sup>82</sup> Code, § 3203. This section may not be obligatory on the Chancellor; but it is a good guide, and ought to be followed, except when its operation would be inequitable.

<sup>83</sup> Code, § 4395; Whittaker v. Whittaker, 10 Lea, 98; Simpson v. Railway Co., 5 Pick., 308.

<sup>84</sup> The next rule day, or such further time as the Court may prescribe, is allowed the defendant in which to answer the bill. Code, § 4395. If Court be in session the next day, that day would be the next rule day.

abandonment of his plea;<sup>85</sup> but under the present practice he has the right to defend on the merits after his plea has been found untrue on the facts.<sup>86</sup>

Where, however, the issue tendered by a plea in abatement, is tried on its merits, upon an issue of fact, if the plea be found false, the complainant, prior to the Act of 1897, was entitled to an order taking his bill for confessed, and a final decree thereon;<sup>87</sup> but now the defendant has the right to plead over to the merits, or answer.<sup>88</sup> The entry on the minutes of the Court, in case of a trial on an issue of fact, may be as follows:

**DECREE ON THE HEARING OF A PLEA IN ABATEMENT.**

John Doe,  
vs.  
Richard Roe. } No. 314.

This cause came on to be heard, this 18th day of April, 1891, before the Chancellor [*or*, before the jury heretofore demanded in the cause, to-wit: William Brown and—*naming them all*—who were duly sworn well and truly to try and determine the issue made] on the plea in abatement, and the proof having been read [*or*, heard, *if tried by a jury* and argument of counsel heard, the Chancellor [*or* jury] finds the issue in favor of the defendant.

It is, therefore, decreed by the Court that the bill be dismissed, and that complainant and Frank Friend, his prosecution surety, pay all the costs of the cause, for which let execution issue.

[*If the issue be found in favor of the complainant, insert after the words, "in favor of," in the above form, the following:*] the complainant. And the defendant not applying for leave to plead over or answer,<sup>89</sup> it is, therefore, decreed by the Court that the bill of complaint be taken for confessed. And, thereupon, this cause coming on to be further and finally heard upon the bill, the order *pro confesso*, and the whole record, upon consideration thereof, the Court orders and decrees [*then give the decree complainant is entitled to, on a pro confesso.*]

If the defendant has pleaded in abatement and answered at the same time, as he has the right to do under the Act of 1897, and the cause is heard at the same time upon the issues made by the bill and plea, and by the bill and answer, then this decree will be modified, as follows:

[*If the issue on the plea be found in favor of the complainant, insert after the words "in favor of" in the first paragraph of this decree the following:*] the complainant.

And thereupon, this cause coming on to be further [*and finally, if it be a final decree,*] heard upon the bill and the answer of the defendant thereto, and the evidence, and whole record in the cause, and argument of counsel, the Court is of opinion that complainant is entitled to the relief by him specially prayed in his bill.

It is, therefore, decreed by the Court that complainant have and recover of the defendant the sum of seven thousand, six hundred and fifty-four dollars and thirty-two cents (\$7,654.32) and all the costs of the cause, for which an execution will issue.

[*If any property has been attached, omit all of the decree after the words "costs in the cause," and recite that property has been attached, and order its sale as shown in § 887, post. If complainant has a lien upon any property, let the decree so recite and declare the lien, and then order the property to be sold as shown in § 567, post.*]

The Act of 1897 provides that a plea in abatement and an answer may be filed at the same time, and when so filed shall be heard at the same time, in which case the decree may be as follows:

<sup>85</sup> *Wilson v. Scruggs*, 7 Lea, 635; *Union County v. Knox County*, 6 Pick., 541.

<sup>86</sup> Acts of 1897, ch. 121, § 1. While the defendant has the right to defend on the merits after his plea in abatement has been overruled, he is not obliged to take advantage of the right. See *Waiver, ante*, § 71. See also, *Sewell v. Tuthill & Pattison*, 4 Cates, 271.

<sup>87</sup> 1 Barb. Ch. Pr., 125. The Code, § 4393, says that if a plea be found false, the complainant shall have the same advantages as if it had been so found by verdict at common law; and at law, this advantage is equivalent to a judgment by default. *Bacon v. Parker*, 2 Tenn., (Overt.) 55; *Wilson v. Scruggs*, 7 Lea, 635; *Simpson v. Railway Co.*, 5 Pick., 304.

This last case expressly overrules *Battelle v. Youngstown R. M. Co.*, 16 Lea, 355.

<sup>88</sup> Acts of 1897, ch. 121. The phraseology of this statute would indicate that its framer had suits at law exclusively in mind.

<sup>89</sup> The defendant can waive the benefit of the Act of 1897; and, if he fail to plead over or answer at once, or to apply for leave so to do, when his plea in abatement is overruled on an issue of fact, he will be deemed to have waived such benefit, and a *pro confesso* and final decree can at once be pronounced against him, as was the practice prior to the Act of 1897. *Sewell v. Tuthill & Pattison*, 4 Cates, 271. See *Waiver, ante*, § 71.

**DECREE ON BILL, PLEA IN ABATEMENT, ANSWER AND PROOF.**

John Doe, <i>et al.</i> , <i>vs.</i> Richard Roe.	}	In Chancery Court at Dandridge.
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This cause coming on this day to be heard upon the bill, the plea in abatement and the answer, and the proof having been read as to all the issues and argument of counsel heard; the Court finds the issue on the plea in abatement in favor of the defendant. It is, therefore, decreed that the bill be dismissed, and that complainant and Frank Friend, his prosecution surety, pay all the costs of the cause, for which an execution is awarded.

If the issue on the plea in abatement is found against the defendant, then omit all in the above decree after the words "in favor of" and insert, in lieu, the following:

the complainant. And the Court being of opinion that the complainant is entitled to the relief by him prayed, it is, therefore, ordered, adjudged and decreed, that [*For forms of decrees, see post, §§ 566-568.*]

**§ 265. Effect of the Trial of a Plea in Abatement in Attachment Suits.**—If the plea in abatement is to an original attachment and the defendant is not before the Court by service of subpoena, or by voluntary appearance outside of his pleadings, and the issue on the plea be found in his favor, the bill will be dismissed, as shown in the preceding decree; but if the defendant is before the Court, and has answered as well as pleaded in abatement, if his plea be found in his favor, and the issues on bill and answer be found in favor of the complainant, then the attachment will be discharged, a decree rendered in complainant's favor on the bill and answer, and an execution awarded for the amount of the decree. In such case, in the preceding decree omit all after the words, "in favor of the defendant," an insert, in lieu, the following:

It is, therefore, decreed that the writ of attachment be quashed and the levy thereunder released and discharged, and the costs incident to the attachment will be paid by the complainant.

The Court, also, finds the issues raised by the bill and answer in favor of the complainant; and it is, therefore, ordered, adjudged and decreed that [*For forms of decrees, see post, §§ 566-568.*]

If the issues on the plea in abatement to the original attachment be found in favor of the complainant, and the issues on the bill and answer be, also, found in favor of the complainant, then omit all after the words "in favor of" in the foregoing decree, and insert, in lieu, the following:

the complainant.

It is, therefore, decreed by the Court that the plea in abatement be overruled and disallowed.

And the Court, being of opinion that the complainant is entitled to the relief by him prayed, it is, therefore, ordered and decreed that [*Here insert decree as prayed, and order the property attached to be sold. For forms, see post, § 887.*]

If the Court on the hearing should decide against both the plea in abatement and the bill, then the bill will, of course, be dismissed, and the costs of the suit apportioned accordingly, adjudging the costs incident to the plea against the defendant, and the balance of the costs against the complainant, unless Equity otherwise require.



## CHAPTER XIV.

### MOTIONS TO DISMISS BILLS.

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| <p>§ 266. The Office of a Motion to Dismiss.</p> <p>§ 267. The Grounds of Motions to Dismiss.</p> <p>§ 268. Motion to Dismiss for Want of Equity on the Face of the Bill.</p> <p>§ 269. Motion to Dismiss Because the Form of the Bill is Unknown.</p> | <p>§ 270. Motion to Dismiss for Want of Jurisdiction of the Defendant.</p> <p>§ 271. Motion to Dismiss for Want of a Prerequisite of the Writ.</p> <p>§ 272. Motion to Dismiss on Other Grounds.</p> <p>§ 273. When a Motion to Dismiss Must be Made.</p> |
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§ 266. **Office of a Motion to Dismiss.**—If there appear in the record, some fatal irregularity in the bringing or prosecution of the suit, or, if some fatal defect be manifest on the face of the bill, the Code provides that the bill may be dismissed on motion of the defendant, because of such irregularity, or defect. The object of the motion is to summarily end the suit; and, as a consequence, the ground of the motion must be both manifest and conclusive. If, by amendment, the irregularity can be remedied, or, if the defect or omission can be supplied, it is the duty of the Court to allow it to be done;<sup>1</sup> for Courts are instituted to enable complainants to have a hearing on the merits. If, however, it is manifest from the positive averments of the bill, or from other matters affirmatively appearing, that the defect is fatal, and cannot be remedied, the bill will be dismissed. The statute provides this summary method by motion because, in such a case, the complainant having no standing in the Court, the sooner the suit is ended the smaller the costs he will be obliged to pay.

§ 267. **Grounds of Motions to Dismiss.**—A bill may be dismissed on motion of the defendant:

1. For want of equity on its face.
2. Because unknown to the forms of the Court.
3. If it appear on the face of the bill, that the Court has no jurisdiction of the person of the defendant.
4. For want of any of the prerequisites to the issuance of the writ.
5. For mis-joinder or non-joinder of parties, where the fact appears on the face of the bill.
6. For multifariousness.

7. For such other grounds as may be specially declared sufficient by the Code.<sup>2</sup> Some of these other grounds are: (1) champerty;<sup>3</sup> (2) the omission of the allegation, in an insolvent estate bill, that the estate amounts to one thousand dollars in value;<sup>4</sup> and (3) a failure to speed a cause according to a rule.<sup>5</sup> All of these grounds will be more fully considered in the following sections. The 1st, 3d, 5th, and 6th causes of dismissal, are in the nature of demurrers *ore tenus*, and may be raised by demurrer;<sup>6</sup> but the demurrers for such causes must be special enough, not to fall under the ban against general demurrers. A bill cannot be summarily dismissed on motion, except for the causes above enumerated.<sup>7</sup>

<sup>1</sup> Code, §§ 4387; 2863-2869.

<sup>2</sup> Code, § 4386.

<sup>3</sup> Code, § 1783.

<sup>4</sup> Code, § 2365; see, as to amounts, Code, § 2362; and *Steel v. Maness*, 15 Lea, 143.

<sup>5</sup> Code, § 4390.

<sup>6</sup> By the Code, § 4388, the 1st, 5th and 6th causes of dismissal, may also be raised by demurrer, and by §§ 4309, 4319, it is enacted that the jurisdiction of the Court may, also, be resisted by demurrer.

<sup>7</sup> *Ford v. Bartlett*, 3 Bax., 22.

§ 268. **Motion to Dismiss for Want of Equity on the Face of the Bill.**

Whenever (1) the supposed rule of law or Equity, on which the bill is founded, manifestly does not exist; or (2) if existing, whenever the facts alleged manifestly fail to bring the case within such rule; or (3) if within the rule, whenever the facts alleged clearly show that the case falls within some manifest exception to the rule; in each of these three cases, there is a want of equity on the face of the bill, and a motion to dismiss the bill for that cause will be sustained.

The Court will not, however, sustain the motion, unless the cause thereof be not only good, but manifestly good; by which is meant, that the Court will not, on such a summary motion, search the bill for fatal defects, nor weigh in delicate balances any nice points of law urged against the bill. Such matters must be brought forward by demurrer. If there be any ground for reasonable debate, as to whether there is a want of Equity, the motion to dismiss will be overruled. Indeed, it may be said generally, that the want of Equity, to justify a motion to dismiss on that ground, must be so manifest and so complete, that the Chancellor would not be reversed, if he should dismiss the bill on his own motion.<sup>8</sup>

If there be any Equity, at all, on the face of the bill, even if it be defectively stated, the motion to dismiss cannot prevail;<sup>9</sup> and, on such a motion, every reasonable presumption is to be made in favor of, rather than against, the bill.<sup>10</sup>

§ 269. **Motion to Dismiss, Because the Form of the Bill is Unknown.**—While the Chancery Court looks to substance and not to form, yet form is necessary to substance. If the essential formalities of a bill were not adhered to, it would widen into such a loose indefiniteness of style and statement, and into such an utter abandonment of method and meaning, that it would be impossible oftentimes to define its substance amid the chaotic conglomeration of its multiform informalities. Pleadings must have some form;<sup>11</sup> and no party has a right to substitute his own form of a bill, for the form sanctioned by the Court. In Chancery, no form is required not necessary to a clear, orderly, and respectful presentation of complainant's grounds of suit; and common politeness and good manners both require that this necessary and simple form be substantially adhered to. The dignity of the Court, and the due, decent, orderly and accurate administration of justice, require that the ordinary form of a bill should not be substantially departed from.

A bill will, therefore, be dismissed if it be unknown to the forms of the Court.<sup>12</sup> If a bill (1) should be addressed not to the Chancellor but to the Clerk, or should have no address; or (2) if it should contain no prayer; or (3) if it should be in rhyme; or (4) if it should fail to name the parties defendant; or (5) if it should be in a foreign language, or so badly written as to be illegible; or (6) if it should be unintelligible; or (7) if it failed to give the names and residences of the parties; in any and all such cases, the bill would probably be deemed unknown to the forms of the Court, and would be dismissed on motion.

<sup>8</sup> *Quinn v. Leake*, 1 Tenn. Ch., 70; *Henderson v. Mathews*, 1 Lea, 34; *Earles v. Earles*, 3 Head, 367; *Mayse v. Biggs*, 3 Head, 36; *Thompson v. Paul*, 8 Hum., 117; *Merriman v. Norman*, 9 Heisk., 269; *Knight v. Atkinson*, 2 Tenn. Ch., 384; *Anderson v. Mullenix*, 5 Lea, 287.

<sup>9</sup> *Anderson v. Mullenix*, 5 Lea, 287; *Randall v. Payne*, 1 Tenn. Ch., 137; *Colville v. Colville*, 9 Hum., 524; *Thompson v. Paul*, 8 Hum., 114; *Henderson v. Mathews*, 1 Lea, 34.

<sup>10</sup> *Kerr v. Kerr*, 3 Lea, 227; *Anderson v. Mullenix*, 5 Lea, 287. *Ut res magis valeat quam pereat*. This maxim applies to bills when questioned by a motion to dismiss, or by a demurrer. See §§ 63; 317, note 4.

<sup>11</sup> *Forma dat esse*. The want of form constitutes a just objection to the proceedings in every Court of Justice; for to reject all form would be destructive to the law as a science, and would introduce great

uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked, that infinite mischief has been produced by the facility of Courts of Justice in overlooking errors in form. It encourages carelessness; and places ignorance too much on a footing with knowledge. To which it may be added, that it often exposes the parties themselves to no small hardships, by embarrassing them at every step in the progress of the cause; and involving the merits of the cause in superfluous details and inartificial allegations, at once loose, obscure, and misleading. *Sto. Eq. Pl.*, § 454.

The disregard of form is a glory in a Court, but a shame in a litigant. Form is the scabbard of the sword of justice that keeps it bright and keen.

<sup>12</sup> Code, § 4386.

But, if a bill contains allegations sufficient, if true, to entitle the complainant to some relief, the fact that the bill is inartificially drawn, or is misnamed by the draftsman, will not justify a motion to dismiss. In such a case, the Court judges the bill, not by its name, or want of technical precision in its frame and averments, but by its substance,<sup>13</sup> and the matters of Equity it sets forth. While the proper name of the bill will not atone for defects of substance, yet proper substance will atone for a defect in the name. The name of a bill is mere matter of form, and is absolutely immaterial; and, whatever be its name, the Court will look at its allegations and prayers, and judge the bill thereby, and not by the particular name it may happen to bear. The rights of the parties will be determined exclusively by the matters of Equity alleged, and not by the appellation given the bill by the complainant's solicitor.<sup>14</sup> This is especially true of bills not strictly original, some of which have highly technical names, and others have various objects and offices. All such bills are judged by their averments, and prayers for relief, and not by their names.<sup>15</sup>

What is meant by the maxim, that Equity regards the substance and not the forms of things, is that if there be sufficient substance in the pleading, the Court will not disregard that substance merely because of the want of some technical formality.<sup>16</sup>

§ 270. **Motion to Dismiss, for Want of Jurisdiction of the Defendant.**—It has already been shown that the Court will not entertain a bill, when it has no jurisdiction of the person of the defendant, provided objection is properly made on that ground. This want of jurisdiction, when not apparent on the face of the bill, must be made to appear by plea in abatement; but, when apparent, a motion to dismiss,<sup>17</sup> or a demurrer,<sup>18</sup> will lie to the bill. The local jurisdiction of the person of the defendant is a matter oftentimes of great importance to him; and when that jurisdiction is wanting, when the bill is not filed in the proper county, the defendant may object to the jurisdiction over him. This objection frequently appears on the face of the bill, because the Code requires the county residence of the parties to be stated in the bill;<sup>19</sup> and when the objection does so appear, the defendant may move that the bill as to him be dismissed.

§ 271. **Motion to Dismiss, for Want of a Prerequisite to the Writ.**—Before a subpoena can issue, or publication be made, the complainant must give the

<sup>13</sup> If the coin be gold a wrong name will not make it brass. The name is a mere tag. *Nomina mutabilia, res autem immobiles.* (Names are mutable but things are immutable.) No baptismal name is required for a bill, and no plea of misnomer will lie to it. *Majors v. McNeilly*, 7 Heisk., 295.

<sup>14</sup> Among the many authorities supporting the text: see: *Dodd v. Benthall*, 4 Heisk., 601; *Majors v. McNeilly*, 7 Heisk., 294; *Cheek v. Anderson*, 2 Lea, 194; *Northman v. Liverpool Ins. Co.*, 1 Tenn. Ch., 312; *Maddox v. Apperson*, 14 Lea, 599. See maxim, Equity looks to the intent rather than to the form, ante, § 43.

The Moloch of Formality erected by the Law, and on whose iron altars justice has been so often sacrificed, has never profaned the Temples of Equity. Technicalities should not be used as swords to perpetrate wrong, but as shields to protect the right. *Butler v. Kenzie*, 6 Pick., 34. There is no magic in forms or names in a Court of Equity. *Northman v. Insurance Co.*, 1 Tenn. Ch., 312. See §§ 43; 431, note 4; 681; 719; 64, sub-sec. 4; 139, note 19. *Nihil facit error nominis cum de corpore constat.* (An error of name amounts to nothing when there is certainty as to the thing itself.) *Præsentia corporis tollit errorem nominis.* (The presence of the body does away with the mistake in the name.) The bill being in the hands of the Chancellor, its prænomens is wholly immaterial, he will judge it from its allegations. The Code does not require a bill to have any Christian name. Code, §§ 4312; 4314.

<sup>15</sup> *Arnold v. Myers*, 1 Lea, 308; *Northman v. Liverpool Ins. Co.*, 1 Tenn. Ch., 312; 318; *Maddox v. Apperson*, 14 Lea, 599; *Murphy v. Johnson*, 23 Pick., 552.

<sup>16</sup> Forms are to the Courts what the levees are to

the Mississippi: they keep the course of justice in its proper channel.

<sup>17</sup> Code, § 4386.

<sup>18</sup> Code, §§ 4309; 4319.

<sup>19</sup> It would seem from Code, § 4309, that a motion to dismiss would, also, lie when it appears from the face of the bill, that the Court has no local jurisdiction of the subject-matter. Chancellor Cooper held, in *Shaw v. Patterson*, 2 Tenn. Ch., 171, that for a want of general jurisdiction of the subject-matter a bill could be dismissed on motion, under Code, § 4386, inasmuch as a general want of jurisdiction of the subject-matter is, ordinarily, all that is meant by want of equity on the face of the bill; and he cites in support of his holding, Code, § 4309; *Greene v. Starnes*, 1 Heisk., 582; and *Bennett v. Wilkins*, 5 Cold., 240. It must be considered, however, that § 4309 is in an article dealing exclusively with the Personal and Local Jurisdiction of the Courts, as shown by its contents and its title. In *Thompson v. Steger's Code*, section 4309 is said to have been drawn from the Act of 1801, ch. 6, § 16, modified; and the original section in that act reads as follows: "After answer filed, and no plea in abatement to the local jurisdiction of the Court, no exception for want of jurisdiction shall ever afterwards be made," meaning, of course, no exception for want of local jurisdiction. In considering a section of the Code regard must be had to the original statute, and to the title of the Article and Chapter of the Code, and the connection in which it is found. It seems reasonably plain, from various sections of the Code, that the general jurisdiction of the Court over the subject-matter in any civil case where the complainant is entitled to any relief, legal, or equitable, can only be resisted by demurrer. *Post*, §§ 289; 295;

required cost bond, or file the required pauper oath in lieu thereof. Such bond or oath is a prerequisite to the writ, and for the want of such a prerequisite the bill will be dismissed on motion.<sup>20</sup>

So, in an original attachment suit, a sworn bill containing a good ground for an attachment, and an attachment bond, or a pauper oath in lieu thereof, are prerequisites to the issuance of the writ of attachment, and for the want of either of such prerequisites, a motion to dismiss the bill will lie.<sup>21</sup>

The motion to dismiss may, also, be made in a case of a fatal defect in any of said prerequisites. The defects in the form of attachment bonds and affidavits may, however, be amended; and where no attachment bond, at all, has been given, or one fatally defective, a sufficient bond may be given, even after a motion to dismiss for want of a sufficient bond.<sup>22</sup>

A bill filed on Sunday, without the prerequisite affidavit, may be dismissed on motion.<sup>23</sup>

**§ 272. Motion to Dismiss, on Other Grounds.**—A bill may, also, be dismissed: (1) for mis-joinder or non-joinder of parties, where the fact appears on the face of the bill; (2) for multifariousness;<sup>24</sup> (3) for want of the allegation, in a bill to administer an insolvent estate, that the value of the estate equals one thousand dollars;<sup>25</sup> (4) for want of a prosecution bond, when the complainant's oath of poverty is shown to be untrue, or his cause of action frivolous or malicious, or is one that cannot be paupered;<sup>26</sup> (5) for failure of complainant to comply with a rule to speed the cause;<sup>27</sup> (6) for failure of a non-resident complainant to answer interrogatories, by a given day, on a peremptory order so to do;<sup>28</sup> (7) for champerty or maintenance;<sup>29</sup> (8) for uncleanness of complainant's hands; and (9) for want of jurisdiction over the subject-matter of the suit.<sup>30</sup> The last six grounds of dismissal may be relied on at any time before final decree,<sup>31</sup> the other three grounds must be taken advantage of in due season, or they will be waived.

A bill in Chancery cannot be ordinarily dismissed, on motion of the defendant, except for the causes enumerated in the statutes.<sup>32</sup> This does not, however, prevent a bill being dismissed by the complainant himself, either orally, in open Court, or in writing during vacation.<sup>33</sup>

**§ 273. When a Motion to Dismiss must be Made.**—The different modes of defence have been heretofore stated, and the order in which they must be relied on.<sup>33a</sup> It is too late to make a motion to dismiss because of some defect apparent on the face of the bill after demurrer, or plea in bar, or answer has been filed. The adoption of any one of these defences, is a waiver of the right to make a motion to dismiss.<sup>34</sup> The only mode of defence, that precedes a motion to dismiss, is a plea in abatement, a defence which seeks to end the suit by reason of some objection outside of the merits of the controversy, and outside

whereas, its local jurisdiction may be resisted by plea in abatement, demurrer, or motion to dismiss. Code, § 4309; *post*, § 292. This construction harmonizes all the sections of the Code on the subject, and harmonizes the vast majority of the decisions of our Supreme Court in reference to demurrers to the jurisdiction. One distinguishing feature of our practice is, that when a party objects to any matter in Court, he must specially designate the ground of his objection, and put his finger on it, by way of identification. It has been held that a demurrer for want of equity, admits the jurisdiction. *Chesney v. Rodgers*, 1 Heisk., 241; *post*, § 292; and so it cannot well be seen how a motion to dismiss for want of equity can deny the jurisdiction, unless the matter be absolutely beyond either legal or equitable cognizance.

<sup>20</sup> Code, § 4386. But defects in prosecution bonds, and in pauper oaths, may be supplied by amendment, or by new bonds, or oaths. *Morris v. Smith*, 11 Hum., 133; *Andrews v. Page*, 2 Heisk., 641; *Wilson v. Corry*, 1 Lea, 391; *Snyder v. Summers*, 1 Lea, 481; *Adamson v. Hurt*, 3 Shan. Cas., 424. See, *ante*, § 182, note.

<sup>21</sup> *Bank v. Fitzpatrick*, 4 Hum., 311.

<sup>22</sup> Code, § 3477; *Alexander v. Lisby*, 2 Swan, 107; *Brooks v. Hartman*, 1 Heisk., 36. But only defects in the form of the attachment affidavit are amendable. *Lillard v. Carter*, 7 Heisk., 604.

<sup>23</sup> A lawfully filed bill is one of the prerequisites of a writ.

<sup>24</sup> Code, § 4386. See, also, §§ 4325-4327 *Johnson v. Brown*, 2 Hum., 327.

<sup>25</sup> Code, § 2365.

<sup>26</sup> Code, § 3194.

<sup>27</sup> Code, § 4390. The rule, however, must precede the dismissal. *Kain v. Ross*, 1 Lea, 76.

<sup>28</sup> Code, § 4464.

<sup>29</sup> Code, § 1783.

<sup>30</sup> The bill may be dismissed at any time when it appears that the Court has no jurisdiction of the subject-matter. *Travers v. Abbey*, 20 Pick., 665. See, *post*, §§ 290; 525.

<sup>31</sup> *Webb v. Armstrong*, 5 Hum., 379; *Dowell v. Dowell*, 3 Head, 502; *Markham v. Townsend*, 2 Tenn. Ch., 713.

<sup>32</sup> *Ford v. Bartlett*, 3 Bax., 22.

<sup>33</sup> Code, § 3199. But see, *post*, §§ 523-524.

<sup>33a</sup> *Ante*, §§ 231; 232.

<sup>34</sup> *Cooke v. Richards*, 11 Heisk., 711.

of the body of the bill. All of the grounds of a motion to dismiss, except the one for want of Equity, also seek to end the suit without contesting the merits. It is a rule of Courts, that, after a defendant has taken issue with the complainant on any of the merits of the controversy, he will not be allowed to set up any defence that is based on some matter outside of the merits. A motion to dismiss, therefore, must be made before demurrer, plea in bar, or answer, or it will not be entertained, except in the cases hereinbefore referred to.<sup>35</sup>

§ 274. **How a Motion to Dismiss May be Defeated, or Avoided.**—There are two ways to meet motions to dismiss: 1st, to show that the motion is not sustainable on the face of the record; and, if sustainable, 2d, to avoid the motion by supplying the defect. If no leave to supply the defect be necessary it should be supplied, if possible, before the motion to dismiss is argued; but if leave be necessary such leave should be applied for before or during the argument of the motion to dismiss.

The complainant may amend his bill, or supply the prerequisites of the writ, after a motion to dismiss has been made; and even after such a motion has been sustained.<sup>36</sup> In the latter case, however, the amendment must be made, or the prerequisite of the writ supplied, during the term at which the motion to dismiss was sustained; or at least, leave to amend, or to supply, must be obtained during such term, or within thirty days after the entry of dismissal, if the term is longer than thirty days.

**MOTION TO DISMISS BILL ALLOWED, AND DISMISSAL SET ASIDE.**

John Doe,	} No. 618.
<i>vs.</i>	
Richard Roe, <i>et al.</i>	

In this cause the defendants moved the Court to dismiss the bill for want of a prosecution bond or pauper oath in lieu, and, it appearing that no bond or oath has been filed, said motion is allowed, and the bill dismissed, at complainant's cost, and an execution will issue accordingly.

Thereupon, complainant tendered and filed a prosecution bond, and moved the Court to set aside and vacate the order dismissing his bill, which motion is allowed, and said order of dismissal is vacated and annulled, and the cause reinstated on the docket to be proceeded in.<sup>37</sup>

<sup>35</sup> See, *ante*, § 272.

<sup>36</sup> Code, §§ 4387; 4335. The Courts are as liberal, in allowing the prerequisites of the writ to be amended or supplied, as in allowing the bill to be

amended. *Sharp v. Miller*, 3 Sneed, 42; *Irvin v. Mathis*, 11 Hum., 603.

<sup>37</sup> A prosecution bond may be filed after the motion is made. See, *ante*, § 179.

CHAPTER XV.

DEMURRERS.

- ARTICLE I. Demurrers generally Considered.
- ARTICLE II. Demurrers by Allowance.
- ARTICLE III. Demurrers of Right.
- ARTICLE IV. Rules Governing Demurrers.
- ARTICLE V. Frame and Form of Demurrers.
- ARTICLE VI. Action of the Court on Demurrers.
- ARTICLE VII. Practical Suggestions concerning Demurrers.

ARTICLE I.

DEMURRERS GENERALLY CONSIDERED.

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|---|---|
| <ul style="list-style-type: none"> <li>§ 275. The Theory of Bills.</li> <li>§ 276. Office of a Demurrer.</li> <li>§ 277. Grounds of a Demurrer Analyzéd.</li> <li>§ 278. Demurrers of Right, and by Allowance.</li> </ul> | <ul style="list-style-type: none"> <li>§ 279. Demurrers to the Discovery.</li> <li>§ 280. Demurrers not Applicable to Pleas, or Answers.</li> </ul> |
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§ 275. **The Theory of Bills.**—Every bill presupposes some general rule of law or of Equity, whereby the Court addressed is authorized to grant to the complainant certain relief, on a certain state of facts, against the defendant; and on such supposition (1) alleges a state of facts intended to bring the complainant's case within the purview of this general rule; and (2) prays for the specific relief the rule gives, when the state of facts it contemplates has been established. When, therefore, a bill in Equity is thoroughly analyzed, it will be found to contain: (1) a presupposed rule of law, or of Equity; (2) the right of the particular Court addressed, to enforce that rule; (3) that the bill contains the substance of the case, contemplated by the rule; (4) that complainant is entitled to the relief given by the rule; and (5) that the defendant is chargeable with that relief.<sup>1</sup>

If (1) the rule of law or of Equity be such as complainant presupposes; and if (2) the Court addressed has jurisdiction to enforce that rule in the case made by the bill; and if (3) the case made by the bill is such as the rule contemplates; and if (4) the complainant is entitled under the rule to the special relief he prays for; and if (5) the defendant is the proper person to be held liable to complainant's specific demands, then the bill is a good one, on its face; and all that the complainant needs, to entitle him to relief, is proof of the material facts alleged in his bill. In such a case, the defendant must contest the case on the facts by plea, or by answer.

§ 276. **Office of a Demurrer.**—But, as each of these five component<sup>2</sup> parts of a bill is essential to the maintenance of a bill, if any one of them is wanting, or materially defective, the complainant would be entitled to nothing, even should he prove the facts he alleges. There would, therefore, no benefit accrue to him from such proof: and it would be a useless waste of time, trouble and money, to make such proof. In such a case, the Court allows the defendant to admit the

<sup>1</sup> See, *ante*, § 166; *post*, § 276, note 2.

<sup>2</sup> It may be objected, that the presupposed rule is not a part of the bill; it is true that it is not an actual *physical* part, but it is an implied *spiritual* part. The mind of man is not a physical part of him, and yet it is his most important part. So, the

presupposed rule of law, or of Equity, is really the very spirit of the bill, and every allegation recognizes, or is intended to recognize, the existence of this spirit. The reason the bill does not state the rule, is, that the Court is supposed to know it. The rule is an implied part of the bill.

truth of the bill, for the purpose of testing its sufficiency in law, by a pleading called a demurrer.<sup>3</sup>

A demurrer, therefore, is a pleading which raises questions of *law* only, and only such questions as arise on the face of the bill, taking the bill as true; and the questions ordinarily raised on the face of the bill by a demurrer, are, that supposing the facts to be as alleged in the bill, (1) the general rule of law or of Equity, presupposed by the bill, does not in fact actually exist, or at least not to the extent and with the effect supposed; (2) but, if so, that the facts set forth in the bill are not such as the rule contemplates and provides a remedy for; (3) but, if so, that the bill shows other facts which draw the case within some exception to the rule of law or Equity supposed; (4) but, if not so, the Court in which the bill is filed, is without jurisdiction to enforce the rule; (5) but if not so, that the complainant is not entitled to bring the suit; (6) but, if so, that the defendant is not liable to the particular relief prayed.<sup>4</sup>

And these various grounds of demurrer may be further summarized as follows:

1. Complainant mistakes the general rule of law; or,
2. He mistakes the force of the facts; or,
3. He mistakes the exceptions to the general rule of law; or,
4. He mistakes the forum; or,
5. He mistakes his rights under the law and facts; or,
6. He mistakes the defendant's liability.

§ 277. **Grounds of a Demurrer Analyzed.**—Taking into consideration the rules heretofore given, as to the various relations between the parties, and the duties arising from those relations, and considering demurrers in connection with those rules,<sup>5</sup> a demurrer to a bill should present one or more of the following objections:

1. The supposed law of the relation does not, in fact, exist; or, at least, does not exist for the purpose, or to the extent, assumed by the bill.<sup>6</sup>
2. The facts alleged in the bill do not show the relation contemplated by the supposed law.<sup>7</sup>
3. The facts alleged do not show any violation of the supposed law.<sup>8</sup>
4. The relief prayed is not of the character or extent allowed by the supposed law.<sup>9</sup>
5. The complainant shows in his bill some fact that puts his case within an exception to the supposed law.<sup>10</sup>
6. The defendant is not liable to the specific relief prayed.<sup>11</sup>
7. The Court addressed has no jurisdiction to enforce the supposed law in favor of the complainant and against the defendant, on the facts alleged, and to the extent prayed.<sup>12</sup>

All of these seven grounds may be condensed into one: The complainant

<sup>3</sup> The word demurrer comes, so Lord Coke has said, from the Latin word, *demorari*, to abide; and, therefore, he who demurs in law, is said to abide in law; *moratur*, or *demoratur in lege*, and will go no further, until the Court has decided whether the other party has shown sufficient matter, in point of law, to maintain his suit. Sto. Eq. Pl., § 441.

<sup>4</sup> A bill must not only show that the complainant is entitled to, or interested in, the subject-matter of the litigation, and is clothed with such a character as entitles him to maintain the suit, and that the defendant is also liable to the relief sought against him, or is, in some manner, interested in the dispute, and that there is such a privity between him and the complainant as gives the complainant a title to sue him, but it must, also, pray the Court to grant the proper relief suited to the case, as made by the bill; and if, for any reason, founded on the substance of the case, as stated in the bill, the complainant is not entitled to the relief he prays, either in the whole, or in part, the defendant may demur. 1 Dan. Ch. Pr., 325-326.

<sup>5</sup> *Ante*, §§ 165-167.

<sup>6</sup> As when a bill is filed to enforce a verbal contract made by a married woman, to give a lien on land to secure money borrowed to pay for the land. *Durant v. Davis*, 10 Heisk., 522.

<sup>7</sup> As when a bill for divorce from bed and board, and for alimony, is filed by a woman who shows in her bill that at the time she married the defendant she had a living husband.

<sup>8</sup> As when a creditor files a bill to collect a debt shown not to be due. *Carter v. Turner*, 2 Head, 52.

<sup>9</sup> As when a judgment creditor, upon a *nulla bond* return, files a bill to reach money in the debtor's pocket, and to have him compelled, by attachment, to pay the judgment out of such money. *Webb v. Jones*, 13 Lea, 200.

<sup>10</sup> As when the bill shows that the suit is barred, or that there has been a former recovery, or any other defense in avoidance.

<sup>11</sup> As when a vendee seeks to have a specific performance of a sale of realty, admitted to be in parol.

<sup>12</sup> As when a divorce bill shows on its face that the complainant is a non-resident.

makes out in his bill no such case as entitles him to the relief he prays against the defendant, in the Court addressed. This, however, would be in the nature of a general demurrer, and for that reason not allowable. The specific reason, or reasons, why the complainant is not entitled to the relief prayed must be clearly stated. The demurrant must, so to speak, put his finger on the defect in the bill, and show precisely wherein it is a defect. General and indefinite demurrers will not avail.

§ 278. **Demurrers of Right, and by Allowance.**—The foregoing are really all the substantial grounds of demurrer the defendants have the real *right* to rely on; but there are some others which the Court *allows* the defendants to set up, in the interests of good pleading and of a proper administration of justice,<sup>13</sup> such as: 1, That the bill seeks to litigate only a part of a controversy; 2, That the complainant should be repelled, because his hands are unclean; 3, That all the persons necessary to a complete determination of the whole controversy, are not made parties; 4, That the complainant is guilty of *laches*; 5, That the bill is multifarious, it improperly confounding distinct grounds of suit; 6, That the bill contains repugnant causes of action; and 7, That there is another suit pending, for the same matter between the same parties. These grounds of demurrer being in the interest of good pleading, or of the proper administration of justice, and being for that reason allowed by the Court, are mere criticisms on the structure of the bill, or the conduct of the complainant; and, therefore, on sustaining such demurrers, the Court, on proper application, will, with two exceptions, grant complainant leave to amend his bill, or to otherwise obviate the objections raised by the demurrer, as he may be advised; whereas, when a demurrer, which is filed as a matter of right, is sustained, there is, generally, no ground for amendment, and the bill is dismissed. The two exceptions above mentioned are when the complainant has been guilty of iniquity, or of *laches*. Demurrers are allowed in these cases, not as a matter of right to the defendant, but because the Court, being a Court of Conscience, founded to redress unconscientious acts, will not assist a person whose own unconscientious conduct has aided in causing the wrong of which he complains, or whose *laches* has rendered it impossible for the Court to do him justice without great risk of doing the defendant injustice. No one has the right to call the powers of a Court of Equity into operation, unless his hands are clean and his feet are swift.

The reason demurrers of right usually end the suit when they are sustained, is that they either oust the Court of its jurisdiction, or show the want of substance in complainant's claim for redress. Demurrers by allowance, on the other hand, do not question either the jurisdiction of the Court, or the substance of a complainant's case. Demurrers of right show that, under the law, the defendant cannot be held liable in that suit, and in that Court. Demurrers by allowance submit to the Court the question, not whether the defendant is liable, but whether the Court ought, under the circumstances, to allow the complainant to proceed with his suit. Demurrers by allowance question the propriety of the suit, demurrers of right question its validity.<sup>14</sup>

§ 279. **Demurrers to the Discovery.**—If the bill seeks a discovery, to that extent it is in the nature of an examination of the defendant, as a witness, in support of the complainant's case. Hence, it inevitably follows that the defendant cannot be compelled to discover any matter he could not be called on to state as a witness; nor is the complainant entitled to any discovery not necessary to aid him in making out his own case. A bill for relief and discovery is both a pleading, and a series of interrogatories for the defendant to answer as a witness; and an answer to such a bill is both a pleading and a deposition.

<sup>13</sup> *Birdsong v. Birdsong*, 2 Head, 290; *Sto. Eq. Pl.*, § 135a.

<sup>14</sup> Demurrers of right may be termed demurrers

in bar; and demurrers by allowance, demurrers in abatement; but the terms used in the text are believed to be more expressive.



Treating it is a deposition, it may be stated, as a general rule, that whenever the evidence called for by the bill, could be resisted, if called for when the defendant was on the witness stand, it can be resisted on the same ground by demurrer to the bill.

Where a bill seeks both relief and discovery, the discovery being incidental to the relief, if the complainant is not entitled to the relief a demurrer will lie to the whole bill.<sup>15</sup>

§ 280. **Demurrers not Applicable to Pleas, or to Answers.**—Demurrers are inapplicable to pleas,<sup>16</sup> or to answers. If a plea be bad in substance, the course is not to demur to it, but to set it down for argument; and if then found bad, it is at once overruled. If an answer is insufficient, in its responses to the charges and statements in the bill, the objections are to be taken to it by exceptions filed. If it be in substance bad as a defence, and no further proofs are required by the complainant, the case can be set down for a hearing upon the bill and answer.<sup>17</sup>

ARTICLE II.

DEMURRERS BY ALLOWANCE.

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| <p>§ 281. Demurrers by Allowance generally Considered.</p> <p>§ 282. Demurrers Because the Bill is Not for the Whole Matter.</p> <p>§ 283. Demurrers Because of Want of Proper Parties.</p> <p>§ 284. Demurrers Because the Bill is Multifarious.</p> | <p>§ 285. Demurrers Because of Repugnancy.</p> <p>§ 286. Demurrers Because of the Pendency of Another Suit.</p> <p>§ 287. Demurrers Because the Complainant's Hands are not Clean.</p> <p>§ 288. Demurrers Because of <i>Laches</i>.</p> |
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§ 281. **Demurrers by Allowance Generally Considered.**—As already shown,<sup>1</sup> there are some grounds of demurrer which Courts allow, not because the demurrant has rights that the bill seeks to violate, nor because the complainant has no right to relief against the demurrant, but because the science of good pleading, or the proper administration of justice, is promoted by such demurrers. These grounds of demurrer are: 1, Because the bill is not for the whole matter; 2, Because there is a want of proper parties; 3, Because the bill is multifarious; 4, Because the complainant's hands are not clean; 5, Because of the *laches* of the complainant; and 6, Because of the pendency of another suit, between the same parties, about the same matter.

It is manifest that none of the foregoing grounds of demurrer are based on any right of the defendant; and that their allowance is wholly a matter within the discretion of the Court. In each of the six foregoing cases, the defendant may be in the wrong, and liable to the relief prayed; but in the first three of the foregoing cases the Court refuses to proceed further, when a demurrer is interposed, unless and until the complainant conforms his bill to the requirements of good pleading; and in the last three of the foregoing six cases the Court will ordinarily, on demurrer, stay its hand because the complainant has estopped himself from asking the aid of a Court of Conscience.

<sup>15</sup> 1 Dan. Ch. Pr., 547 n.  
<sup>16</sup> A demurrer will lie to a defective plea in a Court of law. Code, § 2928; Caruth. Law Suit, 215. In *Witt v. Ellis*, 2 Cold., 38, a plea supported by an answer was demurred to. Such a practice is irregular, but as Courts of Chancery look to substance, and not to forms, such a demurrer will be treated as equivalent to a motion setting the plea down for argument as to its sufficiency. *Klepper v. Powell*, 6

Heisk., 503. For the same reason, a motion to strike out a plea will be treated as equivalent to setting it down for argument as insufficient. *Brevard v. Sammar*, 2 Heisk., 97.  
 Setting a cause down for hearing on bill and answer is in the nature of a demurrer to the answer. <sup>17</sup> Sto. Eq. Pl., § 456; 1 Dan. Ch. Pr., 542, note. <sup>1</sup> *Ante*, § 278.

§ 282. **Demurrers Because the Bill is Not for the Whole Matter.**—A bill may be good as far as it goes, but it may not go to the full extent that complete justice may require; that is, it may seek to litigate a part of a matter only, leaving the balance open for further litigation. Of course, in such a case, the defendant would have no right to require the complainant to so shape his bill as to sue for the whole matter; but as Courts of Equity delight to do complete justice, and not by halves, and as they seek to prevent a multiplicity of suits, they allow a defendant, who has been sued as to a part only of given matter, to insist by demurrer that he shall be sued as to all, or as to none. And, in general, whenever it appears by the bill, that the object of the suit does not embrace all the relief, which the complainant is entitled to under the facts stated, the Court will allow a demurrer on that ground.<sup>2</sup> But, if a complainant should split his cause of action, and sue on one part of it, a recovery on that part will bar a suit on the balance.<sup>3</sup> This ground of demurrer, however, seldom appears on the face of a bill, except in case of bills filed for an accounting; and even in such a case, the defendant will seldom undertake, by demurrer, to force the complainant to enlarge his claim.

§ 283. **Demurrers Because of Want of Proper Parties.**—Who are the proper parties to a suit has been fully considered elsewhere.<sup>4</sup> Whenever the want of proper parties appears on the face of the bill, it constitutes a good ground of demurrer; but if no demurrer be filed, or motion to dismiss made, an objection at the hearing will avail nothing.<sup>5</sup>

Whenever a demurrer is put in for want of necessary 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 a manner as to point out to the complainant the objection to his bill, and to enable him to amend by making proper parties.<sup>6</sup>

On sustaining a demurrer for want of proper parties, the Court will always give leave to make the new parties, either by an amendment,<sup>7</sup> or by a supplemental bill, when substantial justice between the actual parties to the suit requires it. And even if the bill should be dismissed for this defect, the dismissal will be without prejudice to another bill.<sup>8</sup>

The general rule, requiring all persons in interest to be made parties, is not so much a right of the parties before the Court, as a rule prescribed by Courts of Equity themselves in order to prevent future litigation.<sup>9</sup> Hence, the Court will allow the necessary parties to be brought before the Court at any stage of the suit, even at the hearing.<sup>10</sup>

#### DEMURRER FOR WANT OF PARTIES.

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows that Roland Roe has an interest in the land sought to be sold, [or, has the legal title to the land sought to be sold, or, is interested in the account prayed to be stated,] and he is not made a party to the bill; for which reason, no complete decree can be made in the cause.

§ 284. **Demurrers Because the Bill is Multifarious.**—The subject of multifariousness has already been fully discussed.<sup>11</sup> The cases upon the subject of multifariousness are extremely various; and the Courts, in deciding them, seem to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule. Demurrers for multifariousness may be divided into two kinds. 1, Frequently, the objection raised to a bill, though termed multifarious, is, in fact, properly speaking, a misjoinder of causes of suit, the cases or claims asserted in the bill being of so different a character, that the Court will not permit them to be litigated in one

<sup>2</sup> 1 Dan. Ch. Pr., 558.

<sup>3</sup> 1 Dan. Ch. Pr., 330, note.

<sup>4</sup> *Ante*, §§ 80-131.

<sup>5</sup> Code, §§ 4325; 4337.

<sup>6</sup> Sto. Eq. Pl., § 543.

<sup>7</sup> Gray v. Hays, 7 Hum., 588.

<sup>8</sup> Sto. Eq. Pl. § 541.

<sup>9</sup> Sto. Eq. Pl., § 135 a.

<sup>10</sup> Code, §§ 4335-4337; Gray v. Hays, 7 Hum., 588; Birdsong v. Birdsong, 2 Head, 289.

<sup>11</sup> See, *ante*, § 149.

suit. It may be, that the complainants and the defendants are parties to all of the transactions which form the subject of the suit; but, nevertheless, those transactions may be so dissimilar, that the Court will not allow them to be joined together in one suit; but will require distinct suits. 2, But what is more familiarly understood by multifariousness, as applied to a bill, is, where a party is made a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatsoever. In such a case, a demurrer is allowed because uniting distinct matters in one record will put the parties to great and useless expense.<sup>12</sup>

But the objection of multifariousness must still be confined to suits, where the case of a particular defendant is entirely distinct and separate, in its subject-matter, from that of the other defendants. If the case against one defendant is so entire as to be incapable of being prosecuted in several suits, the fact that some other defendant may be a necessary party, to some portion only of the case stated, will not make the bill multifarious. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with others.<sup>13</sup>

Mere multiplicity of matters charged in the bill will not make it multifarious, if these matters have any such connection as renders their joint determination necessary or proper to the adjustment of all the equities arising from that connection, or from the complications of the case. Where the matters spring from a common root, or result from one transaction, or have any other connecting ligaments, they are not multifarious, however numerous.

The result of the principles to be extracted from the cases on the subject of multifariousness 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 complainants, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit without making it multifarious.<sup>14</sup>

And so, by the Code, the uniting in one bill of several matters of Equity, distinct and unconnected, against one defendant, is not multifariousness.<sup>15</sup>

The reason why the objection for multifariousness must be taken by the defendant by demurrer, and not at the hearing, is that this objection proceeds on the ground that the union of distinct matters creates unnecessary trouble and expense to the party who has no concern with some of the transactions, by putting him to the trouble and expense of litigating questions with which he has nothing to do; and if the defendant answers and takes his proof, the expense is in a great measure incurred, and it will be too late for him to complain, if he suffers the cause to proceed to a hearing.<sup>16</sup> And now, by statute, it is provided that the objection of multifariousness must be made by motion to dismiss, or by demurrer.<sup>17</sup>

**1. Essentials of Multifariousness.** To make a bill demurrable for multifariousness, it must contain *all* of the following characteristics:

1. It must join two or more causes of action against two or more defendants.

<sup>12</sup> Sto. Eq. Pl., § 530; 1 Dan. Ch. Pr., 334-346. Another reason for not allowing separate and distinct causes of suit, against separate defendants, to be litigated in one suit is, that the burden of adjudication is, thereby, greatly increased. Chancellors dread unnecessary complications, and often allow demurrers for multifariousness, not so much to benefit the demurrant as to relieve themselves from the increased burdens resulting from the entanglements of a heterogeneous litigation. They realize the great difficulty of doing complete justice when the record is very large, the parties very numerous, and the matters in controversy many and complicated. It is, also, impossible, in such cases, to equitably apportion the costs.

<sup>13</sup> Sto. Eq. Pl., § 271, *u.*

<sup>14</sup> Sto. Eq. Pl., § 533.

<sup>15</sup> Code, § 4327.

<sup>16</sup> Sto. Eq. Pl., § 271, note.

<sup>17</sup> The sections of the Code, upon the subject of multifariousness, are as follows:

4325. Multifariousness, misjoinder, or non-joinder of parties, is no sufficient cause for the dismissal of a bill in Equity, unless objection is made by motion to dismiss, or demurrer.

4326. If a demurrer for multifariousness is sustained, the Court may authorize amendments, by directing separate bills to be filed without new process as to the parties before the Court, and by the addition of new parties, or otherwise, as may be deemed necessary for the attainment of justice.

4327. The uniting in one bill of several matters of Equity, distinct and unconnected, against one defendant, is not multifariousness.

2. These two or more causes of action must have no connection or common origin, but must be separate and independent.

3. The evidence pertinent to one or more of the causes must be wholly impertinent as to the other, or others.

4. One or more of these separate and independent causes of action must be capable of being fully determined, without any necessity of bringing in the other cause or causes, in order to adjust any of the legal or equitable rights of the parties.

5. The decree proper, as to one or more of these separate and independent causes of action, must be exclusively against one or more of the defendants, and the decree proper as to the other cause or causes, must be exclusively against the other defendant, or defendants.

6. The relief proper against one or more of the defendants, on one or more of these separate and independent causes of action, must be distinct from the relief proper against the other defendant or defendants, on the other cause or causes of action.

7. The satisfaction of the proper decree by any one of the defendants, to the extent of his alleged liability, on any one or more of said distinct causes of action, must not be a satisfaction of the proper decree against the other defendants, on the other cause or causes of action.

8. Upon the consideration of the entire bill, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest.<sup>18</sup>

2. **Forms of Demurrers for Multifariousness.** The following are forms of demurrers for multifariousness, omitting the caption :

**DEMURRERS FOR MULTIFARIOUSNESS.**

[For title, commencement and conclusion, see post, § 310.]

Because it appears by said bill that it is brought against this defendant and various other defendants for distinct matters and causes of suit, with several of which this defendant is not alleged, or shown to be, in any manner interested or concerned, and that the bill is multifarious.

Because said bill is multifarious, in that it is filed against this defendant mainly to have a certain tract of land sold for partition; but it, also, seeks to recover alleged debts in no way connected with said land from the other defendants, and seeks to hold this defendant liable for an alleged balance due complainant as a former partner; and this defendant is not in any manner interested in or connected with the debts sought to be collected from his co-defendants, nor is said partnership in any way connected with said land.

Because the bill is multifarious, in that it seeks to recover from him a debt alleged to be based on certain mercantile transactions with which it is not charged the other defendants are concerned; and seeks to recover rents and damages for waste from the other defendants, and it is not charged that this defendant is in any way liable for either said rents or said damages.

§ 285. **Demurrers Because of Repugnancy.**—Where the bill sets out two or more distinct causes of action against the same defendant which are repugnant, or contradictory, or inconsistent, a demurrer will lie on that ground. Thus where the bill sets forth a cause of suit based on the validity of a writing, and another cause based on facts that invalidated the writing, and the reliefs prayed were inconsistent, a demurrer for repugnancy will lie.<sup>19</sup> The difference between repugnancy and multifariousness seems to be that the former sets up discordant grounds of suit against one or more defendants, while multifarious bills set up distinct grounds of suit against several defendants. The Code rule,<sup>20</sup> allowing several distinct causes of action against one defendant, does not contemplate repugnant causes of action.

§ 286. **Demurrers Because of the Pendency of Another Suit.**—If the bill show that another suit is pending between the same parties, about the same

<sup>18</sup> The correctness of these tests will be found fully supported by the adjudications on the subject of multifariousness, as well as by the text books: *ante*, § 149. See also, *Berdanatti v. Sexton*, 2 Tenn. Ch., 704. In *Dechard v. Edwards*, 2 Sneed, 99, our Supreme Court, through Judge Caruthers, say: "It would be inconsistent with the liberalized practice

and rules of pleading of the present day, [1854] to defeat by demurrer a clear equity, for multifariousness or misjoinder as to parties." And see Code, §§ 4325-4327.  
<sup>19</sup> *Bynum v. Ewart*, 6 Pick., 655; see, *ante*, § 149.  
<sup>20</sup> Code, § 4327.

matter, in a Court of concurrent jurisdiction, a demurrer will lie.<sup>21</sup> Thus, where the County or Circuit Court has rightful jurisdiction, concurrent with the Chancery Court, over a particular matter, a demurrer will lie on that ground to a bill in Chancery seeking to assume the jurisdiction of such matter then pending in either the Circuit or County Court, and to enjoin further proceedings in such matter in the latter Court.<sup>22</sup>

§ 287. **Demurrers Because the Complainant's Hands are not Clean.**—He who has done iniquity shall not have equity. Courts of Conscience require of their suitors, that they shall not have willingly participated in any unconscientious or illegal transaction, which they are asking the Court to enforce, to set aside, or to correct. As a rule, whenever it appears on the face of the bill that the complainant's hands are stained with any iniquity, or illegality, connected with the subject-matter of the suit, a demurrer will be allowed, for, according to the maxim, *in pari delicto potior est conditio defendentis*.

But if the complainant was not in equal fault, or if public policy requires it, the Court may allow him relief, even where he has, to some extent, participated in the wrong he seeks to have righted.

The demurrer because the complainant's hands are not clean may be as follows:

**DEMURRERS BECAUSE COMPLAINANT'S HANDS ARE NOT CLEAN.**

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows that the complainant conveyed the land, he now seeks to recover, to this defendant for the purpose of hindering and delaying his creditors; and that he willingly, knowingly, and actively participated in the fraud of which he complains.

Because the bill shows that the note sued on was given [or, that the contract sought to be enforced was based] on an iniquitous consideration [or, on an immoral, or illegal consideration.] to the enforcement of which this Court will not lend its aid.

§ 288. **Demurrers Because of Laches of Complainant.**—Equity assists those who are vigilant, and not those who sleep on their rights. Nothing can call the Court into activity but diligence and good faith. If, therefore, the bill discloses gross *laches* on the part of the complainant, especially in bills for injunction, or specific performance, or in cases where prompt disaffirmance was necessary, or where acquiescence is grossly reprehensible, the Court will allow a demurrer because of such *laches*.<sup>23</sup>

<sup>21</sup> Dan. Ch. Pr. 561.

<sup>22</sup> Parkes v. Gilbert, 1 Bax., 97; Rhea v. Meredith, 6 Lea, 608.

<sup>23</sup> Sto. Eq. Pl., § 503, note. See, ante, §§ 49; 69-70.

ARTICLE III.

DEMURRERS OF RIGHT.

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| <p>§ 289. Demurrers Because of Want of Equity in the Bill.</p> <p>§ 290. Demurrers Because of Want of Jurisdiction in the Court.</p> <p>§ 291. Demurrers Because the Value of the Subject-Matter is Beneath the Dignity of the Court.</p> <p>§ 292. Demurrers Because the Bill has been Filed in the Wrong County.</p> <p>§ 293. Demurrers Because the Suit is for Injuries Involving Unliquidated Damages.</p> <p>§ 294. Demurrers Because the Complainant has a Plain, Adequate, and Complete Remedy at Law.</p> | <p>§ 295. Demurrers Because the Subject-Matter of the Suit is Unfit for, or Foreign to, a Court of Equity.</p> <p>§ 296. Demurrers Because the Bill Seeks to Enforce a Penalty, or Forfeiture.</p> <p>§ 297. Demurrers Because the Facts do not Bring the Case within a General Rule.</p> <p>§ 298. Demurrers Because the Case Falls Within some Exception to the General Rule.</p> <p>§ 299. Demurrers Because the Complainant is not Entitled to Bring the Suit.</p> <p>§ 300. Demurrers Because the Defendant is not Liable.</p> |
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§ 289. **Demurrers Because of Want of Equity in the Bill.**—Following, then, the logical subdivision of the grounds of demurrer heretofore stated,<sup>1</sup> the first cause of demurrer to be considered is, that, taking the facts as stated in the bill to be true, there is no rule of law or of Equity whereunder the complainant is entitled to the relief he seeks, or to any relief. While this is a good ground of demurrer<sup>2</sup> when specifically applied to the facts stated, yet, if put in the old form, “There is no equity in the bill,” or in any similar general form, it will be deemed too general for a special demurrer.<sup>3</sup> The result is, whenever there is a manifest want of Equity in the bill, or in other words, whenever the general rule of law or Equity presupposed by the bill does not in fact actually exist, or, at least, does not exist to the extent and with the effect supposed, the defendant usually takes advantage thereof by a motion to dismiss,<sup>4</sup> which is a sort of statutory parol demurrer.

There are violations of moral duties which Courts do not undertake to redress, because not attended with pecuniary loss, or not involving a breach of legal obligation.<sup>5</sup> There are, also, equities so mixed up with iniquities that a Court of Conscience will not soil its hands by trying to separate the one from the other.<sup>6</sup> There are cases of strict legal right, accompanied with such circumstances of oppression and injustice, that a Court of Equity will not lend its aid in enforcement of such an unconscientious advantage.<sup>7</sup> There are pecuniary injuries done which cannot be redressed because of some other rule of law or Equity more important to be observed, growing ordinarily out of dealings with persons under disability,<sup>8</sup> or resulting from a failure to comply with some statutory requirement.<sup>9</sup> There are cases where pecuniary compensation by way of Damages is manifestly the appropriate remedy, and a specific performance impracticable, if not impossible.<sup>10</sup> There are matters which estop a complainant from setting up what would otherwise have been legal or equitable rights, and thereby defeat his suit.

<sup>1</sup> *Ante*, §§ 276-277.

<sup>2</sup> *Code*, §§ 4386; 4388.

<sup>3</sup> *Ante*, § 277; *post*, § 305.

<sup>4</sup> *Code*, § 4386.

<sup>5</sup> Such as the disinheritation of a deserving child, or the breach of a contract based on no consideration.

<sup>6</sup> As where money was given to be used for some illegal, or immoral, purpose, and the complainant seeks to recover it back, because the defendant misused it.

<sup>7</sup> As where a former guardian comes into a Court

of Equity to enforce a contract made with his ward, the day after he attained his majority, wherein the defendant agreed to convey him land, for a grossly inadequate consideration.

<sup>8</sup> Such as loans of money to, or executory contracts with, infants, unmarried women, and lunatics.

<sup>9</sup> Such as the statute of frauds; and the registration laws.

<sup>10</sup> Such as suits to compel the defendant to marry the complainant, or to paint a picture, write a book, and the like.

In all such cases, and, also, in all criminal cases, and cases of a criminal nature, a Court of Equity refuses to take jurisdiction, because there is in them a manifest want of Equity; and bills in such cases may either be dismissed on motion for want of Equity, or a special demurrer will lie to the bill.

The following form will indicate how a demurrer, for want of equity on the face of the bill, must be drawn in order not to be a general demurrer:

**SPECIAL DEMURRERS FOR WANT OF EQUITY.**

[For title, commencement, and conclusion, see *post*, § 310.]

Because the complainant is not entitled to the relief he prays, nor to any relief, his bill showing that the contract sued on was voluntary and without consideration [*or*, was not reduced to writing.]

Because the complainant is not entitled to the relief he prays, nor to any relief, his bill showing that he had constructive notice by registration of this defendant's title [*or*, had actual notice of this defendant's equities] when he made the purchase he is now seeking to enforce.

Because the complainant is not entitled to the relief he prays, nor to any relief, the matters contained in his bill not being such as create any obligation on the part of this defendant, enforceable in the Chancery Court, by reason of the infancy [*or* coverture] of this defendant.

**§ 290. Demurrers Because of Want of Jurisdiction in the Court Over the Subject-Matter.**—Jurisdiction is the rightful authority and power of a Court, to determine a controversy, and grant the appropriate relief. Hence, it is the first and fundamental rule that, whatever the object of the bill, it must state a case within the jurisdiction of the Court addressed. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured, either by waiver or consent. Consent may cure a want of local jurisdiction, and will give jurisdiction of the person, but not of the subject-matter.<sup>11</sup> If the Court has no jurisdiction of the subject-matter, all of its proceedings are void, and its decrees in the case are nullities,<sup>12</sup> except it be a decree dismissing the bill and adjudging the costs thereof against the complainant.

If, therefore, the bill shows that the Court has no jurisdiction of the subject-matter, the defendant should demur to it on that ground. For instance, if the bill should call on the Court to try a criminal case, or an issue of *devisavit vel non*, or an appeal from another Court, or an action for injuries to person, property or character, involving unliquidated damages, or a proceeding by *certiorari*, or a contest over the election of a Sheriff, in any such case a demurrer will lie. But the matters over which the Court has, and has not jurisdiction, having heretofore been considered, will not be here repeated.<sup>13</sup>

But, in order to sustain a demurrer to the whole bill, for want of jurisdiction of the subject-matter, it must appear that no substantial and essential part of the complaint is within the jurisdiction of the Court. Where any matter set up in a bill is within the jurisdiction, the bill will be sustained as against a demurrer to the whole bill, even though there be matters in the bill clearly without the jurisdiction.<sup>14</sup> A demurrant, in such cases, must confine his demurrer to so much of the bill as is objectionable, or his demurrer will be overruled because too broad;<sup>15</sup> and the demurrer must specially state that the objection is for the want of jurisdiction.<sup>16</sup>

There may, also, be a want of local jurisdiction of the subject-matter, or of the person, but this sort of want of jurisdiction will be considered later.<sup>17</sup>

<sup>11</sup> The rule, that if the defendant answers without objecting to the jurisdiction of the Court, he cannot thereafter object to the jurisdiction, must be taken with the qualifications, (1) that the Court has jurisdiction of the subject-matter; (2) that it is competent for the Court to grant the relief sought; and (3) that the case is fit to be investigated in a Court of Equity. 1 Dan. Ch. Pr., 550, note; *Stockley v. Rowley*, 2 Head, 493; *Starnes v. Newsom*, 1 Tenn. Ch., 245; *Baker v. Mitchell*, 21 Pick., 610; *Travers v. Abbey*, 20 Pick., 665. See *Hooper v. Rhea*, 3 Shan. Cas., 145. If the Court has no jurisdiction of

the subject-matter the bill may be dismissed, *mero motu*, at any time. See, *post*, § 525. Even consent cannot confer jurisdiction over the subject-matter. See *Nashville v. Webb*, 6 Cates, 432.  
<sup>12</sup> *Sto. Eq. Pl.*, § 10.  
<sup>13</sup> *Ante*, §§ 16-30.  
<sup>14</sup> 1 Dan. Ch. Pr., 549, note; *Bittick v. Wilkins*, 7 Heisk., 312; and cases cited, *post*, § 306.  
<sup>15</sup> *Post*, § 306.  
<sup>16</sup> *Post*, § 306.  
<sup>17</sup> *Post*, §§ 292; 305.

Demurrers for want of jurisdiction should specify the fact that they question the jurisdiction of the Court. The following forms will indicate the manner in which such demurrers should be drawn :

#### DEMURRERS FOR WANT OF GENERAL JURISDICTION.

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows that this is a suit to recover unliquidated damages for an injury to the property [person or character] of the defendant, and this Court has no jurisdiction thereof, the complainant having a plain, adequate, and complete remedy at Law.

Because the bill seeks to enjoin the collection of taxes due the State [or, to try an issue of *devisavit vel non*, or, to determine the validity of a patent, or, to enjoin the breach of a copyright, or, to wind up a National Bank,] and this Court has no jurisdiction to grant such relief.

**§ 291. Demurrers Because the Value of the Subject-Matter is Beneath the Dignity of the Court.**—The true ground of this objection is, that the entertainment of suits of small value has a tendency, not only to promote expensive and mischievous litigation, but, also, to consume the time of the Court in unimportant and frivolous controversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land. Courts of Equity sit to administer justice in matters of grave interest to parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation.<sup>18</sup> Our Code accordingly declares that the Court has no jurisdiction of any debt, or demand, of less value than fifty dollars,<sup>19</sup> except in certain cases heretofore stated.<sup>20</sup>

#### DEMURRERS BECAUSE THE DEMAND IS FOR LESS THAN FIFTY DOLLARS.

[For title, commencement, and conclusion, see post, § 310.]

Because the debt [or demand, or subject-matter] sued for is of less value than fifty dollars, as appears by the statements of the bill, and therefore beneath the dignity of the Court, and not within its jurisdiction. [*The averments after the word "dollars" are not essential, but customary.*]

**§ 292. Demurrers Because the Bill has been Filed in the Wrong County.** This ground of demurrer is based on the fact that some other Court of Chancery is invested with the proper jurisdiction.<sup>21</sup> The statutes specify in what counties certain Chancery suits shall be brought, thereby defining and limiting the local jurisdiction of each Court over the subject-matter of various suits; and if a suit, the jurisdiction over which has been localized by statute, should be brought in a county other than that required by the statutes, the jurisdiction of the Court in such county may be resisted by demurrer.

The statutes, also, in some cases, make the local jurisdiction of the defendant depend on the residence of the parties, and require suits to be brought in the counties of such residence: if this requirement is violated, and the bill so shows, it will be demurrable.

But the local jurisdiction, either as to the subject-matter,<sup>22</sup> or as to the person, may be waived by failing to object to it by motion to dismiss, or by demurrer, when it appears on the face of the bill, or by plea in abatement when it does not so appear.<sup>23</sup> The filing of an answer, without having previously objected to the jurisdiction, is a waiver of all objections thereto.<sup>24</sup>

The local jurisdiction of the Court has been elsewhere fully considered, and its repetition here is unnecessary;<sup>25</sup> but it may be stated that a demurrer for want of local jurisdiction of the subject-matter is a waiver of the local jurisdic-

<sup>18</sup> Sto. Eq. Pl., § 500.

<sup>19</sup> Code, § 4281.

<sup>20</sup> *Ante*, § 26.

<sup>21</sup> Sto. Eq. Pl., § 486.

<sup>22</sup> There is a wide difference between a want of jurisdiction of the *subject-matter*, and a want of *local jurisdiction* of the subject-matter. In the former case, the Court can do nothing even by consent; in the latter case, it can do everything by consent, or even by failure to object. It is not the subject-matter that defeats the jurisdiction in the latter case, but merely the *locality* of the subject-matter; and if the defendant does not insist, at the outset, on the

local privilege given him by the law, he cannot afterwards claim it; and the Court thus acquires full jurisdiction over the subject-matter. But neither this note nor the text must be construed as applying to *local suits affecting land*. See *Nashville v. Webb*, 6 Cates, 432; and, *ante*, § 177, note 11f. As to the effect of the want of jurisdiction of the subject matter, see, *ante*, §§ 289-290; and *post*, § 525.

<sup>23</sup> Code, §§ 4309; 4319; 4386; 4318; *Lowery v. Naff*, 4 Cold., 370; *Bennet v. Wilkins*, 5 Cold., 240.

<sup>24</sup> Code, § 4321.

<sup>25</sup> See, *ante*, § 177.



tion of the person, and *vice versa*; and that a demurrer on any ground, except a want of jurisdiction, admits the jurisdiction.<sup>26</sup>

The rule, that if the objection to the jurisdiction is not taken before answer, it cannot be taken at all, has long been in force in the Chancery Courts of England and the United States;<sup>27</sup> and as early as 1801, our Legislature enacted, that after answer filed, and no plea in abatement to the jurisdiction of the Court, no exception for want of jurisdiction should ever afterwards be made.<sup>28</sup>

The following are illustrations of demurrers for want of jurisdiction of the person of the defendant, or of the subject-matter of the suit:

#### DEMURRERS FOR WANT OF LOCAL JURISDICTION OF THE DEFENDANT.

[For title, commencement, and conclusion, see post, § 310.]

Because this Court has no jurisdiction of the person of the defendant, he and the complainant both residing in the county of Blount when the bill was filed, and there being no ground of jurisdiction in the county of Knox shown in the bill.

#### DEMURRER FOR WANT OF LOCAL JURISDICTION OF THE SUBJECT-MATTER.

[For title, commencement, and conclusion, see post, § 310.]

Because this Court has no jurisdiction of the land sought to be recovered [sold, partitioned, or otherwise dealt with,] said land being shown by the bill to be wholly in the county of Scott, and the bill showing no grounds of jurisdiction in the county of Morgan.

§ 293. **Demurrers Because the Suit is for Injuries, Involving Unliquidated Damages.**—If the bill show on its face that its object is to recover unliquidated damages for an injury to person, property, or character, a demurrer will lie for want of jurisdiction on that ground. If, however, the damages have either been liquidated, that is, agreed on, in advance of the suit, by the parties, they may be recovered by bill in Chancery; and so may damages that, though unliquidated, are not for injuries to person, property, or character, such as damages for breach of contract or for fraudulent conduct.<sup>29</sup> The following is the form of a demurrer in such a case:

#### DEMURRER BECAUSE THE SUIT IS FOR DAMAGES FOR INJURIES.

[For title, commencement, and conclusion, see post, § 310.]

Because the bill is filed to recover unliquidated damages for injuries to the person [or property, or character,] of the complainant, and the complainant has a plain, adequate and complete remedy at law; and the Chancery Court has no jurisdiction of the case made by the bill.

§ 294. **Demurrers Because the Complainant has a Plain, Adequate, and Complete, Remedy at Law.**—In general, Courts of Equity will not take jurisdiction where the powers of the common law Courts are sufficient for the purposes of justice, unless such jurisdiction is expressly or impliedly conferred by statute. It may, therefore, be stated, generally, that, where the complainant can have as effectual and complete a remedy in a Court of law as in a Court of Equity and that remedy is direct, certain, and adequate, a demurrer to the jurisdiction of the Chancery Court will hold, unless that Court has obtained concurrent jurisdiction with the Courts of law, by statute. But where there is a clear right, and no plain, adequate, and complete, remedy therefor at law adapted to the particular exigency, there Courts of Equity will assume jurisdiction, by virtue of their inherent powers.<sup>30</sup>

But the fact that a Court of law has jurisdiction of the case stated in the bill, is no longer a ground of demurrer, in Tennessee; because it may be a case of concurrent jurisdiction. The demurrer must be because the Chancery Court has no jurisdiction of the subject-matter.

Prior to the Act of 1877, increasing the jurisdiction of the Chancery Court, the most common ground of demurrer in that Court was that "the complainant

<sup>26</sup> Post, § 305.

<sup>27</sup> 1 Dan. Ch. Pr., 555; Sto. Eq. Pl., § 437, note.

<sup>28</sup> Acts of 1801, ch. 6; 1 Scott's Rev., 688; Code, §§ 4309; 4321.

<sup>29</sup> By the Act of 1877, ch. 97, jurisdiction of all the civil causes of action triable in the Circuit Court, except for injuries to person, property or character,

involving unliquidated damages, was conferred upon the Chancery Court concurrently with the Circuit Court; and a demurrer, for want of jurisdiction of the cause of action, was denied by the same Act, excepting in cases of unliquidated damages for injuries to person, property, or character. See, ante, §§ 21; 29.

<sup>30</sup> Sto. Eq. Pl., § 473; 1 Dan. Ch. Pr., 551.

had a plain, adequate, and complete, remedy at law;" but since that Act, this ground of demurrer has almost ceased to exist,<sup>31</sup> except in so far as it may be applicable to bills filed to probate wills, to enjoin suits or executions at law, or otherwise relieve against proceedings, suits, judgments, or executions, at law. Where the jurisdiction of the Chancery and Circuit Courts is concurrent, the Court that first takes jurisdiction thereby acquires exclusive jurisdiction in that particular case; and if the bill should show that the Circuit Court had acquired jurisdiction, in such a case a demurrer would lie, on that ground.<sup>32</sup>

The questions of jurisdiction that now arise, are not so much questions of jurisdiction between the Courts of Equity and the Courts of law, as questions of local jurisdiction between the various Courts of Chancery, themselves.

But while it is ordinarily true that, in cases of concurrent jurisdiction in the Circuit and Chancery Courts, a demurrer will lie to the bill, if it shows on its face that the same cause of action between the same parties is pending, or has been tried, in the Circuit Court, nevertheless, if the bill show some good reason why the Chancery Court should assume the jurisdiction, a demurrer will not hold. Thus, if a party can make out his case more effectually in the Chancery Court, or can obtain some substantial relief beyond what he could obtain at law, he may come into Equity and enjoin the action at law; this is especially true in cases where, by accident, mistake, or fraud, a party is at a disadvantage in a Court of law, whether he be complainant or defendant in such Court.<sup>33</sup>

The following forms of demurrer will indicate how the fact, that the complainant has an adequate remedy at law, may be taken advantage of:

**DEMURRERS BECAUSE OF REMEDY AT LAW.**

[For title, commencement, and conclusion, see post, § 310.]

Because the complainant has a plain, adequate, and complete, remedy at law, by appeal to the Circuit [or, Supreme] Court; [or, by *certiorari*; or, by a writ of error *coram nobis*; or, by a writ of error; or, by a writ of error and *supersedeas* in the Supreme Court.]

Because the bill shows that all the matters of controversy, in this suit, are now being litigated between the parties to this suit, in the Circuit Court of Anderson county; and said Circuit Court, having first obtained jurisdiction of the subject-matter of the suit and the parties, and being able to administer a plain, adequate, and complete, remedy, should be allowed to retain exclusive jurisdiction of the matters in controversy.

<sup>31</sup> This Act has included within the domains of the Chancery Courts all of the debatable grounds over which the Courts of law and Equity battled for six hundred years. See, *ante*, §§ 21; 29.

<sup>32</sup> 1 Pom. Eq. Jur., § 179; *Lindsay v. James*, 3 Cold., 483; *Moore v. Holt*, 3 Tenn. Ch., 143; *Dixon v. Railroad*, 7 Cates, 362.

<sup>33</sup> Sto. Eq. Jur., § 885. See Digests under Injunction; see, also, *post*, § 814.

A complainant has not a plain and adequate remedy at law in the following cases:

1. *Where the injury threatened, or being committed, would be irreparable, and damages would not put the complainant in statu quo;* and especially where the defendant is insolvent. A Court of law can only award damages; it can grant no injunction, nor otherwise stay the hand of the defendant; and he may, therefore, persevere in his wrong-doing, even after suit at law has been brought against him.

2. *Where the complainant needs the reformation of a written instrument,* either (1) to assert his real rights, or (2) to protect himself from loss, or (3) to resist an unjust and inequitable claim by the defendant. A Court of law cannot reform a writing, and will not hear proof that tends to vary, or contradict, a written instrument. Written instruments include notes of hand, deeds, mortgages, and other written evidences of contract.

3. *Where a written instrument has been obtained by fraud, accident, or mistake, and the defendant has it in his power, by a sale of the instrument, or property conveyed by the instrument, to an innocent purchaser, to injure the complainant.* A Court of law cannot compel the defendant to surrender such an instrument; or, if it be a deed, cannot reinvest the complainant with title to the property.

4. *Where damages for the breach of a contract would be inadequate,* especially in cases of contract for the sale, or purchase, of land, and in other cases where justice requires that the contract should be specifically performed. A Court of law cannot decree, or enforce, a specific performance; it can award damages only, in such a case.

5. *Where the complainant has a beneficial interest in property,* the legal title to which is vested in a trustee, who is violating, or jeopardizing, the trust. A Court of law does not recognize such interests, but regards the trustee as the real, and only owner, if having respect for no one but the holder of the legal title.

6. *Where an accounting between the parties is necessary,* and the items are too numerous, and the matters too complicated, for a jury, acting largely, or wholly, on oral evidence. A Court of law cannot, by means of a jury, and on oral testimony, take and state, a long and intricate account with reasonable accuracy.

7. *Where the complainant has a vendor's, or other lien on property,* the sale of which is necessary to enable him to get his money. A Court of law cannot enforce a vendor's lien, or any other lien, except as given jurisdiction by statute. A Court of law can, as a rule, award a general execution, only.

8. *Where the complainant's rights, or interests, are equitable, and not legal;* as in cases of trusts, mortgages, deeds of trust, equities in land based on agreements to convey, marshaling securities, and cases where the relation of trust and confidence existed between the parties, and cases where the complainant is entitled to a set-off and the defendant is a non-resident, or insolvent.

§ 295. **Demurrers Because the Subject-Matter of the Suit is Unfit for, or Foreign to, a Court of Equity.**—This ground of demurrer is very similar to the one first mentioned, the want of Equity in the bill, and what is said of that ground applies to this. This ground covers: 1, All criminal cases and cases in the nature of criminal cases; 2, All cases of which the Circuit and County Courts have exclusive jurisdiction; 3, All cases wherein a co-ordinate department of the State Government is sought to be coerced, or restrained, in those matters exclusively within its jurisdiction; 4, All cases wherein the Courts, or the Officers, of the United States Government, are sought to be reached, or affected as such; and 5, All cases of which the United States Courts have exclusive jurisdiction, such as questions affecting patents and copyrights, and questions arising out of the Acts of Congress, or treaties with foreign nations.

§ 296. **Demurrers Because the Bill Seeks to Enforce a Penalty, or a Forfeiture.**—Another ground of demurrer is, that it appears on the face of the bill, that its object is to enforce a penalty, or a forfeiture. It is a universal rule in Courts of Equity, not to lend their aid to enforce any penalty, or forfeiture; but to leave the party to his remedy at law. But if the complainant seeking relief, is solely entitled to take advantage of the penalty, or forfeiture, and he expressly waives any right to the penalty, or forfeiture, the bill is maintainable.<sup>34</sup>

§ 297. **Demurrers Because the Facts do not Bring the Case Within a General Rule.**—It may be that the rule of Equity is as supposed by the bill, and that the Court has jurisdiction of the defendant, and yet the state of facts set out in the bill may be insufficient to bring the case within that rule; and, as a consequence, the complainant may have no right to the benefit of the rule.<sup>35</sup> Thus, the complainant may fail to show any actionable interest in the subject-matter of the suit, or may fail to show that the supposed relation exists, or that any of its duties have been violated by the defendant. In all such cases, if the facts set forth in the bill plainly show the infirmity of the complainant's case, a demurrer will lie, such demurrers being, generally, that, on the facts set out in the bill, the complainant is not entitled to the relief he prays, nor to any relief, as against the demurrant.

§ 298. **Demurrers Because the Case Falls Within some Exception to the General Rule.**—Whenever the general rule, entitling a complainant to bring a suit in Chancery, on a given state of facts, has one or more exceptions, (as, perhaps they all have,) if the facts set forth in the bill bring the case there made within one or more of these exceptions, a demurrer will lie for that reason. Some of the most common exceptions, on which demurrers may be grounded, are the following:

1. **Prematurity of the Suit.** Although the general rule is that a debtor must pay the creditor what he owes him, yet the latter cannot sue until the debt falls due. And a suit cannot be brought against an executor or administrator within six months after his qualification.

#### DEMURRER BECAUSE OF PREMATURETY OF SUIT.

[For title, commencement, and conclusion, see *post*, § 310.]

Because the bill shows on its face, that the note [contract, claim, obligation, or, debt,] sued on was not due at the time the bill was filed, and that no cause of action had then accrued to the complainant.

2. **The Statutes of Limitation.** If a creditor delays bringing suit until it is barred by the statutes of limitations, and this fact is clearly shown in the bill, a demurrer may be interposed,<sup>36</sup> unless other circumstances are shown in the bill avoiding the bar.

<sup>34</sup> 1 Dan. Ch. Pr., 387; 563; Sto. Eq. Pl., § 521. What is the effect of the statute, giving the Chancery Court jurisdiction of suits at law, in case of a bill filed to enforce a penalty, or forfeiture, is yet to be determined. It would seem, however, that if

the complainant could enforce a penalty, or a forfeiture, in the Circuit Court, his rights would be the same in Chancery.

<sup>35</sup> See, *post*, § 411, note 2.

<sup>36</sup> Sto. Eq. Pl., §§ 484; 503.

**DEMURRER BECAUSE THE SUIT IS BARRED BY THE STATUTE.**

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows on its face, that the cause of action accrued more than six [or three, or seven, or ten] years before the bill in this case was filed. [Or.]

Because the bill shows on its face that the cause of action sued on did not accrue within three [six, seven or ten] years next before the bill in this case was filed.

**3. The Statute of Frauds.** The bill may state what would otherwise be a contract within some general rule, but if the statute requires such contract to be in writing, and the bill shows that it is in parol, a demurrer will hold to the bill.<sup>37</sup>

**DEMURRER BECAUSE THE CONTRACT IS NOT IN WRITING.**

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows on its face, that the contract sued on was not reduced to writing, as required by the statute for the prevention of frauds and perjuries, but that said contract rests in parol.

**4. Other Demurrable Exceptions.** If any other exception to the general rule authorizing suit in the particular case, appear clearly on the face of the bill, it will be a good cause of demurrer. It may be stated, generally, that any matter which would be proper for a plea in bar, if it did not appear in the bill, will be a good ground of demurrer if it does appear in the bill. These grounds are, in addition to those already stated: (1) payment, or other adjustment; (2) former judgment or decree; (3) an award; (4) a release; (5) a stated, or settled, account; and (6) innocent purchaser for value.

The following forms will serve as a guide in drawing demurrers under this sub-section:

**DEMURRER BECAUSE OF MATTERS IN AVOIDANCE.**

[For title, commencement, and conclusion, see post, § 310.]

Because the bill shows on its face, that the matters in controversy have been adjusted, and no facts are set out invalidating said adjustment.

Because it appears from the face of the bill, that the debt sued for has been paid [or, has been reduced to a judgment, or, has been settled by an award, or, has been released.]

Because it appears by the face of the bill, that this defendant is an innocent purchaser, for a valuable consideration, without any notice of the equities alleged.

**§ 299. Demurrers Because the Complainant is not Entitled to Bring the Suit.** The general rule supposed may be correct, the proper forum for the enforcement of the rule may have been chosen, the case made may be within the general rule, and not within any exception thereto, and yet the bill may show on its face that the complainant is not the proper party to bring the suit. The matters which disable the complainant from prosecuting the suit, are ordinarily the following:

**1. The Complainant is Under a Personal Disability.** If an infant, or a married woman, or an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend, or guardian, or committee, is named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defendant must take advantage of it by plea. This objection extends to the whole bill, for, as the defendant might at the hearing be entitled to costs, he would be materially injured, by being compelled to answer a bill exhibited by persons, whose property is not at their own disposal, and who are, therefore, incapable of paying the costs.<sup>38</sup>

**DEMURRER BECAUSE COMPLAINANT IS AN INFANT.**

[For title, commencement, and conclusion, see, ante, 310.]

Because the bill shows on its face that complainant is under the age of twenty-one years, and yet he sues without anyone being named as his guardian, or next friend.

<sup>37</sup> Treece v. Treece, 5 Lea, 223.

<sup>38</sup> Sto. Eq. Pl., § 493. A lunatic may, however,

prosecute a suit to final decree if proper objection is not made at the proper time. *Ante*, § 82.

**DEMURRER BECAUSE COMPLAINANT IS A MARRIED WOMAN.**

[For title, commencement, and conclusion, see, ante, 310.]

Because complainant's bill shows she is a married woman, and yet she sues without her husband, or a next friend, and her bill alleges no such facts as justify her in so suing.

2. **The Complainant is not Entitled to the Character in which he Sues.** The defect of the title of the complainant to the character in which he sues, is the proper subject of a demurrer, where the objection positively appears upon the face of the bill. Thus, for example, if it should appear upon the face of the bill, that the complainant sued as administrator, in virtue of the grant of administration in a foreign country, the objection might be taken by demurrer; for it is clear that the complainant has no right, under that administration, to sue in our courts.

So, if a voluntary association of persons, not incorporated, should affect, by their bill, to sue in the style and character of a corporate body, the bill would be demurrable on that very account, if the objection appeared upon the face of it; for it is the exclusive prerogative of the government to create corporations, and invest them with the powers of suing, as such, by their corporate name.<sup>39</sup>

3. **The Complainant Shows no Interest in the Subject-Matter.** If the complainant sets forth in his bill facts, that show he has no interest in the subject-matter of the suit, or no interest in some material part thereof, a demurrer will lie; in the latter case,<sup>40</sup> however, the demurrer must be expressly limited to that part of the bill liable thereto. The complainant must not only show an interest in the subject-matter, but a right to institute a suit concerning it, against the defendant. In order to enable a complainant to sue upon a contract, there must ordinarily be some privity between him and the defendant, whereby he has the right to make a demand of him. A defendant may be in the wrong in a given matter, and yet the complainant may not be the proper person to bring suit upon such wrong. Thus, the debtor of a decedent ought to pay the debt, but a legatee or distributee cannot sue him. But there are many cases where no privity is needed to enable a complainant to maintain a bill, as (1) in case of injunctions to prevent trespasses, nuisances and the like; (2) in cases of fraud, actual and constructive; (3) in cases of contribution,<sup>41</sup> and (4) in cases of marshalling of securities.

What sort of interest will sustain a suit has been heretofore fully discussed.<sup>42</sup>

4. **The Complainant has Failed to Take a Necessary Preliminary Step.** Where some preliminary step must be taken to perfect a right of action, as where a notice must be given, or a tender made, and the bill fails to allege that such step has been taken, a demurrer will lie for that reason; and so where a tender is alleged but the money tendered is not filed with the bill.<sup>43</sup>

5. **Some of the Complainants have no Right to Sue.** If any one or more of several complainants have no common interest in the suit, or have separate and diverse interests therein, this is such a mis-joinder as constitutes a good ground of demurrer, and such a demurrer goes to the whole bill.<sup>44</sup> But the Court would allow the improper complainants, with the consent of the other complainants, to dismiss the bill as to themselves, and this may be done even after a demurrer for such mis-joinder has been sustained, and the bill dismissed, if the application be made within thirty days, or before the term ends. The objection that there is a mis-joinder of complainants, cannot be taken advantage of at the hearing, but the Court will then decree according to the respective rights of the complainants; and if any of them then appear to have no interest in the suit, or in the recovery, the bill will be dismissed as to them.<sup>45</sup> The Court on

<sup>39</sup> Sto. Eq. Pl., §§ 496-497. The defect of the title of the complainant seldom appears on the face of the bill, and must, therefore, be, ordinarily, raised by plea, or answer.

<sup>40</sup> 1 Dan. Ch. Pr., 314-316; Sto. Eq. Pl., § 513.

<sup>41</sup> Sto. Eq. Pl., §§ 513-514, notes.

<sup>42</sup> *Ante*, §§ 143-144.

<sup>43</sup> *Rogers v. Tindell*, 15 Pick., 356. See, *ante*, § 148.

<sup>44</sup> 1 Dan. Ch. Pr., 302; 557; notes; Sto. Eq. Pl., §§ 279; 283, 509. See, *ante*, §§ 109-112.

<sup>45</sup> 1 Dan. Ch. Pr., 302; Sto. Eq. Pl., §§ 283; 544, note; or, the Court may, at the hearing, decree against a complainant, and the defendants, in favor of the other complainants. *Ibid.* Code, § 2972.

proper application, will, also, allow co-complainants to be made, defendants when their interests, or the rights of the other complainants, so require.<sup>46</sup> But the demurrer to the bill, in such cases, must be narrowed to the particular relief objected to, otherwise it will be overruled because too broad.

Where there is a mis-joinder of parties, if the mis-joinder is of parties as complainants, all the defendants may demur: for such a mis-joinder is a proper ground of objection by all. If the mis-joinder is of parties as defendants, those only can demur who are improperly joined.<sup>47</sup>

**§ 300. Demurrers Because the Defendant is not Liable.**—The defendant may not be liable at all, or he may not be liable to the extent prayed, or he may not be liable to the complainant. He may have no interest in the subject-matter of the suit, and may in no way be liable to any decree, and may not be entitled to the benefit of any decree. In any such case, he is not a proper party, and a demurrer will lie on that ground, if it plainly appear in the bill.

On the other hand, the defendant may be liable to the complainant in some way, and yet not liable in the particular way, or to the particular extent, the bill prays. Almost all demurrers to the substance of the bill are, in effect, demurrers to the relief prayed;<sup>48</sup> but the ground of demurrer here referred to, is not because the complainant is not entitled to relief, but because he is not entitled to the special relief he prays for, or at least not entitled to some of it, as against the demurrant.

Whenever, therefore, the bill prays for some particular relief against a defendant, which the facts stated do not warrant, a demurrer will lie to the bill to that extent; but such demurrer must be so drawn as to be confined to that part of the bill seeking the unwarranted relief, otherwise, the demurrer will be overruled because too broad.<sup>49</sup>

It may be stated, in general, that if, for any reason, founded on the substance of the case, as stated in the bill, the complainant is not entitled to the relief which he prays, the defendant may demur. It is obvious, that if the case stated is such, that, admitting the whole bill to be true, the Court ought not to give the complainant the relief, or assistance, which he prays for, in whole, or in part, the defect, thus appearing upon the face of the bill, is not only a sufficient, but an appropriate ground of demurrer. And, where the objection is thus on the face of the bill, it should be taken by a demurrer, and ought not to be taken by a plea.<sup>50</sup>

ARTICLE IV.

RULES GOVERNING DEMURRERS.

- § 301. Demurrers Defined, and Explained.
- § 302. When a Demurrer will Lie.
- § 303. The Office of a Demurrer.
- § 304. What a Demurrer Admits.
- § 305. All Demurrers must be Special.

- § 306. A Demurrer must not be Too Broad.
- § 307. A Demurrer must not Speak.
- § 308. Rules when a Demurrer is Joined with Another Pleading.

**§ 301. Demurrers Defined, and Explained.**—Whenever any ground of defence is apparent upon the face of the bill itself, either from the matter contained in it, or from some defect in the case made by it, the proper mode of defence is by demurrer.

A demurrer is a pleading by a defendant which, while admitting the matters of fact stated in the bill to be true, shows (1) that, as they are therein set forth,

<sup>46</sup> Sto. Eq. Pl., § 544, note. The bill may be amended, at the hearing. Code, § 4337.

<sup>47</sup> Sto. Eq. Pl., § 544.

<sup>48</sup> 1 Dan. Ch. Pr., 557; Sto. Eq. Pl., § 526.

<sup>49</sup> See, *post*, § 306.

<sup>50</sup> Sto. Eq. Pl., § 526; 1 Dan. Ch. Pr., 557.

they are insufficient for the complainant to proceed upon, or to oblige the defendant to answer; or (2) that, for some reason apparent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It, therefore, demands the judgment of the Court, whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer specially applies.<sup>1</sup>

A general demurrer is one that assigns no particular or specific ground of objection to the bill, except the usual formulary, "that there is no Equity in the bill." A special demurrer is one that points out the particular defects in the substance of the bill. In our practice, a general demurrer is not allowed, however deficient in Equity the bill may be. The Code requires every demurrer to state the objections relied on; and the Courts hold that these objections must be stated with certainty and directness.<sup>2</sup>

**§ 302. When a Demurrer will Lie.**—A demurrer will lie whenever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing. A demurrer will not be sustained, however, unless it is an absolute, certain, and clear proposition that the bill would be dismissed; for, if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief prayed, or to grant no relief at all, the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer; for, if there is any possibility that the complainant will be entitled to any relief, at the hearing, a demurrer to the whole bill will not lie.<sup>3</sup>

If a bill contains two or more supposed equities, or causes of action, or joins as defendants several parties, if one of these supposed equities or causes of action is manifestly not maintainable, as against one of the defendants, a demurrer may be filed to so much of the bill as sets forth such insufficient matter, or the defendant, not answerable, may demur to the relief prayed against him. Hence, the general rule that a demurrer will lie to the whole bill, when complainant does not show himself entitled to any relief; or it will lie to a part of a bill, when complainant is not entitled to the relief he prays as to that part.

A demurrer to the whole bill should be based on some short, dry, point of law, destructive of the relief sought,<sup>4</sup> and it must be plain that, for the reason stated in the demurrer, the bill must be dismissed at the hearing, for want of merits.<sup>5</sup> If there be doubt whether the grounds of the demurrer are sufficient to destroy the bill, or that part of the bill which it specifically covers, such doubt will enure to the benefit of the bill, and the demurrer will be overruled.

The causes of demurrer must be upon some matter in the bill, or upon the omission of some matter which ought to be therein, or attendant thereon; and not upon any foreign matter alleged by the defendant.<sup>6</sup> No matter outside of the bill can be considered on the hearing of a demurrer, except the law and such matters as the Court may take notice of judicially; and no demurrer will lie to the form of the bill.<sup>7</sup>

**§ 303. The Office of a Demurrer.**—A demurrer is a pleading which, in substance, insists that, admitting the bill to be true, the complainant is not entitled to the relief he seeks against the demurrant, and that, therefore, the bill should be dismissed as to him. The logic of a demurrer is that, as the complainant cannot by proof make out a case stronger than the allegations of his bill, if

<sup>1</sup> 1 Dan. Ch. Pr., 543-544. Daniel's definition has been somewhat changed: he says a demurrer is "in substance, an *allegation* by a defendant," etc. Sto. Eq. Pl., § 446.

<sup>2</sup> Sto. Eq. Pl., § 455; Code, § 2934.

<sup>3</sup> 1 Dan. Ch. Pr., 543-544.

<sup>4</sup> Payne v. Berry, 3 Tenn. Ch., 154.

<sup>5</sup> Brien v. Butterff, 2 Tenn. Ch., 523; 1 Dan. Ch. Pr., 543, note. A demurrer should unsheathe some keen point of law, incisive enough to reach the heart of the bill, and thus destroy it.

<sup>6</sup> Sto. Eq. Pl., § 447.

<sup>7</sup> Code, §§ 2865, 2934.

those allegations, when admitted to be true, will not warrant any decree against the demurrant, then proof of those allegations will avail nothing, and hence the bill should be dismissed without any further costs, or proceedings, by either party.

The object of a demurrer, therefore, is to save costs, and bring the litigation to a speedy close. If no one of these ends is obtained, there is little use in a demurrer.<sup>8</sup> For, in general, if a demurrer would hold to a bill on its merits, the Court, although the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases in which the Court has given relief upon the hearing, although a demurrer to the relief would probably have been allowed. But such cases are rare,<sup>9</sup> and the relief granted in such cases is, generally, based in part upon the answer.

In regard to the appropriate use of a demurrer, it may be stated as a general rule, that, whenever the ground of objection or defence is clearly apparent on the face of the bill itself, either from matter contained in it, or from some defect in its frame, the proper mode of setting up the objection, or defence, is by demurrer, and not by way of plea. Hence, if the case of the complainant, as stated in his bill, will not entitle him to a decree, the proper course is for the defendant to insist upon it by way of demurrer, although it may be equally fatal at the hearing. When the bill is manifestly fatally defective in substance, it is advisable to demur, because it saves unnecessary expense to all parties.<sup>10</sup> When the objection is to a defect in matter of form, the objection must be taken by motion, demurrer for matter of form having been abolished by statute.<sup>11</sup>

Demurrers are, also, often used to dispute the jurisdiction of the Court, as already fully shown.<sup>12</sup>

§ 304. **What a Demurrer Admits.**—As a demurrer proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks; it is held that, at least for the purpose of argument, all the matters of fact which are stated in the bill are admitted by the demurrer, and cannot be disputed in arguing the question whether the demurrer be good or not; and such admission extends to the whole manner and form in which the bill states the facts. Upon this ground, where a bill misstates a deed by alleging it to contain a proviso, the Court, upon the argument of a demurrer to the bill, refused to allow the defendant's counsel to refer to the deed itself for the purpose of showing the incorrectness of the manner in which it was set out, although the bill contained a reference "for greater certainty as to its contents, etc.," to the deed as being in the custody of the defendants.<sup>13</sup>

But, although a demurrer confesses the truth of the facts alleged in the bill, such confession is strictly confined to the facts. The demurrer does not admit any matters of law suggested in the bill, or inferred from the facts stated; nor does it admit the arguments, deductions, inferences, or conclusions, set forth in the bill. Nor does a demurrer admit allegations contrary to facts, judicially known to the Court. Upon the argument of a demurrer, the bill alone must be looked to for the facts of the case, except such facts as the Court may judicially know. If a bill materially misstates a deed in the defendant's possession, and refers to it for greater certainty as to its contents, the Court will not allow the defendant to read the deed on the argument of the demurrer for the purpose of contradicting the bill.<sup>14</sup>

But where a bill, not original, refers to a record in the original cause, and in effect makes such record, or any part thereof, a part of itself, then such a

<sup>8</sup> *Payne v. Berry*, 3 Tenn. Ch., 157. A very large proportion of the demurrers filed are too near the line of frivolousness to justify a Court in an endeavor to determine on which side they are. Now, that all the benefits of a demurrer to the merits may be had by relying thereon in the answer, (except when the jurisdiction of the Court is to be contested,) a separate demurrer should never be filed, unless it is certain to be destructive of the bill, or of some ma-

terial part thereof. *Brien v. Bantorff*, 2 Tenn. Ch., 527; *Payne v. Berry*, 3 Tenn. Ch., 157.

<sup>9</sup> *Sto. Eq. Pl.*, § 447.

<sup>10</sup> *Sto. Eq. Pl.*, § 453. See, *post*, § 590.

<sup>11</sup> *Code*, §§ 2934; 2865; *Waggoner v. White*, 11 Heisk., 741.

<sup>12</sup> *Ante*, § 290.

<sup>13</sup> 1 Dan. Ch. Pr., 544.

<sup>14</sup> 1 Dan. Ch. Pr., 544-546.



record, or part, may be looked to on the argument of a demurrer to such a bill.

A demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant, and are well pleaded; but it does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill. Thus, if a demurrer extends to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill. And if the defendant demurs to the relief only, the whole case made by the bill as the ground of the relief prayed for, is considered as true. A demurrer, therefore, was formerly always preceded by a protestation against the truth of the matters contained in the bill, a practice borrowed from the civil law, and probably intended to avoid any conclusion in another suit; for in the present suit it is wholly without effect.<sup>15</sup> But this protestation is not only wholly unnecessary, but is obnoxious to good pleading, and should be wholly omitted. It is one of those prolix and unnecessary allegations the Chancellor is authorized to order stricken out.<sup>16</sup>

§ 305. **All Demurrers must be Special.**—Formerly, a demurrer to a bill might be general; but now, the Code requires all demurrers to state the objections relied on;<sup>17</sup> and a general demurrer is a nullity.<sup>18</sup> The very objection to be relied on by way of demurrer must be stated in the demurrer, and stated specifically, and not inferentially, or by way of intendment. Thus, if the defendant intends to demur because the Court of Chancery has no jurisdiction of the subject-matter in controversy, he must allege this want of jurisdiction as his ground of demurrer. It will not avail him, in such a case, to demur generally, because complainant's bill contains no ground of Equity entitling him to any relief;<sup>19</sup> for such a demurrer admits the jurisdiction, even in case where there is a clear want of jurisdiction.<sup>20</sup> So, where the demurrer is based on the ground that the Court has no *local* jurisdiction of the subject-matter of the suit, this practically concedes that the Court has jurisdiction of the *person* of the demurrant, even in a case where that jurisdiction could have been resisted by a demurrer on that particular ground.<sup>21</sup> The demurrant cannot allege one cause of demurrer in his pleading, and another in his argument. As he makes his bed so must he lie in it.

A demurrer must not only always specify the several causes on which it is founded, but if the demurrer does not go to the whole bill, it must, also, clearly specify the particular parts of the bill which it is designed to cover; for, if the particular parts are not distinguished, the Court will be compelled to look over the whole bill, in order to pick them out, which task the Court will not undertake. And this designation of the particular parts of a bill which the demurrer, or the particular cause of demurrer, is intended to cover,<sup>22</sup> must be done, not by way of exception, as by demurring to all, except certain parts of the bill; but by a positive definition of the parts, to which the defendant seeks to avoid making any answer.<sup>23</sup>

If a demurrer is too general, that is, if it covers, or is applied to, the whole bill, when it is good to a part only; or, if it is a demurrer to a part of a bill only, but yet is not good to the full extent which it covers, but is so to a part only, it will be overruled; for it is a general rule, that a demurrer cannot be good as to a part of what it covers, and bad as to the rest; and therefore it must stand or fall altogether. But a demurrer may assign several causes of demurrer; and

<sup>15</sup> Sto. Eq. Pl., § 452.

<sup>16</sup> Code, § 4316.

<sup>17</sup> Code, § 2934; *Hobbs v. Memphis R. R.*, 12 Heisk., 526.

<sup>18</sup> *Kirkman v. Snodgrass*, 3 Head, 370.

<sup>19</sup> *Kirkman v. Snodgrass*, 3 Head, 370; *Chesney v. Rodgers*, 1 Heisk., 239.

<sup>20</sup> *Chesney v. Rodgers*, 1 Heisk., 239. "That the complainant is not entitled to the discovery prayed by his bill against this defendant," is not a special demurrer. *Finley v. McCormick*, 6 Heisk., 392.

"That there is no equity in the bill," is a general demurrer, and cannot be noticed as a demurrer, for that reason. *Chesney v. Rodgers*, 1 Heisk., 239; *McCaleb v. Crichfield*, 5 Heisk., 290. But it may be treated as a motion to dismiss. *Brooks v. Smith, Thomp. Cases*, 233; Code, § 4386.

<sup>21</sup> *Whittaker v. Whittaker*, 10 Lea, 93.

<sup>22</sup> *Buckner v. Abraham*, 3 Tenn. Ch., 346; Sto. Eq. Pl., § 457; Code, § 2934.

<sup>23</sup> See next section.

if one cause is good to the whole extent of the demurrer, and another is bad, the demurrer will be sustained.<sup>24</sup> Separate causes of demurrer, each bad as such, cannot be connected so as to make a good lumping demurrer to the whole bill.<sup>25</sup>

The rule may be laid down generally, that no ground of demurrer will be noticed by the Court, unless it is not only specifically stated, but also specifically applied to the bill, showing whether it is to the whole bill or a part of it, and if to a part, what part. No matter what grounds of demurrer to the bill may, as a matter of fact, exist, the demurrant will not be allowed to insist on any except those designated in his demurrer, even when those in his demurrer are insufficient.

**§ 306. A Demurrer must not be Too Broad.**—A demurrer may be too broad; by which is meant, it would have been good if it had been confined to a specific part of the bill, but being a demurrer to the whole bill, and not to the specific part to which it might have been confined, it disputes the whole bill, and, there being some Equity in the bill, the demurrer must, for that reason, be overruled.<sup>26</sup> When a demurrer to the whole bill is sustained, the whole bill is destroyed, and the Court will not dismiss the whole bill merely because a part of it is demurrable. If, therefore, the defendant seeks to cover only part of the bill by his demurrer, he must, in the commencement of his demurrer, specify with particularity that part as the part to which he demurs, and, at the conclusion, pray to be hence dismissed as to such part. The reports contain many instances of demurrers overruled because too broad, which would have been sustained if confined to that part of the bill really demurrable.<sup>27</sup> But, if the bill contains no cause of action whatever, it may be dismissed, although the causes of demurrer assigned may not cover the real defects.<sup>28</sup>

A demurrer intended for only a part of a bill, must not only be specific, and designate that part of the bill which is intended to be covered by it, but the designation must be so clearly made that the Court will be in no doubt as to the part intended, and will have no difficulty in directly ascertaining that part. The part specially demurred to must be designated in such clear and precise terms that not only the Court will have no trouble in ascertaining the part covered by the demurrer, but in case the demurrer is sustained, the Master may have no trouble, on exceptions to the answer for insufficiency, in ascertaining how much, and what part, of the bill remains in Court to be answered unto.<sup>29</sup>

A defendant may, however, put in separate and distinct grounds, or causes, of demurrer to separate and distinct parts of a bill; for the same grounds of demurrer frequently will not apply to different parts of a bill. And if separate grounds of demurrer are put in to different and distinct parts of a bill, one ground of demurrer may be overruled upon argument, and another be allowed.<sup>30</sup>

Where there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good, and be allowed, as to one of the defendants, and be bad, and disallowed, as to the other defendants; for the defence may be good as to one person, and be wholly inapplicable to another. And there is a clear, although a nice, distinction between a demurrer which is too broad in regard to all the defendants, and one which is too broad, or inapplicable, to some of the defendants.<sup>31</sup>

Where a demurrer has been overruled, the Code says no other demurrer shall be received, but the defendant shall answer the allegations of the bill.<sup>32</sup> This,

<sup>24</sup> *Saunders v. Gregory*, 3 Heisk., 575; *Sto. Eq. Pl.*, § 443.

<sup>25</sup> *Bryan v. Buttorf*, 2 Tenn. Ch., 523.

<sup>26</sup> *Riddle v. Motley*, 1 Lea, 468; *Russell v. Bank*, 20 Pick., 614; *Tyner v. Fenner*, 4 Lea, 472.

<sup>27</sup> Some of these cases are the following, in all of which the rule is recognized, that, a demurrer, bad because too broad, is bad altogether, and will be disallowed: *Allen v. Lanier*, 4 Hay., 290; *Colville v. Colville*, 9 Hum., 524; *Fay v. Jones*, 1 Head, 443; *Hunter v. Justices*, 7 Cold., 49; *Crowder v. Denny*,

3 Head, 359; *Saunders v. Gregory*, 3 Heisk., 567; *Mann v. Bamberger*, 4 Heisk., 486; *Bittick v. Wilkins*, 7 Heisk., 312; *Riddle v. Motley*, 1 Lea, 468; *Phoenix Ins. Co. v. Day*, 4 Lea, 247.

<sup>28</sup> *Lane v. Farmer*, 11 Lea, 568; *Parks v. N., C. & St. L. R. R. Co.*, 13 Lea, 1. See, *post*, § 525.

<sup>29</sup> *Sto. Eq. Pl.*, §§ 457-458, note; *Buckner v. Abrahams*, 3 Tenn. Ch., 349.

<sup>30</sup> *Sto. Eq. Pl.*, § 444.

<sup>31</sup> *Sto. Eq. Pl.*, § 445.

<sup>32</sup> Code, § 4395.

however, is probably not imperative, for, if a demurrer should be overruled because too broad, when, if it had been narrowed it would have been sustained as to a part of the bill, the Court would be justified in allowing the demurrer to be amended, if by so doing the litigation would be greatly narrowed, and the costs greatly lessened.<sup>33</sup>

§ 307. **A Demurrer must not Speak.**—From what has been said as to the nature and office of a demurrer, it is clear that it can lie only for objections apparent upon the face of the bill itself, either from the matter inserted, or omitted, or from defects in the frame thereof. A demurrer cannot, therefore, state what does not appear upon the face of the bill, otherwise it would be what has been emphatically called a speaking demurrer, that is, a demurrer wherein a new fact is introduced in order to support it.<sup>34</sup> Thus, for example, where a bill was filed to specifically enforce a contract for the sale of land, without stating whether it was in writing or not, a demurrer to the effect that the complainant was not entitled to the relief sought because the contract was not in writing, was a speaking demurrer, the bill not stating that the contract was not in writing and the presumption being, on demurrer, that it was in writing.<sup>35</sup>

§ 308. **Rules when a Demurrer is Joined with another Pleading.**—As has been already stated, a demurrer may be to a part only of a bill. In such a case, the remainder of the bill must either be pleaded to, or be answered. Every defence must be a complete bar to any recovery, whether that bar be one of law, presented by demurrer, or one of fact, presented by plea in bar, or by answer, or whether the bar consist of some two or more of these defences. All this will be fully shown hereafter, when treating of the Joinder of Defences.<sup>36</sup>

## ARTICLE V.

### FRAME AND FORM OF DEMURRERS, AND WHEN TO BE FILED.

§ 309. Frame of a Demurrer.

§ 310. Form of Demurrers.

§ 311. Demurrers Coupled with Answers.

§ 312. When a Demurrer Must be Filed.

§ 309. **Frame of a Demurrer.**—A demurrer is a pleading to test the sufficiency of a bill. If all the material facts alleged in a bill be true, yet if the bill shows on its face (1) that the Court has no jurisdiction of the person of the defendant, or (2) no local jurisdiction of the subject-matter of the suit, or (3) no general jurisdiction of the cause of action, or (4) that the complainant is entitled to no relief, or (5) that the defendant is in no way liable to the complainant, and not a proper party to the suit, the Court will not require the defendant to answer such bill, if he will show the fatal infirmity of the bill, as to him, by a demurrer specifying the infirmity. The office of a demurrer is, therefore, to challenge the right of the complainant to proceed on his bill as it stands, even admitting every fact in it to be true; and the demurrant points out the fatal infirmity of the bill, and demands the judg-

<sup>33</sup> 1 Dan. Ch. Pr., 600; Sto. Eq. Pl., § 443, note. In the U. S. Equity Courts, the modern English rule has been adopted, as follows: "No demurrer, or plea, shall be held bad, and overruled, upon argument, only because such demurrer, or plea, shall not cover so much of the bill as it might, by law, have extended to." U. S. Equity Rule, 36; Cooke, 404; Sto. Eq. Pl., § 443, note. But no such amendment should be allowed in order either to defeat the jurisdiction of the Court, or to defeat, limit, or, in any way, diminish, an apparently just demand. If an amendment, narrowing a demurrer, will result in narrowing the bill down to such matters only as can possibly be entertained by the Court, even when its

jurisdiction is stretched to the uttermost, then the Court would be justified in allowing a demurrer to be so narrowed, by proper amendment. It is not safe for our Chancery Courts to follow the rules of the U. S. Equity Courts, on questions of jurisdiction: the jurisdiction of our Chancery Courts is *general*, whereas the jurisdiction of the U. S. Equity Courts is *special*, and this distinction totally changes the rules on the question of jurisdiction.

<sup>34</sup> Sto. Eq. Pl., § 448.

<sup>35</sup> 1 Dan. Ch. Pr., 365; 561; 655; Macey v. Childress, 2 Tenn. Ch., 442; Trust Co. v. Weaver, 18 Pick., 66.

<sup>36</sup> See, *post*, §§ 402-405.

ment of the Court whether the bill is sufficient to justify the Court in compelling him to answer it, and whether, for the reasons set forth in the demurrer, the bill should not be dismissed without further proceedings thereon.

A demurrer formerly commenced with a solemn protestation, that the defendants did not confess any of the matters in the bill contained; but this ancient and useless formula is now generally omitted by the best pleaders, it being not only absolutely unnecessary, but, also, mere surplusage, and liable to be stricken out, under the statute, by the Chancellor on his own motion, at the cost of the demurrant.<sup>1</sup>

After the protestation, came the general or special causes of demurrer; and these in turn were followed by a verbose prayer for the judgment of the Court as to whether the demurrant should answer further, and for dismissal. The old form of a demurrer will be seen in a foot-note to the next section.

Now, all this stiff pomposity of verbiage, which was akin to the silk gowns, and the ponderous wigs, of the lawyers and the Judges of the same period, has given way to the simpler forms now in use. The following form of demurrer is in conformity with the spirit of our present practice:

**FORM OF A DEMURRER.**

John Doe, }  
*vs.* } In Chancery at Kingston.  
 Richard Roe, *et al.* }

The defendant, Peter Poe, demurs to the bill in this cause,

1st. Because he is not a proper party, having no interest in the subject-matter of the suit, and not being in any way liable to the complainant.

2nd. Because complainant is not entitled to any relief against him, and does not specially pray any.

Wherefore, this defendant prays the judgment of the Court whether he must answer further, and prays to be dismissed. JAMES SEVIER, Solicitor.

In order to prevent delays by putting in frivolous demurrers, it is required by the practice of the Court, that the demurrer should be signed by counsel, or by the defendant. But it is not required to be put in on oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill.<sup>2</sup>

**§ 310. Form of Demurrers.**—Formerly demurrers began with a “*protestation*,” long and formal, and ended with a “*wherefore*,” equally long and formal; but now all such formalities are forbidden by the Code,<sup>3</sup> and in drawing a demurrer, the protestation clause, and most of the wherefore clause, should be omitted as useless verbiage. The following is a proper

**FORM OF A DEMURRER.**

[The Title, or Style of the Cause.]

John Doe, }  
*vs.* } No. 983.—In the Chancery Court, at Clinton.  
 Richard Roe. }

[The Commencement.]

The defendant demurs to the bill filed against him in this cause on the following grounds:

[The Grounds, or Causes of Demurrer.]

1st. The bill shows on its face, that the cause of action therein set forth accrued more than three [*or six, or ten,*] years before the filing of the bill, and is barred by the statute of limitations of three [*or six, or ten,*] years.

2d. The contract sued on is shown by the bill to be usurious, and the Court will not lend its aid to enforce an illegal contract.

[The Conclusion.]

And the defendant prays the judgment of the Court, whether he shall be compelled to answer further, and prays to be dismissed. JAMES A. FOWLER, Solicitor.

<sup>1</sup> Code, § 4316.  
<sup>2</sup> Sto. Eq. Pl., § 461; Code, § 3979.  
<sup>3</sup> Code, § 4316. The protestation and concluding clauses are seen in the following old form of a general demurrer:

These defendants, by *protestation*, not confessing all, or any, of the matters, and things, in the said complainant's bill contained, to be true, in such manner, and form, as the same are therein set forth,

and alleged, do demur to the said bill; and, for cause of demurrer, show that the said complainant has not, by his said bill, made such a case as entitles him, in a Court of Equity, to any discovery from these defendants, respectively, or any of them; or any relief against them, as to the matters contained in the said bill, or any of such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters com-

A demurrer must be signed by the defendant in person, or by his Solicitor; but as it asserts no fact, it need not be sworn to.<sup>4</sup>

§ 311. **Demurrers Coupled with Answers.**—A defendant is not bound to file a separate demurrer, except for want of jurisdiction of the subject-matter of the suit, or of the person of the demurrant. With these exceptions, he may rely on any ground of demurrer by setting it up in his answer.<sup>5</sup> When he relies upon a demurrer in his answer, the form and location of the demurrer is immaterial: it may be either prefixed to the answer, or suffixed to it, or incorporated in its body.<sup>6</sup>

**DEMURRER COUPLED WITH AN ANSWER.**

John Doe, }  
*vs.* } Demurrer and Answer to the Bill.  
 Richard Roe, *et al.* }

The defendant, Richard Roe, demurs to so much of the bill in said cause, as [*Here specify briefly the particular part of the bill aimed at by the demurrer, as in § 316;*] and for cause of demurrer shows: [*Here set out the causes or grounds of demurrer.*] And for answer to the residue of said bill, the defendant says: [*Here set forth the answer to so much of the bill as is not demurred to. If the part of the bill demurred to is, also, answered to, the answer will overrule the demurrer.*]<sup>7</sup>

**A DEMURRER IN AN ANSWER.**

John Doe, }  
*vs.* } No. 716.—In Chancery, at Sevierville.  
 Richard Roe, *et al.* }

The demurrer and answer of the defendant, Richard Roe, to the bill filed against him and others in the above entitled cause.

This defendant, Richard Roe, demurs to the bill filed in this cause, [*or demurs to so much of the bill filed in this cause, as—(here setting it out as in § 316;)*] and for cause of demurrer shows:

1st. [*Here set out the causes tersely, and number them in order.*]

And this defendant, not waiving his said demurrer, but relying thereon, for answer to said bill, says: [*Here set forth the answer to each and every allegation of the bill, in the same manner as though no demurrer had been prefixed to the answer.*]

This subject will be further considered in treating of the Joinder of Defences;<sup>8</sup> but it may be said, generally, that great caution must be exercised in joining two or more defences.

§ 312. **When a Demurrer Must be Filed.**—If a defendant desires to demur to the whole bill, he must do so before answering the bill; for an answer to the bill will overrule a demurrer to the whole bill. If, however, he wishes to demur to a part only of the bill, he can do so, and then answer the balance of the bill, at the same time, taking care to indicate clearly the part of the bill demurred to, and the part answered.<sup>9</sup>

A demurrer to the bill cannot be filed after a plea in bar or an answer has been filed;<sup>10</sup> nor can a demurrer be interposed when time is given to answer the bill, a demurrer not being regarded as an answer in the sense contemplated in the order giving the time.<sup>11</sup>

If the demurrer is the first pleading the defendant intends to file, he must deliver it to the Clerk in the time specified in the subpoena to answer, as already shown,<sup>12</sup> or a *pro confesso* will be entered against him; and if he intends to

plained of in the said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill; nor entitle the complainant to any relief in this Court, touching any of the matters therein complained of. *Wherefore*, and for divers other good causes of demurrer, appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable Court, whether they shall be compelled to make any further, and other, answer to the said bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.<sup>13</sup> Van Heyth. Eq. Drafts., 419; Sto. Eq. Pl., § 483, note. Such a demurrer would, now, be too general to be noticed. *Ante*, § 305.

<sup>4</sup> 1 Dan. Ch. Pr., 590.  
<sup>5</sup> Code, § 4319. The object of the statute, allowing a demurrer to be relied on in the answer, is to pre-

vent the delays incident to the filing of separate demurrers; and to enable a defendant to answer, without losing his right to demur, also. *Hardin v. Egin*, 2 Tenn. Ch., 39.

<sup>6</sup> *Ibid.*  
<sup>7</sup> A demurrer coupled with an answer is quite different from a demurrer incorporated in an answer. In the latter case, the answer may cover the part of the bill aimed at by the demurrer, without overruling the demurrer. Code, § 4319; *Hardin v. Egin*, 2 Tenn. Ch., 39.

<sup>8</sup> See, *post*, §§ 402-405.  
<sup>9</sup> See, *ante*, § 310.

<sup>10</sup> Except when the defendant is specially allowed to withdraw his answer for that purpose. See, *ante*, § 232, note.

<sup>11</sup> Civ. Rule I, § 7; *post*, § 1190.  
<sup>12</sup> *Ante*, §§ 205; 225-227.

answer after unfavorable action of the Court on his demurrer, he should be present when his demurrer is overruled, so as to file his answer if he have one ready, or to get time to answer, or he will be liable to a *pro confesso*.

ARTICLE VI.

ACTION OF THE COURT ON DEMURRERS.

§ 313. How Demurrers are Disposed Of.

§ 314. When Demurrers are Disposed Of.

§ 315. Effect of Sustaining, and of Overruling Demurrers.

§ 316. Amending Demurrers.

§ 313. **How Demurrers are Disposed Of.**—A demurrer is a challenge by the defendant to the complainant to test the right of the latter to require an answer to his bill; and the complainant can take no step forward so long as the demurrer remains undisposed of. If he thinks the demurrer good, but avoidable by an amendment to his bill, he can avoid it by amending his bill;<sup>1</sup> if, however, he thinks the demurrer fatal to his case, the only course open to him is to allow the Court to determine the sufficiency of the demurrer, or to dismiss his bill on his own motion. If, on the other hand, he thinks the demurrer bad, for any reason, he may demand the action of the Court upon it, either when the case is reached on the docket, or at any earlier time allowed by the rules of the Court.<sup>2</sup>

At the hearing of a demurrer the usual course of procedure is as follows: (1) the complainant reads his bill; (2) the demurrant reads his demurrer, and opens the argument in support of it; (3) the Solicitor of the complainant then replies to the argument of the demurrant; and (4) the demurrant concludes the argument.<sup>3</sup> In hearing a demurrer, the argument is strictly confined to the case presented by the bill, which is, for the purpose of the argument, not only conclusively deemed to be absolutely true, but is, also, given a construction favorable to its maintenance.<sup>4</sup>

The Court may sustain one or more of the grounds of demurrer assigned, or may sustain all, or may overrule all.

§ 314. **When Demurrers are Disposed Of.**—Inasmuch as a demurrer, if good, will destroy the whole, or at least, a part of the bill, it is manifestly useless to proceed further with the suit, until the sufficiency of the demurrer has been tested. For this reason, the statute requires that a demurrer shall be set for argument at the first term after it is filed.<sup>5</sup>

But, as in case of a plea in abatement, the demurrant must not take any step in the cause until his demurrer has been disposed of, or he will be conclusively deemed to have abandoned his demurrer. The object of a demurrer is to ascertain whether the Court will require the defendant to make any further answer to the bill, and if the demurrant voluntarily makes further answer, either by filing a plea or an answer, such action is a voluntary abandonment of his demurrer.<sup>6</sup>

If the defendant has incorporated a demurrer in his answer as provided by

<sup>1</sup> Code, § 4333.

<sup>2</sup> Some Chancellors allow demurrers to be called up, and argued, on motion days, after motions of course, have been all heard. Such a practice greatly expedites the preparation of a cause for hearing, especially in counties where the term lasts several weeks.

<sup>3</sup> The leading counsel for the demurrant usually replies to the complainant's Solicitor. 1 Dan. Ch. Pr., 596.

<sup>4</sup> 1 Dan. Ch. Pr., 596; *post*, § 317. If exhibits are made a part of the bill, they may be considered at the hearing of a demurrer. *Pope v. Harrison*, 16 Lea, 82. On the hearing of a demurrer to a bill of review, the pleadings and decree sought to be reviewed may be considered. See, *post*, § 1251.

<sup>5</sup> Code, § 4394.

<sup>6</sup> *Witt v. Ellis*, 2 Cold., 39.

the Code,<sup>7</sup> he must, also, comply with the further requirement of setting down the matters of demurrer for argument at the next term of the Court,<sup>8</sup> or it may be treated as abandoned.<sup>9</sup> And even where leave has been given to rely on a demurrer in the answer, the advantage of it will be lost, and the demurrer waived, unless it is disposed of before the cause is heard on the merits.<sup>10</sup>

§ 315. **Effect of Sustaining, and of Overruling, a Demurrer.**—If the complainant conceives that there is not sufficient cause apparent in his bill to support a demurrer put in to it, or that the demurrer is too extensive, or is otherwise improper, he may take the judgment of the Court upon it; but if he conceives the demurrer to be good, and that, by amending his bill, he can remove the ground of the demurrer, he may do so before the demurrer is argued. 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, the Court has, sometimes, instead of deciding upon the demurrer, given the complainant liberty to amend his bill, on his paying the costs incurred by the defendant. And this is always done in the case of a demurrer for want of parties. Where a demurrer leaves any part of a bill untouched, the whole of the bill may be amended, notwithstanding the allowance of the demurrer; for the suit in that case continues in Court, the want of which circumstance seems to be the reason of the contrary practice, where a demurrer to the whole of a bill has been allowed.<sup>11</sup>

But, in practice, the Court delivers its opinion upon the demurrer, before entering up judgment, thus giving the party an opportunity to move for leave to amend, before final judgment upon the demurrer; or, what is more common, the counsel interpose orally, at the bar, a suggestion to the Court, that if the opinion of the Court should be against them, upon any point, relievable by amendment, they will ask leave for that purpose.<sup>12</sup>

Even after a demurrer to the whole bill has been allowed, however, the Court will allow the bill to be amended, if it can be done at that term, so as to be proof against the demurrer, and otherwise sustainable;<sup>13</sup> but the amendment should be made known to the Court, before leave to make it is allowed, so that the Court, and not the complainant, may judge of its merit.

If the demurrer is based on, what is termed in this book, grounds of allowance,<sup>14</sup> such as (1) that the bill is not for the whole matter, or (2) that there is a want of proper parties, or (3) that the bill is multifarious, the Court will always readily allow the bill to be amended so as to correct the defect, on proper application, either before or after the demurrer is sustained.

After a demurrer to the whole bill has been overruled, a second demurrer to the same effect cannot be filed;<sup>15</sup> and the defendant must plead in bar to the bill, or answer it.<sup>16</sup> The Court may, however, allow a demurrer to be amended;<sup>17</sup> or the Court may, in a doubtful case, overrule a demurrer with leave to the demurrant to rely upon it, in his answer and at the hearing; but if, in such a case, the defendant goes to a hearing, without previously insisting on the demurrer in his answer, he is deemed to have waived his demurrer.<sup>18</sup> If, however, a demurrer is overruled without leave to rely on it, such a ruling is final, and the Chancellor is bound by it, and cannot redetermine the question, and sustain the demurrer, at the hearing.<sup>19</sup>

<sup>7</sup> Code, §§ 4318-4319.

<sup>8</sup> Code, § 4320.

<sup>9</sup> *Caruthers v. Caruthers*, 2 Lea, 77, citing *Hardin v. Egin*, 2 Tenn. Ch., 39, which says that a demurrer contained in an answer, should be set for hearing as speedily as possible, by the party relying upon it; otherwise, he may be charged with costs, and may be held to have waived its benefits. See, also, on this point, *Kyle v. Riley*, 11 Heisk., 230; and *Stephens v. Martin*, 1 Pick., 278.

<sup>10</sup> *Boyd v. Sims*, 3 Pick., 774.

<sup>11</sup> *Sto. Eq. Pl.*, § 459.

<sup>12</sup> *Sto. Eq. Pl.*, § 459 a.

<sup>13</sup> Code, §§ 2936; 4333-4335; 4387; *Crowder v. Turney*, 3 Cold., 551.

<sup>14</sup> *Ante*, §§ 278; 281-288.

<sup>15</sup> Code, § 4395; 1 Dan. Ch. Pr., 600; *Sto. Eq. Pl.*, § 460.

<sup>16</sup> Code, § 4384.

<sup>17</sup> But, see, *ante*, § 306, note 33.

<sup>18</sup> *Rogers v. Betterton & Co.*, 9 Pick., 630.

<sup>19</sup> *Boyd v. Sims*, 3 Pick., 771. The practice of overruling demurrers, with leave to rely upon them, in the answer, and at the hearing, is questionable. If, at the hearing, the demurrer is sustained, all the trouble and expense of preparing the case for hear-

A decree which sustains a ground of demurrer that goes to the entire bill, but overrules other grounds of demurrer, is a final decree, and an appeal lies from it.<sup>20</sup> The overruling of a demurrer in general terms, when the bill presents distinct grounds for relief, does not adjudicate that all the grounds are maintainable, but only that there is sufficient Equity in the bill to require an answer.<sup>21</sup>

When a demurrer is overruled, the defendant must answer the bill by the next rule day, or by the time prescribed by the Court, or the bill may be taken for confessed, and final decree pronounced.<sup>22</sup> And if the bill is brought on a note of hand, a judgment or decree, bond, stated or sworn account, or other *prima facie* evidence of debt, and is demurred to, and the demurrer overruled, and the defendant fails then and there to plead in bar, or answer, or obtain time to make defence, the complainant is entitled to a *pro confesso* and a final decree thereon, *instantier*.<sup>23</sup>

**ORDER PRO CONFESSO ON OVERRULING A DEMURRER, AND FINAL DECREE.**

Cowan, McClung & Co., }  
*vs.* } No. 813.—Final Decree.<sup>24</sup>  
 John Donaldson. }

The demurrer of the defendant to the bill having been overruled, and the defendant having failed to answer the bill in the time allowed by law, on motion of complainant's Solicitor, the bill is ordered to be taken for confessed and set for hearing *ex parte*.

And thereupon this cause coming on to be further and finally heard upon the whole record, and especially on the bill and the said judgment *pro confesso*, it is ordered, adjudged and decreed by the Court, that, [*Here set out the decree in accordance with the special prayers of the bill. See post, §§ 566-568.*]

**DECREE SUSTAINING A DEMURRER, AND DISMISSING THE BILL.**

John Doe, }  
*vs.* } No. 716.  
 Richard Roe, *et al.* }

The demurrer of the defendants coming on this day to be argued, the Court is of opinion that the demurrer is good and sufficient, and it is therefore allowed; and the Court, thereupon, orders and decrees that the bill be dismissed, and that complainant and Henry Doe, his prosecution surety, pay the costs of the cause, for which an execution will issue.

§ 316. **Amending Demurrers.**—A demurrer may be amended like any other pleading;<sup>25</sup> but, inasmuch as a demurrer is, itself, a fault-finder, the Courts show it but little favor when its own fault is confessed, and leave to amend is prayed only in order to enable it to find more fault. Where, however, a part of the bill is clearly demurrable, but the demurrer, while really aimed at such part, in fact covers the whole bill, the Court will sometimes allow the demurrer to be narrowed and confined to so much of the bill as is really demurrable. As already shown,<sup>26</sup> many demurrers, which would have been good, if confined to part of the bill, are held bad because they are not so confined. It is manifest, that a demurrer will not lie to the whole bill, merely because a part of the bill is demurrable. Where a part only of the bill is demurrable, the demurrer should be strictly confined to such part. The strictness of the practice on this subject, however, is not consistent with the liberality of our practice in other and similar respects, and the Chancellor would be abundantly justified in allowing a demurrer, which is too broad, to be so narrowed in its terms as to apply exclusively to the demurrable part of the bill, especially when such a course

ing, on the issues of fact, go for naught. A demurrer should be finally determined, when first heard; because, when subjected to a redetermination, it introduces into the suit an element of uncertainty, that tends to prevent a full development of the facts; the defendant hoping, and the complainant fearing, that the demurrer may be sustained, at the next hearing, and, the evidence taken, be, thereby, rendered absolutely valueless. As a consequence of this state of uncertainty, neither side, in preparing proofs, puts forth the effort it would have made, had the

demurrer been finally determined when first heard.  
 20 *Simmons v. Taylor*, 2 Pick., 729.  
 21 *Clark v. Pence*, 3 Cates, 20.  
 22 *Rose v. Meek*, 9 Pick., 666.  
 23 *Cowan, McClung & Co. v. Donaldson*, 11 Pick., 322.  
 24 *See Cowan, McClung & Co. v. Donaldson*, 11 Pick., 322.  
 25 *Code*, §§ 2863; 2867.  
 26 *Ante*, § 306.



would greatly narrow the litigation, and consequently lessen the costs of the suit.<sup>27</sup>

To illustrate what is meant by a demurrer being too broad, and being narrowed, suppose a bill to be filed by John Doe, an administrator, to sell some of the decedent's town lots, to pay the decedent's debts; and, also, to set aside a fraudulent conveyance of other lots to Richard Roe, one of his heirs, all of the heirs being defendants to the bill; and suppose Richard Roe should file this demurrer:

**FORM OF A DEMURRER TOO BROAD.**

John Doe,	}	Demurrer.
<i>vs.</i>		
Richard Roe, <i>et al.</i>		

The defendant, Richard Roe, demurs to the bill filed against him, and others, in this cause, on the following grounds:

1st. The estate of the complainant's intestate, not being alleged to be insolvent, the complainant, as his administrator, has no right to file a bill to set aside his intestate's conveyance to this respondent, on the ground that it was made in fraud of creditors.

Wherefore, this defendant prays the judgment of the Court, whether he shall be compelled to answer further, and prays to be hence dismissed.

JOHN JENNINGS, Solicitor.

On argument, this demurrer would be held to be too broad, and would be overruled, notwithstanding the manifest fact that the demurrer would have been good had it been confined to that part of the bill which sought to set aside the conveyance to Richard Roe. The demurrer, in the commencement, shows that Richard Roe "demurs to the bill," that is, to the *whole* bill; and, in its conclusion, it "prays the judgment of the Court whether the defendant shall be compelled to answer *further*, and prays that he be hence *dismissed*." While, therefore, it is plain that the demurrer is good to a *part* of the bill, it is equally plain that it is not good to the *whole* of the bill, and that, as a consequence, Richard Roe must "answer further," and cannot be "dismissed," because the bill is good as to him, in so far as it seeks to sell some of the town lots to pay debts.

Now, if the Court should allow this demurrer to be narrowed, its commencement and conclusion would be amended so as to read as follows:

**FORM OF A DEMURRER TO PART OF A BILL.**

John Doe,	}	Demurrer to the Bill.
<i>vs.</i>		
Richard Roe, <i>et al.</i>		

The defendant, Richard Roe, demurs to so much of the bill as seeks to set aside the conveyance made by complainant's intestate to this defendant, and for cause of demurrer shows:

[*Here set out the same ground of demurrer.*]

Wherefore, this defendant prays the judgment of the Court whether he shall be compelled to answer further as to so much of the bill as seeks to set aside said conveyance; and he prays to be hence dismissed as to such part of said bill.

JOHN JENNINGS, Solicitor.

The following are further forms of rulings illustrating probable phases of the case:

**RULING OF COURT ON A DEMURRER TOO BROAD.**

John Doe,	}	No. 683.
<i>vs.</i>		
Richard Roe, <i>et al.</i>		

The demurrer of the defendant, Richard Roe, to the bill coming on this day to be heard, the Court is of opinion that the demurrer is bad and insufficient, because too broad, and overrules the same, and requires the demurrant to answer the bill on tomorrow.

Thereupon the demurrant having narrowed his demurrer, by leave of the Court, so as to confine it to so much of the bill as seeks to set aside the conveyance made to him by the decedent, and argument having been heard thereon, the Court is of opinion that the demurrer,

<sup>27</sup> The Supreme Court, itself, did this, in the case of *Riddle v. Motley*, 1 Lea, 468. See, also, *Sto. Eq.* | Pl., § 443, note 4. Courts of Equity should always be liberal, when liberality promotes justice.

as amended, is good and sufficient; and it is, therefore, allowed. Thereupon, it is ordered and decreed that the bill be dismissed, in so far as it seeks to set aside said conveyance. The demurrant is allowed one day in which to answer the remainder of the bill.

But, supposing on the filing of said amended demurrer the complainant should ask and obtain leave to so amend his bill as to avoid the point of the said demurrer, then the ruling of the Court would be as follows:

**ORDER OF COURT OVERRULING A DEMURRER.**

John Doe, <i>vs.</i> Richard Roe, <i>et al.</i>	}	No. 683.
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The amended demurrer of Richard Roe to the bill in this cause coming on for argument, on motion of the complainant he is allowed to amend his bill by inserting at the end of the 2d paragraph the words, "the insolvency of the estate of the decedent has been duly suggested to the County Court of said County," and said amendment having been made on the face of the bill, thereupon the Court overruled the demurrer, and required the demurrant to answer the bill, and three days are allowed him for that purpose.

**ARTICLE VII.**

**PRACTICAL SUGGESTIONS CONCERNING DEMURRERS.**

§ 317. The Disposition of the Court towards Demurrers.	§ 318. The Practical Value of Demurrers Considered. § 319. How to Frame a Demurrer.
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§ 317. **The Disposition of the Court towards Demurrers.**—The Courts do not favor demurrers; and this for several reasons: (1) they are often unnecessarily filed; (2) they are frequently hypercritical; (3) they are many times filed for delay; (4) they sometimes evince a disposition to stifle an investigation of the merits of the controversy; and (5) as a result, they very seldom have any merit; and are, consequently, generally overruled.<sup>1</sup>

The legislation of our State,<sup>2</sup> and that of England, has long been hostile to frivolous demurrers; and the object of our statute, in allowing a defendant to rely on a demurrer in his answer, was to save the delay occasioned by separate demurrers,<sup>3</sup> and in that way mitigate some of the evils resulting from demurrers without adequate grounds.

The Courts make every reasonable presumption in favor of the bill when assailed by a demurrer;<sup>4</sup> and if, upon a critical examination of the facts stated in the bill, there is a possibility that the suit may be sustained, though upon a different ground from that assumed, a demurrer to the whole bill will be overruled,<sup>5</sup> the policy of the Courts being, to give every complainant an opportunity to be heard on the merits of his case, when any Equity whatever appears in his bill, although defectively stated.<sup>6</sup> For this reason, demurrers are now less frequently filed than formerly.<sup>7</sup>

§ 318.—**The Practical Value of Demurrers Considered.**—Demurrers are often of more practical value to the complainant than to the defendant; and the only substantial ground of complaint against demurrers, is the delay occasioned by

1 See, Barton's Suit in Equity, 113; Sto. Eq. Pl., § 454, note. See statutes, and Court rules, in various States, against demurrers. Code, §§ 2865; 2934; 2938; 4319; 4397; Tenn. Ch. Code, § 7; Equity Rules of U. S. Courts, §§ 31; 34; Cooke, 403.  
 2 Code, §§ 2865; 2934; 2938.  
 3 Hardin v. Egin, 2 Tenn. Ch., 39.  
 4 Thompson v. Paul, 8 Hum., 114; Lincoln v. Purcell, 2 Head, 143; Kerr v. Kerr, 3 Lea, 222. The English rule is the reverse, following the maxim,

*Ambiguum placitum interpretari debet contra proferentem.* Our Courts apply the maxim, *Benigne facienda sunt interpretationes, ut res magis valeat quam pereat*; and such is the spirit of our religion, Constitution and laws. Const., Art. 1, § 17; Code, § 2884. See, *ante*, § 63.  
 5 Trafford v. Wilkinson, 3 Tenn. Ch., 449.  
 6 Anderson v. Mullenix, 5 Lea, 287.  
 7 1 Dan. Ch. Pr., 542.

demurrers that are frivolous, hypercritical and impertinent. Demurrers, generally, are but little more than a notification to the complainant to amend his bill in certain particulars, to strengthen it where weak, and to unload it of unnecessary matters, or parties; and the Solicitor of the demurrant thus becomes a mere volunteer training-master to assist in putting the complainant's bill into such a shape that it will triumphantly reach the goal of its ambition.<sup>8</sup> Indeed, the demurrant, either in his demurrer, or in his argument thereon, often points out to the erring complainant the true road to success—a road the latter is generally not slow to take advantage of, by amending his bill, thus using the demurrant's own weapon to destroy him in the final battle.<sup>9</sup>

As a rule, a defendant should never demur, unless the point of his demurrer will almost certainly either, (1) cause the bill to be dismissed for want of jurisdiction of the person or the subject-matter; or (2) will penetrate to the very heart of the bill, and thus totally destroy it; or (3) will be fatal to some substantial part of the bill,<sup>10</sup> in which latter case, he should be very careful to confine his demurrer to that part of the bill intended to be aimed at. Such a demurrer is a vindication of the right of a demurrer to a place in the science of pleading, for it ends the litigation with the least possible delay, and the least possible costs; and thus benefits alike the complainant, the demurrant, and the Court.

**§ 319. How to Frame a Demurrer.**—A demurrer is, in substance, some conclusive reason why the defendant should not be required to answer the bill. This reason should be expressed in the most concise and cogent manner possible. Some demurrers are as long as an argument; some state, restate, and reiterate the restatement of the same objection; and others are a mere collection of criticisms. As a rule, the longer the demurrer, the weaker it is; and the more numerous the causes of demurrer, the less its effect. Sometimes it is well to restate a ground of demurrer in an alternative form; but long demurrers should never be filed. The ground of almost any demurrer may be expressed in five or six lines; and if three or four grounds are not sufficient to destroy the bill, it would be better to answer the bill at once, for it is safe to predict that a longer demurrer will be ineffectual.

A demurrable bill generally exposes a vulnerable part to plain view, and a demurrer is some keen point of law, driven into the bill through this weak and exposed part. A demurrer operates like a stiletto, and not like a bombardment. The brevity of an axiom, or a proverb, should characterize its form; and its

<sup>8</sup> The following observations of Wigram are quoted in a note to section 859, of Story's Eq. Pl.: "A defendant, who demurs, indeed, may have the benefit of every objection, which is apparent from the face of the bill, and a decision in favor of a demurrer, if submitted to by the plaintiff, will put a more speedy termination to a suit, than a defense by answer. But this possible advantage is purchased at the price of a premature discussion of the case, of which, if the demurrer should be unsuccessful, upon argument or the plaintiff be permitted to amend his bill, or if he should file a new bill, he will not fail to take advantage. The injurious consequences of such discussions have, almost universally, induced counsel of the greatest experience to advise against the practice of demurring, except where it was of paramount importance to the defendant, to avoid some of the discovery sought by the bill. The necessity for demurring could never have existed, if a defendant could, by answer, be protected against the discovery, which the demurrer would cover. A plea, which raises a question of law only, is in the same predicament as a demurrer; A plea, however, which raises a question of fact, is open to observations of a graver character, which would necessarily supersede its use, if a defendant might, by answer, protect himself against discovery, save that, which may be necessary to try the plea itself. If the defendant has several grounds of defense, he will, by plea, lose the benefit of all, except that which his plea may raise; whereas, by answer, he may have the benefit

of them all. If circumstances exist, as in the case put by Lord Redesdale, by which the plaintiff's right to relief may be qualified, the defendant, by pleading, may lose the benefit of those qualifying circumstances, which an answer would save. And, if the ground of defence be single, the defendant will obtain no advantage by a plea, which an answer will not equally afford him, but will subject himself to the disadvantage of a premature discussion of his case, which has already been adverted to. Negative pleas were (although reluctantly) admitted in Equity pleadings; because, without such a mode of meeting a case, the defendant was without the means of protecting himself against discovery." Wigram on Discovery, §§ 153-161. Inasmuch as a discovery is seldom sought now, the effect of the foregoing quotation is: Never to demur, or plead, when the same defence may be made by answer.

<sup>9</sup> Not seldom does the demurrant's Solicitor feel, at the hearing, that his defeat was the result of his own demurrer.

"So the struck eagle, stretched upon the plain,  
No more through rolling clouds to soar again,  
Viewed his own feather on the fatal dart  
And wing'd the shaft that quivered in his heart."

<sup>10</sup> What is meant here by "some substantial part of the bill," is, some part, which, when destroyed, will (1) either lessen the costs, or, (2) lessen the recovery against the demurrant.

substance should not only be good law, but law that will pierce the heart of the bill to its very core.

If the bill includes more matters than one, a demurrer may be applied to one of these parts, in which case great care should be taken to expressly confine the demurrer to the particular part of the bill intended to be covered by the demurrer. A bill cannot be destroyed by striking at one of its limbs. The books are full of cases of demurrers overruled because too broad,—demurrers which would have been allowed, if they had been narrowed and confined to the particular matter assailed. When you demur to a part of a bill only, say so, and specify the part; and answer the remainder of the bill. Remember these rules:

1. Never demur to the whole bill, unless the point of your demurrer will destroy the whole bill.

2. Never demur to the whole bill, when the point of your demurrer is fatal to a part only of the bill.

3. When your ground of demurrer is destructive of a part only of the bill, confine your demurrer to such part only, and answer the remainder of the bill.

4. Condense each ground of your demurrer into a single short and cogent sentence, or proposition.

5. Assign no cause of demurrer unless (1) it is applicable to the facts contained in the bill, and (2) will certainly show that those facts do not entitle the complainant to the relief thereon sought against the demurrant.

6. Content yourself with two or three grounds of demurrer, no ground covering more than five or six lines in writing.

7. Never demur when your demurrer will benefit your adversary more than your client.

8. Always demur when the bill shows a want of jurisdiction; the failure to demur in such a case may be fatal to your client.

## CHAPTER XVI.

## PLEAS IN BAR.

- ARTICLE I. Pleas in Bar Generally Considered.  
 ARTICLE II. Kinds of Pleas in Bar.  
 ARTICLE III. Frame and Form of Pleas in Bar.  
 ARTICLE IV. Pleas Supported by an Answer:  
 ARTICLE V. Proceedings upon a Plea in Bar.

## ARTICLE I.

## PLEAS IN BAR GENERALLY CONSIDERED.

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|--|---|
| § 320. Pleas in Bar Defined.                               | § 322. The Various Kinds of Pleas in Bar. |
| § 321. Pleas in Bar Distinguished from Pleas in Abatement. | § 323. The Rationale of Pleas in Bar.     |
|  | § 324. Pleas in Bar no Longer Necessary.  |

§ 320. **Pleas in Bar<sup>1</sup> Defined.**—When any matter fatal to the bill, or to any substantive part of it, appears on the face of the bill itself, it may be taken advantage of by a demurrer, and, sometimes, by a motion to dismiss; but, when a matter fatal to the bill, or to any substantive part of it, exists in fact, but is not apparent on the face of the bill, it must be brought before the Court by an affirmative plea, or by an answer. So, if some single allegation of the bill be false, and if the proof of its falsity will defeat the bill, or defeat a material part of the bill, such allegation may be denied by a negative plea. Hence, it may be generally stated that the office of a plea is either (1) to bring forward some single matter of fact, omitted from the bill, which, if true, will destroy the bill, or (2) to deny some single matter of fact alleged in the bill, which, if false, will deprive the bill of its Equity, and cause its dismissal. The former is called an affirmative plea, the latter a negative plea. It will thus be seen, that a plea is a special answer showing, or relying on, a single matter of fact as ground for dismissing the bill. But while the defence proper for a plea is one that presents a single point or matter of fact, which will cause the dismissal of the bill, or that part of it to which the plea applies, nevertheless it is not necessary that the defence should consist of a single fact: the defence may consist of a variety of circumstances, if they are all material, and all tend to one point.<sup>2</sup> The office of a plea in bar is to narrow the issue, lessen the costs, and speed the decision of the controversy. For this reason, the Court does not ordinarily allow more than one plea in bar to be filed; for, if more than one plea be filed, the costs and delays would be nearly or quite as great, as though the defendant had answered.

An affirmative plea brings forward a matter of fact omitted from the bill, and which if alleged would have rendered the bill demurrable; while a negative plea denies a matter of fact which, if it had been omitted from the bill, would

<sup>1</sup> Pleas in bar are seldom used in Tennessee Chancery practice, as all matters that can be set up by such pleas can now be set up in an answer. Code, § 4318. Such pleas, however, are largely considered in this book, 1st, because they are allowable and sometimes used; and 2d, because they show the defences that can be made by an answer, and illustrate the particularity required in an answer when certain special defences are set up. As to the practical value of pleas in bar, see, *ante*, § 318, note 8; and, *post*, §§ 324; 359.

<sup>2</sup> 1 Dan. Ch. Pr., 603; Sto. Eq. Pl., § 649. The matter of fact, which the plea presents, may be made up of several constituent facts. Thus, the plea of innocent purchaser brings forward the several facts constituting that defence: (1) Seizure in fee, by the defendant's vendor; (2) a conveyance, in fee, to the defendant; (3) the payment of the purchase-price, and (4) the absence of notice of complainant's alleged equities.

have made the bill demurrable. A defendant cannot, by an affirmative plea, insist upon a matter which is apparent upon the face of the bill, and may be made the subject of a demurrer.<sup>3</sup>

Pleas in bar admit: (1) that the Court has jurisdiction; and (2) that the bill on its face entitles the complainant to relief; and seek (3) to defeat his title to that relief, by either denying some material fact alleged in the bill, or by bringing forward some new material fact which avoids the case made out by the bill. Hence, pleas in bar, when sustained, terminate the particular suit.

Pleas in bar are not so much used as formerly to set up defences in bar, for the reason that, under the Code, the defendant may now incorporate all matters of defence, on the merits, in his answer, and is not required to plead specially in any case, except in abatement.<sup>4</sup> The meaning of the statute is that all matters, on which a plea in bar may be grounded, may be set up in an answer; and as discoveries and sworn answers are seldom called for now, an answer is ordinarily a mere plea, or series of pleas, in the garb of an answer. Under our practice, the substance of pleas is retained to the utmost, even when incorporated in an answer, and no one can draw an answer, with accuracy and precision, unless he well understands the essentials of pleas in bar.<sup>5</sup>

§ 321. **Pleas in Bar Distinguished from Pleas in Abatement.**—The division of pleas in the English practice is into: (1) pleas to the jurisdiction; (2) pleas to the person of the complainant or defendant; (3) pleas to the bill; and (4) pleas in bar. In our practice, all pleas are divided into (1) pleas in abatement, and (2) pleas in bar. All pleas in abatement dispute the jurisdiction of the Court over the person, or the subject-matter. Pleas in bar include all defences, proper for a plea, that do not dispute the jurisdiction of the Court.<sup>6</sup> The matter of a plea in bar can always be set up in an answer; whereas the matter of a plea in abatement can never be set up in an answer, but must always be pleaded specially, and pleaded before any other defence is made, or offered to be made. Pleas in abatement deny that the Court has any right to take any step at all in the suit, except to dismiss it. Pleas in bar concede the right of the Court to proceed in the cause, but deny that the complainant is entitled to the relief prayed, or at least to some substantive part of the relief prayed. In our practice pleas in bar range in effect all the way from a simple dismissal of the bill, as in case of a plea of a former suit pending, to a total bar of the subject-matter of the bill, as in case of plea of former judgment.

§ 322. **The Various Kinds of Pleas in Bar.**—Pleas in bar are, ordinarily, divided into: (1) the pure, or affirmative, (2) the negative, or impure, and (3) the anomalous.

1. **Affirmative Pleas in Bar** are those which merely state matter not apparent upon the bill, and rely upon the effect of such matter in bar of the complainant's claim. Such a plea usually proceeds upon the ground that, admitting the case stated by the bill to be true, the matter suggested by the plea affords a sufficient reason why the complainant should not have the relief he prays, or the discovery which he seeks; and when such a plea is put in, the Court, in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to be compelled to make, instantly decides upon the validity of the defence, taking the plea and the bill, so far as it is not contradicted by the plea, to be true.<sup>7</sup>

<sup>3</sup> 1 Dan. Ch. Pr., 604.

<sup>4</sup> Code, §§ 4318; 4309; 4385; *Lowery v. Naff*, 4 Cold., 370; *Bennett v. Wilkins*, 5 Cold., 240; *Kendrick v. Davis*, 3 Cold., 524.

<sup>5</sup> Defences in bar are the same, whether set up in a plea, or in an answer; and, although the ordinary practice now is to set up these defences in an answer, rather than by plea; nevertheless, the defences are the same, and can be as well considered

under the head of pleas, as under the head of answers. An answer is a mere series of pleas; and the averments necessary in a plea are equally necessary in an answer. Hence, the space devoted to pleas is, by no means, misused; but essential to a thorough understanding of the science of defensive pleading.

<sup>6</sup> See *Pleas in Abatement*, ante, § 241.

<sup>7</sup> 1 Dan. Ch. Pr., 604.

The grounds of affirmative pleas in bar are almost as numerous as are the affirmative defences that may be set up in an answer; but the following are the principal grounds: (1) prematurity of the suit; (2) another suit pending; (3) a former judgment; (4) an award; (5) payment; (6) a release; (7) a stated account; (8) the statute of limitations; (9) the statute of frauds and perjuries; and (10) innocent purchaser.

2. **Negative Pleas in Bar** are those which, instead of admitting the facts stated in the bill, and destroying their effect by setting up some new fact or chain of facts, undertake to destroy the complainant's right to relief, by denying some matter of fact stated in the bill on which his right depends. Thus, where a bill is filed to redeem, or to foreclose a mortgage, or to settle a partnership, a negative plea averring that there is no mortgage, or that there is no partnership, will be good.<sup>8</sup> So this plea will lie to negative the character in which the complainant sues, or the defendant is sued, as where the complainant sues, or the defendant is sued, as heir, executor, administrator, guardian, or as a corporation, or partner.

A negative plea must, ordinarily, be supported by an answer, when the bill sets up matters which, if not denied by the answer, would, if true, defeat the plea.<sup>9</sup>

Negative pleas in bar ordinarily deny (1) that the complainant possesses the character in which he sues, or (2) that the defendant possesses the character in which he is sued, or (3) that the complainant has the title he claims, or (4) that the defendant executed the instrument sued on, or (5) that complainants are partners, or (6) that the debt or demand sued on is of the value of fifty dollars.

3. **Anomalous Pleas in Bar**<sup>10</sup> are those which, strictly speaking, neither affirm new matter nor negative the complainant's title as alleged in the bill, but which reassert some fact stated in the bill, and which the bill seeks to impeach, and deny all the circumstances which the complainant relies upon as the ground upon which he seeks to impeach the fact so set up. Thus, where a bill is brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud.<sup>11</sup> Anomalous pleas must be supported by an answer, when the bill seeks a discovery, or alleges facts or circumstances in avoidance of the admitted bar.<sup>12</sup>

§ 323. **The Rationale of Pleas in Bar.**—The logic of an affirmative plea in bar is this: the complainant having omitted from the bill an essential matter of fact, which, if it had not been omitted, would have rendered the bill demurrable, the defendant may, by bringing this omitted essential matter of fact before the Court, destroy the apparent case contained in the bill, and in this way terminate the litigation, quickly and cheaply. Thus, a bill may show on its face a good cause of action, setting up many details, and praying for relief. If, however, the bill suppresses the fact that there has been a payment or a release, or a former adjudication, or that the suit is barred by the statutes of limitation, or that any other statutory, or equitable, defence exists, in any such case the defendant may set up this suppressed fact by a plea in bar, and, thereby, end the suit.

<sup>8</sup> 1 Dan. Ch. Pr., 604-605; Sto. Eq. Pl., § 660.

<sup>9</sup> Seifred v. People's Bank, 1 Bax., 200.

<sup>10</sup> Negative pleas are sometimes termed anomalous pleas; but, in this volume, they are separately classed.

<sup>11</sup> 1 Dan. Ch. Pr., 605; 607.

<sup>12</sup> Whithorne v. St. Louis Ins. Co., 3 Tenn. Ch., 147. Anomalous pleas are, sometimes, termed impure, and, sometimes, incongruous, pleas; they are, also, occasionally, termed negative pleas; but their character is so different from that of an ordinary negative plea, that they are treated, in this work, as a separate class. It is believed that many of the difficulties in dealing with pleas, arise from inter-mixing the three classes of pleas, which have been

separately considered in this Chapter. The characteristics of each of the three classes are distinctive; and any attempt to treat them under one head, or even under two heads, is sure to result in confusion, if not in error. Beames, Story, and Daniel, find themselves obliged, constantly, to use qualifying phrases, and make exceptions, in treating of pleas; because, much that is true of one sort of plea, is not true of the other two sorts. See Beames' Pl. in Eq., 6; 7; 9-18; 36; 124-125; Sto. Eq. Pl., §§ 651; 660; 667-671. This confusion is almost entirely obviated by separating pleas into three classes, as has been done in the text. Daniel recognizes these three classes. 1 Dan. Ch. Pr., 604-607.

A negative plea in bar denies some essential allegation contained in the bill, some averment on which the case rests; and the logic of the plea is: that, inasmuch as the complainant's alleged rights all depend on a false allegation of a single essential matter of fact, it is unnecessary for the defendant to answer all the various charges and averments in the bill, when the suit can be ended by a plea denying the allegation of this one essential matter of fact. A negative plea in bar is the opposite of an affirmative plea; an affirmative plea in bar seeks to bring into the case an essential matter of fact which the bill has left out, while a negative plea seeks to strike out of the case an essential matter of fact which the bill has brought in. In other words, an affirmative plea seeks to end the suit by injecting into it a fatal fact, and a negative plea seeks to end the suit by extracting from it a vital fact.

It is plain, that both affirmative and negative pleas in bar are really nothing more than short, pointed answers, intended to confine the litigation to a single issue, that, if decided in favor of the defendant, would end the suit; and, it is for this reason, the Courts often disallow a plea in bar as a plea, but allow it to stand as an answer, with liberty to the complainant to except to it for insufficiency, as an answer.

§ 324. **Pleas in Bar no Longer Necessary.**—Under the old practice, the defendant was required to answer most searching interrogatories in reference to his business affairs; and could be forced to divulge the most important secrets relative to the matters in controversy. To avoid the unpleasant necessity of these disclosures, the lawyers of those days resorted to pleas in bar whenever they could be made available. The result was a very artificial system of pleading, quite foreign to the simplicity of the original Chancery practice. But now that a discovery is seldom sought by a bill, and parties are competent witnesses, the old necessity for pleas in bar has, to a great extent, ceased to exist; and they are, therefore, seldom used. Under our practice, a defendant is not required to specially plead any matter in bar, but may incorporate all matters of defence to the merits in his answer.<sup>13</sup> Unless, therefore, the defendant desires to plead some matter in abatement, he will, ordinarily, set forth his defences in an answer, and thus avoid the perils and perplexities incident to pleas in bar.<sup>14</sup> Nevertheless, when either a negative or affirmative plea in bar will greatly narrow the controversy, and thereby lessen costs, and shorten the litigation, such a plea would be good practice. As illustrations of cases where pleas in bar may be advantageously interposed, may be mentioned the following affirmative pleas: (1) accord and satisfaction, (2) payment, (3) account stated or settled, (4) award, (5) former judgment, (6) failure of consideration, (7) infancy, (8) coverture, (9) duress, (10) statute of limitations, (11) statute of frauds; and the following negative pleas: (1) denial of the character in which the complainant sues, or the defendant is sued; (2) denial of the relation alleged, and (3) *non est factum*.

<sup>13</sup> Code, § 4318.

<sup>14</sup> While pleas in bar are no longer necessary, and are, in fact, seldom resorted to, nevertheless their logic remains, and he who wishes to be a good pleader must master that logic. All the defences that can be made by plea in bar can, also, be made by answer; but the defences are the same, and the essential averments are the same; and no pleader can intelligently draw an answer who does not thoroughly understand the rules and principles ap-

plicable to pleas in bar. They illustrate the logic of legal defence; and the uniform ruling of our Courts is, that, when matter proper for a plea is incorporated in an answer, all the certainty required in a plea is necessary in the answer. *Connell v. Furgason*, 5 Cold., 405; *Rhea v. Allison*, 3 Head, 179; *Stephens v. Porter*, 11 Heisk., 348. See *Arnold v. Kyle*, 8 Bax., 322. As to the practical value of pleas, see *ante*, § 318, note 8.



## ARTICLE II.

## KINDS OF PLEAS IN BAR.

§ 325. Pleas to the Bill.	§ 330. Plea of the Statute of Frauds.
§ 326. Pleas to the Person.	§ 331. Plea of a Statute of Limitations.
§ 327. Plea of Title in the Defendant.	§ 332. Plea of Innocent Purchaser.
§ 328. Plea or Former Suit Pending.	§ 333. Pleas of Stated, and of Settled, Accounts.
§ 329. Plea of Former Judgment, or <i>res adjudicata</i> .	§ 334. Other Pleas in Bar.

§ 325. **Pleas in Bar to the Bill.**—Courts of Equity delight to do complete justice, and not by halves. This maxim means that the Court delights to do complete justice in one and the same suit, and not to do half justice in one suit, and risk the chance of doing the other half, in another suit about the same general cause of action. For this reason, Courts of Equity require (1) that all the persons necessary to enable the Court to do complete justice in one suit shall be made parties, either complainant or defendant; and (2) that one cause of action shall not be split into several.

These matters may be set up by plea; but such pleas, like demurrers by allowance, are not based on any ground of right in the defendant, and are allowed by the Court only in the interest of good pleading, and in aid of the proper administration of justice. The grounds of these two pleas may be more fully stated as follows:

1. **That the Bill is for Only a Part of the Subject-Matter** of the controversy, that the complainant is splitting up his cause of action, and is, thereby, giving occasion for a multiplicity of suits.<sup>1</sup>

2. **That there is a Mis-Joinder of Parties Complainant**, or a non-joinder of parties complainant or defendant.<sup>2</sup> If the complainants have no joint right of action against the defendant, he may plead that fact. So, if there is such a deficiency of parties, whether complainants or defendants, that the Court will be unable to do complete justice, this fact may be pleaded, the plea showing the persons proper to be made parties, either by name or description, to the end that the complainant may know how to amend his bill,<sup>3</sup> and bring the deficient parties before the Court, either by making them co-complainants, or by making them defendants, or both.

Pleas for want of proper parties are, however, seldom filed, as they very seldom profit the defendant. Under our Code, a non-joinder of parties is no sufficient cause for the dismissal of a bill in Equity, unless objection is made by motion to dismiss, or demurrer.<sup>4</sup> On such a plea being sustained by proof, the cause will be ordered to stand over, with leave to the complainant to amend, but if the amendment is not made on a rule given, the bill may then be dismissed.<sup>5</sup>

§ 326. **Pleas to the Person.**—These pleas, in effect, maintain that whatever may be the merits of the case on the facts, either (1) the complainant is not the person to call upon the Court to investigate them, or (2) if the complainant

<sup>1</sup> Sto. Eq. Pl., §§ 287; 746.

<sup>2</sup> Code, §§ 4325; 4337; 4386; 4388.

<sup>3</sup> Sto. Eq. Pl., §§ 745, note; 238.

<sup>4</sup> Code, § 4325. This section is not in conflict with § 4337; for, while the latter section recognizes a plea for want of proper parties, yet it does not authorize a bill to be dismissed because of such a plea. The order on sustaining such a plea, would be to let the bill stand over, with leave to amend

by adding the necessary parties, as is done even where a demurrer for want of parties is allowed. *Gray v. Hays*, 7 Hum., 588; Sto. Eq. Pl., § 745.

<sup>5</sup> It is difficult to classify pleas to the bill; their matter and effect are in abatement, but as they do not object to the jurisdiction of the Court, they may be set up in an answer, and must, therefore, in our practice, be classed among pleas in bar. See Code, §§ 4337; 4386; 4388.

is the person, that the defendant is not the person he is alleged to be. These pleas question, ordinarily, either the character in which the complainant sues, or in which the defendant is sued, and include the following:

1. That the complainant is an infant, or married woman, or a person of unsound mind, and sues in his or her own name, without next friend, or guardian.<sup>6</sup>

2. That the defendant is not a single woman, nor an adult, nor a person of sound mind.

3. That the complainant is suing, or the defendant is being sued, as administrator or executor, when he does not possess that character in this State, having been appointed by some other State.

4. That the complainant does not sustain the character in which he sues; that he is not a corporation, or an administrator, or executor, or guardian, or trustee, or partner, or heir, or husband, or wife, or widow, or devisee, or legatee, or distributee, or tenant in common.<sup>7</sup>

5. That the defendant does not possess the character in which he is sued; that he is not a corporation, or an executor, or administrator, or guardian, or trustee, or heir, or husband, or tenant, or partner, or the official he is represented to be.<sup>8</sup>

6. That the complainant or defendant is a bankrupt. If a complainant, who has made an assignment in bankruptcy, sues for a debt included in his assignment, the defendant can plead that fact in bar to the bill, or may allege it in his answer. On the other hand, if a defendant has been discharged in bankruptcy, and is sued upon a debt from which he has been discharged, he can plead such discharge in bar to the bill, or may set it up in his answer. The certified discharge is evidence of the jurisdiction of the Court granting the discharge, and of the regularity of the proceedings, and of the discharge itself. A discharge in bankruptcy does not, however, *proprio vigore*, nullify all antecedent debts, but must be pleaded, and if the defendant fails to plead his own discharge, or the assignment in bankruptcy by the complainant, he is deemed to have waived such defense, and must suffer judgment accordingly. But a discharge when pleaded and proved is conclusive and cannot be avoided.<sup>9</sup>

These pleas, under the old practice, were generally classed as pleas in abatement,<sup>10</sup> but in our practice they are pleas in bar, because they do not question the jurisdiction of the Court, and may, therefore, be relied on in an answer. The last three classes are, also, pleas in bar by the strict logic of pleading, because, if true, they do not abate the suit, but bar the complainant's right of recovery against the defendant, and forever terminate the controversy. These pleas are the same in effect as those that deny the title of the complainant to institute the suit, or deny the interest of the defendant in the subject-matter of the suit.<sup>11</sup>

#### PLEA THAT COMPLAINANT IS A MARRIED WOMAN.

[For title, commencement, and conclusion, see, post, § 340.]

The defendants, for plea to the bill filed against them in this cause, say,—

That the complainant, Sarah Doe, before and at the time of the filing of her said bill, was, and now is, a married woman, the wife of John Doe, who is still living and fully capable of suing, if necessary, in her behalf.

<sup>6</sup> Sto. Eq. Pl., §§ 725; 727; ante, §§ 82-83.

<sup>7</sup> Sto. Eq. Pl., § 727.

<sup>8</sup> Sto. Eq. Pl., § 732.

<sup>9</sup> Sto. Eq. Pl., §§ 519, 722, 726; *Morris v. Creed*, 11 Heisk., 165; *Hudson v. Bingham*, 12 Heisk., 59; *Loveland's Pro. in Bankr.*, § 298.

<sup>10</sup> Sto. Eq. Pl., §§ 708; 722.

<sup>11</sup> Sto. Eq. Pl., §§ 728; 734. In all the cases in the last four classes stated in the text, the plea, if found true, forever terminates the controversy, by showing, either (1) that the complainant has no right to the relief he seeks, because he has no title to the character in which he sues; or, (2) that the defendant is not liable to the complainant, because he has not the character, and consequent liability, the complainant alleges; or, (3) that the bankruptcy

proceedings have taken away from the bankrupt complainant his rights, or from the bankrupt defendant his liability. Whatever destroys the complainant's suit, and disables him forever from recovering, may be pleaded in bar. 1 Dan. Ch. Pr., 638. If a party who sues as heir is not an heir, does not a plea denying his heirship as completely bar the suit as would a plea admitting his heirship, but denying his ancestor's title? The want of character cannot be cured as to that suit; and, if complainant subsequently becomes an heir, administrator, guardian, or other character, and then sues, as such, it is as much a new and different suit as that of a complainant, who, after being defeated, for want of a title to a particular farm, should bring a second suit, after acquiring that title.

**PLEA THAT DEFENDANT IS A MARRIED WOMAN.**

[For title, commencement, and conclusion, see, post, § 340.]

The defendant, Mary Roe, for plea to the bill, says:

That when the bill in this cause was filed she was and now is married to one Richard Roe, who was then and still is her husband, and living in Knox county, Tennessee.

**PLEA THAT COMPLAINANT IS AN INFANT.**

[For title, commencement, and conclusion, see, post, § 340.]

That the said complainant at the time of filing his said bill was, and now is, an infant under the age of twenty-one years, and he sues by neither a guardian nor a next friend.

**PLEA OF BANKRUPTCY OF THE DEFENDANT.**

[For title, commencement, and conclusion, see, post, § 340.]

That, on the.....day of....., 190..., in the District Court of the United States for the.....District of Tennessee, he was adjudged a bankrupt, and was duly discharged from the debt or demand set forth in complainant's bill, as will more fully appear from said discharge which is herewith filed, marked A, and made a part of this plea.

§ 327. **Plea of Title in the Defendant.**—If the defendant's title be superior to the complainant's, he may plead it in bar. Such a plea will, generally speaking, be founded either (1) on an adverse possession sufficiently long to bar the suit, or (2) on a will, or (3) on a conveyance.<sup>12</sup> To a bill brought by an heir at law against a devisee in possession, the latter may plead his title under the will, averring that the will was duly executed and proven. To a bill by an heir against the defendant in possession of land claimed by the former, the defendant may plead a conveyance executed to him by the ancestor.<sup>13</sup> To a bill brought by the holder of the last deed in the regular chain of conveyances from the grantee against a person in possession, the latter may plead, (1) that he has had twenty years' notorious and continuous adverse possession of the land; or (2) that the land has been granted, and that he has had seven years' notorious and continuous adverse possession thereof, under a color of title; or (3) that he has had seven years' continuous adverse possession thereof. The last plea is a plea of the statute of limitations, as it merely bars the suit, while the first two pleas are pleas of title, the possession being merely the evidence of title, and standing in the place of a deed, and having the same force and effect. The matter of the first and second of the above named pleas may be relied on without being specially pleaded.

§ 328. **Plea of Former Suit Pending.**—In Courts of concurrent Equity jurisdiction, the one that first acquires jurisdiction thereby obtains exclusive jurisdiction.<sup>14</sup> If, therefore, there be a suit pending, in another Court of concurrent Equity jurisdiction, between the same parties, concerning the same subject-matter, and for the same object, the defendant to the second suit may plead the pendency of the former suit as a defence<sup>15</sup> to the second suit. But the pen-

12 1 Dan. Ch. Pr., 672.

13 Sto. Eq. Pl., § 812.

14 Moore v. Holt, 3 Tenn. Ch., 143.

15 The exact character and class of the plea of former suit depending seem involved in some doubt; and, in our Courts, the plea has oscillated between pleas in abatement and pleas in bar. It is said, in Green v. Neal, that it is not strictly a plea in abatement, but is in the nature of a plea in bar. 2 Heisk., 219. In Macy v. Childress, it is said to be in the nature of a plea in abatement. 2 Tenn. Ch., 25. And in Morley v. Power, 5 Lea, 697; and in Connell v. Ferguson, it is said to be strictly, neither a plea in abatement, nor in bar, but a plea to the bill. 5 Cold., 405. In Tennessee, all pleas are either pleas in abatement, or pleas in bar. Code, § 4384. This is, manifestly, not a plea in bar, logically considered; for, if successful, it does not bar the suit, but only abates it; and if, after the plea is allowed, the former suit is dismissed by the complainant, he can bring a third suit in the Court, allowing the plea, against the same parties, and for the same purpose; and the dismissal of both, or

either, of the former suits, cannot be pleaded in bar of the third suit.

Nevertheless, the plea of former suit depending questions not so much the jurisdiction of the Court as the manifest injustice of permitting the defendant to be twice sued, at the same time, for the same matter; and, to this extent, it goes to the merits. For this reason, in our practice, this defence may be relied on in the answer; and, hence, under the Code, must be treated as in the nature of a plea in bar, as to the time, and manner, of setting it up; but as in the nature of a plea in abatement, when its effect is to be considered. Connell v. Ferguson, 5 Cold., 401; and cases above cited. Parmlee v. Railroad, 13 Lea, 600. It is said in Turley v. Turley, 1 Pick., 261, that all pleas may be relied upon in an answer, which do not go to the jurisdiction of the Court; and this is the true, and only, criterion in our State. And in Railroad v. Brigman, 11 Pick., 625, citing the above section of this book, (then, § 333,) it is held that a plea of former suit pending is a plea in abatement in our Circuit Courts, but a plea in bar in our Chancery Courts. See, ante §§ 241; 243; 321.

gency of two suits<sup>16</sup> for the same subject-matter, and the same purpose, in two different Chancery Courts in this State, will not prevent both Courts from proceeding to a hearing where each suit is instituted by a different person.<sup>17</sup> The pendency of a suit in another State, or in a United States Court sitting in this State, cannot be pleaded in abatement, or in bar, to a suit in our own State between the same parties upon the same matter.<sup>18</sup>

The plea should set forth, with certainty, (1) the commencement of the former suit, its general nature, and character, and objects and the relief prayed, giving the substance of the former bill or declaration; (2) that the second suit is for the same subject-matter as the first, and between the same parties, or their privies; (3) that the proceedings in the former suit were taken for the same purpose; (4) that there have been proceedings in the suit, such as an appearance, or process requiring an appearance, and (5) that the former suit is still pending.<sup>19</sup>

It is not necessary that the former suit should be between precisely the same parties as the latter suit: it may be between their privies.<sup>20</sup> Nor is it necessary that the entire subject-matter of the latter suit be included in the former suit, for if the latter suit is for a part of the subject-matter of the former suit, the plea will lie.<sup>21</sup> Thus, if after a bill is filed to recover property, and a second bill is filed to recover a part of the same property, either by the original complainant or a purchaser from him, the pendency of the former suit may be pleaded.

Where there is a plea of the pendency of a former suit, the course is to obtain a reference of the plea to the Master to ascertain and report, whether both suits are substantially the same; and the course, which the Court has taken, where the second bill has appeared to embrace the whole subject in dispute, more completely than the first, has been, to dismiss the first bill with costs, and to direct the defendant in the second cause to answer, upon being paid the costs of a plea allowed; which puts the case on the second bill in the same situation as it would have been in if the first bill had been dismissed before filing the second.<sup>22</sup>

<sup>16</sup> Searight v. Payne, 1 Tenn. Ch., 186; Macy v. Childress, 2 Tenn. Ch., 25; Cunningham v. Campbell, 3 Tenn. Ch., 491. It is stated, in works on Equity Pleading, that this plea will not lie when the pending suit is in a Court of law; Sto. Eq. Pl., § 742.

<sup>17</sup> Story says, that where the defendant is being sued also at law, he is not without a remedy for the double vexation; for a Court of Equity will, upon the coming in of the defendant's answer, put the complainant to his election, whether he will proceed in the suit at law, or in Equity; and, if he elects the latter, then, an injunction will issue to stay further proceedings at law; if he elects the former, then, the bill will be dismissed. But, if the complainant should fail in his suit at law, this dismissal of his bill will not be a bar to his bringing a second bill. Sto. Eq. Pl., § 742; Cocke v. Dotson, 1 Tenn. (Overt.), 169. Franklin v. Hersch, 3 Tenn. Ch., 469; 1 Barb. Ch. Pr., 126.

<sup>18</sup> Moore v. Holt, 3 Tenn. Ch., 141. As instances of suits of this character, may be mentioned, suits to wind up a partnership, suits to partition land lying in different counties, or to sell them for partition.

<sup>19</sup> Lockwood v. Nye, 2 Swan, 515; Cunningham v. Campbell, 3 Tenn. Ch., 491.

<sup>20</sup> Brien v. Marsh, 1 Tenn. Ch., 628; Sto. Eq. Pl., § 737.

<sup>21</sup> But it must be brought by the same complainant, or by some person in the same right; for, if the two bills are filed by different persons, though for the same purpose, the Court will not stop either before decree. Moore v. Holt, 3 Tenn. Ch., 141; but, see, Green v. Neal, 2 Heisk., 217, where it was held that a bill filed by a distributee against an administrator for a *devastavit*, was good ground for a plea of former suit to a bill afterwards brought by a creditor against the same administrator for the same *devastavit*, on the ground that the first suit

was for the creditor's benefit, and he could have become a party to it by petition, or even by motion.

<sup>22</sup> Searight v. Payne, 1 Tenn. Ch., 186. For tests when the plea will lie, see test of the sufficiency of a plea of former judgment, *post*, § 329. The test of the identity of the matters of the two suits, is whether the judgment in the first could be pleaded to the second in bar as a former adjudication. Moore v. Holt, 3 Tenn. Ch., 144.

<sup>23</sup> Sto. Eq. Pl., § 738. Story evidently refers to cases where both suits are in the same Court. Exactly how the truth of a plea of former suit depending is to be ascertained, is not definitely settled. In Green v. Neal, 2 Heisk., 217, the plea was referred to the Clerk and Master for a report as to whether the two suits were the same; and the question was determined on exceptions to his report; but, in this case, both suits were in the same Court. See Searight v. Payne, 1 Tenn. Ch., 191. In Allen v. Allen, after reviewing the authorities, it was held, by Chancellor Cooper, that this plea must be dealt with like all other pleas; set down for argument, if deemed bad; issue taken on it, if deemed good, but false. 3 Tenn. Ch., 145; and, see Montgomery v. Owell, 1 Tenn. Ch., 184; Searight v. Payne, 1 Tenn. Ch., 190; and Macy v. Childress, 2 Tenn. Ch., 23.

The correct practice, under our statute, is the one indicated by Chancellor Cooper. Our statute prescribes one uniform course, on all pleas, whether in abatement, or in bar. Code, § 4393. Why refer the plea to the Master, when it raises such nice questions of law and fact as will inevitably result in exceptions to any report the Master may make? Why not have it decided by the Court, in the first instance? The English Masters were trained lawyers; ours are, generally, not. The English practice, also, contemplates that both suits are in the same Court, England having but one Chancery Court; whereas, as a matter of fact, in our State, the

Where a decree is made upon a bill brought by a creditor, on behalf of himself and of all other creditors of the same person, and another creditor comes in before the Master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a person coming in under a decree, is a *quasi* party. The proper way for a creditor in such a situation to proceed, if the complainant in the original suit is dilatory, is by application to the Court for liberty to conduct the cause.<sup>23</sup>

The matter of this plea may be incorporated in an answer, without the necessity of pleading it specially; but, when so incorporated, there must be the same certainty of averments that is required in a plea;<sup>24</sup> but as the plea of former suit depending need not be sworn to,<sup>25</sup> so an answer setting up the same defence need not be sworn to, when the oath to the answer is waived.

The plea may be good as to part of the two suits, and bad as to the residue, in which case it will be allowed to stand as a defence in so far as it is good.<sup>26</sup>

The following form will illustrate the frame and essentials of a plea of former suit pending:

**PLEA OF FORMER SUIT PENDING.**

John Doe,  
vs.  
Richard Roe, et al. } In the Chancery Court, at Kingston.

The defendants, for plea to the bill filed against them in the above entitled cause, say, That heretofore, and before the complainant filed his present bill in this Court, to-wit: on the 5th day of March, 1891, he filed another bill of complaint in this Court, [or, in the Chancery Court of Loudon county] against these defendants for the same matters, and to the same effect, and for the like relief, as he, the complainant, does, by his present bill, demand and set forth, that is to say, the complainant in his said former bill, alleges that [*Here give the substance of the former bill and its prayers.*] to which said first bill these defendants did put in their joint and several answers, denying [*Give the defences set up in the answer;*] and other proceedings were thereupon had; and the said former bill is still pending in this Court, [or, in said Chancery Court,] and the matters thereof undetermined; and, therefore, the said defendants do plead the said former bill, answer, and proceedings in bar of the present bill, and demand the judgment of this Court, whether they shall be required to make any other, or further answer thereto; and pray to be hence dismissed with their costs.

[Annex affidavit and jurat as in § 340, post.

S. C. BROWN, Solicitor.

**§ 329. Plea of Former Judgment, or, Res Adjudicata.**—If the same controversy has been already adjudicated on its merits between the same parties,

former suit is, generally, in some other Court. When we have a plain statute, it would seem to be as binding on our Courts as the practice of the Court of another nation, especially when the latter is not adapted to the state of facts here prevailing. See *Green v. Neal*, 2 Heisk., 217. As to the necessary evidence to sustain the plea, see *Searight v. Payne*, 1 Tenn. Ch., 186; *Macey v. Childress*, 2 Tenn. Ch., 24. *Moore v. Holt*, 3 Tenn. Ch., 142; *Cunningham v. Campbell*, 3 Tenn. Ch., 488. The proper proof in support of the plea is a certified copy of the record of the former suit. *Parmelee v. Railroad*, 13 Lea, 600. See, also, *Williams v. Caplinger*, 6 Hum., 257.

If the plea be found false, it has been decided that the defendant has the right to answer over, and contest the case upon the merits. *Cunningham v. Campbell*, 3 Tenn. Ch., 488; See *Battelle v. Youngstown Co.*, 16 Lea, 355. But why make an exception in favor of this plea when the statute makes no such exception? In *Searight v. Payne*, 1 Tenn. Ch., 186, Chancellor Cooper seemed to be of opinion that the practice in reference to this plea was unsettled. The Code, § 4393, prescribes one uniform practice in case of all pleas; and when we follow our own statutes the road is plain and straight, but when we disregard our own statutes for the sake of conformity to the English practice, then arise uncertainty and confusion. If our statute is observed, then, when a plea of former suit pending is filed, if deemed insufficient, it must be set down for argument; if deemed or held sufficient, a replication to it must be filed, if found false by

the Court at the hearing on the facts, the complainant is entitled to the same advantages as if it had been found false in fact by verdict at common law, that is, he is entitled to a final decree as on a judgment *pro confesso*. Code, § 4393; *Bacon v. Parker*, 2 Tenn., (Overt.), 55; *Wilson v. Scruggs*, 7 Lea, 635; *Simpson v. Railway Co.*, 5 Pick., 304.

<sup>23</sup> Sto. Eq. Pl., § 740.

<sup>24</sup> *Connell v. Furgason*, 5 Cold., 405; *Macey v. Childress*, 2 Tenn. Ch., 25; *Morley v. Power*, 5 Lea, 697.

<sup>25</sup> *Green v. Neal*, 2 Heisk., 219. All the authorities agree that when the former suit is in the same Court, the plea of such suit need not be sworn to; but there is a difference of opinion on the subject when the former suit is in another Court. Some authorities hold that in the latter case the plea must be sworn to. *Mitt. Eq. Pl.*, 247, note; the great weight of authority, however, is to the effect that a plea of a former suit pending in another Court need not be sworn to. 1 *Barb. Ch. Pr.*, 118; 1 *Dan. Ch. Pr.*, 686-687; *Sto. Eq. Pl.*, § 742, note; *Beames, Pleas in Eq.*, 150. The reason given for not requiring a plea of former suit pending to be sworn to, is that the Court takes cognizance of its own records. This reason is good only when the former suit is in the same Court. 1 *Dan. Ch. Pr.*, 688. On principle, it would seem that where the former suit is in another Court, the plea should be on oath.

<sup>26</sup> *Searight v. Payne*, 1 Tenn. Ch., 186. See former notes to this section.

or their privies, in a Court of competent jurisdiction, the judgment or decree of such Court may be pleaded in bar to the second suit.<sup>27</sup> Such plea must, however, show that the issue and the subject-matter in the two suits were the same, and that the former suit was between substantially the same parties as the present suit;<sup>28</sup> and so much of the former bill and answer must be set forth as is necessary to show that the same point was there in issue.<sup>29</sup>

Although a final judgment of a Court of competent jurisdiction, whether in this, or in any other State, will operate as a bar to a claim for the same matter in a Court of Equity, yet if, from any circumstance, such as fraud, mistake, accident, or surprise, it is against conscience that the defendant should avail himself of such a bar, a Court of Equity will interfere to set it aside. Where, however, a bill for that purpose is filed, the defendant may plead the judgment in bar, negating by averments, and denying by an answer in support of his plea, the equitable circumstances alleged in the bill upon which the judgment is sought to be impeached.<sup>30</sup>

John Doe, <i>vs.</i> Richard Roe, and Roland Roe.	}	In Chancery at Rutledge.
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**PLEA OF RES ADJUDICATA, OR FORMER JUDGMENT OR DECREE.**

The defendants, for plea to the bill filed against them in this cause, say, That heretofore, and before the complainant filed his said bill in this Court, to-wit: on July 25, 1882, he, the complainant, filed another bill in this Court [*or in the Chancery Court at Knoxville,*] against the defendant for the same matter and demand and to the same effect, and for like relief, as he, the complainant does, by his present bill, demand and set forth; that is to say, the complainant in his said former bill alleged (1) that the defendant, Richard Roe, was justly indebted to him in the sum of one thousand dollars, evidenced by a note of hand, dated January 1, 1880, and due one day after the date thereof; and alleged (2) that this defendant, Richard Roe, intending and contriving not to pay said debt, did, on August 6, 1881, convey to this defendant, Roland Roe, the following tract of land in the 10th civil district of Knox county. [*Here describe it exactly as it is described in complainant's former bill,*]; and alleged (3) that this conveyance was made and contrived of fraud, covin, collusion and guile, to the intent and purpose to delay, hinder and defraud the creditors of said Richard Roe of their just and lawful debts, and especially to delay, hinder and defraud complainant of his said debt; and alleged (4) that this defendant, Roland Roe, took said conveyance from his co-defendant, the defendant Richard Roe, well knowing the fraudulent purpose and character thereof, and with intent to aid his co-defendant, the defendant, Richard Roe, to hinder, delay and defraud his creditors, especially the complainant, of their just debts; and that said conveyance was collusively made, and that there was a secret agreement between the defendants whereunder the defendant, Roland Roe, was to hold said land in secret trust for the benefit of his co-defendant, Richard Roe; and alleged (5) that while said conveyance recites that it was made for the consideration of one thousand dollars in hand paid, the recital is false, and that no cash was paid at all, and that if any was pretended to be paid it was a mere device in furtherance of the covin, collusion and fraud whereby the defendants were contriving to hinder and delay the complainant; and (6) prayed for process against defendants, and for a decree against the defendant, Richard Roe, for the amount due complainant as hereinbefore shown, and for principal and interest, and for costs of the suit, and to have said conveyance decreed to be fraudulent and void as against complainant, and said tract of land sold and the proceeds applied to the satisfaction of complainant's debt; and (7) prayed further that all other creditors of the defendant, Richard Roe, might be allowed to come in and prove their debts, that the bill be sustained as a general creditors' bill, that said property be attached, that the defendant, Roland Roe, be enjoined from selling, encumbering, or in any way disposing of said property, or any part thereof, and for general relief; all of which will fully and at large appear by reference to the record of said suit herewith filed, marked A, and made an exhibit to this plea, and a part hereof.<sup>30a</sup>

<sup>27</sup> Harris v. Water & Light Co., 6 Cates, 328. Or it may be set up in an answer. But the defence must be specially and expressly set up and relied on in one pleading or the other, otherwise it cannot be of any avail at the hearing, though appearing in the evidence; and enough of the former bill and answer must be set out to show clearly that the issues in the former suit and in the pending suit are identical; or the record in the former suit may be filed as an exhibit to the answer. Turley v. Turley, 1 Pick., 251; Jourloman v. Massengale, 2 Pick., 81.

<sup>28</sup> But a former judgment, between the same

parties and for the same property, will not bar a new suit based upon a subsequently acquired title. McKissick v. McKissick, 6 Hum., 75.

<sup>29</sup> Sto. Eq. Pl., § 791.

<sup>30</sup> Dan. Ch. Pr., 664. Or, he may make his entire defence by answer, the answer containing the matter both of the plea and the supporting answer.

<sup>30a</sup> It is best to file the record of the former judgment as an exhibit. Jourloman v. Massengale, 2 Pick., 81, 88.

These defendants were served with process under said former bill, and made answer in substance as follows: (1) defendant, Richard Roe, denied the justness of said note, and averred that it was obtained from him by fraud and duress under the form of a compromise into which he was forced, and that the only consideration was money lost in gambling with the complainant; (2) both of these defendants answered fully to the charges of fraud, covin, collusion and guile, and denied each and all of them absolutely, and denied that there was any trust or secret agreement whereunder this defendant, Roland Roe, was, or is, to hold said land for the benefit of his co-defendant, Richard Roe; and (3) both of these defendants averred that said conveyance was made in pursuance of a title-bond executed two years before said alleged note of hand, and that the consideration expressed in said conveyance was duly and wholly paid, eight hundred dollars of it before said alleged note was executed, and the remaining two hundred dollars on the day said conveyance was executed.

These defendants further say that on the issues thus made, proof was taken and the suit came on for final hearing, and was heard in and by this Court, [*or*, by the said Chancery Court at Knoxville,] and this [*or* said] Court decreed that said note for one thousand dollars, then and now sued on, was based on a gambling consideration, and was fraudulent and void, and dismissed said former bill of complainant, and taxed him with all the costs of said former bill and suit, and the complainant prayed no appeal from said decree.

Therefore, these defendants plead said former suit, proceedings and adjudication in bar of the present bill, and aver and say that said adjudication is and remains in full force and effect; and they pray the judgment of the Court whether they shall be required to answer further, and pray to be hence dismissed with their costs.

[*Annex affidavit as in § 340, post.*]

G. MC. HENDERSON, Solicitor.

The question whether the former suit and the present one are for the same cause of action, the parties being substantially the same, is answered in the affirmative if the subject-matter of the present suit is either identical with, or included in, the subject-matter of the former suit, or the same question might have been raised.<sup>31</sup> To ascertain whether the subject-matter of the present is included in the former suit, these two tests may be applied: 1st, Could the subject-matter of the present suit have been properly included in the adjudication of the former suit, the pleadings being considered?<sup>32</sup> and 2d, Would the evidence pertinent in the present suit have been admissible in the former suit? If these two questions, and they are alternative forms of the same test, are answered affirmatively, then it conclusively follows that the two causes of action are the same, and the former adjudication is ground for a plea in bar of the present suit.

It is not required that the results of the two suits should be the same, any more than it is required that the results of two trials of the same suit at law should be the same. When a new trial of the same suit is had at law, the second verdict often differs from the first; and so the evidence in the second trial often differs from that in the first. These considerations show, that the decisive test whether the two suits are for the same cause of action, does not depend on whether the evidence in the second suit was *actually* introduced in the first, nor on whether the judgment in the first suit *actually* included the subject-matter of the second suit. The real questions are: 1st, *Could* the evidence in the present suit have been legally introduced in the former suit? 2d, *Could* the former judgment have legally included the subject-matter of the present suit?

If, therefore, the capacity and scope of the former suit were sufficient to have legitimately included the subject matter of the present suit in its adjudication, then, in the sense of the rule, the two suits are for the same cause of action, whether the former adjudication, as a matter of fact, embraces the precise subject-matter of the present suit, or not.<sup>33</sup> The estoppel of a judgment or decree extends to all matters material to the decision which the parties might have brought forward.<sup>34</sup>

And of course, the tests that apply to a plea of former judgment, apply with equal force to a plea of the pendency of a suit not yet determined.<sup>35</sup>

31 Sto. Eq. Pl., § 791, note.

32 Lindsley v. Thompson, 1 Tenn. Ch., 274.

33 Lindsley v. Thompson, 1 Tenn. Ch., 274;

Knight v. Atkinson, 2 Tenn. Ch., 388; Nicholson v. Patterson, 6 Hum. 394; Parkes v. Clift, 9 Lea. 524;

Nolan v. Cameron, 9 Lea, 234; Boyd v. Robinson, 9 Pick., 1.

34 Sale v. Eichberg, 21 Pick., 333.

35 Moore v. Holt, 3 Tenn. Ch., 144; ante, § 328.

To constitute a good plea of former judgment, it must be shown by giving the substance of the former bill and answer, (1) that the same issue was joined in the former suit, as is tendered in the bill; (2) that the subject-matter of the suit was the same, and (3) that the proceedings in the former suit were for the same object and purpose,<sup>36</sup> and if the former suit was decided in favor of the defendant, the plea must show, (4) that the former judgment was rendered on the merits,<sup>37</sup> and (5) that the former judgment was final.<sup>38</sup> If the facts set out in the plea or answer make out the defence, it is not necessary to use any merely technical phraseology, or to aver in so many words, that the defendant relies on the defence of *res adjudicata*.<sup>39</sup>

§ 330. **Plea of the Statute of Frauds.**—Whenever any agreement required by the statute to be in writing exists really in parol, only, the statute may be pleaded to any bill filed to enforce such agreement; and so may the statute be pleaded to a bill setting up an essential verbal variation of a written contract within the statute.<sup>41</sup> This plea is applicable to suits brought for the specific execution of contracts for the sale or lease of lands, when such contracts have not been reduced to writing, but that fact does not appear on the face of the bill. If the fact that the contract was in parol appear on the face of the bill, the proper method of taking advantage of the fact is by demurrer.<sup>42</sup>

The plea must contain express averments, denying that the contract specified in the bill was reduced to writing and signed by the defendant, or by any person by him thereunto lawfully authorized; and must rely on the statute in bar of the bill.<sup>43</sup>

If this defence is set up in an answer, it must be made specifically. A verbal contract for the sale of land is not void, but voidable only; and, if it is admitted in the answer, such written admission will be a compliance with the statute, and will authorize the Court to enforce the contract, unless the defendant in his answer expressly relies on and pleads the statute, in bar of the relief prayed.<sup>44</sup>

The following is the form of a

#### PLEA OF THE STATUTE OF FRAUDS.

[For title, commencement, and conclusion, see, post, § 340.]

The defendant, Richard Roe, for plea to the bill filed against him in the above entitled cause, says, That neither he, nor any person by him, thereunto lawfully authorized, did ever sign any contract or agreement in writing, or any memorandum or note thereof, for the sale [lease or mortgage,] to the complainant of the tract of land [or, lot] mentioned and described in the said bill. And the defendant pleads and relies on these matters, and the statute for the prevention of frauds and perjuries, in bar of complainant's suit; and prays to be dismissed.

§ 331. **Plea of a Statute of Limitation.**<sup>46</sup>—If the bill show on its face that the recovery sought is barred by a statute of limitation,<sup>47</sup> a demurrer will lie:

<sup>36</sup> Sto. Eq. Pl., 780, a.

<sup>37</sup> Bankhead v. Alloway, 1 Tenn. Ch., 207; Hunt v. Means, 2 Sneed, 548; Harris v. Water & Light Co., 6 Cate, 328.

<sup>38</sup> Sto. Eq. Pl., § 791.

<sup>39</sup> Arnold v. Kyle, 8 Bax., 322; Code, §§ 2884; 2906. But the record of the suit at law must be produced in support of this defence. Williams v. Caplinger, 6 Hum., 257. See, also, Parmelee v. Railroad, 13 Lea, 600. And enough of the former bill and answer must be set forth to show that the same point was then in issue. Sto. Eq. Pl., § 791; Jourlmon v. Massengill, 2 Pick., 81. The estoppel of a judgment, or decree, extends to all matters which the parties might have had decided, as well as to those actually decided. Lindsley v. Thompson, 1 Tenn. Ch., 272; and the fact that the former judgment or decree was irregular, or even erroneous, in no way invalidates its force and effect. *Ibid*; Nicholson v. Patterson, 6 Hum., 394. Unless the judgment or decree be absolutely void, it is proof against collateral attack. Mere errors that might have reversed the decree on appeal, or writ of error, do not impair its validity when indirectly

or collaterally assailed. Kilcrease v. Blythe, 6 Hum., 378. *Nemo debet bis vexari*.

<sup>41</sup> Sto. Eq. Pl., 761.

<sup>42</sup> 1 Dan. Ch. Pr., 655; note; Treece v. Treece, 5 Lea, 223.

<sup>43</sup> Code, § 1758; 1 Dan. Ch. Pr., 656; Sto. Eq. Pl., § 763; Brakefield v. Anderson, 4 Pick., 206.

<sup>44</sup> Sneed v. Bradley, 4 Sneed, 301; Brakefield v. Anderson, 3 Pick., 206; Barnes Broa v. Coal Co., 17 Pick., 354; City v. Manufacturing Co., 9 Pick., 276. A part performance of a parol contract as to land will not take it out of the statute. Patton v. McClure, Mart. & Yerg., 333; Goodloe v. Goodloe, Nashville, 1906.

<sup>45</sup> Our statute of frauds is based on the Act of 1715, ch. 38, which, in turn, is based on the statute of 29 Charles II., ch. 3; *anno*, 1676.

<sup>46</sup> Our statutes of limitations are based on the Act of 1715, ch. 27, which in turn is based on the Act of 21 James I., ch. 16, passed in 1623.

<sup>47</sup> Laws are made for the diligent and not for the negligent. *Ante*, § 49. Statutes of limitation force persons having debts or demands to be in



but if the bill suppress the fact of the bar, such fact must be set up by plea, the plea ordinarily averring, either that the cause of action did not accrue within the period specified in the particular statute of limitation relied on; or, in suits to recover specific property, that the defendant had been in continuous adverse possession for the time requisite to bar the recovery sought.

The bill, may, however, show that the cause of action arose more than the statutory limit of years before suit was brought, and may avoid the bar by alleging a fraudulent concealment of the cause of action by the defendant;<sup>48</sup> or a new promise by him, or a statutory disability, or the non-residence of the defendant.<sup>49</sup> In such a case, a pure plea would not lie; and the defendant must file an impure, or anomalous, plea, setting up the limitation relied on, and denying the new promise, or the disability, or the non-residence, or denying the fraud, or denying that the fraud, if any, was first discovered within the limitation. The plea should, also, be accompanied with an answer in its support, containing a like denial of the promise, or other matter charged, and all the circumstances thereof.<sup>50</sup>

A statute of limitation which bars the remedy only must be pleaded, or specially set up in the answer, or it cannot be relied on at the hearing;<sup>51</sup> but a statute which cuts off the right need not be pleaded, or relied on in the answer, but may be relied on at the hearing, as a bar to the complainant's title. Statutes of limitation which bar the right are those which give title to personal property,<sup>52</sup> or to land,<sup>53</sup> if not sued for within the period of limitation.<sup>54</sup> Heirs, or other persons who inherit land, may plead the statute of limitations to protect their land in an administration suit, if the administrator fail to do so.<sup>55</sup>

The plea must be verified, or it may be disregarded;<sup>56</sup> but the verification may be waived by filing a replication to the plea, or by taking proof on it.<sup>57</sup>

The following is the form of a

#### PLEA OF A STATUTE OF LIMITATION.

John Doe,  
vs.  
Richard Roe, *et al.* } In the Chancery Court, at Madisonville.

The defendant, Robert Roe, for plea to the bill filed against him and others, in the above entitled cause, says, That the complainant's cause of action, if any he has, accrued more than

distrustful and vigilant. The interests of society require that there should be some end to the right to litigate. The law allows all claimants a reasonable time in which to bring suit; and if they fail to do so within the time allowed, and, as a consequence, suffer loss, they must impute that loss to their own negligence or misplaced confidence, and not to the law, which was made for the general good, and cannot be warped to suit the exigencies of individuals. Statutes of limitations are made for the good of society, and for the peace and quiet of mankind, so that they may know when to be at rest, and when the troubles of threatened litigation may cease. *Smith v. Hickman*, Cook, 332. Nature, herself, appoints a season for everything, and if anything is not done in the season appointed, the wheels of time are not reversed for the benefit of any one. The doors of the Courts open at the summons of those only who are diligent. The statute of limitations, not only in this State, but generally, is now looked upon with favor, as a statute of repose. *Cooke v. Hoffman*, 5 Lea, 112; *Coleson v. Blanton*, 3 Hayw, 152. Time is depicted carrying a scythe and an hour-glass. While, with his scythe, he cuts down the evidence which might protect a party against unjust demands, he, at the same time, with his hour-glass, metes out the period when unjust demands can be no longer sued on. *Smith's Eq. Jur.*, 20. See, *ante*, § 70.

<sup>48</sup> See note, 54, *infra*.  
<sup>49</sup> *Sully v. Childress*, 22 Pick., 109, citing the above section of this book, then § 336.

<sup>50</sup> *Graham v. Nelson*, 5 Hum., 610; *Sto. Eq. Pl.*, § 754; *Bank v. Bank*, 1 Ch. Apps., 474, citing the above section of this book, then § 336.

<sup>51</sup> *Carter v. Wolfe*, 1 Heisk., 701; *German Bank*

<sup>52</sup> Code, § 2773; *McCombs v. Guild*, 9 Lea, 87.  
<sup>53</sup> Code, §§ 2763; 2767; 2281; 2786; *Caldwell v. McFarland*, 11 Lea, 463.

<sup>54</sup> *Bomar v. Haglar*, 7 Lea, 89. In this case, the reason of the text is clearly shown by Judge Cooper.

Courts of Chancery are equally as much bound to respect the statutes of limitations as are Courts of law. *Hickman v. Gaither*, 2 Yerg., 207. And in all cases where the Courts of law and Equity have concurrent jurisdiction, these statutes apply with as much vigor in one Court as in the other. *Peebles v. Green*, 6 Lea, 474. But, a Court of Chancery, having no such forms of actions as the statutes of limitations specify, it must, of necessity, look to the evidence; and if, upon that evidence, a suit at law would be barred, it will be barred in Equity. *Phipps v. Richmond*, 1 Hum., 21. In applying the statutes of limitations, Courts of Equity have made but one exception beyond those contained in the statute, and that is in cases where the cause of action has been concealed by the fraud of the defendant. *Nicholson v. Lauderdale*, 3 Hum., 200; *Vance v. Motley*, 8 Pick., 310; and where a beneficiary sues an express trustee, *Hughes v. Brown*, 4 Pick., 578.

The statutes of limitations now cover nearly the whole field of Equity, and the exceptions recognized in the Chancery Court are very few. By the act of 1885, ch. 9, vendors' liens on realty retained in the face of the deed, mortgages, deeds of trust, and assignments of realty to secure debts, are barred in ten years after the maturity of the debt.

<sup>55</sup> *Miller v. Taylor*, 2 Shan. Cas., 464; *Acts of 1905*, ch. 73.

<sup>56</sup> *Graham v. Nelson*, 5 Hum., 609.

six [or, ten] years before said bill was filed, [and if a new promise is alleged, add—and that he did not promise to pay the debt sued on within six years next before the filing of the bill.] *[Annex affidavit and jurat as in § 254.]* McCroskey & Peace, Sol's.

In drawing pleas of the statutes of limitations, it is a safe practice to follow the language of the statute itself as closely as possible, as by so doing the statute is pleaded in its own words.

The plea of the statute of limitations in case of suits brought to recover lands must conform to the statute relied on. The following form will aid the pleader:

**PLEA OF SEVEN YEARS' ADVERSE POSSESSION.**

John Doe,  
vs. } No. 618. } In Chancery, at Wartburg.  
Richard Roe, et al.

The defendants, for plea to the bill filed against them in this cause, say, That they, and each of them, have had by themselves [or, by themselves and those through whom they claim, or, by those through whom they claim,] continuous adverse possession of the tract of land sued for by complainant, for more than seven years before the bill in this case was filed.

*[Annex an affidavit and jurat, as in § 254, ante.]* WILLIAM A. HENDERSON, Solicitor.

§ 332. **Plea of Innocent Purchaser.**—From what has been above stated,<sup>58</sup> it is obvious that where a conveyance is insisted upon by plea, as an adverse title, it must bear date at a period anterior to the commencement of the complainant's title as shown by the bill: there are cases, however, in which a conveyance may be insisted upon, though posterior in point of date, to the complainant's title. In such cases, however, it is necessary to the validity of the plea, that the conveyance should have been for a valuable consideration, and that, at the time it was perfected, the defendant, or the person to whom it was made, should not have had notice of the complainant's right. A plea of this sort is called a plea of purchase, for a valuable consideration, without notice; and it is founded upon the principle that where the defendant has an equal claim to the protection of a Court of Equity to defend his possession, as the complainant has to the assistance of the Court to assert his right, the Court will not interpose on either side.<sup>59</sup>

Such a plea must contain the following essentials:

1. **It Must Aver a Conveyance.** It must show that the defendant holds the land in dispute under a deed of purchase, giving its date, and name of vendor.<sup>60</sup> An agreement to convey, or a title bond, is not sufficient.<sup>61</sup>

2. **Seizin, Actual or Pretended, in the Vendor.** It must aver that the vendor was seized, or pretended to be seized, in fee, at the time he executed the conveyance.<sup>62</sup> If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession, at the time of the execution of the conveyance. And, if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion. But, although a bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the complainant's ancestor.<sup>63</sup>

3. **Payment of the Consideration Money.** The plea must, also, distinctly aver that the consideration money, mentioned in the deed, was *bona fide* and truly paid, independently of the recital of the purchase deed; for, if the money be not paid, the plea will be overruled,<sup>64</sup> as the purchaser is entitled to relief against the payment of it. The particular consideration must also be stated.<sup>65</sup> There can be no objection to the amount of the consideration; for, if it be valuable, the plea will not be invalidated by mere inadequacy. The question is,

<sup>58</sup> See *ante*, § 327. See, also, *ante*, § 75, where the equities of an innocent purchaser are considered.  
<sup>59</sup> 1 Dan. Ch. Pr., 674; Sto. Eq. Pl., §§ 805-808. See *Innocent Purchaser, ante*, § 75. The plea of innocent purchaser is no defence to an ejectment bill. 1 Pom. Eq. Jur., §§ 743; 765. The plea of innocent purchaser is called the "Gibraltar of defences."

<sup>60</sup> 1 Dan. Ch. Pr., 676.  
<sup>61</sup> *Smithal v. Gray*, 1 Hum., 496; *Pillow v. Shannon*, 3 Yerg., 508.

<sup>62</sup> *Craig v. Leiper*, 2 Yerg., 193. This is a leading case. See, also, *Saylors v. Saylors*, 3 Heisk., 529; *White v. N. & N. R. Co.*, 7 Heisk., 550.

<sup>63</sup> 1 Dan. Ch. Pr., 677; Sto. Eq. Pl., § 805.  
<sup>64</sup> *Livingston v. Noe*, 1 Lea, 66.  
<sup>65</sup> *High v. Batts*, 10 Yerg., 337; *Ellis v. Temple*, 4 Cold., 321. Whether the particular consideration paid should be alleged seems to be doubted. 1 Dan. Ch. Pr., 677.

not whether the consideration is adequate, but whether it is valuable. For, if it be such a consideration as will not be deemed fraudulent within the statute, or is not merely nominal, it ought not to be impeached in Equity.<sup>66</sup> But the consideration must have been advanced at the time the title is taken; for a conveyance, in consideration of a pre-existing debt, will not protect the purchaser.<sup>67</sup>

4. **Denial of Notice of Complainant's Claim.** The plea must, also, deny notice of the complainant's title, or claim, previous to the execution of the deed and payment of the purchase money; for till then, the transaction is not complete; and therefore, if the purchaser have notice previous to that time, he will be bound by it. The notice so denied must be notice of the existence of the complainant's title, and not merely notice of the existence of a person who could claim under that title.<sup>68</sup> But a denial of notice, at the time of making the purchase and paying the purchase money, is good.

The notice must be positively and not evasively denied, and must be denied whether it be, or be not, charged by the bill.<sup>69</sup> If particular instances of notice, or circumstances of fraud are charged, the facts from which they are inferred must be denied as specially and particularly as charged. But the defendant need only by his plea deny notice generally, unless where facts are specially charged in the bill as evidence of notice.

If there are circumstances charged to show that the defendant had notice, the plea must be supported by an answer denying notice, and denying the particular facts alleged in the bill to show notice. But the denial of notice in the answer, does not exempt the defendant from the necessity of denying notice in his plea.<sup>70</sup>

If, however, a defendant omit to deny notice either in his plea, or in his answer, and the complainant fails to object in the proper time and manner, he will be deemed to have waived the question of notice; and, even if notice be proved, it will avail him nothing at the hearing.<sup>71</sup>

A person affected by notice has the benefit of the want of notice to intermediate parties, and may shelter himself under a purchaser without notice. But notice to an agent is notice to the principal.<sup>72</sup>

The defence of innocent purchaser cannot be made at the hearing, unless set up by plea, or answer;<sup>73</sup> and when set up in an answer must contain the same essential averments, and be otherwise as full and explicit, as though set up in a plea.<sup>74</sup> Indeed, in such a case, an answer is both a plea and an answer in support of it.

<sup>66</sup> 1 Dan. Ch. Pr., 677.

<sup>67</sup> Cook v. Cook, 3 Head, 719; Anderson v. Taylor, 1 Tenn. Ch., 442; Finnegan v. Finnegan, 3 Tenn. Ch., 515.

<sup>68</sup> Pinson v. Ivey, 1 Yerg., 296; Sto. Eq. Pl., § 806.

<sup>69</sup> Aiken v. Smith, 1 Sneed, 312; Sto. Eq. Pl., § 662; Pillow v. Shannon, 3 Yerg., 509.

<sup>70</sup> 1 Dan. Ch. Pr., § 678. Story says that it is not the office of a plea to deny particular facts of notice, even if such particular facts are charged. Sto. Eq. Pl., § 806; and such would seem the better practice. It is the office of the answer supporting the plea to deny the particular facts; and, it is believed that a general denial of notice in a plea will be sufficient, even when the bill charges particular facts and circumstances to show notice. But in the latter case, the plea must be supported by an answer denying such particular facts and circumstances.

<sup>71</sup> 1 Dan. Ch. Pr., 679; 695; Harris v. Smith, 14 Pick., 286; Stainback v. Junk, 14 Pick., 306, both citing above section of this book, then, § 337.

<sup>72</sup> 1 Dan. Ch. Pr., 675; Sto. Eq. Pl., § 808.

<sup>73</sup> It cannot be made by demurrer. Dunham v. Harvey, 3 Cates, 620.

<sup>74</sup> Rhea v. Allison, 3 Head, 177. Pomeroy gives the necessary allegations of a plea, or answer, setting up the defence of innocent purchaser, as follows:

The allegations of the plea, or of the answer, so far as it relates to this defence, must include all those particulars which are necessary to constitute a *bona fide* purchase. It should specify the consideration, which must appear from the averment to be "valuable," within the meaning of the rules upon that subject, and should show that it has actually been paid and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary whether notice is charged in the complaint or not. The denial must correspond with the settled rules upon the subject of notice, so as to bring the case within the operation of those rules. The defendant must allege that the grantor from whom he immediately took his title, was seized, or appeared to be seized, or pretended to be seized, of a legal estate at the time of the conveyance, and also that such grantor was in possession, if the conveyance purported to be of a present estate in possession. Consequently, the defendant must allege that by the conveyance in question he either actually obtained a legal freehold estate, or else obtained what purported and appeared to be such an estate, and what he at the time purchased as, and supposed and believed to be, such a freehold legal estate—that he acquired a legal seizin from his immediate grantor. 2 Pom. Eq. Jur., § 785. See Dunham v. Harvey, 3 Cates, 620.

The following is a short but sufficient form of a plea of innocent purchaser:

**PLEA OF INNOCENT PURCHASER.**

John Doe,  
*vs.* } No. 793. } In Chancery, at Knoxville.  
 Richard Roe, *et al.* }

This defendant, Romeo Roe, for plea to the bill filed against him and others, in this cause, says:

That on the 8th day of May, 1890, his co-defendant, Richard Roe, was seized, or pretended to be seized, in fee, of the lot described in the bill, and was in actual possession thereof, and this defendant on said day purchased from said Richard Roe said lot, for the consideration of one thousand dollars, which was then and there truly and actually paid to said Richard Roe, and this defendant then and there took from said Richard Roe, in pursuance of said purchase, a deed conveying to this defendant said lot in fee, with full covenants of seizin, right to convey, and general warranty of title, which deed was on said day duly acknowledged, probated, and registered. And this defendant avers that, at and before the taking of said deed, and the payment of said money, he had no notice whatever of the title and claim the complainant sets up to said lot in his bill, and had no reason to believe or suspect that he had any such title or claim, or any claim or title whatsoever, but he verily believed that said Richard Roe then had the legal and equitable right to sell and convey said lot; and that in all he did in making said purchase and in paying said consideration money, this defendant acted in good faith, without any notice whatever of complainant's alleged rights, and without any intention in any way to injure or defraud the complainant. And so this defendant insists and pleads that he is a *bona fide* purchaser of said lot, for a good and valuable consideration, and without notice of the title and claim set up by the complainant to said lot; and he, therefore, prays to be dismissed.

[*Annex affidavit and jurat, as in § 340, post.*] W. P. WASHBURN, Solicitor.

If the bill charges circumstances showing notice, or charges fraud, the plea must be supported by an answer denying the circumstances, or the fraud.<sup>75</sup> This answer may follow the plea, thus:

**ANSWER SUPPORTING A PLEA.<sup>76</sup>**

And this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer to said bill, says: [*then proceed with a denial of the particular facts or circumstances alleged in the bill as evidence of notice; or with a denial of the fraud alleged; and conclude the answer in the usual way.*]

§ 333. **Pleas of Stated, and of Settled Accounts.**—When a bill is filed for the purpose of compelling the defendant to account, if there has already been a stated account, or if there has been a settled account, he may set up this defence by plea in bar.

An account is stated when the matters of charge and discharge on both sides have been examined, a balance struck, and such balance admitted to be correct. When such balance is paid, the account is called a settled account.<sup>77</sup>

To sustain a plea of stated account, the account must be shown to be (1) in writing, (2) that a balance was struck, (3) what that balance was, (4) that the balance was agreed on as correct, and, (5) that the settlement resulting in such balance was final.<sup>78</sup> It is not necessary to aver or prove that the account was settled upon a minute investigation of items, a general agreement or composition being sufficient; nor will the fact that errors were excepted be a sufficient ground for opening an account, unless specific errors are pointed out in the bill.<sup>79</sup> It is not essential to the validity of a stated account as a bar, that it should be signed by the parties; it will be sufficient if it has been delivered and acquiesced in for a considerable length of time. The plea must, however, aver that the stated account is just and true, to the best of the defendant's knowledge and belief.<sup>80</sup> Where fraud is charged, and the defendant pleads the account in bar, he must in his supporting answer deny the allegations charging fraud.<sup>81</sup>

Settlements with the County Court, made by executors, administrators, and guardians, when the beneficiaries are infants, are only *prima facie* correct, and

<sup>75</sup> See, *post*, §§ 345-349.

<sup>76</sup> For fuller form, see, *post*, § 348.

<sup>77</sup> Sto. Eq. Pl., § 798. See, *post*, § 952.

<sup>78</sup> 1 Dan. Ch. Pr., 665; Sto. Eq. Pl. § 798.

<sup>79</sup> 1 Dan. Ch. Pr., 666; Sto. Eq. Pl., § 800.

<sup>80</sup> 1 Dan. Ch. Pr., 666.

<sup>81</sup> Sto. Eq. Pl., § 802; 1 Dan. Ch. Pr., 667.

may be opened without surcharging and falsifying them; they will, however, be *prima facie* evidence in the taking of the general account.<sup>82</sup> But where the beneficiaries are of age, and have notice of the settlement, and the right of contest and appeal, such settlements have all the force and effect of a stated account.<sup>83</sup>

A stated account will not be opened, unless the complainant charges and clearly proves either fraud on the defendant, or specific error caused by mistake. Where, however, the relation of attorney and client, principal and agent, guardian and ward, or trustee and beneficiary, exists, the Court will open a stated account on much less proof than when there is no such confidential relation; and will do so in such cases even where only general errors are pointed out, if fraud or undue influence be shown.<sup>84</sup>

But where there is no fraud, and where errors or mistakes only are shown to exist in the account, the account will not be opened, but the complainant will be permitted merely to surcharge and falsify it. This is an important distinction, because, where an account is opened, the whole of it may be unraveled, and the parties will not be bound by deductions agreed upon between them, on taking the former account. The *onus probandi* is always on the party having the liberty to surcharge and falsify; for the Court takes it as a stated account. If the party can show omission for which there ought to be credit, it will be added, (which is a *surcharge*), or of any wrong charge is inserted, it will be deducted, (which is a *falsification*). This, however, must be done by proof on his side. Although a party seeking to open a settled account, must specify the errors he insists upon, yet it is not necessary that he should, at the hearing, prove all the errors specified in his bill. If he proves some of them, he entitles himself to a decree giving him liberty to surcharge and falsify. Where parties are at liberty to surcharge and falsify, they are not confined to mere errors of fact, but may take advantage of errors of law; and where one party is allowed to surcharge and falsify, the other is allowed the same privilege.<sup>85</sup>

#### PLEA OF STATED, OR SETTLED ACCOUNT.

John Doe,

*vs.*

Richard Roe, *et al.*

} In Chancery, at Knoxville.

The defendant, Richard Roe, for plea to so much of the bill as seeks an account, says that on or about the 10th day of April, 1893, [giving the date of the settlement.] the complainant and defendant made and stated a full and final account in writing of all the matters and things referred to in the bill, which account was true and just to the best of his knowledge and belief, and resulted in a balance of \$200, [state the amount.] due the defendant, [or, the complainant.] [If the account was settled then add.] And that the complainant approved said account and paid [or received] the said balance due from [or to] him on said account, on or about the 15th day of April, 1893 [giving the date of the payment. If the defendant received the balance and gave a receipt thereon, then add.] And thereupon the complainant gave the defendant a receipt for the same as follows: [here copy it in full]. [If vouchers were delivered up or destroyed, then add:] thereupon defendant surrendered [or, with complainant's consent, destroyed] all his vouchers relating to said settlement. [If the bill charges fraud in avoidance of the account, add:] and the defendant denies each and every allegation of fraud contained in the bill.<sup>86</sup>

Therefore the defendant pleads said stated [or settled] account in bar of the complainant's bill, and prays to be hence dismissed.

[Annex affidavit of the truth of the plea. See post, § 340.]

A. B., Solicitor.

If fraud is charged in the bill as a ground for opening the account, then not only must the plea deny the fraud, but it must be accompanied by an answer denying the fraud.<sup>87</sup>

§ 334. **Other Pleas in Bar.**—There are various other pleas in bar, among which the following are the most usual:

1. **Plea of an Award.** Whenever the matters set up in a bill as the ground

<sup>82</sup> Turney v. Williams, 7 Yerg., 213; Elrod v. Lancaster, 2 Head, 571; Code, §§ 2305; 3786.

<sup>83</sup> Turney v. Williams, 7 Yerg., 212; See, also, Matlock v. Rice, 6 Heisk., 39.

<sup>84</sup> 1 Dan. Ch. Pr., 667; Sto. Eq. Pl., 800.

<sup>85</sup> 1 Dan. Ch. Pr., 668. For practice in suits for an accounting, see, post, §§ 953-958.

<sup>86</sup> Sto. Eq. Pl., § 802.

<sup>87</sup> For a form of a supporting answer, see, post, § 348.

of relief, have been included in an award, such award may be pleaded to the bill.<sup>88</sup> If the bill be filed to set aside an award, the award may be pleaded in bar to the bill, in which case the fraud, or misconduct alleged in the bill, must be denied by way of averment in the plea, and the plea must be supported by an answer denying all the charges which assail the award. An agreement to refer the matters in dispute to arbitrators cannot, however, be pleaded.<sup>89</sup>

2. **Plea of a Release, Payment, or Accord and Satisfaction.** If the complainant has released his claim, or if he has been paid, or if there has been an accord and satisfaction, these matters may be pleaded in bar of a bill seeking a recovery on the same claim, or cause of action. In such a case, the consideration upon which the release was made, or the amount paid, or the terms of the accord and satisfaction, should be specified in the plea; and if the bill seeks to avoid the release, payment, or satisfaction, because of fraud, duress, accident, or mistake, these grounds must all be generally denied by the plea, and must be specially denied by an answer in support of the plea.<sup>90</sup>

3. **Plea of Prematurity of the Suit.** If the bill should be filed before some necessary preliminary act has been done, or before the debt sued on was due, or before the right to make demand had vested, or before an executor had probated the will, in any such case the defendant may plead the prematurity of the suit in bar of the bill.<sup>91</sup>

4. **Plea of Non est Factum.** This plea is interposed when the suit is based on some obligation purporting and alleged to be executed by the defendant, and he wishes to deny that he executed it.

**PLEA OF NON EST FACTUM.**<sup>92</sup>

[For title, commencement, and conclusion, see post, § 340.]

That the note, [bond, or other instrument sued on in the bill,] upon which the complainant's bill is founded, was not executed by him, or by any one authorized to bind him in the premises.

*The plea must be verified. See ante, § 254.*

5. **Plea that Complainant is Connected with a Trust.** When the complainant, or any other person or corporation interested in the prosecution of the suit, is connected with, or the cause of action grows out of, some business with a trust, that fact may be pleaded in bar of the suit.<sup>93</sup>

**PLEA THAT COMPLAINANT IS CONNECTED WITH A TRUST.**

[For title, commencement, and conclusion, see post, § 340.]

The defendant for plea to the bill filed against him in this cause, says that the complainant [or William Brown, one of the complainants,] is a member of, or connected with, and the cause of action grows out of business, or a transaction with, a trust [pool, contract, arrangement, or combination] made with a view, or which tend, to prevent full and free competition in [Here insert some one or more of the things declared illegal by the Act of 1891, ch. 218, sec. 1, such as] the manufacture and sale of tobacco in this State.

6. **Plea of Tender.** When, before the bill was filed, the defendant tendered to the complainant all the complainant was entitled to, such tender can be pleaded in bar to the bill.

**PLEA OF TENDER OF MONEY.**

[For title, commencement, and conclusion, see post, § 340.]

The defendant for plea says that after complainant's cause of action accrued, and before the bill in this case was filed, he tendered to complainant the sum of.....dollars [stating the amount], which was the full amount due complainant on the note, [contract, account, or other cause of action,] sued on by him in his said bill, but the complainant refused to receive the same. The defendant has always been, and still is, ready and willing to pay said sum to the complainant, and he now brings it into Court along with this, his plea, and deposits it with the Clerk and Master, and tenders it to the complainant.

7. **Plea of an Estoppel.** All matters relied on as an estoppel must be speci-

88 Witt v. Ellis, 2 Cold., 38.  
89 Sto. Eq. Pl., §§ 803-804.  
90 Sto. Eq. Pl., §§ 796-797.

91 See, ante, § 248.  
92 Furnish v. Burge, 17 Pick., 538.  
93 Acts of 1891, ch. 218, § 5.

fically pleaded, whether deeds, judgments, decrees, records, agreements, conduct or words.

8. **Other Pleas in Bar** Every matter of defence, outside of the denial of the charges in the bill, must be specially set up, such as, besides pleas already stated, (1) non-performance of condition precedent, (2) set-off, (3) recoupment, (4) novation, (5) alteration of contract, (6) rescission of contract, (5) fraud, (6) failure of consideration, (7) consideration, illegal or immoral, (8) infancy or coverture of defendant when contract was made, or obligation incurred, (9) duress and (10) drunkenness.

A plea or set-off must be so definite and specific that an issue of fact may be made thereon.<sup>94</sup>

### ARTICLE III.

#### FRAME AND FORM OF PLEAS IN BAR.

§ 335. General Requisites of a Plea in Bar.

§ 336. Requisites of an Affirmative Plea.

§ 337. Requisites of a Negative Plea.

§ 338. Requisites of an Anomalous Plea.

§ 339. Frame of a Plea in Bar.

§ 340. Forms of Pleas in Bar.

§ 335. **General Requisites of a Plea in Bar.**—The true end of a plea in bar is, to save to the parties the expense and delay of an examination of the witnesses on all the matters set up in the bill. This being so, it is manifest that if the plea should make such an issue as would result in all the expense and delay consequent upon an answer, no benefit would accrue from filing a plea rather than an answer.<sup>1</sup> Hence the rule that a plea must be either an allegation, or a denial, of some controlling fact, or of some matters, which, taken collectively, make out some general fact, which is a complete defence.<sup>2</sup>

A plea must reduce the questions of fact in issue to a single point; and this point, if decided in favor of the defendant, must end the bill, or at least so much of the bill as is pleaded unto. But while a plea must reduce the issues of fact to a single point, it may nevertheless set up a variety of circumstances, if these circumstances all tend to a single point, and, when all taken together, constitute but one general fact.<sup>3</sup>

As the office of a plea is to save expense and delay, by narrowing the issues of fact down to a single point, the Court, ordinarily, disallows double pleas; for, if more than one issue of fact is to be made, the defendant may as well answer at once.<sup>4</sup> Nevertheless, two pleas are sometimes allowed when they present issues in a narrow compass; thus, a plea that a complainant is not an heir, as asserted in his bill, and a plea of the statute of limitations, have been allowed to be pleaded together.<sup>5</sup> Two or more pleas in Chancery can only be filed, however, by leave of the Court,<sup>6</sup> and such leave will only be granted when, thereby, the issues are greatly narrowed, and the costs much lessened,

<sup>94</sup> State, *ex rel.*, *v.* Alexander, 7 Cates, 156.

<sup>1</sup> Benson *v.* Jones, 1 Tenn. Ch., 498.

<sup>2</sup> Sto. Eq. Pl., § 652.

<sup>3</sup> Sto. Eq. Pl., §§ 652; 654.

<sup>4</sup> Benson *v.* Jones, 1 Tenn. Ch., 498.

<sup>5</sup> Sto. Eq. Pl., § 657. The reason why a defendant is not, generally, allowed to plead more than one plea in Equity, while he can plead several at law, is, that the defendant at law has no opportunity of filing an answer to all the various matters set up in the declaration. The reason a plea is allowed in Equity,

to lessen the expense, to determine the suit upon a single point. Whereas, if more than one plea should be allowed, then, there may be as many pleas as there are matters to be put in issue; and, thus, pleas would tend to lengthen the litigation, and increase the expense. As an answer is only a connected series of pleas, if more than one plea is necessary, the defendant should almost invariably be required to answer. Benson *v.* Jones, 1 Tenn. Ch., 498; Sto. Eq. Pl., § 657, note; 1 Dan. Ch. Pr., 608.

<sup>6</sup> Benson *v.* Jones, 1 Tenn. Ch., 498; 1 Dan. Ch.

when compared with a defence by answer. When two or more pleas are filed they must not be inconsistent.

It has been already stated that a demurrer cannot be good in part, and bad in part; although one cause of demurrer assigned may be good, and the others not. But the same principle does not apply to a plea; for a plea may be bad in part, and not in the whole. Thus, for example, if a plea covers too much, the Court will allow it to stand as a defence to the part it properly covers,<sup>7</sup> and will require the part not covered to be answered unto.

A plea, like a demurrer, may be either to the whole bill, or to a part only of the bill. If it does not go to the whole bill, it should definitely and exactly express to what part it does extend. Whenever an affirmative plea is to the whole of the bill, but does not extend to, or cover the whole, the plea is bad;<sup>8</sup> but in such a case the Court may allow it to stand for an answer, with leave to the complainant to except to its sufficiency.

§ 336. **Requisites of an Affirmative Plea.**—An affirmative plea, in addition to the characteristics and requisites stated in the preceding section, must also possess the following:

1. It must be founded on some new matter, that is, on matter not apparent on the face of the bill; or, as the technical phrase is, it must be founded on some matter *dehors* the bill.<sup>9</sup>

2. It must not only reduce the case to a single point, but it must be such a point as is issuable; and also, such as, if decided in favor of the plea, will result in the dismissal, or bar of the bill.<sup>10</sup>

3. It must be direct and positive, and not state matters by way of argument, or inference. Where, however, the defendant is executor, administrator, or heir, and the facts are not in his personal knowledge, he may swear to the plea, according to his best knowledge and belief.<sup>11</sup>

4. It must clearly and distinctly aver all the facts necessary to render the plea a complete defence to so much of the case made by the bill as the plea is intended to cover, so that the complainant may, if he chooses, take issue upon it. Averments are also necessary to exclude intendments, which would otherwise be made against the pleader.<sup>12</sup>

§ 337. **Requisites of a Negative Plea.**—The office of a negative plea is not to bring forward some new matter to displace the Equity of the bill, but to deny some single material fact alleged in the bill, and thus end the suit. To illustrate: if the bill be by a party claiming to be an heir, personal representative, partner, or tenant in common, it is manifest that if he does not possess this character he cannot maintain his suit, and the office of a negative plea is to put in issue this character in which the complainant sues, by emphatically and briefly denying that he possesses such character, thus reducing the contest to a single narrow issue.<sup>13</sup> And so, the defendant may, by a negative plea, deny the character of heir, administrator, guardian, partner, or husband, attributed to him by the bill, if the result of the suit hinges on his possessing that character.

A negative plea is not, however, by any means, confined to a denial of the character in which a complainant sues, or the defendant is sued, but such a plea is proper whenever any alleged fact, essential to the relief sought, is false, and can be so negatived as to present a single narrow issue of fact, decisive of the suit. A negative plea may not only be filed to put in issue some single fact on which the complainant's right to relief depends, but may, also, be used to deny any single fact on which the bill rests the alleged liability of the defendant.

<sup>7</sup> Sto. Eq. Pl., § 692.

<sup>8</sup> Sto. Eq. Pl., § 693.

<sup>9</sup> *Wenson v. Jones*, 1 Tenn., Ch., 498; Sto. Eq. Pl., §§ 647; 651; 660.

<sup>10</sup> Sto. Eq. Pl., § 661.

<sup>11</sup> Sto. Eq. Pl., § 662; 1 Dan. Ch. Pr., 684.

<sup>12</sup> Sto. Eq. Pl., § 665.

<sup>13</sup> 1 Dan. Ch. Pr., 604; Sto. Eq. Pl., §§ 660; 668.



A negative plea is often required to be supported by an answer, especially when the Equity of the bill is based on charges of fraud, or of notice.

§ 338. **Requisite of an Anomalous Plea.**—An anomalous plea, as already shown, is one which reasserts some matters stated in the bill, and which the bill seeks to impeach, and denies the alleged matters of impeachment. Thus, where a bill is filed to impeach a decree on the ground of fraud used in obtaining it, the defendant may plead the decree in bar of the suit, aiding his plea by averments negating the charges of fraud alleged in the bill. Of the same nature are pleas, setting up the award itself, to a bill filed for the purpose of impeaching it on the ground of partiality or fraud in the arbitrators; and pleas setting up stated accounts and releases where bills have been filed for the purpose of setting them aside.<sup>14</sup> Such pleas simply rely on the decree, award, account, or release, and deny the matters of avoidance alleged in the bill; in other words, an anomalous plea relies on that which the bill seeks to avoid, and seeks to avoid that on which the bill relies.

Anomalous pleas must be supported by an answer, denying all the facts and circumstances charged as matters of fraud in the bill.<sup>15</sup>

§ 339. **Frame of a Plea.**—Formerly pleas, like demurrers, were prefaced by a protestation against any admission of the facts stated in the bill; but this always unnecessary precaution is now obsolete; and the defendant now, after giving the style of the cause and of the Court, proceeds at once to state the extent to which his plea goes; as whether it is to the whole bill, or to part only of the bill; and in the latter case, to what part it is intended to apply: then follows the substance of the plea, or matter relied upon, as an objection to the jurisdiction of the Court,<sup>16</sup> or to the person of the complainant, or of the defendant, or in the bar of the suit, together with such averments as are requisite and necessary to support it. The conclusion of the plea is a prayer for the judgment of the Court, whether the defendant ought to be compelled to make any further answer to the bill, or to the part of it to which the plea is offered;<sup>17</sup> or the plea may conclude with a simple prayer to be dismissed generally, or to be dismissed as to so much of the bill as the plea covers.

Pleas in bar setting up any defence, not a matter of record, must be sworn to;<sup>18</sup> but pleas of any matter of record in the Court itself, need not be upon oath.<sup>19</sup> Pleas must also be signed by counsel.<sup>20</sup> The verification of a plea in behalf of a firm, by one member of the firm, is sufficient. A plea may be verified by the Solicitor, if he show in his affidavit that he is acquainted with the facts set out in the plea.<sup>21</sup> A plea may be sworn to before any person authorized to swear a defendant to his answer.<sup>22</sup>

§ 340. **Forms of Pleas in Bar.**—Pleas, like all other pleadings in Chancery, were formerly long and complicated; but the Code sweeps away all prolixity, and discountenances all unnecessary and false allegations in pleadings;<sup>23</sup> and pleas in Chancery should now conform to the terse models set forth in the Code, for Courts of Law.<sup>24</sup> The following is a proper

<sup>14</sup> 1 Dan. Ch. Pr., 605-606.

<sup>15</sup> Sto. Eq. Pl., § 651; 670; 1 Dan. Ch. Pr., 614-620.

<sup>16</sup> What is said in this section as to the frame of pleas applies both to pleas in abatement, and pleas in bar.

<sup>17</sup> Sto. Eq. Pl., § 694.

<sup>18</sup> *Graham v. Nelson*, 5 Hum., 605.

<sup>19</sup> 1 Dan. Ch. Pr., 686; Sto. Eq. Pl., § 696. It is the safer practice to verify all pleas that require to be sustained by oral evidence, or by the records of

a Court other than that wherein the plea is filed. The waiving of an answer under oath does not waive the defendant's oath to his plea. 1 Dan. Ch. Pr., 686, note.

<sup>20</sup> 1 Dan. Ch. Pr., 685. Or, pleas may be signed by the defendant in person. Code, § 3979.

<sup>21</sup> *Cheatham v. Pearce*, 5 Pick., 668.

<sup>22</sup> A plea is a special answer. See *Cheatham v. Pearce*, 5 Pick., 668.

<sup>23</sup> Code, § 4316; *ante*, § 339.

<sup>24</sup> Code, § 2640.

**FORM OF AN AFFIRMATIVE PLEA IN BAR.**

[The Title, or Style of the Cause.]

John Doe, }  
*vs.* }  
 Richard Roe. } In Chancery Court at Jacksboro.

[Commencement.]

The defendant for plea to the bill in this cause says :

[The Matter of the Plea.]

That the debt specified in the bill as the ground of suit was fully paid and satisfied by him before the bill was filed.

[The Conclusion.]

He, therefore, prays to be hence dismissed with his costs. W. R. PETERS, Solicitor.

[The Verification.]

State of Tennessee, }  
 County of Campbell. }

The defendant, Richard Roe, makes oath<sup>25</sup> that his foregoing plea is true.

[The Jurat.]

RICHARD ROE.

Sworn to and subscribed  
 before me, June 1, 1890.

JOHN J. GRAHAM, C. M.

**FORM OF A NEGATIVE PLEA IN BAR.**

John Doe, }  
*vs.* }  
 Richard Roe, Adm'r, &c. } In the Chancery Court, at Jacksboro.

The defendant, Richard Roe, who is sued in said cause as administrator of Robert Roe, deceased, for plea to the bill, says, that he is not, and never has been, administrator of the estate of said Robert Roe, deceased, as said bill alleges. Wherefore, he prays to be dismissed with his costs.

RICHARD ROE.

[Affidavit and jurat, as above.]

There is no difference in form between a plea in bar and a plea in abatement, and the fact whether a plea is in bar, or in abatement, is ascertained by the subject-matter,<sup>26</sup> and not by the form.

If a plea in bar is to only a part of the bill, it must so show on its face; and must be expressly limited to such part, or it will be disallowed on argument, because insufficient to bar the whole bill.

If the bill should seek to enforce other equities besides, for instance, a parcel sale of land, the plea of the statute of frauds should be limited as follows :

**FORM OF A PLEA TO PART OF A BILL.<sup>27</sup>**

John Doe, }  
*vs.* }  
 Richard Roe, *et al.* }

The defendant, Richard Roe, for plea to so much of the bill as seeks to enforce an alleged contract for the sale of land therein described, says :

That neither he, nor any other person by him thereunto lawfully authorized, ever signed any contract or agreement, or any memorandum or note thereof, in writing, for the sale of said land, or of any part thereof, or of any interest therein, to the complainant.

Wherefore, he prays to be hence dismissed as to so much of said bill as seeks to enforce said contract of sale.

C. J. SAWYERS, Solicitor.

But where a part of a bill is pleaded to, the remainder of the bill must be answered; and in answering, care must be observed to limit the answer to so

<sup>25</sup> Pleas that require to be sustained by evidence, not of record, must be sworn to. *Ante*, § 339.

<sup>26</sup> Code, § 2908.

<sup>27</sup> The old form of the title and commencement of pleas is as follows:  
 The plea of Richard Roe to the complaint filed against him in the Chancery Court at Jacksboro, by John Doe.

This defendant, by protestation, not confessing any of the matters in said bill to be true, for plea to said bill [or, for plea to so much of said bill as

prays, &c.] says: [Stating the ground of the plea.]

And the old form of the conclusion of a plea is as follows:

Therefore this defendant doth plead said matter to said bill, and prays the judgment of the Court whether he should be compelled to make any further answer to the said bill [or, to so much of said bill as is hereinbefore pleaded to:] and prays to be hence dismissed with his reasonable costs.

JAS. R. COCKE, Solicitor.

much of the bill as has not been pleaded to; for, if the whole bill be answered,<sup>28</sup> the answer will overrule the plea. Where the plea covers only a part of the bill, the answer to the remainder of the bill may follow the plea, on the same page of the paper, as follows:

And the said defendant, not waiving his said plea, but insisting thereon, for answer to the remainder of said bill, says: [*Here set out the answer to so much of the bill as is not covered by the plea.*]

## ARTICLE IV.

### PLEAS SUPPORTED BY AN ANSWER.

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|--|---|
| § 341. When a Plea Must be Supported by an Answer. | § 346. When a Supporting Answer is not Required.          |
| § 342. Why a Plea Must be Supported by an Answer.  | § 347. The Frame of a Plea, and of the Supporting Answer. |
| § 343. Origin of this Class of Pleas.              | § 348. Form of a Plea, and of the Supporting Answer.      |
| § 344. Character of Such a Plea.                   | § 349. The Present Practice.                              |
| § 345. Character of the Supporting Answer.         |   |

§ 341. **When a Plea Must be Supported by an Answer.**—The cases, in which it is necessary that a plea should be supported by an answer, may be conveniently divided into: 1, Those where the defendant denies some allegation in the bill necessary to the relief the complainant prays;<sup>1</sup> 2, Those where the complainant admits the existence of a legal bar, but alleges some equitable circumstances to avoid the effect of the bar;<sup>2</sup> and 3, Those where the complainant does not admit the existence of any legal bar, but charges some circumstances, which may be true, and to which there may be a valid ground of plea, and also charges other circumstances which are inconsistent with the substantial validity of the plea. 1, In the first case, the defendant must answer when the bill charges facts or circumstances which would tend to disprove, or otherwise invalidate, the plea, responding in his answer to all matters not expressly met and denied by his plea. 2, In the second case, the defendant may insist, by way of plea, upon the legal bar, denying the circumstances, which would avoid it; and he must accompany the plea with an answer, making a discovery as to all the circumstances charged in the bill, in support of his plea. 3, In the third case, the defendant must distinguish those facts, which if true, would not invalidate or disprove his plea; and plead to the relief and discovery sought with regard to them. And he must then accompany the plea with an answer to those facts, and to those only, which if true, would disprove, or invalidate his plea, and to all the matters which are specially alleged as evidence of those facts.<sup>3</sup>

Even a plea in abatement denying the ground of an attachment may be properly supported by an answer denying the various charges of misconduct tending to support the fraudulent transfer alleged as the ground for an attachment.<sup>4</sup>

<sup>28</sup> The answer will be deemed an answer to the whole bill, whether so intended or not, and although the whole bill be not in fact answered, unless the answer show affirmatively on its face that it is an answer to a part only of the bill.

<sup>1</sup> *Benson v. Jones*, 1 Tenn. Ch., 498. *Seifred v. People's Bank*, 1 Bax., 200; *Pigue v. Young*, 1 Pick., 263.

<sup>2</sup> The most common cases of this class are bills (1)

them, (2) to avoid the effect of a judgment at law, (3) to set aside a release, or (4) an award, or (5) to open a stated account. 1 Dan. Ch. Pr., 616.

<sup>3</sup> 1 Dan. Ch. Pr., 616; Sto. Eq. Pl., § 674.

<sup>4</sup> *Seifred v. People's Bank*, 1 Bax., 200; *Pigue v. Young*, 1 Pick., 263. The pleas in abatement in these cases were strictly negative pleas, and the supporting answers were clearly within the rule applicable to such cases.

Where the bill charges fraud or notice, or other equitable matter in avoidance of the bar pleaded, the plea must be supported by an answer denying the fraud, notice, and other facts and circumstances alleged by the bill in avoidance.<sup>5</sup>

**§ 342. Why a Plea Must be Supported by an Answer.**—All negative and anomalous pleas in bar of a suit must be supported by an answer, when a discovery is prayed in the bill.<sup>6</sup> It has heretofore been fully shown that a bill is both a pleading and an interrogation, and that an answer under oath is both a pleading and a deposition.<sup>7</sup> As a pleading, the bill may be met by a negative or anomalous plea, denying some essential fact contained in it, but such pleas are no answer to the matters of interrogation, and the interrogation may be intended to obtain the very evidence necessary to maintain the bill, and defeat the plea.<sup>8</sup> An affirmative plea does not deny any matter contained in the bill; indeed, for all the purposes of the plea, it admits all of the matters of fact charged in the bill. An affirmative plea, therefore, in effect, admits the bill, but seeks to displace its Equity, by bringing forward a single additional matter of fact. Inasmuch, then, as an affirmative plea admits the truth of the bill, the complainant cannot find fault with the defendant for not answering his interrogation.<sup>9</sup> Nor can the complainant object to a plea because not supported by an answer, when he in his bill has waived an answer on oath.<sup>10</sup>

Anomalous and negative pleas, however, deny some essential fact or facts alleged by the complainant, and at the same time admit nothing, but leave the complainant's interrogation wholly unanswered, thus depriving him of the very evidence his bill was, in part, filed to obtain in furtherance of his case.<sup>11</sup> And, besides, if such a plea is not supported by an answer negating those charges and allegations of the bill which tend to sustain the matter denied by the plea, such charges and allegations become evidence for complainant on argument of the sufficiency of the plea.<sup>12</sup>

**§ 343. Origin of This Class of Pleas.**—The origin of this class of pleas may be easily traced to a change in the frame and character of bills and pleadings, from those which existed under the old practice of the Court. Bills were formerly of a very simple character, not taking any notice of the real or supposed defence which would be set up by the defendant. The defence came out upon a plea; the replication stated the matter in avoidance of the plea; then the rejoinder denied the matter in the replication; and the parties were then at issue. When, for example, according to the old practice, a complainant by his bill stated a case for relief, if there had been a former decree on the merits, which he sought to set aside on account of fraud in obtaining the decree, the bill did not, in any manner whatsoever, allude to the decree. It was left to the defendant to plead the decree, as a defence barring the complainant's right. And the complainant then, by his replication, would reply that the decree had been obtained by fraud: by which the complainant would admit that the decree was a bar, if not capable of impeachment on the ground of fraud. The defendant would, by his rejoinder, avoid or deny the charge of fraud, and sustain the decree; and the issue would be simply on the charge of fraud.<sup>13</sup>

But, when a change of the frame of pleadings took place, and special replications, rejoinders, and surrejoinders, fell into disuse, and the bill, instead of relying solely on the matter constituting the complainant's original case, proceeded to anticipate the defence, and charged facts to avoid that defence (thus

<sup>5</sup> *Graham v. Nelson*, 5 Hum., 605.

<sup>6</sup> See, *post*, § 345.

<sup>7</sup> *Ante*, § 142; *Sto. Eq. Pl.*, § 672.

<sup>8</sup> *Seifred v. People's Bank*, 1 Bax., 200; 1 Dan. Ch. Pr., 614; *Sto. Eq. Pl.*, § 672; *Cheatham v. Pearce*, 5 Pick., 668.

<sup>9</sup> 1 Dan. Ch. Pr., 615.

<sup>10</sup> *Cheatham v. Pearce*, 5 Pick., 668.

<sup>11</sup> *Pigue v. Young*, 1 Pick., 263; *Cheatham v. Pearce*, 5 Pick., 668.

<sup>12</sup> *Seifred v. People's Bank*, 1 Bax., 200.

<sup>13</sup> *Sto. Eq. Pl.*, § 676.

performing the double functions of a bill, and of a replication under the old practice), and required a discovery as to the matters charged, a change in the mode of making his defence became indispensable for the protection of the defendant; and he was compelled to put in a plea, which was, in part, both a plea and a rejoinder. That is, he was obliged to plead the bar, and to negative the charges and circumstances which sought to avoid it. And, as a discovery was sought in relation to these very matters charged in avoidance, he was also compelled to accompany his plea with an answer, fully discovering and responding to these matters. The material issue thus made between the parties was not the bar set up in defence; but it was the facts and charges set up in the bill to avoid it. Nor was the plea, under such circumstances, liable to the imputation of duplicity; for it contained, in the whole, but one single defence. And the answer was necessary in support of the plea; because the complainant was entitled to the discovery of the facts and charges, stated in his bill in avoidance of the bar, and which might be indispensable to prove his case at the hearing.<sup>14</sup> And while such an answer is technically called an answer in support of the plea, nevertheless it is, in effect, often an answer in support of the bill.

**§ 344. Character of Such a Plea.**—The plea, as well as the answer, must contain averments negating the facts and circumstances set up in the bill in avoidance of the bar admitted by the bill. For otherwise, the plea will not amount to a complete defence to the bill, since the denial of those facts and circumstances is in truth the only point in the controversy. If those facts and circumstances do not exist, the bar or defence is admitted by the complainant to be perfect. If they do exist, the defendant must equally admit that the bar or defence is fatally defective.<sup>15</sup> In drawing the plea, it is important to keep in mind the distinction between so much of the bill as is a pleading, and the part that is a mere interrogation. The office of the plea is to effectually meet so much of the bill as is a pleading, and no more. It should not cover any part of the bill that is in effect a mere interrogation calling for a discovery. A plea is not rendered double by the insertion of several averments<sup>16</sup> that are necessary to exclude conclusions arising from allegations in the bill to anticipate and defeat the bar set up in the plea.

Hence it is, that, in every case where an answer is required to accompany a plea, the plea should not cover the whole bill. It should cover so much of the bill only as is a pleading; and not cover any part of the bill which relates to the discovery of the particular facts; for, as to these, the complainant has a right to require an answer. If the plea covers such a discovery, it will be bad; because the defendant is bound to make that discovery.<sup>17</sup>

It must be remembered that the answer in support of the plea is no part of the defence. The defence is the matter set up in the plea, and the answer is merely the evidence the complainant has called for to sustain his case,<sup>18</sup> although when that evidence makes for the defendant, the effect of the answer is to aid the latter, and not the complainant.

**§ 345. Character of the Supporting Answer.**—In drawing the answer in support of the plea, the fact that a bill is both a pleading and an interrogation must be kept in mind. The object of the answer is two fold: 1st, To respond to the matter charged in support of the case made by the bill, and to this extent it is a sort of deposition; and 2d, To negative those averments and charges in the bill, which, if not denied by the answer, would, by intendment, show the plea to be insufficient.<sup>19</sup>

<sup>14</sup> *Pigue v. Young*, 1 Pick., 263; *Sto. Eq. Pl.*, § 678; 1 *Dan. Ch. Pr.*, 606.  
<sup>15</sup> *Sto. Eq. Pl.*, § 680.  
<sup>16</sup> 1 *Dan. Ch. Pr.* 607 *Bogardus v. Trinity*

<sup>17</sup> *Benson v. Jones*, 1 *Tenn. Ch.*, 498; *Sto. Eq. Pl.*, § 686.  
<sup>18</sup> 1 *Dan. Ch. Pr.*, 624; *Cheatham v. Pearce*, 5 *Pick.* 668

The answer in support of a plea must be full and clear, or it will not support the plea; for the Court will take all of the bill not covered by the plea, or the answer, to be true.<sup>20</sup> If there is any charge in the bill, which is an equitable circumstance in favor of the complainant's case against the matter pleaded, such as fraud, or notice of title, that charge must be denied by way of answer, as well as by averment in the plea. In such a case, the answer must be full and clear, or it will not be effectual to support the plea; for the Court will intend the matters so charged against the pleader, unless they are fully and clearly denied. But if they are in substance fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered. Even though the Court, upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude indentments against the pleader; yet, if the complainant thinks the answer to them is evasive, he may except to the sufficiency of the answer in those points.<sup>21</sup>

Where an answer is filed in support of a plea, care must be observed not to extend the answer so as to cover that part of the bill already covered by the plea; for, in such a case, the answer would overrule the plea. The same rule prevails where no answer is required to support the plea: in such a case, no discovery being called for, the bill is a mere pleading, and is, therefore, wholly covered by the plea. Consequently, in such a case, any answer would overrule the plea.<sup>22</sup>

The best test of the sufficiency of an answer in support of a plea is, to consider as true every allegation in the bill not sufficiently denied by the answer, and then to consider whether, if these allegations be true, the plea is a sufficient bar to the complainant's claim for relief.<sup>23</sup>

**§ 346. When a Supporting Answer is Not Required.**—If it appears from the bill, that no discovery is sought by the complainant, in aid of the facts and circumstances he alleges in avoidance of the bar he admits, the defendant need not put in any answer at all.<sup>24</sup>

In order to require, or even to justify, an answer, there must be some specific facts charged in the bill, to which such an answer is a proper response. A bill may be specific in two respects. It may allege a particular fact, and charge that the evidence thereof is in the possession of the defendant; or it may be specific in charging a general fact; such as the fact upon which the title of the complainant is founded, and charge particular circumstances to prove that general fact, and require discovery thereof from the defendant. It is necessary, in order to the allowance of an answer in support of a plea, that the bill should contain some charge of one kind or of the other. Therefore, where the bill does not charge any specific fact, inconsistent with the plea, negating, and avoiding, as it were, that plea by anticipation, it is not necessary to put in an answer in support of the plea; for nothing is charged, which is specific in any point of view, to defeat the plea, and an accompanying answer is unnecessary; and indeed is improper, since it would overrule the plea.<sup>25</sup>

In general, an answer is not required to support a plea, unless the complainant charges fraud, notice, or some other equitable ground of avoiding the bar admitted by his bill. And when such an answer is required, it ordinarily arises from one of two considerations: 1, It is in the nature of proof called for by the bill, to enable the complainant to obviate the bar he is seeking to avoid; in which case the defendant must fully answer all the charges of fraud, notice, or other equitable circumstances alleged. In such a case the answer is for the

<sup>20</sup> 1 Dan. Ch. Pr., 624.

<sup>21</sup> Sto. Eq. Pl., § 684.

<sup>22</sup> Sto. Eq. Pl., § 668.

<sup>23</sup> *Bogardus v. Trinity Church*, 4 Paige, (N. Y.), 178.

This is a leading case.

<sup>24</sup> Sto. Eq. Pl., § 682; 1 Dan. Ch. Pr., 616; *Cheat-ham v. Pearce*, 3 Pick., 668. It would seem, both from reason and authority, that when the oath of

the defendant to his answer is waived, no answer in support of the plea is necessary, unless there be allegations which are not denied by the plea; and which, if not denied by an answer, would render the plea insufficient. 1 Dan. Ch. Pr., 614, note; *Heartt v. Corning*, 3 Paige, (N. Y.), 566.

<sup>25</sup> Sto. Eq. Pl., § 681.

complainant's benefit. 2, It is in the nature of a support to the plea, and is intended by its denial of the details, specifications, and circumstances of fraud, notice, or other equitable matters, to exclude those intendments which, without such a denial, would be made against the defendant; for, upon argument of a plea, every fact stated in the bill and not denied by the answer in support of the plea, is taken to be true. In cases of this sort, the answer is for the defendant's benefit, and is, in reality, in support of the plea; whereas, in the former case the answer is required by the complainant as a means of proof to overthrow the defence set up by the plea; and is, in reality, in support of the bill.<sup>26</sup>

§ 347. **Frame of a Plea, and of the Supporting Answer.**—The office of the plea is to put in issue the matters alleged in avoidance by the bill, ordinarily fraud or notice; and the office of the answer in support of the plea is to respond to all the charges whereby the avoidance is sought to be sustained. Thus, in a bill seeking to set aside a decree, because of fraud in its procurement, and specifying the circumstances of the alleged fraud, the plea will set up the decree in bar of the bill, by proper general averments denying the allegations of fraud; and the answer will meet fully and deny all the circumstances of fraud alleged in the bill, and will respond to all other matters of interrogation in the bill.

In all cases where a plea is accompanied by an answer, it must be put in upon oath, unless the defendant be a corporation, and then its seal must be affixed.<sup>27</sup> When an answer accompanies a plea in order to support it, it is prefaced with an averment that the defendant does not thereby waive his plea, but wholly relies thereon. So, where the plea is not to the whole of the bill, but only to a part, the answer is commenced with the same protestation against a waiver of the plea, and with a declaration that it is intended to be only in answer to the part of the bill, not covered by the plea.<sup>28</sup>

As the averments negating the charges of fraud are used merely to put the fact of fraud, as alleged by the bill, in issue in the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud, contained in the bill, fully in issue. And as the complainant is entitled to have the answer of the defendant, upon oath, to any matter in dispute between them, in aid of proof of the case made by the bill, the defendant must answer to the facts of fraud, alleged in the bill, so fully, as to leave no doubt in the mind of the Court, that, upon that answer, if not controverted by evidence on the part of complainant, the fact of fraud could not be established. If the answer should not be full in all material points, the Court may presume that the fact of fraud may be capable of proof in the point not fully answered; and may, therefore, not deem the answer sufficient to support the plea as conclusive; and, therefore, may overrule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. But, although the answer may be deemed sufficient to support the plea upon argument, the complainant may except to the answer, if he conceives it not to be so full to all the charges, as to be free from exception; or, by amending his bill, he may require an answer to any matter, which may not have been so extensively stated, or interrogated to, as the case warranted; or to which he may apprehend, that the answer, although in full terms, may have been in effect evasive.<sup>29</sup>

If, however, the complainant excepts to the answer, that is an admission that the plea is sufficient. The better practice for the complainant is to set

<sup>26</sup> While the answer, in such cases, is called an answer in support of the plea, it is such, in reality, only when it effectually overcomes the special matters charged in the bill; if the answer confirms those

answer in support of the plea, but an answer in support of the bill.

<sup>27</sup> 1 Dan. Ch. Pr., 668.

<sup>28</sup> Sto. Eq. Pl., § 695.

the plea down for argument, and thus have its sufficiency determined, before excepting to the answer for insufficiency.<sup>30</sup>

**§ 348. Form of a Plea, and of the Supporting Answer.**—The form of an answer in support of a plea is simple and untechnical. The plea is in the usual form of a plea in bar, and the supporting answer follows the plea, on the same paper. All this will more clearly appear by the following general form of a plea and a supporting answer, showing their characteristics, and how joined.

**GENERAL FORM OF A PLEA AND A SUPPORTING ANSWER.**

John Doe  
*vs.*  
 Richard Roe, *et al.* } No. 618. InChancery, at Knoxville.

The defendant, Richard Roe, for plea to the bill filed against him in this cause, says:

That [*Here set out the matter pleaded, such matter being ordinarily a release, former judgment, award, account stated or settled, innocent purchaser, or other matter in avoidance of the bill.*]

Therefore, this defendant pleads the said release [former judgment, award, account stated, account settled, innocent purchaser, *or other matter pleaded in avoidance,*] in bar of the complainant's bill [*or, in bar of so much of the complainant's bill as is hereinbefore particularly mentioned,*] and prays the judgment of the Court hereon.

And this defendant, not waiving his said plea, but relying thereon, and in support thereof, for answer to the residue of said bill, says, that the release, [former judgment, award, account stated or account settled,] was not obtained by any artifice or fraud whatsoever; and he denies the fraud and artifices charged, and denies the undue influence alleged, and says that all and singular the allegations of fraud set forth in the bill are untrue. [*Deny the particular circumstances of fraud charged. If notice is alleged in the bill as the ground of its equity, say—The defendant had not at the time he purchased said lot, [or at the time he took his deed therefor, or at the time he paid the purchase-money for said lot,] any notice whatever of complainant's alleged claim to said lot, and the defendant says that the first notice that he ever had of said claim was when he read complainant's said bill, and that until he read said bill he never had any notice of complainant's claim, or any suspicion thereof, or any reason or ground of suspicion.*]

Therefore, the defendant prays to be hence dismissed.

W. P. WASHBURN, Solicitor.

[*Annex an affidavit of the truth of the answer and plea.*]

**§ 349. The Present Practice.**—The old practice of filing a negative plea, and supporting it with an answer, is still in force, although seldom resorted to.<sup>31</sup> The present practice is to incorporate all matters of defence to the merits, in the answer.<sup>32</sup> It is now good pleading to incorporate in the answer all the averments that would constitute a good negative or anomalous plea, and in the same answer to respond to all matters of interrogation. In short, the plea and supporting answer of the old practice can now be both incorporated in one and the same answer, the present answer in such cases being, in effect, a plea supported by an answer.<sup>33</sup> And our Courts discourage the practice of answering in support of a plea, where an answer can be avoided.<sup>34</sup>

<sup>30</sup> Sto. Eq. Pl., § 689.

<sup>31</sup> The author has set forth this practice, in this Article, more to make his book complete, than as evidence of his appreciation of the present value of this form of pleading and defence. The principles involved are, however, valuable to all who seek to master the science of pleading. Pleas in bar should now never be resorted to when they require an answer in their support, as an answer, under our present

practice, can perform the two-fold office of a plea and an answer; and a defence by that mode is less perplexing, less technical, and more apt to be sustained, than the old method by plea and supporting answer.

<sup>32</sup> Code, § 4318.

<sup>33</sup> 1 Dan. Ch. Pr., 617, note.

<sup>34</sup> *Pigue v. Young*, 1 Pick., 263.



## ARTICLE V.

PROCEEDINGS UPON A PLEA IN BAR.<sup>1</sup>

§ 350. How a Plea is Put at Issue.

§ 351. The Truth of Pleas, How Ascertained.

§ 352. Overruling and Allowing Pleas.

§ 353. When a Plea May be Ordered to Stand for an Answer.

§ 354. Amendment of Pleas.

§ 350. **How a Plea is Put at Issue.**—If the complainant conceives any plea to be naught, either for the matter or manner of it, he may set it down with the Clerk to be argued;<sup>2</sup> or, if he thinks the plea good, but not true, he may take issue upon it, and proceed to trial.<sup>3</sup> Upon the argument of a plea, every fact stated in the bill, and not denied by the averments of the plea, or by the answer in support of the plea, must be taken as true; and, on the other hand, the matter contained in the plea must be considered as true, upon such argument.<sup>4</sup>

If, therefore, the complainant conceives a plea to be defective in point of form, or of substance, he may take the judgment of the Court upon its sufficiency, as stated above. Upon argument of a plea in bar, it may either be allowed or disallowed, or the benefit of it may be saved to the hearing; or it may be ordered to stand for an answer. If allowed on argument, the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, are true. If, therefore, a plea is held sufficient upon argument, or if the complainant without argument thinks it, although good in form and substance, not true in point of fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavored to be supported.<sup>5</sup>

But, upon argument, the Court may not be content either to overrule the plea or to allow it, being of opinion, that, while the plea, if strictly true, may be a defence, nevertheless the complainant may introduce matters in evidence under his bill which would avoid the plea. In such a case, the Court, in order to give both sides a full opportunity to present their case, will, without overruling the plea, direct that the defendant may have the benefit of it at the hearing. Upon such an order the complainant may prove matters that will either disprove or avoid the plea.<sup>6</sup>

If the complainant takes issue on the plea, and the plea be found true, it will be a good defence to so much of the bill as it covers, for the plea may

<sup>1</sup> The proceedings upon a plea in bar and upon a plea in abatement are the same, except that a plea in abatement can never be ordered to stand for an answer. And what is said in this article about (1) putting pleas at issue; (2) ascertaining the truth of pleas; (3) overruling and allowing pleas; and (4) amending pleas, applies to pleas in abatement as well as to pleas in bar.

<sup>2</sup> It is irregular practice to demur to a plea, but should such a demurrer be filed, the Court would treat it as a mode of setting the plea for hearing as to its sufficiency. *Klepper v. Powell*, 6 Heisk., 506. In *Witt v. Ellis*, 2 Cold., 38, a plea was demurred to and no objection raised to the practice. See *Dan. Ch. Pr.*, 692, note. A demurrer lies to a plea in the Circuit Court. *Harris v. Taylor*, 3 Sneed, 536.

<sup>3</sup> Code, 4393; *post*, § 351. Our Statutes and Rules of Practice are silent as to when and how issue must be taken on a plea; but inasmuch as a plea is a special answer, and an answer must be excepted to within twenty days after notice of its being filed, it

would seem that a plea must be set down for argument, (which is equivalent to excepting to its sufficiency,) or issue taken upon it, within twenty days after notice of its being filed; and if the complainant fail to set the plea down for argument, or to take issue upon it, within said time, the defendant may have his plea taken for confessed, or may treat the cause as at issue, without a replication, in which latter case the cause would stand for trial at the term next following. See Code, §§ 4400, 4401; 4322; 4328; 4432; 1 Barb. Ch. Pr. 121; *Allen v. Allen*, 3 Tenn. Ch., 145; *Seifred v. People's Bank*, 2 Tenn. Ch., 17; 1 *Dan. Ch. Pr.*, 696, note. Taking proof on the plea would be equivalent to taking issue upon it. *Bank v. Foster*, 6 Pick., 735.

<sup>4</sup> 1 *Dan. Ch. Pr.*, 694; 1 Barb. Ch. Pr., 120-121.  
<sup>5</sup> 1 *Dan. Ch. Pr.*, 695; *Sto. Eq. Pl.*, § 697. The burden of proof upon an affirmative plea is on the defendant, but in case of a negative plea the burden is generally on the complainant.

<sup>6</sup> 1 *Dan. Ch. Pr.*, 699; *Sto. Eq. Pl.* § 698

apply to only a part of the bill, or, if it applies to the whole bill, may be true only as to a part, in which latter case it will bar such part.<sup>7</sup> Unlike a demurrer, a plea may be good in part and bad in part, and such a plea will be sustained to the extent of its goodness.<sup>8</sup>

If the complainant deems a plea insufficient, either for the manner or the matter of it, he may set it down with the clerk to be argued, or he may set it down for argument by an entry on the minutes, if the Court be in session. The following is a

**FORM OF SETTING A PLEA DOWN FOR ARGUMENT.**

John Doe,  
vs.  
Richard Roe, *et al.* }

The complainant says the plea of the defendant, Richard Roe, is not sufficient :  
1st. Because it is not properly verified.<sup>9</sup>  
2d. Because, if true, it presents no matter sufficient to bar the suit.  
3d. Because it does not cover the whole bill; and does not profess to be to a part only of the bill.

Wherefore, he sets said plea down for argument. LEON JOUROLMON, Solicitor.

If the complainant considers the plea good in form and in substance, but false in fact, he must take issue upon it, if an affirmative plea,<sup>10</sup> and proceed to trial.<sup>11</sup> Issue is taken, ordinarily, by filing a replication<sup>12</sup> within twenty days.

**REPLICATION TO A PLEA.**

John Doe,  
vs.  
Richard Roe, *et al.* } In Chancery, at Knoxville.

The complainant joins issue on the plea filed in this cause by the defendant, Richard Roe.  
A. S. PROSSER, Solicitor.

§ 351. **The Truth of Pleas, How Ascertained.**—If the plea, upon argument, is held to be good; or, if the complainant admits it to be so by replying to it, the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests.<sup>13</sup> If he fails in this proof, so that at the hearing of the cause, the plea is held to be no bar, and the plea extends to the discovery sought by the bill, the complainant is not to lose the benefit of that discovery; but the Court will order the defendant to be examined on interrogatories, to supply the defect. But, if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good, either in point of form or of substance. Therefore, when a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the complainant's title, and the complainant replied, it was determined that the plea, although irregular, had been admitted, by the replication, to be good; and that the fact of notice not being in issue, the defendant proving what he had pleaded, was entitled to have the bill dismissed.<sup>14</sup>

Pleas of a former decree, or of another suit depending in the same Court, are generally referred to the Master to inquire into the fact; and if the Master

7 Moore v. Holt, 3 Tenn. Ch., 143.  
8 Scaright v. Payne, 1 Tenn. Ch., 189; 1 Dan. Ch. Pr., 610; Sto. Eq. Pl., § 692; Parmelee v. Railroad, 13 Lea, 600.  
9 If the plea is one requiring verification, and is not properly verified, it may be stricken from the files on motion.  
10 A negative plea makes an issue without a replication. A replication is, however, allowable, but not necessary. Bank v. Foster, 6 Pick., 735, modifying Cheatham v. Pearce, 5 Pick., 668.  
11 Code, § 4393, Cheatham v. Pearce, 5 Pick., 668.

12 Code, § 2930. The contrast between the form of this replication and the old form, well illustrates the superiority of our present forms of pleading over the old forms. The form of the replication above given is the one used in the Circuit Court, but it is equally available in the Chancery Court.  
13 The burden of proof is on the defendant when he pleads an affirmative plea, but the burden is on the complainant when the defendant files a negative plea. 1 Dan. Ch. Pr., 697-698.  
14 Sto. Eq. Pl., § 697; 1 Dan. Ch. Pr., 695.

reports the fact true, the bill, on confirmation of the report, will be dismissed. But the complainant may except to the Master's report, and bring on the matter to be argued before the Court.<sup>15</sup>

The complainant may go into evidence to disprove the plea, and if he has in his bill alleged any matter which, if true, may have the effect of avoiding the plea, such as notice or fraud, he may introduce any proof he may have in support of his allegation. And where the plea introduces matter of a negative nature, such as denial of notice or fraud, if the existence of the notice or fraud is not admitted by the answer in support of the plea, it will be necessary for the complainant to produce evidence in support of the affirmative of the proposition. After the complainant has replied to a plea, the validity of the plea can never be questioned, but only its truth; in fact, nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts which it suggests. But, if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good, either in point of form or substance.<sup>16</sup>

A plea in bar presupposes that, if a certain essential fact, omitted from the bill, could be made to appear; or, if a certain essential fact contained in the bill could be made to disappear, then the bill would be demurrable. On this presupposition, the plea avers that the omitted essential fact exists, or that the alleged essential fact does not exist. If complainant disputes the legal accuracy of the presupposition, he will set the plea down for argument as to its sufficiency, thus making an issue of law;<sup>17</sup> if he admits the presupposition, but disputes the truth of the plea, he will take issue upon it, and thus raise a question of fact.<sup>18</sup>

**§ 352. Overruling and Allowing Pleas.**—If, upon argument, the Court is of opinion that the plea is insufficient as a defence, it is overruled, and the defendant required to answer the bill.<sup>19</sup>

If, however, the plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded be true; in which case the complainant must dismiss so much of the bill as is covered by the plea, or take issue upon the plea.<sup>20</sup>

Sometimes, upon the argument of a plea, the Court considers that, although the plea appears to set up a good defence, yet there may be facts in avoidance. In such a case, the Court may direct that the benefit of the plea be saved to the defendant at the hearing, in which case the plea must be replied to by the complainant;<sup>21</sup> or the Court may allow the defendant to rely upon the matter of the plea in his answer, which is the better practice.<sup>22</sup>

If the complainant files a replication to the plea, and the plea is, at the hearing, found to be true in fact, it will be a complete bar to so much of the bill as the plea covers, even though the plea is not good, either in form or in substance.<sup>23</sup>

**§ 353. When a Plea May be Ordered to Stand for an Answer.**—If, upon

<sup>15</sup> Sto. Eq. Pl., § 700; but see, *ante*, § 328, note 22.  
<sup>16</sup> 1 Dan. Ch. Pr., 697-698.

<sup>17</sup> In strict Chancery practice, a demurrer is not the proper method of testing the sufficiency of a plea; but, inasmuch as a demurrer is used for that purpose in the Courts of law, and is withal a plain, intelligible and definite method of testing a plea's sufficiency, no reason exists, outside of ancient usage, why a demurrer should not lie to an insufficient plea in Equity as well as at law. Setting down a plea for argument is in the nature of a general demurrer, while demurrers, being now special, point out the particular objections to the plea relied on, and thus more fully conform to the spirit of our present system of pleading. And our Courts have practically

either as a demurrer, *Witt v. Ellis*, 2 Cold., 40; or as a mode of setting the plea for argument on its sufficiency. *Klepper v. Powell*, 6 Heisk., 506, *ante*, § 350.

<sup>18</sup> Code, § 4393.

<sup>19</sup> Code, § 4395. No second plea is allowed upon the overruling of a plea upon argument. *Ibid.*

<sup>20</sup> 1 Dan. Ch. Pr., 696.

<sup>21</sup> 1 Dan. Ch. Pr., 699; *Brien v. Marsh*, 1 Tenn. Ch., 625. If there be two pleas, both or either may be allowed to stand for an answer. *Ibid.*

<sup>22</sup> *Whittaker v. Whittaker*, 10 Lea, 98. The latter practice is more consonant with our statute. Code, § 4318. Of course, the matter of a plea to the jurisdiction cannot be relied on in an answer. *Ibid.*

argument, the Court considers that the matter offered by way of plea may be a defence, or part of a defence, but that it has been informally pleaded, or is not properly supported by the answer, so that the truth is doubtful, it will, in such case, instead of overruling the plea, direct it to stand for an answer.<sup>24</sup>

If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers; unless, by the order, liberty is given to the complainant to except to it for insufficiency; and where a defendant pleaded to the whole bill, and, on arguing the plea, it was ordered to stand for an answer, without saying, one way or the other, whether the complainant might except, the complainant was not allowed to except, because, by the terms "for an answer" in the order, a sufficient answer is meant, an insufficient answer being no answer. It is to be observed, that, if a plea be to a part only of the bill, and is accompanied by an answer to the rest, an order that it may stand for an answer, without giving the complainant liberty to except, will not preclude the complainant from excepting to the answer to that part of the bill which is not covered by the plea. The order for the plea to stand for an answer, is, however, frequently accompanied with a direction that the complainant shall be at liberty to except; but the liberty is sometimes qualified so as to protect the defendant from any particular discovery, which he ought not to be called upon to make. When a plea has been ordered to stand for an answer, with liberty to except, the complainant must proceed to deliver his exceptions within twenty days, otherwise the answer will be deemed sufficient. The proceedings upon the exceptions are the same as those upon exceptions to answers in general.<sup>25</sup>

If a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the complainant may yet except to the answer, as insufficient to the parts of the bill not covered by the plea. If a plea, accompanied by an answer is allowed, upon argument as sufficient, the answer may be read at the hearing of the cause to counterprove the plea.<sup>26</sup>

**§ 354. Amendment of Pleas.**—Pleas may be amended where there has been an evident slip or mistake, and the material ground of defence seems to the Court to be good. Yet the Court always expects to be told precisely what the amendment is to be, and how the slip happened, before it will allow the amendment to be made. The defendant will, also, be tied down to a short time in which to amend.<sup>27</sup>

The motion to amend must be supported by an affidavit, and be accompanied by the draft of the amendment proposed, that the Court may judge of its materiality.<sup>28</sup> A defect in the form of a plea, or in the form of its verification, may be amended without affidavit, the plea being resworn to after amendment.<sup>29</sup> After a plea has been argued and overruled, no second plea will be allowed.<sup>30</sup>

<sup>24</sup> *Brien v. Marsh*, 1 Tenn. Ch., 625.

<sup>25</sup> 1 Dan. Ch. Pr., 700-701; Sto. Eq. Pl., § 699.

<sup>26</sup> Sto. Eq. Pl., § 699.

<sup>27</sup> Sto. Eq. Pl., § 701.

<sup>28</sup> Dan. Ch. Pr., 704.

<sup>29</sup> *Trahué v. Higden*, 4 Cold., 620; *Seifred v. People's Bank*, 2 Tenn. Ch., 19.

<sup>30</sup> Code, § 4395.

## CHAPTER XVII.

## ANSWERS AND DISCLAIMERS TO BILLS.

- ARTICLE I. The Answer as a Pleading.  
 ARTICLE II. The Answer as a Deposition.  
 ARTICLE III. Matters Common to All Answers.  
 ARTICLE IV. The Frame and Form of an Answer.  
 ARTICLE V. Practical Suggestions as to Answers.  
 ARTICLE VI. Disclaimers to Bills.

## ARTICLE I.

## THE ANSWER AS A PLEADING.

§ 355. General Nature on an Answer.

§ 356. Answer as a Mode of Defence.

§ 357. What Defences May be Made by an Answer.

§ 358. All the Defences Relied on Must be Stated.

§ 358. Answer Superior to a Plea as a Mode of Defence.

§ 360. What is a Sufficient Answer When the Defendant's Oath is Waived.

§ 355. **General Nature of an Answer.**—If a defendant<sup>1</sup> is unable to overthrow the bill by a plea in abatement, or a motion to dismiss, or by a demurrer, or a plea in bar, he must answer the bill. An answer may have a four-fold nature: 1, It may set forth the defendant's defences to the charges contained in the bill, and to this extent it is a mere pleading; 2, It may contain the defendant's responses to the discoveries sought by the bill, in which case it is also a sort of deposition;<sup>2</sup> 3, It may set up matters as to which the defendant is entitled to some affirmative relief either against the complainant or against a co-defendant, and to this extent resembles a cross-bill; and 4, It may enter into a detail of all the matters that can be set up in answer to the equities of the bill, in order to sustain a motion to dissolve an injunction, or to defeat a motion for a receiver, in which case the answer partakes of the nature of a counter affidavit.<sup>3</sup> All of these different phases of an answer will be duly considered in their proper places; but, for the present, an answer will be considered in its character as a pleading, and as a deposition.

The general nature of the answer which a complainant has a right to require from each defendant upon the record, is sufficiently shown by the old form of prayer in a bill requiring an answer on oath: "*that the defendant may, upon his corporal oath, according to the best and utmost of his knowledge, recollection, information and belief, full, true, direct and perfect answer make to all and singular the several matters and things hereinbefore contained, and that as fully*

<sup>1</sup> The party filing an answer as a pleading is termed a *defendant*, because he defends; but when he, also, answers the question propounded by the bill, or makes the discovery called for, he is termed a *respondent*, because he responds. The term respondent is the more formal and ancient, but in this book, the term defendant is preferred, (1) because it is now almost universally used in our statutes and Supreme Court Reports; and (2) because an answer is generally a mere unsworn pleading, setting up defences, and a response under oath is seldom called

Story, Daniel, Barbour, Pomeroy and other eminent authors. See, *ante*, § 133, note 7.

<sup>2</sup> When an answer is demanded on oath, it is both a pleading and a deposition. See, *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 601; *Sto. Eq. Pl.*, § 850; *Gardner v. Gardner*, 4 Heisk., 310; 3 Greenl. Ev., § 284.

<sup>3</sup> The failure to note these various phases an answer may assume, has caused some apparent, and some real, conflicts in the rulings of Courts in reference to answers. See, *Sto. Eq. Pl.*, § 850; 1 Dan.

and particularly as if the same were here again repeated, and he thereunto severally and distinctly interrogated.”<sup>4</sup>

§ 356. **Answer as a Mode of Defence.**—In its character as a pleading,<sup>5</sup> an answer may set up all the defences of fact the defendant can present on the merits of the controversy. These defences may consist: (1) in a denial of any one or more of the material allegations of the bill; or (2) in a confession of the apparent case made out by the bill, and the presentation of new matters that avoid some one or more of the material averments of the bill; or (3) an answer may deny some allegations, confess others, and confess and avoid the rest; or (4) it may admit the material allegations of the bill, and set up some defence thereto that might have been pleaded in bar, such as the statute of limitations, the statute of frauds, innocent purchaser, former adjudication, and the like.

An answer generally controverts the facts stated in the bill, or some of them; and states other facts to show the rights of the defendant in the subject of the suit, or the absence of any right on the part of the complainant. But sometimes it admits the truth of the case made by the bill, and, either with or without stating additional facts, submits the questions, arising upon the case thus made, to the judgment of the Court. If an answer admits the facts stated in the bill, or such as are material to the complainant's case, and states no new facts, or such only as the complainant is willing to admit, no proof is necessary: the answer, in such a case, is considered as true; and the Court will decide the cause upon its admissions. But, if the answer does not admit all the facts in the bill, material to the complainant's case, or states any fact which the complainant is not disposed to admit, the truth of the answer, or any part of it, may be controverted by the complainant, and the truth of the allegations of the bill established by proper evidence.<sup>6</sup>

A defendant should, in his answer, confine himself to the facts pertinent to the case, and should refrain from stating arguments, inferences, or conclusions of law. The object of a pleading is to notify the adverse party of the facts intended to be proved, and not to inform either him or the Court what inferences of law should be drawn from the facts.<sup>7</sup> If, however, a defendant undertakes, in his answer, to make out a particular defence, which he deduces from the facts he sets out, he will not be allowed, at the hearing, to use these same facts for the purpose of establishing a different defence;<sup>8</sup> for such a course would not only operate as a surprise to the complainant, but would, also, enable a defendant to mislead his adversary.

§ 357. **What Defences May be Made by Answer.**—The defendant in his answer is not confined to any one defence, but may avail himself of any and all matters of law or fact, which will constitute either a partial or a complete defence to the charges contained in the bill. He may, in his answer: (1) deny any or all of the complainant's material allegations; or, (2) may confess and avoid any or all of them; or, (3) may set up any matter of law or fact that would constitute a plea in bar to the relief prayed; or, (4) may adopt any two or more of these various methods of defence.

A defendant may, in his answer, set up as many defences as may be deduced from the same state of facts. Thus, he may rely both on the statute of limitations, and on the laches of the complainant, as the evidence to support each is substantially the same. He may, also, rely upon various defences in the alternative; thus he may deny that he ever executed the writing charged, and may

<sup>4</sup> 3 Dan. Ch. Pr., 1884.

<sup>5</sup> Sto. Eq. Pl., § 850.

<sup>6</sup> Sto. Eq. Pl., § 849.

<sup>7</sup> An answer should content itself with giving the facts. The Chancellor, generally, knows the law as well as counsel; and when the facts are set forth, he will determine their force and legal effect. An alle-

gation that the defendant has a good and valid defence, without specifying the defence so that the Court can judge of its merits, is *vox et præterea nihil*, and cannot be noticed at all. *Montgomery v. Olwell*, 1 Tenn. Ch., 172.

<sup>8</sup> 1 Dan. Ch. Pr., 713.

aver that, if executed by him, its execution was obtained by duress or fraud, and that there was a failure of consideration; and, as a further defence to it, may plead the statute of limitations. A defendant cannot, however, set up two defences which are absolutely inconsistent and contradictory.<sup>9</sup>

The defendant is not required to file any other pleading than an answer, unless he intends to set up matters in abatement, or to object to the jurisdiction of the Court.<sup>10</sup> He may set up, in his answer, any matter that would be a ground of demurrer, or the subject-matter of a plea in bar. And, in general, he may incorporate all matters of defence in his answer, and is not required to plead specially, or to demur, in any case, except to the jurisdiction of the Court.<sup>11</sup> The result is, a plea in bar is seldom necessary, and seldom used.

§ 358. **All the Defences Relied on Must be Stated.**—The defendant in answering must be careful to set forth, clearly, any and all special defences he intends to rely on,<sup>12</sup> whether such special defences be matters of law, or matters of fact. If he intends to rely on (1) the want of proper parties,<sup>13</sup> (2) on the statute of frauds, (3) the statute of limitations, (4) the defence of innocent purchaser, (5) non-partnership with a co-defendant,<sup>14</sup> (6) failure, or illegality, of consideration, (7) usury, (8) payment, (9) satisfaction, (10) release, (11) former adjudication, (12) non-performance of condition precedent, (13) alteration of instrument sued on, (14) tender, (15) higher security taken, (16) merger, (17) an account stated, (18) title paramount, (19) an award, (20) a compromise, (21) infancy, (22) coverture, (23) drunkenness, (24) mental unsoundness, (25) fraud, (26) duress, (27) estoppel, (28) *non est factum*, (29) non-partnership of complainants, (30) set-off, (31) recoupment,<sup>15</sup> or the like, he must set up these defences in a clear and unambiguous manner, to the end that the complainant may be apprised thereof; for he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in the evidence.<sup>16</sup>

It would be a gross fraud upon the complainant to allow a defendant to set up one defence in his answer, and to make out and rely upon an entirely different defence in his proof. If such a practice were tolerated, instead of a pleading subserving the purpose of notifying the adversary of what the pleader intended to prove, it would be a mere ruse to enable him to mislead and deceive his adversary as to his real cause of action, or real defence. And where a defendant has made out a case by proof, different from the one set up in his answer, he should not be allowed to amend his answer so as to conform to the proof, without being operated with the costs of all the proof taken in the cause. The proofs must be conformed to the pleadings, and it is a reversal of both logic and law to allow a party to conform his pleadings to his proofs.

In stating a defendant's case, however, it is only necessary to use such a degree of certainty as will inform the complainant of the nature of the defence to be made; and the same degree of definiteness need not be observed in setting out these defences as is required of the complainant in specifying the grounds on which he relies for relief.<sup>17</sup> Nevertheless, is a fundamental rule of pleading, applicable alike to bills, pleas, and answers, that nothing can be proved or dis-

<sup>9</sup> 1 Dan. Ch. Pr., 713. *Allegans contraria non est audiendus*. (He who alleges matters that are contradictory will not be heard.)

<sup>10</sup> And he may even object to the general jurisdiction of the Court over the subject-matter. *Travers v. Abbey*, 20 Pick., 665. See, *ante*, § 290.

<sup>11</sup> Code, §§ 4318-4319; *French v. Rainey*, 2 Tenn. Ch., 652; *Travers v. Abbey*, 20 Pick., 665. Prematurity of suit may be pleaded in an answer. *Pigue v. Young*, 1 Pick., 263.

<sup>12</sup> *Rogers v. Green*, 9 Heisk., 679; *Coward v. Culver*, 12 Heisk., 544; *Williams v. Bartlett*, 4 Lea, 620.

<sup>13</sup> Code, §§ 4318-4319, 4337.

<sup>14</sup> *Alley v. Myers*, 2 Tenn. Ch., 206.

<sup>15</sup> *Furman v. North*, 4 Bax., 296; *Turley v. Turley*, 1 Pick., 261; *Read v. Street Ry. Co.*, 2 Cates, 316; 1 Dan. Ch. Pr., 712. And when the matter of a plea is set up in an answer, the averments must contain all the certainty of a plea, not in its technical niceties, but in its material statements. "Certainty of allegation constitutes the beauty of Equity pleading." *Turley, Judge*, in *High v. Batte*, 10 Yerg., 338.

<sup>17</sup> The defence that the claim is stale may, however, be insisted on without being set up in the answer. 1 Dan. Ch. Pr., 714, note 5. The reason of this is that staleness is not so much a defence as it is a rule, regulating the discretion of the Chancellor.

proved which has not been alleged.<sup>18</sup> As to the particularity required in setting forth defences reference is made to the preceding Chapter on Pleas in Bar. Whatever may be pleaded in bar may be set up in an answer, and when so set up the same degree of definiteness, particularity and directness should be observed.

**§ 359. Answer Superior to a Plea as a Mode of Defence.**—Where the same defence can be made by an answer that could be made by plea, it is generally better to make it by answer, because: (1) an answer is less technical, and more easily framed; (2) an answer can set up all the facts and circumstances that tend to aid, or strengthen, the defence;<sup>19</sup> (3) an answer enables a defendant to present his defences in all their fullness and particularity, and shows a disposition to boldly and frankly meet all the alleged equities set up in the bill; whereas, (4) a plea rather indicates a disposition to avoid a contest on the merits, and sometimes implies that the defendant has no defence except some hard rule of law, or some technical bar; and (5) as a result, a plea is often regarded with disfavor by the Court,<sup>20</sup> when the same defence set up in an answer, and especially when explained and supported by equitable circumstances, will be regarded with, at least, an impartial disposition. Chancellors have a yearning to penetrate to the heart of the merits of a controversy, and sometimes feel that a plea is like a door, that shuts them out of the chamber where the real truth is to be found.

As shown elsewhere, pleas were formerly resorted to in order to avoid being compelled to make a discovery, which was often irksome and embarrassing, as well as damaging, for when a defendant answers under oath he is required to answer fully. By means of a plea, the defendant relieved himself from the disagreeable task of answering as to all the many matters he was required to discover. But now, in Tennessee, bills praying a discovery under oath are seldom filed, and all defences, except matters in abatement and objections to the jurisdiction, may be incorporated in the answer, including both matters of law and matters of fact.<sup>21</sup> Hence, pleas are seldom necessary, and less seldom resorted to; and the tendency is here, as throughout the Union, to present all defences by means of an answer; and this is especially true where an unsworn answer is permitted. As a bill is the simplest and most natural, and yet the most effective method of presenting a complainant's cause of action to a Court, so an answer is the simplest and most natural, and yet the most effective method of presenting the defendant's side of a legal controversy.

**§ 360. What is a Sufficient Answer when a Defendant's Oath is Waived.** An answer having been originally intended to be a sworn discovery of facts in the defendant's knowledge, necessary to enable complainant to make out his case, it was natural for the defendant to evade full and direct answers to the charges and interrogatories contained in the bill; and we accordingly find the books of Chancery Practice full of cases where answers have been excepted to because evasive, and because not containing full and direct responses to the bill.

But when an unsworn answer is called for, it is manifest that no discovery is sought or expected, and that complainant contemplates nothing more from the defendant than a pleading making an issue.<sup>22</sup> For this reason, it has been uniformly held that an unsworn answer cannot be excepted to, for insufficiency,<sup>23</sup>

If, therefore, an unsworn answer cannot be excepted to for insufficiency, the result would seem inevitable that an answer containing nothing but a general denial of "each and all of the allegations of the bill, and every part thereof,"

<sup>18</sup> See, *Furman v. North*, 4 Bax., 296.

<sup>19</sup> 1 Dan. Ch. Pr., 714; Sto. Eq. Pl., § 851.

<sup>20</sup> Sto. Eq. Pl., § 454, note; *ante*, § 318, note.

<sup>21</sup> Code, §§ 4318-4319.

<sup>22</sup> Code, § 4317; *Overton v. Holinshade*, 5 Heisk.,

<sup>23</sup> *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 599; in this case the matter is fully considered, and numerous authorities are cited. See, also, *Sheppard v. Akers*, 1 Tenn. Ch., 326, and cases there cited.



would be a sufficient unsworn answer, as it makes an issue, and puts the complainant to the proof of all the material allegations in his bill.<sup>24</sup>

What is meant by the statement that an unsworn answer cannot be excepted to for insufficiency, is: that it cannot be excepted to for not meeting every charge, averment and interrogatory contained in the bill, if it, as a whole, contains sufficient to make an issue. This answer may be a general one, as stated above; but if the defendant makes an issue as to some of the material allegations of the bill, but utterly ignores others, and nowhere in his answer generally traverses "all the material allegations not otherwise answered," such an answer would be liable to exception for insufficiency, because the defendant must answer sufficiently to make an issue on the whole bill.<sup>25</sup>

The provisions of our statutes for enforcing an answer,<sup>26</sup> and for securing a sufficient answer by means of exceptions, were intended for sworn answers where discoveries were sought, in whole or in part; and such provisions were not intended to apply to unsworn answers, containing nothing scandalous or impertinent.<sup>27</sup>

Nevertheless, whatever may be the strict law when tested, it is unquestionably the better practice for an unsworn answer to respond to each of the material allegations, in their order, and conclude with a general denial of each and every allegation not already answered unto. Besides, where a defendant, by denying well known facts, thereby causes the cost of proving them, it would be a proper exercise of discretion to onerate him with a part of the costs, even when successful. For all parties owe it to the Court, and owe it to the cause of justice and of good pleading, to circumscribe the issues as much as possible, and to make the costs of the litigation as light as possible.

In all cases where the statute requires a plea to be sworn to, an answer incorporating such a plea must be sworn to, even when the oath of the defendant to his answer is waived by the complainant. In such a case, the answer is a mere pleading, but nevertheless a pleading required by the statute to be under oath.<sup>28</sup>

<sup>24</sup> This is the conclusion fairly deducible from the cases cited in *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 599, and in *Saepard v. Akers*, 1 Tenn. Ch., 326. By the Code, § 4322, "no replication is required or allowed," even when the answer, by confession and avoidance, presents an issue wholly different from the one tendered by the bill. In such a case, an issue on the new matter in the answer is made by operation of the statute, much the same as an issue on the matters in the bill is made by a *pro confesso* against an infant. As an answer without oath ordinarily denies everything in the bill, it would much speed the cause to allow the complainant to waive an answer entirely, except when he wishes a discovery on oath, or when the defendant wishes to set up matters in avoidance; and in case of such waiver to have an issue made by operation of law on all averments of fact contained in the bill. Be this as it may, the logic of the foregoing authorities demonstrates that any unsworn answer, that makes an issue of fact on all the material averments of the bill, is a sufficient answer. See, also, *Payne v. Berry*, 3 Tenn. Ch., 154. In *Story's Equity Pleading*, § 875, *c.*, it is said with great positiveness: "There can be no question, upon principle, it would seem, that the answer of the defendant not upon oath, although responsive to the bill, is to be treated merely in the nature of a plea of denial, by way of special traverse, and it would be of the same effect, precisely, if it were a mere general issue."

<sup>25</sup> *Payne v. Berry*, 3 Tenn. Ch., 154.

<sup>26</sup> Code, §§ 4360-4368.

<sup>27</sup> "The rules which regulate exceptions to Chancery pleadings," says Chancellor Cooper, "were intended to secure full discovery, and to prevent

the records of the Court from being encumbered with impertinent matter, or made the vehicles of private malice. They are rigidly enforced for the attainment of these ends. \* \* \* If, however, no real benefit is to be obtained by calling them into play, a resort to them is a useless consumption of time, and sets ponderous machinery in motion to no purpose." *Gleaves v. Morrow*, 2 Tenn. Ch., 593. "This ponderous machinery" was not devised for unsworn answers; and hence, where no discovery is sought, and where the answer contains nothing impertinent or scandalous, such answer cannot be excepted to for insufficiency, if it contains enough to put all of the complainant's material allegations in issue, and this it may do by a general denial of "each and every allegation in the bill contained," as well as by a specific denial of each specific allegation, *seriatim*.

<sup>28</sup> Code, §§ 2909; 3777; 3779 *a.* The defendant may confine his affidavit to so much of the bill as denies the partnership, or the execution of the instrument sued on. The waiver of the defendant's oath to his answer means that the complainant does not want the answer as a deposition; it does not mean that the defendant is to be allowed to plead non-partnership or *non est factum* without swearing to the plea. This he must do even in the Circuit Court. The plea denying the alleged partnership, is misnamed a plea in abatement by the statute. Code, § 2908. It is no more a plea in abatement than is the plea of *non est factum*, or the plea of not guilty. The defence of non-partnership may be set up in an answer. It would be disrespectful to the Legislature to suppose that they meant anything more than that such a defence must be sworn to. See, *Eaton v. Dickinson*, 3 Sneed, 405.

ARTICLE II.

THE ANSWER AS A DEPOSITION.

- § 361. Answer as a Mode of Proof.
- § 362. What Must be Answered, and How.
- § 363. Particularity and Precision Required in an Answer as a Deposition.
- § 364. What Matters Must be Discovered, and How.

- § 365. Thoroughness of the Required Discovery.
- § 366. How Charges Must be Denied.
- § 367. Difference between an Answer Sworn to, and an Answer not Sworn to.

§ 361. **Answer as a Mode of Proof.**—Formerly, the principal purpose of an answer was the discovery of facts within the defendant's own knowledge, either because the complainant had no other means of proof, or to save the expense of obtaining other proof. The defendant was not formerly a competent witness in any Court, and his evidence could only be had by making him a party to a bill in Equity, and compelling him to answer.<sup>1</sup> Parties being now competent witnesses, however, the necessity of a discovery from a defendant now seldom arises; and, as a consequence, the oath of the defendant is generally waived. Nevertheless, cases arise when an answer on oath is required, and in such cases the defendant must respond particularly and precisely to each and every material allegation and charge contained in the bill; making the discovery called for, if in his knowledge or power; denying such allegations as are personally known to be untrue; admitting such as are personally known to be true; expressing belief or disbelief as to those not personally known to be true or untrue, but as to which the defendant has information; averring want of information or of belief as to those parts of the bill of which he has no knowledge, information or belief; and bringing forward such matters of avoidance, or in bar, as he can present to defeat the whole, or any part, of the relief sought by the complainant.

§ 362. **What Must be Answered, and How.**—The defendant is required to answer to each and all of the matters of fact contained in the bill, not only according to his positive knowledge of the facts stated, and to his best remembrance of them, but also according to the best information he may have received, and the best belief he may have in reference thereto. It is not necessary, however, that the defendant should say, in so many words, that he has no knowledge, information, or belief, in relation to the matters charged. Any other expression which amounts to the same thing will be sufficient.<sup>2</sup>

It is not necessary for a bill to contain specific interrogatories, in order to obtain a specific answer from the defendant.<sup>3</sup> The general interrogatory or request in the bill, "that the defendant may answer make to all and singular the premises, fully and particularly, as though specially interrogated," is sufficient to entitle the complainant to a full disclosure of the whole subject-matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill, with all the material circumstances.<sup>4</sup> Nevertheless,

<sup>1</sup> Gardner v. Gardner, 4 Heisk., 310. In consequence of the general habit of waiving the defendant's oath to his answer, there is a tendency in Tennessee, even when the oath is not waived, to regard the answer primarily, and almost exclusively, as a pleading, whose office is to present the intended defences rather than to furnish evidence in support of the complainant's case. Nevertheless, the rules of practice on the subject of a discovery are in full

force, and must be observed whenever an answer under oath is called for.

<sup>2</sup> Gleaves v. Morrow, 2 Tenn. Ch., 597. In this case, Chancellor Cooper says that the object of a discovery is not merely to purge the conscience of the defendant, but to lighten the burden of proof. On this point see, Chapter on Bills of Discovery.

<sup>3</sup> Gleaves v. Morrow, 2 Tenn. Ch., 597.

<sup>4</sup> 1 Dan. Ch. Pr., 715, note 4; Sto. Eq. Pl., § 38.

special interrogatories are often added in order to prevent evasion, and to thoroughly sift the conscience of the defendant.<sup>5</sup>

§ 363. **Particularity and Precision Required in an Answer as a Deposition.** In its character as a deposition, an answer must contain a full and perfect response to each and all of the material allegations in the bill. It must confess, avoid, deny, or traverse, all the material parts of the bill. It must state 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. It should, also, be certain in its allegations, as far as practicable. To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and he must not merely answer the several charges literally; but he must confess or traverse the substance of each charge.<sup>6</sup>

And, wherever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, although 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 sums of money received by the defendant, was not sufficient. And the complainant, having excepted to the answer on this ground, the exception was allowed, the Court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill; and that it was not sufficient for him to say, generally, that he had in the schedule set forth an account of all sums received by him.<sup>7</sup>

In that part of an answer that is a pleading, the defendant must state his case distinctly, and specify his defences; but he is not required to disclose the proofs on which his defences rest. On the other hand, that part of the answer which is a deposition must give a direct and full answer to every question asked, and to every allegation and charge made; for, as to this part of his answer, the defendant is a *witness* giving in his *evidence*, and sworn to tell the truth, and the *whole truth*.<sup>8</sup>

§ 364. **What Matters Must be Discovered, and How.**—Where defendants have in their power the means of acquiring the information, necessary to enable them to give the discovery called for, they are bound to make use of such means,<sup>9</sup> whatever pains or trouble it may cost them; therefore, where defendants filling the character of trustees are called upon to set out an account, they cannot frame their answer so as merely to give a sufficient ground for an account in the Master's office; they are bound to give the best account they can by their answer. But a defendant ought not to be required to obtain information so as to meet the complainant's wishes, and thereby become his agent to procure testimony.<sup>10</sup> Where executors, or other trustees, are called upon to set out accounts, they must set them forth; although, for the purpose of rendering their schedules less burdensome, they may, instead of going too much into particulars, refer to the original accounts in their possession; and when it is said that a defendant may refer to an account in his possession, it must not be understood as authorizing him to refer, by his answer, to accounts made out by himself for the purposes of the case, but only to accounts previously in existence.<sup>11</sup> But where a defendant is required to set forth a general account, he may set forth the account, or the statement of the sums received, by means of schedules annexed to his answer, and made part thereof.<sup>12</sup>

<sup>5</sup> Sto. Eq. Pl., §§ 35; 38.

<sup>6</sup> Sto. Eq. Pl., § 852.

<sup>7</sup> Sto. Eq. Pl., § 852.

<sup>8</sup> Gres. Eq. Ev., 19

<sup>9</sup> Gleaves v. Morrow, 2 Tenn. Ch., 597.

<sup>10</sup> Morris v. Parker, 3 Johns., Ch., (N. Y.), 301.

<sup>11</sup> 1 Dan. Ch. Pr., 724.

<sup>12</sup> 1 Dan. Ch. Pr., 727.

In many cases where the defendant is asked, as to his knowledge or information of facts, it is not sufficient for him to say that he has no knowledge or information of those facts, if the facts are such as have passed between his agent and the complainant, and he is interrogated thereto; for under such circumstances he is bound to make inquiries of his agent before he makes his answer. Such a case is not governed by the same considerations as one where the facts are equally open and accessible to both parties, and the means of information are the same; for the principal has means of knowing from his agent what the facts are; and he has no right in his answer to say that he does not know what his agent has done. It is plain that if he answered that he had been informed by his agent that the facts were so, and he believed the information, the answer would be good evidence, and might be material. So if a party is interrogated as to his knowledge, remembrance, information and belief, and the answer alleges that the defendant has no knowledge or information that a fact is not true, that is not sufficient, for he ought to state whether he believes it to be true.<sup>13</sup>

**§ 365. Thoroughness of the Required Discovery.**—It is a fundamental rule of Equity pleading that, when an answer on oath is called for, and the defendant answers, he must answer fully, and leave no charge or allegation in the bill without an adequate response; and he must answer “*as to his knowledge, remembrance, information and belief.*” And, in general, if a fact is charged, which is in the defendant’s own knowledge, as if done by himself, he must answer positively and not to his remembrance or belief only, if it is stated to have happened within seven years before. It seems, however, that where a special cause is shown, so positive an answer may be dispensed with. As to facts which have not happened within his own knowledge, the defendant must answer as to his information *and belief*, and not as to his information merely, without stating any belief either one way or the other. It is not, however, necessary to make use of the precise words “*as to his information and belief;*” the defendant may make use of any expressions that are tantamount to them; thus, to say that the defendant “*cannot answer the facts inquired after, as to his belief or otherwise.*” is generally considered a sufficient denial; for though the word, “*information*” is not used, the expression, “*belief or otherwise,*” is held to include it. And so where an answer was in this form—“*And this defendant further answering saith, it may be true for anything he knows to the contrary, that,*” &c. and after going through the several statements, it concluded thus—“*but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning them;*” the defendant in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect, deny that he had any information concerning them. A defendant cannot, by merely saying “*that a matter may be true for anything he knows to the contrary,*” avoid stating what his recollection, information, or belief, with reference to it is, or saying that he has no recollection or information, or that he cannot form any belief at all concerning it, either in these words or in equivalent expressions.<sup>14</sup>

If the defendant answers that he has not any knowledge or information of a fact charged in the bill, he is not bound to declare his belief one way or the other. It is not sufficient to answer that the specific facts charged “*may be true, but the defendant has no knowledge of them, and leaves the complainant to prove them.*” Nor is it sufficient to say that “*the defendant has not any knowledge of the foregoing facts but from the statement thereof in the bill.*” A denial by the defendant, “*according to his recollection and belief,*” is not sufficient, when the fact is directly charged to be within his knowledge; but when a defendant states that he is “*utterly and entirely ignorant,*” as to a

<sup>13</sup> Sto. Eq. Pl. § 855, *o.*

<sup>14</sup> 1 Dan. Ch. Pr. 723.

fact, it is sufficient.<sup>15</sup> It is not necessary that a defendant should say in so many words, that he has no knowledge, information, or belief in relation to the matters charged; any other expression which amounts to the same thing will be sufficient.<sup>16</sup>

In general, if a fact is charged which is in the defendant's own knowledge, as if it is done by himself, he must answer positively, and not to his remembrance or belief, at least if it is stated to have happened within seven years before. But as to the facts which have not happened within his own knowledge, he must answer as to his information and belief, and not his information merely, without stating any belief either one way or the other. As to recent facts, however, within his own knowledge, he must answer positively, and not on belief, although not so as to the result of a conversation.<sup>17</sup>

§ 366. **How Charges must be Denied.**—If the defendant deny a fact he must traverse it directly, and not by way of negative pregnant; thus, if a fact be laid to be done with divers circumstances, the defendant may not traverse it literally as laid down in the bill, but he must traverse the point of substance; as, if a man be charged to have done a thing upon such a day, or in such a place, he must not deny that he did it in manner and form as charged, for that implies that, in some sort, he did it. So, if he be charged with the receipt of one hundred dollars, he must deny that he has received one hundred dollars, or any part thereof; and if he has received any part, he must set forth what part.<sup>18</sup> So, an answer to a bill of discovery for documents in the defendant's possession, merely alleging the defendant's belief that the documents do not contain evidence, or tend to show the complainant's title, is not sufficient, but the answer must distinctly negative the allegations in the bill. However, no positive rule can fully provide for all the various difficulties in cases of this sort; and each case must, therefore, be decided upon its own circumstances.<sup>19</sup> The purpose of all the rules on this subject is that, when an answer on oath is called for, the defendant shall be compelled to make a full, direct, clear, and frank response to all charges, averments and allegations in the bill; and shall not be permitted to be silent, evasive, indefinite, or ambiguous in his answers to those charges and allegations. It is the duty of the defendant to make full, true, direct, and perfect answers to all and singular the matters stated and charged in the bill; and such answers must not only exhaust his knowledge and remembrance, but, also, his information, hearsay and belief; and this duty the Courts will firmly enforce.

§ 367. **Difference between an Answer Sworn to and an Answer not Sworn to.**—The difference between an answer sworn to by the defendant on the complainant's demand, and an answer not sworn to because of the complainant's express waiver of such oath, is the difference between a paper which is both a pleading and a deposition, and a paper which is merely an adverse pleading. The Code says, that where an answer from a defendant under oath is waived by the complainant in his bill, the answer is entitled to no more weight as evidence than the bill.<sup>20</sup> The result is, an answer, the oath to which is waived, is a mere pleading, whose exclusive function is to make an issue of fact,<sup>21</sup> or a mixed issue of law and fact;<sup>22</sup> whereas an answer, the oath of the defendant to which has not been waived, is not only a pleading containing all of the defendant's defences to the merits of the bill, but is also a deposition,<sup>23</sup> in so far as it is responsive to the averments and the charges contained in the bill, and as such, has all the force and effect of any other deposition in the cause. If, however,

<sup>15</sup> 1 Dan. Ch. Pr., 723, note 4.

<sup>16</sup> *Gleaves v. Morrow*, 2 Tenn. Ch., 597.

<sup>17</sup> Sto. Eq. Pl., §§ 854-855. When a defendant answers that he has no knowledge of the fact charged, but believes it to be true, this is deemed an admission of its truth, for, what the defendant believes in such a case, the Court will believe. Sto.

<sup>18</sup> 1 Dan. Ch. Pr., 726.

<sup>19</sup> Sto. Eq. Pl., § 855.

<sup>20</sup> Code, § 4317.

<sup>21</sup> *Dünlap v. Haynes*, 4 Heisk., 479.

<sup>22</sup> Code, §§ 4318-4319.

<sup>23</sup> *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 601.

the bill is one required to be sworn to, it also partakes of the nature of a deposition for enough to balance any contrary averments or statements in a sworn answer.<sup>24</sup> The failure to keep this distinction in mind has resulted in much confusion in specifying the requirements of answers.<sup>25</sup>

ARTICLE III.

MATTERS COMMON TO ALL ANSWERS.

- § 368. The Answer Must Make an Issue.
- § 369. Answer where there are Several Defendants.
- § 370. What Documents a Defendant Must Produce, and When.
- § 371. What Matters Need Not be Answered.

- § 372. Scandal and Impertinence not Allowable.
- § 373. Prayer for Counter Relief.
- § 374. When an Answer Must be Sworn to, even When the Oath is Waived.
- § 375. Essentials of an Answer.
- § 376. When an Answer Must be Filed.

§ 368. **The Answer Must Make an Issue.**—An answer that makes no issue is no answer, and may be stricken from the files on motion,<sup>1</sup> and an order *pro confesso* taken. Every answer, whether on oath or not, should distinctly and fully meet every material averment and charge contained in the bill; and should do so specifically, and not by way of general sweeping denials. A general admission of all the allegations and charges set forth in the bill, is, however, sufficient.

While the failure to admit or deny a charge or allegation is not deemed an admission of its truth, nevertheless, such failure would be deemed a circumstance against the defendant in weighing the evidence for and against such charge or allegation.<sup>2</sup>

§ 369. **Answer Where There are Several Defendants.**—Where there are several defendants, no one of them is required to answer matters that relate exclusively to his co-defendant. Co-defendants can answer separately or jointly, but when their defence is joint they should answer jointly. One defendant can, also, adopt the answer of a co-defendant in whole or in part, using appropriate language to make it his own as fully as though he had himself made each and every response therein adopted.<sup>3</sup>

Where a defendant answers, and meets fully the equities set up in the bill against a co-defendant who has been *pro confessoed* for want of an answer, such answer, if sustained by the proof, will also protect the latter from a decree on the *pro confesso*, when there is privity of interest between them, such as partner and partner,<sup>4</sup> trustee and beneficiary,<sup>5</sup> vendor and vendee,<sup>6</sup> and the

<sup>24</sup> *McLard v. Linnville*, 10 Hum., 163; *Bogart v. McClung*, 11 Heisk., 112-113; *Williamson v. Williamson*, 11 Lea, 365. See Chapter on Evidence, *post*, § 460.

<sup>25</sup> An answer required to be under oath, when not properly sworn to, stands as an unsworn answer and only makes an issue. *Chester v. Canfield*, 2 Shan. Cas., 309.

<sup>1</sup> *Phillips v. Overton*, 4 Hayw., 291. The defendant must answer sufficiently to make an issue. *Payne v. Berry*, 3 Tenn. Ch., 154.

<sup>2</sup> In England, under the present practice, every allegation in a bill not denied, nor expressed to be not admitted by the answer, is deemed to be admitted, except in case of answers by married women, infants, and lunatics. *Snell's Pr. Eq.*, 669. In New Jersey and Kentucky, a material fact averred in the bill, and not denied in the answer, is taken as admitted. In New Hampshire, the Chancery Rules provide that "all facts well alleged in the bill, and not denied, or explained in the answer, will be held

to be admitted." 1 Dan. Ch. Pr., 837, note. In our courts of law, all allegations in the declaration, not denied in the plea, are taken as true. Code, § 2910. See, also, Code, § 2929. It has often been held that an answer may be "too faint in its denials to call for proof on the part of the complainant." *Rhea v. Allison*, 3 Head, 179; *Cox v. Waggoner*, 5 Sneed, 544. If an answer "too faint in its denials" is equivalent to an admission, it would seem that an answer that does not deny at all could not have any more force, to say the least. Nevertheless, the weight of authority is that a failure to admit, or deny, any material allegation in a bill, is not an admission, and that the complainant must prove the truth of the allegation not replied to. *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 599. In this case, the point is thoroughly considered, and all of our cases cited.

<sup>3</sup> See, *post*, §§ 378; 382.

<sup>4</sup> *Petty v. Hannum*, 2 Hum., 102.

<sup>5</sup> *Cherry v. Clements*, 10 Hum., 552.

<sup>6</sup> *Hennessee v. Ford*, 8 Hum., 499.

like.<sup>7</sup> But where the rights of the *pro confessoed* defendant are distinct rights, and he has no joint or common interest with the defendant who answers, this rule does not apply.<sup>8</sup>

§ 370. **What Documents a Defendant Must Produce, and When.**—In so far as an answer is a deposition, it is the duty of the defendant to disclose his possession of any and all books, papers, writings, and other documents, called for by the bill, if in his possession, custody, or control. If he is charged with having in his possession, custody or power, books, papers, or writings, a statement in his answer that there are certain books, papers, or writings, in some other county or State, the particulars of which he is unable to set forth, without any answer as to the fact, whether they are in the defendant's possession, custody, or power, will be insufficient; for, if the defendant admits the books, papers, or writings to be in his possession, custody, or power, the complainant may make a motion upon the defendant to produce them; and the Court will, upon such motion, order them to be brought in within a reasonable time. And so, where a defendant stated, in his answer, that he had not certain books, papers, and writings in his possession, custody, or power, because they were coming over to this country, it was held that they were in his power, and that the defendant ought to have so stated in his answer. It may be observed here, that where books, papers, or writings, are in the custody or hands of the defendant's Solicitor, they are considered to be in the defendant's own custody or power, and should be stated to be so in his answer. So, generally, all the books, papers, and documents which the defendant has a right to inspect, provided he can enforce that right, are deemed to be in his power.<sup>9</sup>

If a defendant is called upon to set out a deed, or other instrument, in the words and figures thereof, he should do so, or give some reason for not complying with the requisition; he may, however, avoid this by admitting that he has the deed, or other instrument, in his possession, and offering to give the complainant a copy of it. It may here be observed that it is, always, a proper precaution, where a defendant sets out a deed, or other instrument, in his answer, whether *in hac verba*, or by way of recital, to crave leave to refer to it, as, by so doing, the defendant makes it a part of his answer, and relieves himself from any charge in case it should be erroneously set out.<sup>10</sup>

The defendant will be required to produce documents and papers (1) admitted, in his answer, to be in his possession, or under his control; or, (2) referred to in his answer, and not admitted to be in his possession, or under his control, but shown to be; or, (3) when referred to in his answer for greater certainty. But the complainant is not entitled, as a matter of right, to the discovery and production of any documents, or papers, called for by the bill, except those which appertain to his own case, or the title made by his bill. Documents and papers, which wholly and solely respect the defendant's title, or defence, he is not compellable, by his answer, to discover, or to produce; but if he voluntarily refers to them, for greater certainty, he may be compelled to produce them.<sup>11</sup>

§ 371. **What Matters Need Not be Answered.**—A defendant need not answer any matter that is scandalous or immaterial; nor need he answer any interrogatory not based on some material matter of fact charged in the stating part of the bill. If an answer to an interrogatory, either in the affirmative or negative, would not be pertinent to the matters put in issue by the bill, such

<sup>7</sup> In *Brian v. Peterman*, 5 Head, 499, a denial of the justice of an account, by one of two executors, was held sufficient for both, they being jointly charged, citing *Petty v. Hannum*, 2 Hum., 102. See, also, *Smith v. Cunningham*, 2 Tenn. Ch., 565, where the authorities are cited. In *McDaniel v. Goodall*, 2 Cold., 395, it is declared to be "a well settled principle of this [the Supreme] Court, that if a joint defendant answers the bill and removes the Equity set

up against himself, and the other defendant, who does not answer, no decree can be rendered against the defendant failing to answer." See, also, *Butler v. Kinzie*, 6 Pick., 31, in which case, *Caldwell, J.*, cites all the cases on this question, in our reports.

<sup>8</sup> *Phillips v. Hollister*, 2 Cold., 269.

<sup>9</sup> *Sto. Eq. Pl.*, § 852; 1 *Dan. Ch. Pr.*, 725.

<sup>10</sup> 1 *Dan. Ch. Pr.*, 725-726.

<sup>11</sup> *Sto. Eq. Pl.* 58 852-850

interrogatory need not be answered.<sup>12</sup> It may be stated as a rule, that any matter charged in a bill, that is clearly immaterial, may be absolutely ignored by the defendant in his answer. One test of materiality is to ascertain whether, if the defendant should answer in the affirmative, the admission would be of any use to the complainant in the cause, either to assist his Equity, or to advance his claim to relief. If it is, it must be answered, for it is material; if not, it is immaterial, and need not be answered.<sup>13</sup>

In considering what is material to be answered unto, it must be remembered that a discovery may be material to the complainant's general case, if made by some one of the defendants, which would be wholly irrelevant if made by another; in such cases, the defendant, from whom the discovery would be immaterial, is not obliged to make it. A defendant is, in fact, only obliged to answer so much of the complainant's bill as is necessary to enable the complainant to obtain a complete decree against him individually. Defendants in Equity are frequently formal parties, and are introduced for the purpose of bringing before the Court all persons who have an interest in the subject in dispute: and although, in practice, it is very common for each party to answer every part of the bill, it is often unnecessary. Thus, a trustee, or encumbrancer, or heir at law, need answer only so much of the bill as applies to him. The propriety of this distinction is obvious, when the nature of a bill in Equity is considered, namely, that although it is a suit combining several parties for the purpose of obtaining an object, in which they are all in some manner interested, yet the suit is distinct as against each defendant. Each defendant, therefore, is liable only so far as the bill prays relief against him; and his defence may, therefore, be applicable to that part of the case only,<sup>14</sup> and he need not answer any part of the bill except what applies to, or concerns, himself.<sup>15</sup>

The Court will not, in general, allow the circumstance of a complainant's having a claim upon a defendant, to be used for the purpose of enabling such complainant to investigate all the private affairs of such defendant. Nor will the Court compel the defendant to make a discovery, where the interests, which the complainant may have in it, is very remote in its bearings on the real point in issue, and would be an oppressive inquisition.<sup>16</sup>

But it must always be remembered that a defendant cannot be compelled to discover any facts which (1) may tend to criminate him; or (2) subject him to a forfeiture, or to something in the nature of a forfeiture; or (3) which are immaterial to the relief sought against him; or (4) which may be matters of professional confidence;<sup>17</sup> or (5) which relate to his own title in cases where there is no privity between him and the complainant.<sup>18</sup> In these cases, the defendant is not compelled to protect himself from a discovery, by plea or demurrer, but may in his answer decline to disclose such facts, upon stating the grounds upon which he bases his actions; such grounds, if matters of fact, to contain the substance of a plea.<sup>19</sup> The Court must be satisfied from the circumstances of the case that his grounds are sufficient.<sup>20</sup> In such cases, the question whether the defendant is, or is not, obliged to make the discovery, will be determined by the Court, in case the complainant excepts to the answer for insufficiency.<sup>21</sup>

**§ 372. Scandal and Impertinence not Allowable.**—An answer, like any other pleading, must be free from any scandalous, improper, irrelevant, or impertinent matter.

1. **As to Scandal.** If an answer goes out of the case stated in the bill, and drags in anything scandalous, it will be expunged, by order of the Court.<sup>22</sup>

<sup>12</sup> French v. Rainey, 2 Tenn. Ch., 640. Sto. Eq.

Pl., § 36; 1 Dan. Ch. Pr., 717.

<sup>13</sup> Sto. Eq. Pl., § 853.

<sup>14</sup> Sto. Eq. Pl., § 853c.

<sup>15</sup> *Ibid.*, § 848.

<sup>16</sup> Sto. Eq. Pl., § 853 b.

<sup>17</sup> French v. Rainey, 2 Tenn. Ch., 647.

<sup>18</sup> 1 Dan. Ch. Pr., 717; 721; Sto. Eq. Pl., § 846.

<sup>19</sup> French v. Rainey, 2 Tenn. Ch., 652-653.

<sup>20</sup> 1 Dan. Ch. Pr., 716.

<sup>21</sup> Sto. Eq. Pl., § 846.

<sup>22</sup> Greaves v. Morrow, 2 Tenn. Ch., 592.



But, as in a bill, so in an answer, nothing relevant can be deemed scandalous.<sup>23</sup> But the substance of the matter may be relevant, and yet the mode of expression may constitute scandal.<sup>24</sup> What is scandal has heretofore been considered.<sup>25</sup>

2. **As to Impertinence.** Strictly speaking, every statement in pleading beyond the naked facts relied on is impertinence;<sup>26</sup> and if an answer goes out of the case, made by the bill, to bring in some matter not material to the defence, it will be deemed impertinent; and, upon proper application, will be expunged.<sup>27</sup> Long recitals, unnecessary digressions, setting forth documents at length, and prolix details, constitute impertinence.<sup>28</sup> An answer should contain a clear and orderly statement of the facts on which the defence is founded, without prolixity or repetition.<sup>29</sup> Nothing material is impertinent.<sup>30</sup>

The best rule, for determining whether any given matter be impertinent, is to consider whether it would be proper to put it in issue, or to establish it by evidence;<sup>31</sup> for, it is plain that if any matter need not be either admitted, denied, or proved, it can have no relevancy to the merits of the controversy, and must be absolutely impertinent and unnecessary; and its introduction should, in some proper way, be rebuked by the Court.

In the Code, it is made the duty of the Court to discountenance prolixity and unnecessary and false allegations, in all Chancery pleadings; and for this purpose the Court may, on its own motion, or upon application of the opposite party, refer the pleadings to the Master to be revised, or order particular parts to be stricken out, and charge the party in fault with the unnecessary costs.<sup>32</sup>

Under this section of the Code, all scandalous, impertinent, and irrelevant matter would be deemed unnecessary matter; but how a Court, or a Master, can ascertain what allegations in a pleading are false, by a mere examination of the pleading itself, is not apparent. At the hearing, however, the Court can impose costs on a party whose "false allegations" have caused "unnecessary costs."

All scandalous and impertinent matter will be expunged, on exception being taken thereto;<sup>33</sup> or the Court may, on its own motion, refer the pleadings to the Master to be revised, or order particular parts to be stricken out.<sup>34</sup>

§ 373. **Prayer for Counter Relief.**—The Code, in specifying the contents of an answer, says, it should contain a "prayer of dismissal, or counter relief." This would seem to indicate an intent to allow an answer to set up matters proper for a set off, or cross action, such as are allowed in the Circuit Court,<sup>35</sup> but the practice is to require the answer to be filed as a cross-bill, when such matters are set up, and counter-relief sought thereon.<sup>36</sup> Nevertheless, when there are counter equities in the defendant's favor, which may be granted on the maxim, that he who seeks equity must do equity, it is proper for such a defendant to set these out fully in his answer, and pray for such counter-relief.<sup>37</sup> The answer, when filed as a cross-bill, will be considered hereafter.<sup>38</sup>

§ 374. **When an Answer Must be Sworn to, even When the Oath is Waived.** There are two classes of cases wherein the answer must be sworn to, even when the complainant has waived an answer under oath: (1) where the statute requires the defence to be on oath; and (2) where the defendant uses his answer both as a pleading and as an affidavit.

<sup>23</sup> Nothing relevant is scandalous, and the *maius* or *minus* of the relevancy is not material. Blake's Ch. Pr., 264; *Gleaves v. Morrow*, 2 Tenn., Ch., 596.

<sup>24</sup> Sto. Eq. Pl., § 862.

<sup>25</sup> *Ante*, § 150.

<sup>26</sup> *Gleaves v. Morrow*, 2 Tenn. Ch., 594.

<sup>27</sup> *Mrzenna v. Brucker*, 3 Tenn. Ch., 161.

<sup>28</sup> Sto. Eq. Pl., § 863.

<sup>29</sup> Code, § 4315.

<sup>30</sup> Sto. Eq. Pl., § 863.

<sup>31</sup> *Mrzenna v. Brucker*, 3 Tenn. Ch., 161; 1 Dan.

Ch. Pr., 728, note 4.

<sup>32</sup> Code, § 4316.

<sup>33</sup> Sto. Eq. Pl., §§ 862-863.

<sup>34</sup> Code, § 4316.

<sup>35</sup> Code, §§ 2918-2924.

<sup>36</sup> *Mrzenna v. Brucker*, 3 Tenn. Ch., 161; and cases above cited.

<sup>37</sup> It would seem, from a consideration of Code sections 4315, 4324, 2970-2974, 2918-2924, that it was the intention of the revisers of the Code to allow a cross-claim to be set up in an answer, without filing the answer as a cross-bill. Such, however, is not the practice. The defendant must in such cases, file his answer as a cross bill in order to enable the complainant to present his defences, and if necessary, to deny, on oath, any cross-claims purporting to be signed by the complainant, or his agent. See *infra*, note 43.

<sup>38</sup> See *post*, §§ 405, 722-723, 1006.

1. **Where the Statute Requires It.** Under the Code, all pleas which (1) deny the execution, or assignment, by the defendant, his agent, attorney, or partner, of any instrument in writing the foundation of the suit, whether produced, or alleged to be lost or destroyed; and (2) all pleas since the last continuance, must be sworn to.<sup>39</sup> So, when any of these defences are set up in answer, the answer must be sworn to.

Where the plea is required to be sworn to, if the defendant cannot admit or deny the fact for want of sufficient knowledge, he may state his want of knowledge, and thereupon make the denial necessary to present the defence.<sup>40</sup>

Every written contract, instrument, or signature, purporting to be executed by the party sought to be charged, his partner, agent, or attorney in fact, and constituting the foundation of an action, is conclusive evidence against such party, unless the execution thereof is denied under oath.<sup>41</sup> If the party be dead, the personal representative may make the denial under oath, according to the best of his knowledge, information, and belief.<sup>42</sup>

The execution or assignment of instruments offered in evidence by the defendant, when allowed by law, is equally conclusive as when introduced by the complainant, unless denied under oath.<sup>43</sup>

When two or more persons sue as partners upon an account, bill of exchange, bond or note, unless the partnership is denied by a plea, or answer on oath, the partnership need not be proved.<sup>44</sup>

A sworn account from another county, or State, is conclusive evidence against the party sought to be charged, unless he shall on oath deny the account,<sup>45</sup> or prove that it has been paid.<sup>46</sup>

So, if the instrument sued on, although originally executed by the defendant, has been materially altered since its execution without authority from the defendant, he must in his answer, or by a special plea of *non est factum*, so aver; and such answer or plea must be sworn to;<sup>47</sup> even though the bill call for an unsworn answer.

And if an endorser is sued on his endorsement, he must deny, on oath, the execution of the endorsement, and as a result, his plea or answer denying the endorsement must be sworn to.<sup>48</sup>

The answer denying the execution or assignment of such instruments, must be as definite and comprehensive as a plea. But, in such cases, the defendant is not bound to swear to the truth of any other matter or defence contained in his answer, when his oath to his answer is waived, and may limit his oath to such parts of the answer as contains the required denial; or he may annex to his answer as a part thereof a sworn denial.

**SPECIAL AFFIDAVIT TO AN ANSWER.**

State of Tennessee, }  
County of Knox. }

Richard Roe makes oath that so much of his foregoing answer as denies that complainants are partners [or, as denies the execution, or assignment, or endorsement, of the note, account, or other instrument, sued on.] is true.

[Sworn to and subscribed, &c., see ante, § 340.]

RICHARD ROE.

**2. Where the Defendant has Use for it as Pleading and an Affidavit. Sometimes**

39 Code, §§ 2909; 3777.  
40 Code, § 2911.  
41 Code, 3777; *Snap v. Thomas*, 5 Lea, 503; *Douglass v. Cross*, 6 Cold., 416.  
42 Code, § 3778.  
43 Code, § 3779. Before a defendant could offer such an instrument in evidence, it would seem that the complainant should have some chance to deny it under oath, by a proper pleading. This indicates the necessity of filing the answer as a cross-bill, when counter-claims are set up by the defendant.  
44 Code, § 3779 a. In all the foregoing cases, the affidavit to the answer may be restricted to so much of the answer as denies the execution, or assignment,

of the paper sued on, or, as denies the partnership of the complainants.  
45 Code, § 3780. M. & V.'s Code, § 4529, mis-digests the law on this point. The section omits an account proved before a justice of another State. M. & V.'s section should begin, "An account on which action is brought, coming from any other county, or State, with," etc. T. S. Code, §§ 3780-3780 a; Acts of 1879, ch. 40; *Hist. Lawsuit*, (Martin's ed.,) 270, note. *Foster & Webb v. Scott County*, 23 Pick., 693.  
46 *Briggs v. Montgomery*, 3 Heisk., 678.  
47 *Claybrooks v. Wade*, 7 Cold., 560; *Bloom v. Cate*, 7 Lea, 471; *Cor. Lawsuit*, § 126.  
48 Code, §§ 2909; 3777; *Knott v. Planter's Bank*, 2 Hum., 493.

the defendant needs to use his answer as an affidavit, in order to meet a sworn bill in some interlocutory matter, such as on an application to set aside a judgment *pro confesso*, or on a motion to dissolve an injunction, or to secure or resist the appointment of a receiver, or for some other purpose.<sup>49</sup> In all such cases, the answer must be sworn to, in order to be of any avail.<sup>50</sup>

§ 375. **Essentials of an Answer.**—An unsworn answer must contain the following essentials:

1. It must be properly entitled.
2. It must respond to all the material allegations of the bill sufficiently to admit them, or to put them in issue.
3. It must set up, distinctly, each and every special defence to be relied on at the hearing.<sup>51</sup>
4. It must be free from scandal and impertinence.
5. It must be properly signed.
6. It must be filed in the cause.

A sworn answer, in addition to the foregoing essentials, must contain the following:

1. It must make full and true discovery of every matter charged in the body of the bill, or contained in the interrogatories, as to which the defendant has either personal knowledge or remembrance, or information from others, or belief; and if, as to any such matter, the defendant has neither knowledge, remembrance, information, nor belief, he must so distinctly state.
2. It must be properly sworn to.

If any of these essentials, except the third, is wanting in an answer, it will be subject to exceptions, as hereafter shown.

§ 376. **When an Answer Must be Filed.**—Unless a plea in abatement, demurrer, or plea in bar, has been duly filed on or before the third day of the appearance term, if the Court holds three days, and if not, on the first day of the appearance term, an answer must then be filed, or the defendant will be in default, and liable to an order taking the bill for confessed, and to a final decree thereon.<sup>52</sup> But, on good cause shown,<sup>53</sup> the defendant may obtain further time within which to file his answer: in which case the answer must be filed within the time given, or he will be liable to a *pro confesso*.<sup>54</sup>

<sup>49</sup> It must always be sworn to in support of a motion to set aside an order *pro confesso*, when the defendant is required to show merits. No Court should set aside a *pro confesso* in order to let in an unsworn answer. But after such an answer is filed, if the bill has waived the defendant's oath, the affidavit to the answer is *functus officio*.

<sup>50</sup> See, *post*, §§ 387; 842.

<sup>51</sup> This is really not an essential in the ordinary meaning of the term. An answer will be good with-

out it, but a defendant would not be allowed to prove any matter in avoidance, unless it was specially pleaded. It is, therefore, essential to the defendant's defence that such special matter be set up in his answer.

<sup>52</sup> See, *ante*, §§ 225-227.

<sup>53</sup> See, *post*, § 62, sub-sec. 8, as to what is meant by "good cause shown."

<sup>54</sup> See, *ante*, §§ 225-227; where the time when an answer must be filed is fully considered.

ARTICLE IV.

THE FRAME AND FORM OF AN ANSWER.<sup>1</sup>

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| <p>§ 377. Commencement of an Answer.<br/>         § 378. Body of an Answer.<br/>         § 379. When, How, by Whom, and Before Whom, an Answer Must be Signed and Sworn To.<br/>         § 380. Form of an Answer.<br/>         § 381. Old Form of an Answer.<br/>         § 382. An Answer by Adoption.</p> | <p>§ 383. Answer of an Infant.<br/>         § 384. Answer of Other Persons under Disability.<br/>         § 385. Forms of Titles and Commencements of Answers.<br/>         § 386. Forms used in Framing Answers, and Setting up Defenses.</p> |
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§ 377. **Commencement of an Answer.**—In the first place, an answer must be entitled in the cause so as to agree with the style of the cause in which it is to be filed. A defendant may correct any mistake in his own name made by the bill,<sup>2</sup> but cannot correct or alter the names of other parties,<sup>3</sup> or change the style of the cause.<sup>4</sup> There are several forms of titles of answers, all of which will be hereafter considered.

An answer must clearly show (1) of which of the defendants it is the answer; and (2) the names of the complainants in the cause in which it is filed as an answer. Two or more persons may join in the same answer, and where their interests are the same, and they appear by the same Solicitor, they ought to do so, unless some good reason exists for their answering separately. It may be stated as a general rule, that the defendants should answer jointly, unless their titles are different. An answer, purporting to be the joint answer of five defendants, cannot be sworn to as the answer of three only, but it ought to be amended by striking out the names of the other two. An answer misnaming the complainant, is considered as no answer; and the defendant, therefore, is not bound by it. If there is a mistake in a name, the answer may be taken off the file, corrected, and resworn. But where there is a misnomer of the complainant in the cause, and a proper answer is afterward put in, the first answer will be ordered to be taken off the file, by the description of a paper writing, purporting to be an answer.<sup>5</sup>

After giving the title of the cause, it is common, in drawing an answer, to make a reservation of the benefit of all exceptions to the bill because of its errors, uncertainties, and imperfections; but such a reservation is not only utterly worthless, but downright surplusage, and mere impertinence; and may be stricken out on motion of the complainant, or by the Court on its own motion.<sup>6</sup> But if the defendant desires to rely on a demurrer in his answer, it is ordinarily set out before the answer of the bill is undertaken.

§ 378. **Body of the Answer.**—Next after the demurrer, if any, comes the substance of the answer, according to the defendant's knowledge, remembrance, information and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying, or of adding to, the case made by the bill, or of stating a new case on his own behalf.<sup>7</sup>

<sup>1</sup> All answers must be in English, even the answer of a foreigner. Dan. Ch. Pr., 855.  
<sup>2</sup> 1 Dan. Ch. Pr., 731. This correction may be made thus: "The answer of David Doe, in the bill, by mistake, called Daniel Doe, to bill of complaint," etc.

<sup>3</sup> 1 Dan. Ch. Pr., 731.  
<sup>4</sup> Code, (M. & V.), § 3664; 1 Dan. Ch. Pr., 732.  
<sup>5</sup> Sto. Eq. Pl., § 869; 1 Dan. Ch. Pr., 732.  
<sup>6</sup> Code, §§ 4315-4316.  
<sup>7</sup> Sto. Eq. Pl., § 870.

The answer should contain a clear and orderly statement of the facts on which it is founded, without prolixity or repetition;<sup>8</sup> and should not refer to files of another Court as containing a statement of the defendant's case.<sup>9</sup>

After the responses to the various charges and interrogatories, and after setting up any matters in avoidance, and any pleas or other special defences to be relied on, the answer usually contains a general traverse or denial of any and all other matters not already otherwise specifically answered;<sup>10</sup> and concludes with a prayer of dismissal or counter-relief, according to the nature of the case.<sup>11</sup>

Where there are several defendants, one of them may sufficiently answer by adopting a sufficient answer, put in by a co-defendant; but it will not be a sufficient adoption to say that the facts in the co-defendant's answer are "substantially correct as far as this defendant is concerned." Where two defendants answer jointly, and one of them speaks positively for himself, the other may, where not charged with anything on his personal knowledge, say he has read the answer and believes it to be true.<sup>12</sup>

An answer, like a bill, should be divided into paragraphs, numbered consecutively, each paragraph containing, as nearly as possible, a separate and distinct response, statement, or allegation. This practice has been found not only conducive to brevity and certainty in pleading, but greatly facilitates reference to the contents.<sup>13</sup>

**§ 379. When, How, by Whom, and Before Whom, an Answer Must be Signed and Sworn to.**—The signing and verification of an answer are matters of no little importance: they are the acts which vitalize it and entitle it to a place among the records of the Court, and to be filed in the cause whereof it is entitled.

1. **By Whom an Answer Must be Signed.** An answer must be signed by the defendant in person,<sup>14</sup> or by his Solicitor,<sup>15</sup> and that Solicitor must belong to the bar of the Court in which the answer is filed. The reason a Solicitor is required to sign the answer, when a party does not sign in person, is to ensure that it is in proper form, and contains no scandalous or impertinent matter; and to enable the Court to know to whom to look, in case of gross irregularities in the body of the answer.

2. **By Whom an Answer Must be Sworn to.** An answer must also be sworn to by each and all of the defendants joining in the same, except those whose oath is waived by the bill. The defendants may jointly, or separately, or jointly and severally; answer, but in either case each defendant whose oath is not waived, must swear to his answer, or it will be no answer as to him.<sup>16</sup> A joint answer of husband and wife must be sworn to by both, unless the complainant consents to receive it on the oath of the husband only. The guardian of a minor, or of a *non compos*, and a guardian *ad litem*, swear to the answers they put in for their wards, they swearing only to their belief in the truth of the defence made. When a married woman is also an infant, she must answer by guardian *ad litem*.<sup>17</sup>

But the signature of a party, or of his counsel, or of both, or the oath of a

<sup>8</sup> Code, § 4315.

<sup>9</sup> 1 Dan. Ch. Pr., 731.

<sup>10</sup> Sto. Eq. Pl., § 870.

<sup>11</sup> Code, § 4315.

<sup>12</sup> 1 Dan. Ch. Pr., 730.

<sup>13</sup> This practice exists now in England, 1 Dan. Ch. Pr., 731; and in several of the States; and is being generally adopted in Tennessee.

<sup>14</sup> Code, § 3979.

<sup>15</sup> Sto. Eq. Pl., § 876; 1 Dan. Ch. Pr., 733; 1 Barb. Ch. Pr., 141. The answer must be signed by the defendant in person, or by his Solicitor, though the oath be waived. 1 Dan. Ch. Pr., 734. The better practice is to require the defendant to sign his

answer, when not sworn to by him. *Johnson v. Murray*, 12 Lea, 109; *Cook v. Dews*, 2 Tenn. Ch., 496; *Carter v. Montgomery*, *Ibid.*, 219. Objection to an answer, because not signed by the defendant, must be made within twenty days after the filing of the answer, or, rather, after notice of such filing. *Jones v. Carper*, 2 Tenn. Ch., 626; *Stadler v. Hertz*, 13 Lea, 315. The signature of the solicitor to an unsworn answer is ordinarily sufficient. *Stadler v. Hertz*, 13 Lea, 317.

<sup>16</sup> *Cook v. Dews*, 2 Tenn. Ch., 496; 1 Dan. Ch. Pr. 734; Sto. Eq. Jur., § 874.

<sup>17</sup> 1 Dan. Ch. Pr., 753-754, notes.

defendant, will be deemed to have been waived, if not objected or excepted to within the time allowed for filing exceptions to the answer.<sup>18</sup>

The answer of a corporation is put in without oath, and under the corporate seal, if it have one; if none, then, under a scroll attested by its president or other proper officer. But if a corporation desires its answer to perform any of the functions of an affidavit, or as a ground for dissolving an injunction, it must be sworn to by some officer acquainted with the facts.<sup>19</sup>

If the bill does not waive an answer on oath, the defendant must make affidavit to the truth of his answer, unless the defendant is a corporation, in which case its corporate seal is attached as its most solemn affirmation of the truth of its answer.<sup>20</sup> The proper verification of the answer is always a matter of great importance, and often the rights of the defendant depend on the force and effect of the affidavit to his answer.<sup>21</sup> Where a defendant is neither an infant nor a lunatic, he must swear to his answer, in his own proper person. A married female defendant must swear to her answer when the bill so requires. Guardians *ad litem* sign and swear to their own answers.<sup>22</sup> Neither an infant nor a lunatic is required to sign or swear to his answer, unless the infant is over fourteen years of age, and the object of the suit is to sell his property for reinvestment, or for his education and support, in which case he must answer, and swear to his answer, in person.<sup>23</sup>

If the answer (1) sets up and relies on the plea of *non est factum*, or if (2) it denies the execution of any written instrument purporting to be signed by the defendant, and constituting the foundation of the suit, or if, (3) it denies the partnership of the complainants in certain cases, such an answer must be sworn to, even when the bill waives the defendant's oath to his answer.<sup>24</sup>

3. **Before Whom an Answer May be Sworn to.** Answers may be sworn to (1) before any Judge, Justice of the Peace, Court Clerk, or Notary Public, in this State; and (2) in another State, before any Judge, or Justice of the Peace, accompanied by a certificate of his official capacity by the Clerk of his Court; and (3) before a Commissioner of this State appointed by the Governor, or by a Notary Public, whose attestations shall be under their seals of office; and (4) in any foreign government, before any officer authorized to take probates of deeds, and authenticated in like manner.<sup>25</sup>

§ 380. **Form of an Answer.**—It will be seen, from the foregoing analysis,

<sup>18</sup> 1 Dan. Ch. Pr., 733; 736, notes. See, Waiver, *ante*, § 71.

<sup>19</sup> 1 Dan. Ch. Pr., 735, note; Sto. Eq. Pl., § 874; Smith v. St. Louis M. L. Ins. Co., 2 Tenn., Ch. 599.

<sup>20</sup> 1 Dan. Ch. Pr., 735. A corporation, being an artificial person, has neither soul nor conscience, and is incapable of committing perjury; hence, it cannot make an oath.

The answer of a corporation may be verified as follows:

And the defendant, having now answered fully, has caused its corporate seal to be hereunto affixed by its Secretary [or President] in attestation of the truth of this its answer to said bill.

FRANK FAITHFUL,  
Secretary, [or President.]

<sup>21</sup> See Article on Affidavits; and, see sections in Chapters on Injunctions and Evidence, *post*. Mr. Daniell says: "The form of the oath, or affirmation, administered to a defendant, on putting in his answer, is as follows: 'You swear (or solemnly affirm), that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge; and that what relates to the act and deed of any other person, or persons, you believe to be true.'" 2 Dan. Ch. Pr., ch. 15, § 2, p. 270; Sto. Eq. Pl., § 872, note.

<sup>22</sup> 1 Dan. Ch. Pr., 734. An answer must, also, be signed by the defendant, or defendants, putting it in, unless an order has been obtained to take it without signature; where an answer is put in by guardian, or guardian *ad litem*, the signature of such guardian, or guardian *ad litem*, is alone required; and where such guardian is, also, a defend-

ant, and puts in an answer in that character, as well as in that of guardian, he need only affix his signature to the answer once.

Sometimes, the Court has, under special circumstances, directed the Clerk to receive an answer, though it has not been signed by the defendant; as, where a defendant went abroad, forgetting, or not having had time, to put in his answer; or, where a defendant had gone, or was resident, abroad, and had given a general power of attorney to defend suits. *Ibid*.

<sup>23</sup> Code, § 3325.

<sup>24</sup> Code, § 3777. The defendant may limit his affidavit to so much of his answer as denies the execution of the writing sued on. When two, or more, persons sue, as partners, upon an account, bill of exchange, bond, or note, it will not be necessary for them to prove their partnership, unless the defendant files a plea denying the partnership, on oath. The statute calls this plea an abatement, but it is no more a plea in abatement than is the plea of *non est factum*. Code, § 2098. All that the statute means is that the plea must be on oath. It would be disrespectful to the Legislature to suppose otherwise. See *Eaton v. Dickinson*, 3 Sneed, 405; *Barnes v. Thompson v. Swan*, 315. The statute prescribes such pleas for "suits at law;" but inasmuch as Courts of Chancery have jurisdiction of the causes of action specified in the statute, the more prudent practice would be to verify such plea in Chancery, in the same manner that pleas of *non est factum* are verified.

<sup>25</sup> Code, § 4398.

that there is very little formality in an answer. If it is properly entitled, and is responsive to the bill, and is duly signed and verified, when verification is necessary, it will be a sufficient answer. The following is a

**FORM OF AN ANSWER.**<sup>26</sup>  
**The Title, or Style of the Cause.**

John Doe, }  
vs. } In Chancery, at Jacksboro.  
Richard Roe, et al. }

**Commencement.**

The defendant, Richard Roe, for separate answer to the bill filed against him and others in said cause, says:

**The Substance, or Body.**

I.

That he admits that he purchased from complainant the tract of land described in the bill, at the time and for the price alleged in the 1st paragraph of the bill; but he denies that there was to be any lien retained. On the contrary, this defendant says that it was expressly agreed that there should be no lieu, and the deed received by this defendant acknowledges on its face that the purchase-money was fully paid at the delivery of said deed, such acknowledgment being in strict accord with the agreement of the parties.

II.

This respondent denies the allegations contained in the 2d paragraph of the bill, in so far as they charge that the certificate of deposit, given complainant by this defendant, was intended as collateral security for the said purchase-money; and this defendant positively avers the fact to be, that said certificate of deposit was assigned to complainant without recourse, and was received by complainant as equivalent to cash money, and as an absolute and unconditional payment for said land.

III.

This defendant has no personal knowledge, and no information, relative to the matters alleged in the 3d paragraph of the bill, and cannot therefore admit them, or any of them; and he has no belief as to their truth, and demands that they be strictly proven, if deemed material.

IV.

In answer to the allegations contained in the 4th paragraph of the bill, this defendant denies that he ever promised or agreed, to convey to complainant the house and lot described in said paragraph, and says he never made any such, or any, promise or agreement to make said conveyance; and he says that, if any such agreement was made by his co-defendant, Peter Poe, the latter was not by him thereunto lawfully authorized, and this defendant says that there is not, and never was, any agreement in writing to sell or convey said house and lot, or either of them, or any interest in them, signed by him, or by any one by him thereunto lawfully authorized, and as to this paragraph of the bill, and the prayer for specific performance predicated thereon, he relies on and pleads the statute for the prevention of frauds and perjuries.

V.

**The General Traverse.**

All allegations contained in said bill not already specifically denied are here and now generally denied, and denied as fully as though separately and specifically denied.

**The Conclusion.**

And now having fully answered, this defendant prays to be hence dismissed with his costs.  
ROBERT PRITCHARD, Solicitor. RICHARD ROE.

**The Affidavit, or Verification.**

State of Tennessee, }  
County of Hamilton. }

Richard Roe makes oath that he has read [*or, heard read*] his foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and those matters he believes to be true.<sup>27</sup>

RICHARD ROE.

Sworn to and subscribed }  
before me, this July 3, 1890. }  
J. B. RAGON, C. & M.. }

<sup>26</sup> The Code provides no form for an answer, but declares that the answer should contain a clear and orderly statement of the facts on which the defense is founded, without prolixity or repetition, and [conclude] with a prayer of dismissal, or counter relief, according to the nature of the case. Code, § 4315. And it is made the duty of the Court to discountenance prolixity. Code, § 4316. In drawing the above

common sense provisions. The title, or style of the cause, and the commencement are conformed, as nearly as practicable to the caption or commencement of the Code form of a bill, which is deemed in conformance to the best prevailing practice in our State, and is substantially the same as the revised practice in England. Hicks' Ch. Pr., § 103.  
<sup>27</sup> This is the usual form of an affidavit. 2 Da-

§ 381. **Old Form of an Answer.**—The old form of an answer was almost as cumbersome and tautological as the old form of a bill, and contained almost as many unnecessary words. Indeed, in both pleadings the sense was often suffocated by the pleonasm in the clauses, and the inversions in the sentences.<sup>28</sup> The following form illustrates what were the usual commencements and conclusions of answers, before our Code :

**OLD FORM OF ANSWER.**

The joint and several answers of John Smith and Henry Jones, two of the defendants, to the bill of complaint, filed against them and others in the Chancery Court at Nashville, by Charles Brown, an infant, by William Brown, his father and next friend, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all, and all manner of, benefit and advantage of exceptions that can or may be taken to the manifold errors, uncertainties, imperfections and insufficiencies in the said complainant's said bill contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is material or necessary for them to make answer unto—answer and say, they admit, [*stating what they specially admit,*] and these defendants deny [*stating what they specially deny, and concluding as follows:*]

And these defendants deny all, and all manner of, unlawful combination and confederacy wherewith they are, in the said bill, charged, without that, that any other matter, cause, or thing, in the complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed, or denied, is true, to the knowledge or belief of these defendants. All of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable Court shall direct; and humbly pray to be hence dismissed with their reasonable costs, and charges in this behalf most wrongfully sustained.

A. JACKSON, Solicitor.

JOHN SMITH,  
HENRY JONES.

[*Annex affidavit by both of the defendants. See ante, § 380.*]

It will be noted that the whole ground covered by the above answer is covered by the first five and last three lines of the answer set out in the preceding section.

§ 382. **An Answer by Adoption.**—Where there are several defendants having similar interests and defences, and one of them has answered, this answer may be adopted in whole or in part by the others, or by any one or more of them. If the answer is adopted in whole by any one or more of such defendants he, or they, may, with the consent of the defendant who has answered, write under such answer words to the following effect :

John Doe,  
vs. } In Chancery, at Jacksboro.  
Richard Roe, et al. }

The defendants, Robert Jones and Henry Smith, say they have read, [*or, heard read,*] the foregoing answer of their co-defendant, Richard Roe, and that the contents thereof are true of their own knowledge, except as to the matters therein stated to be on information and belief, and these matters they believe on information to be true.

And these defendants adopt the foregoing answer of Richard Roe as their own.

ROBERT JONES,  
HENRY SMITH.

This must be sworn to by the defendants who sign it, unless the bill waives their oath.

If a defendant wishes to adopt an answer in part, but has no personal knowledge of certain matters answered unto on personal knowledge, he can do so by specifying these matters, and answering as to them on information and belief or otherwise, as shown in the following form :

**ANSWER BY ADOPTION.**

John Doe,  
vs. } In Chancery, at Jacksboro.  
Richard Roe, et al. }

The defendant, Roland Roe, for answer to the bill in this cause says that he has read

of affidavit is often used for both bills and answers: State of Tennessee, }  
County of Hamilton. }

Richard Roe makes oath [*or, affirms,*] that the statements in his foregoing answer, made as his own knowledge, are true; and those made as on information and belief, he believes to be true.

RICHARD ROE.

[*Sworn to, as above.*]

More care should be given to the forms of affidavits and jurats than is sometimes done. See Article on Affidavits, *post*, §§ 788-789.

<sup>28</sup> See forms in Van Hayth. Eq. Dr., *passim*.



[or, heard read] the answer of his co-defendant, Richard Roe, and that the said answer is true as of his own knowledge, except as to the parts thereof contained in paragraphs 4 and 5, in reference to certain alleged trespasses [*specifying with particularity the parts excepted.*] and as to these matters he has no personal knowledge but on information believes the answer as to them to be true.

And this defendant adopts the said answer of Richard Roe as his own.

ROLAND ROE.

This answer must be sworn to, unless the bill waives this defendant's oath. If the oath of the defendant is waived, he can write under the answer he desires to adopt, the following: "I adopt the foregoing answer, and make it my own," and sign it, and have the Clerk and Master refile it as his answer.

§ 383. **Answer of an Infant.**—An infant answers by his general guardian, if he have one, if not, he answers by a special guardian appointed by the Court, *pro hac vice*, called a guardian *ad litem*, as heretofore fully shown.<sup>29</sup>

The guardian *ad litem* ordinarily files a mere general answer for his ward, placing his rights and interests under the protection of the Court,<sup>30</sup> but, if on investigation, he deems it advisable to put in a special answer for his ward, it is his duty to do so.<sup>31</sup>

If an infant who has answered by guardian *ad litem* attains his majority while the cause is pending, he has the right to put in a new answer, upon satisfying the Court that his interests will be promoted thereby. His application to put in a new answer should be supported by affidavit showing merits, and should be made without delay.<sup>32</sup>

The following is the usual form<sup>33</sup> of a

**GENERAL ANSWER OF AN INFANT BY GUARDIAN AD LITEM.**

John Doe.	}	In Chancery, at Jacksboro.
<i>vs.</i>		
Richard Roe, <i>et al.</i>		

The defendant, Robert Roe, an infant, for separate answer to the bill filed against him in said cause, answering by J. E. Cassidy, his guardian *ad litem*, says, That he is an infant about ten years old, and knows nothing about the matters in said bill alleged, and, therefore, neither admits nor denies them, but submits his rights and interests in said matters to the protection of the Court.

ROBERT ROE,

[*Annex affidavit, as in § 380.*]

By J. E. CASSADY, Guardian *ad litem*.

The answer must be sworn to by the Guardian *ad litem*; indeed, the answer is considered to be his, and not the infant's; and the infant is not bound by it; and it cannot be excepted to for insufficiency.<sup>33a</sup>

§ 384. **Answers of Other Persons Under Disability.**—An idiot answers by his regular guardian, or by a guardian *ad litem* specially appointed by the Court to make proper defence for him. If a defendant is reduced to a state of second childhood by age and infirmity, the course is for him to answer by a guardian in the same manner as an infant. The answer of a lunatic is, also, to be made by his regular guardian, or by the person appointed as his guardian *ad litem* by the Court to defend the suit. And a complainant cannot except, for insufficiency, to the answer of a defendant of unsound mind, against whom a commission of lunacy has issued, he answering by his guardian *ad litem*; but if he answers by a regular guardian his answer may be excepted to.<sup>34</sup>

A married woman generally answers jointly with her husband, but sometimes she answers separately by leave of the Court; in which case she answers by her next friend. Where a marriage has really taken place only to defraud creditors, a married woman may be made to answer as if she were single. And it has been held, that where a husband and wife have answered jointly, and the bill is afterwards amended, and then the husband goes abroad, the wife remaining in this country, and being the material defendant, there must be an

<sup>29</sup> See, *ante*, §§ 106-108, in relation to guardians *ad litem*.

<sup>30</sup> *Mills v. Dennis*, 3 Johns. Ch., 368.

<sup>31</sup> 1 Barb. Ch. Pr., 148.

<sup>32</sup> 1 Barb. Ch. Pr., 149-150.

<sup>33</sup> 2 Barb. Ch. Pr., 412; 1 Dan. Ch. Pr., 163.

<sup>33a</sup> 1 Barb. Ch. Pr., 148-149.

<sup>34</sup> 4 St. Eq. Jur. § 871; 1 Barb. Ch. Pr., 177.

order upon her to answer separately, or it will not be any contempt of the Court in her if she refuse to answer.<sup>35</sup>

A married woman may, by leave of the Court, answer separately from her husband (1) when their interests are antagonistic; (2) when he is mentally incompetent to answer; (3) when she disapproves of the defence he intends to make; (4) when they are living separate; and (5) in any other case when it seems proper to the Court that she should be allowed to answer separately.<sup>36</sup>

§ 385. **Forms of Titles and Commencements of Answers.**—While, as has often before been remarked, the Chancery Court looks to substance rather than to form, and while there is no prescribed form of an answer, nevertheless there must be enough form to enable the Court and its officers to identify the writing as an answer, and there must be enough title and commencement to clearly show what particular bill it answers. The following are some of the most common forms of titles and commencements used in our State:

**TITLES AND COMMENCEMENTS OF ANSWERS.**

**1. For Husband and Wife.**<sup>37</sup>

The joint answer of Richard Roe and Rachel Roe, his wife, defendants to the bill of complaint of John Doe, filed against them [and others,] in the Chancery Court at Nashville.

These defendants reserving to themselves all right of exception to said bill, for answer thereto say. [*Or the following form can be used in lieu:*]

John Doe,  
vs.  
Richard Roe, et al. } In Chancery, at Nashville.

These defendants, as husband and wife, jointly answering the bill in said cause, say: [*Or when the wife answers separately, the commencement will be:*]

The defendant, Rachel Roe, answering the bill in said cause separately from her husband the said Richard Roe, by leave [or order] of the Court, says:

**2. For Two or More Defendants who are Sui Juris, and Join in Answering.**

The joint and several answers of Roland Roe and Romeo Roe, defendants, to the bill of complaint filed against them [and others,] in the Chancery Court at Memphis by John Doe and Henry Doe.

These defendants reserving to themselves all right of exception to said bill, say: [*Or the following form can be used in lieu:*]

John Doe,  
vs.  
Rich Roe, et al. } In Chancery, at Memphis.

The defendants, Roland Roe and Romeo Roe, jointly and severally answering the bill in said cause, say:

**3. For Separate Answer by a Defendant who is Misnamed in the Bill.**

The separate answer of Richard Roe in the bill called Rich Roe, defendant, to the bill of complaint filed against him and others in the Chancery Court at Chattanooga by John Doe.

This defendant reserving all right and benefit of exception to said bill, for answer thereto says: [*Or the following form may be used in lieu:*]

John Doe,  
vs.  
Rich Roe, et al. } In Chancery, at Memphis.

The defendant, Richard Roe, in the bill in said cause, called Rich Roe, separately answering said bill, says:

**4. For Separate Answer by a Corporation.**

John Doe,  
vs.  
Montvale Springs Company. } In Chancery, at Maryville.

The defendant, the Montvale Springs Company [*or, the County of Blount, or the City of Knoxville, or the Knoxville & Augusta Railroad Company,*] for separate answer to the bill filed against it in said cause, says:

§ 386. **Forms Used in Framing Answers, and in Setting up Defences.**—There are certain formulas used in framing answers, which, while not essential,

<sup>35</sup> Sto. Eq. Pl., § 873; 1 Dan. Ch. Pr., 753-754.  
<sup>36</sup> 1 Dan. Ch. Pr., 178-183; 1 Barb. Ch. Pr., 150-153; Code, §§ 2486; 2805. The English rule is much relaxed in this State; and a wife, if an adult, and

sane, will, generally, be allowed to answer separately, whenever she applies for leave to do so.  
<sup>37</sup> Husband and wife generally answer jointly. See, *ante*, §§ 236; 383.

are evidences of good pleading, and the young Solicitor would do well to adopt them wherever applicable. The following are those oftenest needed :

**1. Where a Defendant Admits a Statement.** This defendant, further answering, says he has been informed and believes it to be true, that [*or, This defendant admits that, (specifying the substance of the allegation in the bill intended to be admitted.)*]

**2. Where the Defendant is Ignorant as to the Allegation.** This defendant, further answering, says that he knows nothing whatever as to the truth of the allegation in the bill that, [*here stating the allegation briefly;*] and this defendant has no information or belief in reference thereto, he being an utter stranger to all these matters, and to each of them.

**3. Where the Defendant Denies an Allegation in the Bill.** This defendant, further answering, denies that, [*or, says it is not true that,*] this defendant [*or, the complainant,*] did [*specifying the substance of the charge denied.*]

**4. Where the Defendant Denies an Allegation and Calls for its Proof.** This defendant denies that [*here giving the substance of the allegation denied;*] and if such fact is material, this defendant requires that it be duly proved, [*or, that the deed, or other writing, be produced and duly proved, or, that said decree, judgment, award, or contract, be produced at or before the hearing of the cause, and proved in the manner required by law.*]

**5. Where a Defendant Believes a Statement to be True.** And this defendant, further answering, says that he believes it to be true that, [*stating the allegation in the bill referred to;*] but the defendant does not know the same of his own knowledge.

**6. Where an Account of Moneys Received, or Paid, is Required.** And this defendant, further answering, says he has, in a schedule to this answer, marked A, which he makes a part hereof, set forth, according to the best and utmost of his knowledge, remembrance, information and belief, a full, true, and particular account of all and every sum and sums of money by him received for or on account of [*the matter in controversy, stating it.*]

**7. Where a Defendant Admits a Statement as to a Written Instrument.** And this defendant further says that he has been informed and believes it to be true that the allegation in complainant's bill as to the existence of a certain deed [*will, contract, bond, mortgage, or other writing, specifying the instrument referred to,*] is true, but this defendant has no knowledge of the contents thereof, and for greater certainty as to its contents refers to the said deed [*or other instrument*] when the same shall be produced and duly proved, and such production and proof this defendant requires.

**8. General Denial of Allegations not Already Admitted or Denied.** All and every charge and allegation in complainant's bill not hereinbefore answered, admitted, avoided, or denied, is here and now denied, and the complainant required to fully prove the same, according to the rules of law and of this Court.

**9. Where the Defendant Pleads the Statutes of Limitations in his Answer.** This defendant avers and pleads that the cause of action set forth in the bill, if any there be, accrued more than six [*or ten*] years before said bill was filed; and he relies on and pleads the statute of limitations of six [*or ten*] years in bar of the complainant's bill and alleged cause of action. [*Or, To so much of the bill as seeks to hold this defendant liable on (or, seeks to recover, or, seeks a decree for, the account, note, debt, bond, mortgage, or lien,) he pleads and relies on the statute of limitations of six (or ten) years in bar thereof, the cause of action alleged having accrued more than six (or ten) years before the bill was filed, as he avers and pleads.*]<sup>38</sup>

**10. Where the Defendant Pleads the Statute of Frauds in his Answer.** This defendant avers and says that the agreement for the sale of the land described in the bill [*or other agreement sought to be enforced*] alleged to have been made by this defendant, and sought to be enforced by the bill, was not reduced to writing, nor was any memorandum or note thereof ever signed by him, or by any one by him thereunto lawfully authorized, and he pleads this fact, and the statute for the prevention of frauds and perjuries, in bar of any relief on said alleged agreement.

**11. Where the Defendant Pleads in His Answer that he is an Innocent Purchaser.** This defendant avers and says that on May 8, 1890, his co-defendant, Roland Roe, was seized, or pretended to be seized in fee [*and so on, using the remainder of the words contained in the plea of innocent purchaser in § 332.*]

**12. Where the Defendant in His Answer Pleads a Former Judgment or Decree.** These defendants, for further answer, say that heretofore, and before the filing of said bill. to-wit, on July 25, 1882, the complainant filed another bill in this Court [*or, in the Chancery Court at .....*] against these defendants [*and so on, using the remainder of the words contained in the plea of former judgment, in § 329.*]

<sup>38</sup> If the bill sets up facts to avoid the statute of limitations the answer should specifically and directly deny all the alleged facts. See, *ante*, § 147.

## ARTICLE V.

## PRACTICAL SUGGESTIONS AS TO ANSWERS.

§ 387. As to Answers when to be Used as Affidavits.

§ 388. As to Setting up Matters in Avoidance.

§ 389. As to Pleading the Statutes of Limitations.

§ 390. As to Pleading the Statutes of Frauds, Innocent Purchaser, and Former Judgment.

§ 391. How to Frame an Answer.

§ 392. As to Answering Fully.

§ 387. **As to Answers When to be Used as Affidavits.**—Attention has already been called to the fact that an answer often serves the double purpose of a pleading and an affidavit,<sup>1</sup> especially when (1) it is to be used to resist the granting of an injunction prayed for, but not yet allowed; (2) when it is to be used as the basis of a motion to dissolve an injunction already granted; and (3) when it is to be used to resist the appointment of a receiver; or (4) to have the order of appointment modified. In all such cases, the answer must possess all the definiteness, particularity, precision, and directness, necessary in an affidavit; and its value and force will be in direct proportion to its clearness, fullness, and appositeness, and in proportion to the number of its material statements based on the personal knowledge of the defendant himself. Therefore, it is often of vital importance (1) that the answer should show on its face what statements are based on the personal knowledge of the defendant, and what on information and belief; and (2) that the affidavit to the answer should be that the facts stated as on the defendant's own knowledge are true, and those based on information he believes to be true.<sup>2</sup>

§ 388. **As to Setting up Matters in Avoidance.**—In drawing an answer, the most important matter for you to consider is: what is your client's real defence;—on what facts does he rely to defeat the bill. Of course, all the material allegations of the bill must be responded to, and if your client's defence is purely negative, that is, consists entirely in denying the material facts charged, then an answer negating the charges in the bill will be adequate to the emergency. But if your client's defence consists in new matters, matters not stated in the bill, or, if stated, incorrectly stated, then you must set forth these matters in your answer, fully and clearly, according to the facts your client will be able to prove. These new matters are commonly called matters in avoidance, and you will not be allowed to prove them, or to read your proof in reference to them, at the hearing, unless you have in your answer set them up as a defence. It is no uncommon thing for defendants to suffer, because of their failure to set up, in their answer, the facts in avoidance constituting their defence.

The most common matters in avoidance are: (1) fraud, vitiating the contract; (2) failure of consideration; (3) payment; (4) a release; (5) an award; (6) a former judgment; (7) a subsequent agreement; (8) a rescission; (9) statute of limitations; (10) statute of frauds; (11) innocent purchaser; (12)

<sup>1</sup> See, *ante*, §§ 361-366; also, *post*, § 392.

<sup>2</sup> An answer on information, and belief, has but little force, for the reason that it may be true, and yet all be based on mere hearsay. An answer, so sworn to, cannot withstand a bill whose averments of fact are based on personal knowledge, and are directly and positively sworn to as true on complainant's own knowledge. See Chapters on Injunctions and Evidence, *post*.

Young Solicitors are, sometimes, perplexed by the fact that the oath of their clients to their answers is waived. This means that the answer is not wanted by complainant as a deposition; but it, by no means, prevents the defendant from swearing to it, and using it as an affidavit, for his own purposes. The oath to such an answer is available at all times, except at the hearing.

usury; (13) tender; (14) infancy; and (15) set-off. In all cases, where matters in avoidance exist, the complainant may, and ordinarily will, aver the original agreement, or other cause of liability, in such a way that he will be entitled to a decree against your client at the hearing, on the pleadings and proof, if, in drawing the answer, you content yourself with merely denying the allegations of the bill.<sup>3</sup> In all such cases, you should be particular to set up your affirmative defences, specifically, fully, and clearly, conforming your allegations to the facts your client will be able to prove.<sup>4</sup>

You must, however, be careful not to get caught between the horns of a dilemma, by setting up matter in avoidance which will entitle the complainant to a decree against your client, on the facts set out in avoidance. Thus, if you allege a contract, or a state of facts disclosing a liability, different from that charged in the bill, the complainant may abandon the grounds for relief alleged in his bill, and take a decree against your client on the facts contained in the answer.<sup>5</sup>

**§ 389. As to Pleading the Statutes of Limitations.**—If the effect of the lapse of time is to vest title in your client, you need not plead the statute of limitations. Thus, if your client, sued in ejectment, has had seven years open, continuous, adverse possession of the land in dispute, before suit brought, holding under a grant, deed, devise, or other writing purporting to be a conveyance in fee, and the land is granted land, he becomes thereby vested with title thereto, and need not plead the statute of limitations. So, adverse possession of three years gives title to personal property, and you need not plead the statute in such a case. Nevertheless, all prudent pleaders set up and rely on the statutes of limitations, in every case where it can be pleaded.

Remember, the statute cannot be relied on as a defence, except in the two foregoing cases, unless specially set up in a plea, or in the answer. This defence is one a defendant is not obliged to rely on, and the law does not allow it, unless it is relied on; and, where a defendant fails to rely on it, he is deemed to decline the benefits of the statute.<sup>6</sup>

As a result, he will not ordinarily be allowed to amend his answer, so as to set up the statute of limitations, without the payment of the costs of all proof then on file, and frequently will be taxed with all the costs then accrued; and, if the motion to so amend is not made until the trial term, it may be refused altogether.<sup>7</sup>

The defence of the statute of limitations is generally made in the answer, along with all the other defences to the bill, but whether made in the answer, or in a plea, it must be specifically made. It is a fundamental rule in Chancery pleading to allege every fact on which the pleader relies, to make every charge he expects to prove, to set up every defence he hopes to establish, and to bring forward every matter likely to help his case.

**§ 390. As to Pleading the Statute of Frauds, Innocent Purchaser, and Former Judgment.**—The fact that these, and all other defences in bar, may be set up in an answer, has caused young pleaders to think that, when relied on in an answer, the same measure of definiteness and particularity is not necessary as when relied on by plea. This is an error, that has often resulted in disaster to the defendant. It may be stated, generally, that every defence proper for the subject-matter of a plea in bar, should, when pleaded in the

<sup>3</sup> The fact that an unsworn answer is usually called for, often causes Solicitors to draw and file a mere negative answer, in the nature of a general denial of the cause of action, without ever investigating the facts. The result is, defendants, not infrequently, find themselves, at the hearing, either obliged to submit to a decree, because their proof in avoidance is ruled out; or, are obliged to pay all the costs of the cause, in order to get leave to amend their answer, so as to set up their defence in avoid-

ance. You should never file an answer without first ascertaining your client's real defence.

<sup>4</sup> See *Turley v. Turley*, 1 Pick., 251.

<sup>5</sup> See cases cited in the Chapter on Decrees. *Post*, §§ 406, note—; 555, note 1; 558.

<sup>6</sup> *Quilibet potest renunciare juri pro se introducto*. Broom's Leg. Max., 670; *Johnson v. Cooper*, 2 Yerg., 533. See *Waiver, ante*, § 71.

<sup>7</sup> *Wilson v. Wilson*, 2 Lea, 17.

answer, be set forth with the same precision and accuracy as when set up in a plea in bar.<sup>8</sup>

1. **The Statute of Frauds** cannot be relied on at the hearing unless specially pleaded, or set up as a defence in the answer. It will not avail to call attention, in the answer, to the fact that the agreement sued on is not in writing; nor will it profit to deny that it is in writing, or to allege that it is not in writing. The fact that it is not in writing must not only be distinctly averred, but the Court must also be plainly notified that such fact is set up, and relied, on as a defence and bar to the relief prayed.<sup>9</sup>

2. **The Defence of Innocent Purchaser** is often insufficiently made in answers. Pleading "in short" has sometimes, though with painful reluctance, been condoned by the Courts of law, but never by the Courts of Chancery; and to say in an answer, in a general way, that the defendant was an innocent purchaser and relies on that fact as a defence, avails nothing, and is a mere delusion. The indispensable elements of this plea have been already fully enumerated and treated of, and every prudent pleader will consult his books before framing this defence in his answer.<sup>10</sup>

3. **The Defence of a Former Judgment, or Decree**, requires to be drawn with great care in order to be available.<sup>11</sup> Instead of great care, however, it often happens that the defence is set up so indefinitely and carelessly that it is wholly ignored at the hearing; and the result is loss to the client, and mortification, not to say disgrace, to the Solicitor.

§ 391. **How to Frame an Answer.**—In drawing an answer, you should keep in mind the doctrine of relations, and of the general rule of law, already stated.

1. **Where Relations Exist.**<sup>12</sup> If the bill is based upon relations, you must either (1) deny the relation alleged, or the facts alleged as showing the relation; or (2) you must show that no such duties or rights as alleged resulted from those relations; or (3) you must, by way of avoidance, set up some new facts, such as payment, release, adjustment, former judgment, award, statute of limitations, or the like.

2. **Where No Relations Exist.**<sup>12</sup> If no relations are alleged, you must either (1) deny the complainant's title; or (2) you must deny the injury he alleges your client has done; or (3) you must, by way of avoidance, set up some of the new facts above stated in case of relations.

3. **As to Setting up Defences.** In an answer, you can unite as many defences as exist. You may deny the relation and the violation of the relation, and may set up matters in avoidance at the same time. So, you may deny complainant's title and the injury he alleges, and at the same time set up any matters in avoidance. Great care must be observed in such cases, however, to prevent your answer from presenting inconsistent or antagonistic defences. Thus, while denying the title or relation, and the injury alleged, you may say:

#### DENIAL AND AVOIDANCE, HOW COMBINED.

Further answering, the defendant says that, while not now nor then admitting complainant's title [*or, the relation alleged,*] and not admitting the wrongs he complains of, nevertheless, for the sake of buying peace and to save himself the trouble and expense of defending a suit, the defendant did on [*such a day, giving the date,*] pay the complainant the sum of fifty dollars, [*or other amount,*] in full satisfaction of said supposed injuries; and the defendant pleads said payment and satisfaction in bar of the recovery sought by the bill.

In the same way, a release, former judgment, award, or the statute of limitations, may be set up in bar of any recovery, even when the answer denies the original liability.

Always keep in mind that you cannot rely on, at the hearing, any special

<sup>8</sup> See, *ante*, § 324, note 14.

<sup>9</sup> See, *ante*, §§ 330; 390.

<sup>10</sup> See, *ante*, §§ 332; 390.

<sup>11</sup> See, *ante*, § 329.

<sup>12</sup> See, *post*, § 415, for a summary of all possible defences on the merits.

defense, it matters not how good a defence it is, nor how clearly it is proved, unless it has been distinctly set up in the answer.<sup>13</sup>

**4. As to the Phraseology of an Answer.** Ordinarily, in drawing an answer it is best to begin with the beginning of the bill, and answer its charges and averments, one by one, in the order in which they appear in the bill. If the bill is divided into paragraphs, as it should be, divide your answer into corresponding paragraphs, if practicable, admitting or denying the allegations of the bill, paragraph by paragraph.

Avoid all literary displays, all attempts at wit, all repartee, retorts, or unkind allusions or insinuations, either towards the complainant, or his Solicitor, and all scandal. Courts are not arenas for the display of rhetoric, poetry, wit, sarcasm, or invective, much less of billingsgate or scandal.

In detailing facts, omit all profane and indecent expressions, and all manifestations of indignation or passion. Clothe hard facts in soft words. By the courtesy of your language, show that you are a gentleman, and that you, also, have respect for your profession and for the Court.<sup>14</sup>

If the answer is called for on oath, remember it becomes both a pleading and a deposition, and let the defendant's responses to the charges be full, clear, and direct, and let it be sworn to in due form, as heretofore shown.

If the answer is not on oath, have your client sign it; if it is on oath, his signature to the affidavit will be sufficient evidence that it is his answer.

**§ 392. As to Answering Fully.**—It is a general rule of Equity pleading that, if a defendant answers at all, he must answer fully, if an answer on oath is called for; but that, if his oath is waived, his answer cannot be objected to for insufficiency, provided it makes an issue. Under the operation of this exception to the general rule, many pleaders make their answers a mere string of empty formalities and general denials. This practice had its origin in the fact, that many unsworn answers are drawn in the absence of the defendant, and consequently in ignorance of the facts. Nothing, but the most imperious necessity, should ever induce a Solicitor to draw an answer in the absence of his client.

An unsworn answer should, not as a rule of pleading, but as a rule of great practical value, be as full as a sworn answer, if the defendant has any defence, or even excuse, to present to the Court. The bill often opens up the details of the controversy, and pictures in dark colors the wrongs alleged, making the narrative hot with flashes of invective and denunciation against violations of trust and confidence, or pathetic with the sufferings of injured innocence, or the wails of victimized suppliants — all done to arouse indignation against the defendant, and sympathy for the complainant.

To such a hot storm of allegation and denunciation, mere cold and formal denials of the material allegations of the bill are totally insufficient. Such an answer is often regarded as but little better than an admission, that the defendant has no merits on his side, and that his only hope of success depends on denials, and the failure of proof. To meet such a bill, the defendant, even when his oath is waived, should go into the details of the controversy from his own point of view, and should show, as far as possible, that the complainant has drawn on his imagination for his facts; and should, in a dispassionate and calm manner, meet all the allegations, and show the hollowness of complainant's charges. Do not undertake to meet heat with heat, or denunciation with denunciation; but, on the contrary, reprove such displays in a Court, and adopt a style of coolness and a tone of moderation, as a sign of confidence in

<sup>13</sup> See, *ante*, § 358.

<sup>14</sup> Chancellors frequently debate in their hearts, while pleadings are being read, whether to order scandalous and impertinent matter to be stricken out, or to reprove counsel therefor, or to pass the matter in silence. It is amply sufficient in a bill, to charge

that the adverse party used indecent or profane language, without specifying the language used. The language used is mere evidence, and not a proper allegation. No pleading should contain such matters of evidence.

the justness of your defence, and of your willingness to have all the facts presented to the Court.

Therefore, as a rule, answer fully, whether your client's oath is demanded or waived. Such an answer can do no harm, and will often do much good. A bill is a sort of opening argument on behalf of the complainant; and that argument will seldom be met by a mere formal general denial. Let your answer present your side of the controversy, as fully as the facts and the rules of pleading will permit.

If your client has a meritorious defense have him swear to his answer, even when his oath is waived. Such an answer has more force. The Court is impressed by the fact that it is not a mere pleading by counsel.

ARTICLE VI.

DISCLAIMERS TO BILLS.

§ 393. Disclaimers Defined.

§ 394. When Defendant not Allowed to Disclaim.

§ 395. When Disclaimer Allowable.

§ 396. Effect of Disclaimer.

§ 397. Form of Disclaimer.

§ 398. Form of Disclaimer.

§ 393. **Disclaimers Defined.**—If the defendant has no defence, and does not desire to make any, he need not answer the bill, or make any other defence thereto, unless a discovery is sought from him, in which case he must answer; for, if he does not do so voluntarily, he can be compelled by attachment. If he claims nothing, and the bill on its face shows that he has no interest in the subject-matter of the suit, and that no relief is prayed against him, he may demur, unless the bill alleges that he has, or claims, an interest, in which case he must disclaim, or answer. If he claims no interest in the subject-matter of the suit, and he has not been claiming any, and has not been exercising any acts of possession or ownership thereover, he may disclaim. A disclaimer is a sort of answer, which renounces all claim to the subject of the complainant's demand, and makes no defence other than a denial of any and all charges that the defendant is claiming an interest in the subject-matter of the suit, or is in possession of it, or exercising acts of ownership over it, when such charges are made.

A disclaimer is distinct, in substance, from an answer, although sometimes confounded with it. But it can seldom be put in without an answer; for, if the defendant has been made a party by mistake, having had an interest, which he may have parted with, the complainant may require an answer sufficient to ascertain whether that is the fact, or not; and if, in truth, it is so, an answer seems necessary to enable the complainant to make the assignee a party, instead of the defendant disclaiming. And although a mere witness may avoid answering by a disclaimer, yet an agent, charged by a bill with personal fraud, cannot, by disclaiming any interest, avoid answering fully.<sup>1</sup>

§ 394. **When Defendant Not Allowed to Disclaim.**—A defendant cannot, by a disclaimer, deprive the complainant of the right of requiring a full answer from him; unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit. For a complainant may have a right to an answer and a discovery notwithstanding a disclaimer; and, in such a case, the defendant cannot shelter himself from answering, by alleging

<sup>1</sup> Sto. Eq. Pl., § 838.



that he has no interest in the subject-matter of the suit.<sup>2</sup> Although he has no interest in it, others may have an interest in it against him. He may be deeply accountable; and the very statement, that he is deeply accountable, is, in one sense, an allegation that he has an interest in the suit. A man cannot disclaim his liability. Under such circumstances, it may be necessary to revive a suit against the personal representatives of a deceased defendant, who had himself disclaimed.<sup>3</sup> Nor can a disclaimer by one defendant prejudice the complainant's right as against the others.<sup>4</sup>

A party cannot get rid of his liability to answer a suit by a mere disclaimer, if his answer may properly, under all the circumstances, be required.<sup>5</sup> Thus, for example, if his disclaimer does not show that he is under no liability in respect to the matters of the bill, it will be bad. So, if the bill alleges some other facts, as, that the defendant has mixed himself up with the whole transaction, and has by his personal conduct made it necessary that the bill should be filed, a mere disclaimer will not entitle him to be dismissed from further answering the suit; for, under such circumstances, justice might not be done to the other party. Generally speaking, therefore, a mere disclaimer is scarcely to be deemed sufficient, or proper, except where the bill simply alleges that the defendant claims an interest in the property in dispute, without more, for under such circumstances, if the defendant, claims no interest, that is a sufficient answer to the allegation.<sup>6</sup> It would seem, on principle and authority, that a disclaimer cannot be made by a person, incapable from disability, of conveying the property or right disclaimed.<sup>7</sup>

Unless the defendant has been claiming, or been in possession of, the subject-matter, or exercising acts of ownership over it, the disclaimer generally ends the suit at complainant's cost. But if the disclaimer is false, the complainant may prove its falsity, and thus not only entitle himself to a decree, but subject the defendant, in the discretion of the Court, to the costs of the suit.

**§ 395. When Disclaimer is Allowable.**—A disclaimer is ordinarily filed by a defendant, when he is falsely charged with claiming an interest in certain property, assets, or rights, specified in the bill. A party who claims an interest in land may be sued, even though not in possession, or not exercising any acts of ownership;<sup>8</sup> and if the allegation that he claims an interest is false, in whole or in part, he must disclaim as to so much of the land as he does not claim, be it all or only a part. So, if the bill seeks to recover more land than the defendant is in possession of, or is exercising acts of ownership over, he must disclaim as to so much of the land as he does not claim, or is not in possession of, or is not exercising acts of ownership over; and as to the part he does claim, he must plead or answer. Any plea, or answer, which denies that the defendant is unlawfully withholding the land sued for, or is unlawfully claiming an interest in, or unlawfully exercising acts of ownership over, the land sued for, admits that the defendant is in possession of the premises sued for, unless he states distinctly in his answer the extent of his possession.<sup>9</sup> Hence, it is of great importance to the defendant, to show distinctly, in his answer, by metes and bounds, or other definite description, the extent of his possession or claim, and to enter a full and absolute disclaimer as to the balance of the land sued for; otherwise, although he may defeat a recovery as to that part of the land which, outside of his answer, he really claims, he will be liable to the costs of the cause for contesting the complainant's right to all the land sued for. But a defendant cannot dispute the complainant's entire claim, and, at the same time, in the same answer, disclaim as to part; for, in such a case, his answer would overrule his disclaimer.<sup>10</sup>

<sup>2</sup> Wallace v. County Court, 3 Shan. Cas., 556.

<sup>3</sup> Sto. Eq. Pl., § 840.

<sup>4</sup> 1 Dan. Ch. Pr., 707.

<sup>5</sup> Wallace v. County Court, 3 Shan. Cas., 556.

<sup>6</sup> Sto. Eq. Pl., § 838, a.

<sup>7</sup> Bouv. L. Dic., "Disclaimer."

<sup>8</sup> Code, § 3231.

<sup>9</sup> Code, § 3240.

<sup>10</sup> Lea v. Slatterly, 7 Bax., 235; 1 Dan. Ch. Pr., 709; Sto. Eq. Pl., § 839. The two defences are absolutely inconsistent. *Allegans contraria non est audiendus.*

A defendant cannot, after bill filed, transfer his interest in the subject-matter of the suit, and then disclaim.<sup>11</sup>

§ 396. **Effect of Disclaimer.**—If the defendant disclaims, and it appears that the bill was exhibited for vexation only, the Court will dismiss the bill, with costs against the complainant. But if the complainant had probable cause or reason to exhibit his bill against such defendant, he may, if he pleases, pray a decree against such defendant, and all claiming under him, since the bill was exhibited; and it is commonly granted.<sup>12</sup> The course to be pursued by the complainant, after a sufficient disclaimer to the whole bill has been filed, is either to dismiss the bill as to the party disclaiming, or to amend; unless the disclaimer is false, and this he may prove.<sup>13</sup>

If a defendant puts in a disclaimer, and afterwards discovers that he had an interest, which he was not apprized of at the time when he disclaimed, the Court will, upon the ground of ignorance, or mistake, permit him to make his claim. But the Court will, in such a case, require the defendant to show a strong ground by affidavit, to get rid of the disclaimer upon the record.<sup>14</sup> If the defendant takes no steps to get rid of the effect of the disclaimer, he will be forever barred, because it is matter of record.<sup>15</sup> Where a defendant claims rights against a co-defendant, but not against the complainant, he should reserve such rights in his disclaimer, or they will not be considered in determining the suit.<sup>16</sup>

When an answer amounts to a disclaimer, any matter in it, not responsive to the bill, is mere surplusage. Thus, where the stock of a shareholder in a corporation was attached, and such a corporation being a co-defendant, answered that it had no interest in the stock, but that a third party not sued had, the allegation as to such third party was held to be mere surplusage.<sup>17</sup>

If the disclaiming defendant has occasioned the suit by his own misconduct, as by setting up a false claim, the complainant may so show, and on this being done the costs will be adjudged against such defendant.<sup>18</sup>

§ 397. **Frame of Disclaimer.**—Though a disclaimer is, in substance, distinct from an answer, yet it is, in point of form, an answer, and is preceded and concluded by the same formal words, and it is put in and filed, in the same way. It contains simply an assertion that defendant disclaims all right and title to the matter in demand; but, in order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant does not, and never did, claim any, and that he now disclaims all, right and title in the subject-matter of the suit. The forms given in the books of practice are all of an answer and disclaimer, joined in one pleading.

If a defendant puts in a disclaimer when he ought to answer, or accompanies his disclaimer by an answer which is considered insufficient, the defendant may except to it, in the same manner as to an answer. And if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant on the disclaimer.<sup>19</sup>

A defendant may disclaim as to one or more matters in the bill, and answer as to the others. So, he may demur to one part of the bill, plead to another part, answer to a third, and disclaim to a fourth; but each of these defences must clearly refer to a separate and distinct part of the bill, and no defense

<sup>11</sup> Wallace v. County Court, 3 Shan. Cas., 542. See, *ante*, §§ 66; 115-116.

<sup>12</sup> Sto. Eq. Pl., § 842.

<sup>13</sup> 1 Dan. Ch. Pr., 709.

<sup>14</sup> Sto. Eq. Pl., § 841.

<sup>15</sup> 1 Dan. Ch. Pr., 709. Inasmuch as the pleadings are seldom enrolled; and may therefore, become lost, or mislaid, it would be good practice, when a complainant dismisses his bill because of a sufficient disclaimer, to recite in the decree of dismissal, the fact, and substance, of the disclaimer; and thus perpetuate the fact.

<sup>16</sup> 1 Dan. Ch. Pr., 707.

<sup>17</sup> Saltmarsh v. Hockett, 1 Lea, 215.

<sup>18</sup> 1 Dan. Ch. Pr., 709. Whenever a suit is caused by the falsity of a defendant's claim, and his defence to such suit rests upon such falsity, he will be taxed with the costs, even though successful, as where he falsely claimed to be heir, administrator, or executor. 2 Dan. Ch. Pr., 1405; Adams' Eq., 389. And see Pigue v. Young, 1 Pick., 263.

<sup>19</sup> 1 Dan. Ch. Pr., 708-710.

must lap on any part of the bill covered by another defence,<sup>20</sup> for reasons already given.

Under our Code, a disclaimer will be deemed a species of answer;<sup>21</sup> and must, like an answer, be sworn to by the defendant, when his oath is not waived, and must be signed by the defendant in person, or by his Solicitor.<sup>22</sup>

§ 398. **Form of Disclaimer.**—The essential thing in all pleadings in Chancery is substance; and so a disclaimer is sufficient, if, (1) it contains the necessary substance, and (2) is properly entitled and filed in the cause, and (3) is duly signed when the defendant's oath is waived, or is duly signed and sworn to, when the oath is not waived. The following is a

**FORM OF DISCLAIMER.**<sup>23</sup>

John Doe,  
vs.  
Richard Roe, *et al.* } No. 423.—In the Chancery Court, at Kingston, Tenn.

This defendant, Roland Roe, for answer<sup>24</sup> and disclaimer to the bill filed against him and others in this cause, separately answering, says:

I.

That he disclaims any and all right, title, interest, or claim in and to the tract of land described in the bill, [*or to the legacy or property or other subject-matter of the suit.*]

II.

[*If the facts will warrant it, then add:*] This defendant further says that he does not now claim said land, [*or other property,*] or any interest whatever therein, and never did claim any interest whatever, and never had any possession of said land, and never exercised any acts of ownership over it.

He, therefore, prays that this disclaimer may be taken as a full and sufficient answer to said bill, and that he may be hence dismissed with his costs.

GEORGE L. BURKE, Solicitor.

ROLAND ROE,<sup>25</sup>

<sup>20</sup> Sto. Eq. Pl., § 839.

<sup>21</sup> Code, § 4384.

<sup>22</sup> 1 Dan. Ch. Pr., 708.

<sup>23</sup> For another form of a disclaimer, see, *post*, § 1049.

<sup>24</sup> A disclaimer is a species of answer; and the forms all commence as shown in the text. Sto. Eq.

Pl., § 843; 3 Dan. Ch. Pr., 2113. The complainant is entitled to an answer, as well as a disclaimer; although, if the disclaimer be satisfactory to him, he may waive a further answer. Sto. Eq. Pl., § 840.

<sup>25</sup> As a disclaimer is a muniment of title, it should be signed by the defendant in person.

## CHAPTER XVIII.

## CROSS BILLS.

§ 399. Cross Bills Generally Considered.

§ 401. Proceedings upon a Cross Bill.

§ 400. When a Cross Bill should be Filed.

§ 399. **Cross Bills Generally Considered.**—It frequently happens that the original bill is so framed as to cramp a defendant in making his defence; or that full justice cannot be done all the parties, and especially a defendant, without bringing other and cognate matters before the Court; or without a discovery from the complainant; or that it is necessary to bring a new party before the Court in order to fully adjust the rights and equities of the original parties; or that the defendant has affirmative rights growing out of, or incident to, the subject-matter of the controversy, which he wishes to have adjudicated and enforced in the same litigation; or that the defendant is entitled to a set off, a receiver, an injunction, or some other affirmative relief connected with the litigation. In any such cases, the defendant may file a cross bill, in order more fully to make his defence, or in order to obtain the affirmative relief to which he deems himself entitled.

In our practice, the efficacy of cross bills has been enlarged, and the variety and extent of the reliefs granted greatly increased; so that, by means of both original and cross bills, the Court is enabled to fully dispose of the entire subject-matter of every litigation; and to do complete justice to all the parties, complainant and defendant; and enforce the rights and duties of all, so as to leave no roots out of which new suits may arise.<sup>1</sup>

§ 400. **When a Cross Bill should be Filed.**—The proper time for filing a cross bill, when such a bill is deemed necessary, is at the time of putting in the answer to the original bill; for the cross bill is, ordinarily, for the purpose of making a more complete defence than can be made by an answer. If a cross bill is not then filed, the delay must be satisfactorily accounted for, or the proceedings on the original suit will not be stayed.<sup>2</sup>

Under our Code, the answer may be filed as a cross bill, if the relief thereby sought is against the complainant; but, if it is necessary to bring new parties before the Court, a separate cross bill must be filed. Ordinarily, all of the equities and legal rights the defendant desires to bring before the Court, and have adjudicated, may be set up as well in an answer, filed as a cross bill, as in a separate cross bill;<sup>3</sup> and, as a consequence, separate cross bills are now seldom filed, except when necessary to make a new party, or when filed subsequently to the filing of the answer to the original bill. Sometimes, the necessity for a cross bill does not appear until after the filing of the answer; and sometimes the facts, necessitating a cross bill, do not arise until after the filing of the answer: in such cases, a separate cross bill must be filed; and, if prompt and proper application is made, leave to file it will be readily granted.

§ 401. **Proceedings upon a Cross Bill.**—When the defendant resorts to a cross bill, he is required to answer the original bill before he can require the

<sup>1</sup> For a fuller consideration of the practice and pleadings in reference to Cross Bills, see, *post*, §§ 725-738.

<sup>2</sup> 2 Dan. Ch. Pr., 1548, note; 1 Barb. Ch. Pr., 129. No leave of the Court is necessary to file a cross bill.

<sup>3</sup> For forms of answers filed as cross-bills, see, *post*, §§ 405; 733-735; 1096.

original complainant to answer the cross bill.<sup>4</sup> A cross bill may be dismissed on motion, demurred to, pleaded to, or answered; and these various defences must be made, at the same time, and in the same way, as in case of defences to original bills. The testimony taken in the original cause may be read in the cross cause, and *vice versa*, as a rule: the two causes are generally treated as one cause; and generally heard and determined at the same time, and in the same decree. At the hearing, the cross bill may be dismissed, and relief granted on the original bill; or, the original bill may be dismissed, and relief granted on the cross bill; or, relief may be granted on both bills; or, both bills may be dismissed.

The subject of cross bills will be fully treated in a subsequent Chapter, specially devoted to them.<sup>5</sup> They are briefly alluded to in this part of the book, because, in order of time, they belong here. Their treatment, however, requires too much space to make it convenient to consider them, in detail, here.

<sup>4</sup> Code, § 4408.

| <sup>5</sup> See, *post*, §§ 725-738.

CHAPTER XIX.

JOINDER OF DIFFERENT DEFENCES TO A BILL.

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| <p>§ 402. Joinder of Two or More Kinds of Defence.</p> <p>§ 403. How a Demurrer and an Answer Must be Joined.</p> | <p>§ 404. How a Plea and an Answer Must be Joined.</p> <p>§ 405. Form of an Answer filed as a Cross Bill.</p> |
|---|---|

§ 402. **Joinder of Two or More Kinds of Defence.**—As already shown in treating of demurrers and pleas in bar, a defendant is not obliged to confine himself to any one mode of defence; but, if the bill furnish occasion, he may demur to one part of it, plead in bar to another, answer to a third, and disclaim as to the balance; and all of these defences may be joined, and relied on, at the same time. It must, however, be kept in mind, that there cannot be two kinds of defence made to the same part of the bill, at the same time, by separate pleadings; thus, the same part of a bill cannot be demurred to and pleaded to, or answered, at the same time in separate pleadings; nor can the same part be pleaded to and answered, at the same time, in separate pleadings; for a demurrer is overruled by a plea or an answer, and a plea is overruled by an answer. Where two or more kinds of defence are, therefore, made at the same time, by separate pleadings, they must clearly relate to separate and distinct parts of the bill.<sup>1</sup>

To illustrate how these various defences may be joined in resisting the same bill: Suppose one complainant should file a bill against one defendant, alleging: (1) that the defendant had agreed, in writing, for a valuable consideration, to convey to him a certain farm; (2) that the defendant at the same time agreed, for a valuable consideration, to sell and convey to him another certain farm adjoining the former; (3) that notwithstanding complainant had fully paid for the former tract, and had duly tendered the stipulated price for the latter tract, the defendant refused to convey either tract; (4) that on complainant remonstrating with the defendant for repudiating said agreements, the defendant assaulted and severely beat him, doing him great injury and damage; and (5) that the defendant is now claiming a part of complainant's home farm adjoining said latter tract, and is threatening to cut some of the timber trees thereon; and suppose complainant in his said bill should pray: (1) for a specific performance of the two contracts of sale; (2) for damages resulting from the battery charged; and (3) for a decree settling complainant's title to his home farm. There being only one defendant, the bill could not be attacked for multifariousness,<sup>2</sup> but the defendant might (1) demur for want of jurisdiction as to the claim for damages; (2) might plead the statute of frauds as to the agreement to sell the second tract mentioned, and show that the agreement was not in writing; (3) might answer as to the agreement in writing to convey the first named tract, and show that the agreement to convey contains a material mistake, hurtful to defendant, and designedly caused by the complainant; and (4) might disclaim as to complainant's home farm; and (5) might file his answer as a cross bill, or file a separate cross bill, to show the particulars of

<sup>1</sup> *Ante*, § 232; 1 Dan. Ch. Pr., 787; 1 Barb. Ch. Pr., 173; *Saunders v. Gregory*, 3 Heisk., 575; Sto. Eq. Pl., §§ 439; 442. | <sup>2</sup> Code, § 4327.

the mistake in the written agreements to convey, and pray to have it corrected, and the writing reformed.

Our practice favors the incorporation of a demurrer in an answer, and the incorporation of a plea in an answer,<sup>3</sup> the object being to enable the parties to take their proof pending the demurrer, or plea, and thus hasten the final determination of the cause.<sup>4</sup> The statute allowing a defendant to rely on a demurrer or plea in his answer, allows a defendant to answer to so much of the bill as he demurs or pleads to; and in such a case the rule that an answer overrules a demurrer or plea when both apply to the same part of the bill, does not prevail.<sup>5</sup> If, however, the demurrer or plea be merely prefixed to the answer, and not contained in it, or made a part of it, but is intended to be a separate and distinct pleading, an answer covering the part of the bill demurred or pleaded to, would overrule the demurrer, or plea. If, however, the defendant seeks to object to the jurisdiction of the Court, he must file a separate demurrer, or a separate plea, as all answers admit the jurisdiction.<sup>6</sup>

§ 403. **How a Demurrer and an Answer Must be Joined.**—As an answer overrules a demurrer to so much of the bill as is answered, it is of great importance, when a demurrer does not go to the whole bill, to have it clearly express the particular parts of the bill which it is designed to cover; for, if the particular parts are not distinguished, the Court will be compelled to look over the whole bill, in order to discover them. And this designation of the particular part demurred to must be done, not by way of exception, as by demurring to all, except certain parts of the bill, but by a positive designation of the particular parts intended to be demurred to.<sup>7</sup>

Thus, for example, where a defendant puts in an answer and demurrer, the demurrer extending to the whole of the bill, "except only as to such part, and so much thereof, as requires this defendant to set forth, whether, &c., &c.," the demurrer was overruled, because it imposed upon the Court the duty of comparing the demurrer and the answer with the whole bill. So, where a defendant put in an answer to so much of the bill as he was advised he was bound to answer, making an answer to certain charges in the bill, and then put in a demurrer "to all and every the other allegations, and charges, and matters, and things in the complainant's bill contained," the demurrer was overruled; for it imposed on the Court the necessity of finding out what was demurred to, by examining every part of the bill. So, where a demurrer was put in to all the relief and to all the discovery prayed by the bill, "except so far as the bill seeks a discovery touching the several title deeds, &c., in the bill mentioned, &c., &c.," and as to the residue of the bill, not demurred to, proceeded to answer the facts specified and excepted, the demurrer was held bad, and overruled for the like reason.<sup>8</sup>

In framing a demurrer to one part of the bill, and answering to another part, care must be taken, not only not to include in the part demurred to any part of the bill which is covered by the answer; but also, not to include in the answer any matter to which the demurrer, although not in form, yet in substance, properly applies; for, in such a case, the demurrer is overruled by the answer.<sup>9</sup>

The following is the form of

#### DEMURRER JOINED WITH AN ANSWER.

John Doe, }  
*vs.* } No. 618.—In the Chancery Court, at Sevierville.  
 Richard Roe, *et al.* }

The demurrer of the defendant, Richard Roe, to part of the bill filed against him and others in said cause, and his answer to the remainder of said bill.

<sup>3</sup> Code, §§ 4318-4319.

<sup>4</sup> *Harding v. Egan*, 2 Tenn. Ch., 39.

<sup>5</sup> In *Saunders v. Gregory*, 3 Heisk., 576, this distinction seems to have been overlooked.

<sup>6</sup> Code, § 4321; *Rankin v. Craft*, 1 Heisk., 711; but see, *ante*, § 261.

<sup>7</sup> *Sto. Eq. Pl.*, § 457; *Dillon v. Davis*, 3 Tenn. Ch., 386.

<sup>8</sup> *Buckner v. Ahrahams*, 3 Tenn. Ch., 346; *Sto. Eq. Pl.*, § 458; *Payne v. Berry*, 3 Tenn. Ch., 154.

<sup>9</sup> *Sto. Eq. Pl.*, § 465; *Saunders v. Gregory*, 3 Heisk., 575.

I.

This defendant, for demurrer to so much of said bill as seeks to obtain a recovery of damages against him for the assault and battery alleged in the bill, says that this Court has no jurisdiction of such cause of action, but that the jurisdiction thereof is in the Circuit Court; and he prays to be hence dismissed as to so much of said bill as seeks said recovery.

II.

And as to the remainder of said bill, the defendant, not waiving his said demurrer, for answer to said remainder, says; [*Then proceed with the answer to the residue of the bill, being careful, however, to say nothing whatever relative to the assault and battery; and conclude as in case of an ordinary answer.*]

The matter of demurrer may, however, under the Code, be incorporated in the answer; and, in such a case, the answer may cover matter so relied on without overruling the grounds of demurrer thus set up, unless such grounds dispute the jurisdiction of the Court over the subject-matter or the person.<sup>10</sup> If the defendant desires to dispute the jurisdiction of the Court by a demurrer, he must file a separate demurrer for that purpose, for all answers admit the jurisdiction.<sup>11</sup>

The following would be the form of a

**DEMURRER INCORPORATED IN AN ANSWER.**

John Doe,  
vs. } No. 716.—In the Chancery Court, at Jacksboro.  
Richard Roe, et al. }

The demurrer and answer of the defendant, Roland Roe, to the bill filed against him and others in the above entitled cause.

This defendant demurs to the bill, because it shows on its face that complainant's cause of suit accrued more than six years before his bill was filed, and is, therefore, barred by the statute of limitation of six years; and the defendant relies on this ground of demurrer as a defence to the bill.

And for answer to the bill, this defendant, not waiving his foregoing demurrer, says that he paid the debt, for the recovery of which complainant sues, before the filing of the bill.

This defendant, therefore, prays to be dismissed.

ROLAND ROE.

J. E. JOHNSTON, Solicitor.

[Annex affidavit, if the bill requires an answer on oath.]

§ 404. **How a Plea and Answer must be Joined.**—What is said in the preceding section, about the care and caution to be observed in joining a demurrer and answer, applies with full force to the joining of a plea and answer. The part pleaded to must be designated with such particularity of description, that there can be no uncertainty as to what part of the bill is covered by the plea; and in answering to the remainder of the bill, care must be taken to say nothing whatever about the particular part of the bill covered by the plea.<sup>12</sup> How this may be done is shown by the following form of a

**PLEA JOINED WITH AN ANSWER.**

John Doe,  
vs. } No. 618.—In the Chancery Court, at Sevierville.  
Richard Roe, et al. }

The plea of the defendant, Richard Roe, to part of the bill filed against him and others in said cause, and his answer to the remainder of the bill.

I.

This defendant, for plea to so much of said bill as seeks a specific performance of the alleged agreement by this defendant to sell and convey to the complainant the second tract of land mentioned in the bill, and therein designated as the "Ridge Farm," says,

That neither this defendant, nor any person by him thereunto lawfully authorized, did ever sign any contract or agreement in writing, or any memorandum or note, in writing, of any contract or agreement, for the sale to complainant of the said "Ridge Farm," or of any part thereof. And as to so much of said bill as seeks the specific enforcement of the alleged contract for the sale of said "Ridge Farm," this defendant pleads the foregoing matter, and relies on the statute for the prevention of frauds and perjuries.

II.

And, as to the remainder of the said bill, this defendant, not waiving his said plea, for answer to said remainder, says: [*Then proceed with the answer to the residue of the bill,*

<sup>10</sup> Code, § 4319; *Harding v. Egan*, 2 Tenn. Ch., 39.

<sup>11</sup> Code, § 4321; *Rankin v. Craft*, 1 Heisk., 711; but see, *ante*, § 261.  
<sup>12</sup> Sto. Eq. Pl., § 688.



carefully avoiding any mention of, or allusion to, any of the allegations in the bill in reference to the "Ridge Farm;" and conclude as in case of ordinary answer.]

A defendant may, however, under the Code, incorporate the matter of any plea in bar in his answer; and he is not required to file a separate plea in any case, except when he seeks to dispute the jurisdiction of the Court.<sup>13</sup> A plea to the jurisdiction of the Court must be separately filed, and any answer will overrule it.<sup>14</sup> The following is the form of a

#### PLEA INCORPORATED IN AN ANSWER.

John Doe,  
vs.  
Richard Roe, et al. } No. 716.—In Chancery, at Rutledge.

The plea<sup>15</sup> and answer of the defendant, Robert Roe, to the bill filed against him and others in the above entitled cause.

This defendant, for plea to the said bill, says that the note [bond, or other instrument,] sued on by the complainant, and constituting the foundation of his suit, was not executed by him, or by any one authorized to bind him in the premises.

And not waiving his said plea, but relying thereon, this defendant further answering said bill, says: [*Here he may set up any other matters of defence, such as infancy, duress, insanity, drunkenness, statute of limitations, or other matter.*]

And now, having fully answered, he prays to be dismissed.  
G. MC. HENDERSON, Solicitor.

ROBERT ROE.

The plea set up in the foregoing answer must be sworn to, even though the oath to the answer be waived.<sup>16</sup>

§ 405. **Form of an Answer Filed as a Cross Bill.**<sup>17</sup>—An answer, when intended to be filed as a cross bill, must combine the form and substance of an answer with the substance and prayers of a cross bill. In so far as it is to be an answer, it must conform to all the requirements of an ordinary answer; and when the bill has been fully answered, then the draftsmen will set up any equities, connected with the subject-matter of the litigation, which he may desire to have enforced, unless, as generally happens, these equities have already been sufficiently shown in answering the bill. The answer as a cross bill will then conclude with a prayer for process, and for the special relief sought, and for general relief. The following is the form of an answer filed as a cross bill, the original bill having been filed by a wife against her husband and the trustee and beneficiary in a trust deed, to enjoin the sale of the land by the trustee, and assert her rights to a homestead therein:<sup>18</sup>

#### ANSWER AND CROSS BILL TO ENFORCE DEED OF TRUST.

Ann E. Enochs, by her next friend, John Doe,  
vs.  
John W. Wilson, P. E. Wilson, and James W. Enochs. } In the Chancery Court,  
at Dyersburg.

The joint and several answer and cross bill of John W. Wilson and P. E. Wilson, to the bill filed against them and James W. Enochs, in the above entitled cause.

These respondents, for answer to said bill, say:

##### I.

They admit that the complainant, Ann E. Enochs, is the wife of their co-defendant, James W. Enochs; and that the complainant's husband is in possession of the tract of land containing one hundred acres described in her bill; and that the defendant, John W. Wilson, is about to sell said tract, in pursuance of authority given him by her husband by a deed of trust, in which she did not join; but these defendants find nothing else in the bill that they can admit, and each and all of the allegations of the bill, not hereinabove admitted, are each and all denied.

##### II.

The facts connected with the attempt of the defendant, John W. Wilson, to sell said tract, are as follows: James W. Enochs, on January 5, 1876, conveyed the tract of 100 acres described in the bill to the defendant, John W. Wilson, in trust, to secure a note of the said

<sup>13</sup> Code, § 4318.

<sup>14</sup> Code, § 4321; Kendrick v. Davis, 3 Cold., 524; but see, ante, 261.

<sup>15</sup> Or the words "plea and" may be entirely omitted, and the commencement of an answer used.

<sup>16</sup> Code, §§ 2909; 3777; ante, §§ 374; 380, note 24.

<sup>17</sup> See, post, §§ 732-733.

<sup>18</sup> This form is based on Enochs v. Wilson, 11 Lea, 228, in which case the original bill was dismissed, and the prayer of the cross-bill granted. See, also, Chestnut v. Frazier, 6 Bax., 217.

James W. Enochs, executed on that day to the defendant, P. E. Wilson, for the sum of fifteen hundred and eighty-five dollars, bearing interest from date, at the rate of ten per cent. per annum, and due two years after the date thereof: said trustee, John W. Wilson, upon default in the payment of said note, was authorized in and by said trust deed to sell said tract for cash, and apply enough of the proceeds to pay said note, principal and interest.

## III.

Said note having matured, and none of it having been paid, or offered to be paid, the defendant, P. E. Wilson, requested said trustee, the defendant John W. Wilson, to advertise and sell said tract in the manner specified in and by said trust deed; and he, the said trustee, had advertised the same accordingly; and was about to sell when he was restrained by the injunction of your Honor's said Court, in this cause.

## IV.

These defendants, further answering, say, that it is true that the complainant did not join her husband in the execution of said trust deed; but she fails to state to your Honor, what these defendants aver to be the fact, that, at the time said trust deed was executed, her said husband owned a tract of land containing one hundred and forty-six acres, adjoining said one hundred-acre tract; and that, at said date, she and her husband and children resided on said one hundred and forty-six-acre tract, as their homestead. These defendants aver that said homestead tract was well worth three thousand dollars at the time said trust deed was made; and these defendants were at the time, and now are, advised that it was not necessary for the complainant to join her husband in the execution of said trust deed.

## V.

These defendants further answering, say, that since the execution of said trust deed the complainant's husband has sold and conveyed said homestead tract, selling ten acres of it to one M. O. King, on February 23, 1876; seventy acres on March 20, 1876, to one Segroves for the benefit of certain creditors; and on March 23, 1877, he sold the residue of said homestead tract to one H. Fuller, his wife's father, for a pretended consideration of two thousand dollars; but he, the defendant Enochs, and the complainant and their family, continue to reside on said residue as before.

## VI.

Further answering, these defendants say, that the complainant joined her husband in said deed to Segroves, and that the seventy-acre tract conveyed to him, Segroves, was at the date of the conveyance well worth fifteen hundred dollars. Complainant also signed the deed to said Fuller, and her privy examination was duly taken to its execution; but for some reason her husband did not sign the deed, although the deed purports to be made by him.

## VII.

And now, having fully answered, these defendants are advised that, on proper application by cross-bill, your Honor will declare and enforce their rights in the premises; and they, therefore, file this their answer as a

## CROSS BILL

and assuming to that extent the character of cross-complainants, on the foregoing statement of facts, which they say is true, pray:

1st. That all proper process issue, and be served on said Ann E. Enochs, and her said husband, James W. Enochs, who are made defendants to this cross-bill, requiring them to answer this cross-bill, but not on oath.

2d. That the amount due the cross-complainant, P. E. Wilson, on said note, which is herewith filed as an exhibit to this cross-bill, marked "Exhibit A," be ascertained; and that he have a decree against the cross-defendant, James W. Enochs, for the amount due thereon.

3d. That said deed of trust, which is herewith filed as an exhibit to this cross-bill, and marked "Exhibit B," be specifically enforced by decree of your Honor; and the tract of land therein described, to-wit: said one hundred-acre tract, be sold as therein stipulated, for cash, and in bar of all equity of redemption, or homestead rights, in satisfaction of the amount decreed to be due on said note, and of the costs of this cross-bill.

4th. And that the cross-complainants have all such other and further relief as they may be entitled to.

LATTA & MARSHALL, Solicitors.

JOHN W. WILSON,  
P. E. WILSON.

If the oath to the answer is waived, no affidavit need be annexed to the answer filed as a cross-bill, unless some extraordinary process is prayed: in such case, the affidavit may, if so desired, be so framed as to cover only the facts on which the prayer for extraordinary process is based.

## AFFIDAVIT TO ANSWER FILED AS A CROSS BILL.

State of Tennessee, }  
County of Dyer. }

John Wilson and P. E. Wilson, above named, make oath and say that the statements in

their foregoing answer and cross-bill, made as on their own knowledge are true, and those made as on information and belief, they believe to be true.

Sworn to and subscribed  
before me, March 4, 1878.  
JOHN SOMERS, Chancellor. }

JOHN W. WILSON,  
P. E. WILSON.

**ANSWER AND CROSS BILL FOR SUBROGATION.<sup>19</sup>**

John Doe, *et al.*, }  
*vs.* } In Chancery at Nashville.  
Rachel Roe. }

The answer and cross-bill of Rachel Roe to the bill filed against her in said cause.  
The defendant for answer to said bill says:

I.

That she admits the death of James Doe, and it may be that he was the father of complainants, John Doe and George Doe, but how this is she has no knowledge, and calls on complainants to prove their kinship.

II.

Further answering, she admits said James Doe at one time owned the house and lot described in the bill, but she denies that he was the owner or possessor thereof at his death. That your Honor may understand the nature of defendant's ownership and possession of said house and lot, further answering, she says, that she and James Doe were living together in said house, but occupying different rooms and beds; and she positively denies that they were cohabiting when he died, or had been cohabiting for several years next before his death. While so living in the same house, and about six years ago, he borrowed four hundred dollars from the Ideal Building and Loan Association, and gave it a mortgage on said house and lot to secure the loan. Soon afterward and after paying about one hundred dollars on said mortgage he fell sick and was never able to do any more work, and she supported him with the labor of her hands until he died, and then she paid the expenses of his last sickness and funeral. After said James Doe became unable to work, said house and lot were advertised for sale under said mortgage, and was about to be sold, when he took his deed for said house and lot out of his trunk, and handed it to defendant, in presence of witnesses, and said to her "Here is my deed for this house. I cannot pay the balance of the mortgage, and I turn it all over to you, and you can do the best you can. If you lift the mortgage the property is yours. Here's the deed." Thereupon the defendant took the deed and has kept it ever since, claiming said house and lot as her own property. Defendant thereupon made a contract with said Building and Loan Association to pay them ten dollars a month on said mortgage, and at this rate, except when she paid more, she finally paid the entire balance on said mortgage, aggregating three hundred and seven dollars, for all of which she has the receipts given by said Association, and has said mortgage endorsed to her by said Association.

III.

Further answering, defendant denies that said James Doe was ever of weak mind, but she admits that he was weak in body and so weak as to be unable to work the last five years of his life. She denies that she ever exercised any influence over him to obtain said deed. On the other hand, he begged her to take it, and do all she could to keep the property from being sold under the mortgage, a thing she was slow to do, for fear that after paying a great deal she might not be able to pay all, and thereby lose what she had paid. She emphatically denies all fraud and imposition in obtaining said deed and mortgage, or either of them, or any sale to her by said James Doe of said property, except as herein stated.

IV.

Further answering, defendant denies that she is insolvent. She owes nobody anything, has her taxes all paid and seventy-three dollars loaned out on good security, and is still able to work, and does work, and is earning over ten dollars a month besides her expenses, and can give security for the rents of said house and lot pending this litigation, if your Honor so requires.

V.

Further answering, the defendant files with this answer said deed and mortgage, marked A and B, respectively.

And now having fully answered said bill she prays that it may be dismissed. But being advised that, on the facts of this case, if she cannot hold said house and lot, she has an equitable lien thereon to reimburse her for what she paid on said mortgage, and for said medical and funeral expenses, which latter amounted to fifty-five dollars, therefore, she files this answer as a

CROSS BILL.

and the premises considered prays:

1st. That the complainants, John Doe and George Doe, be required by subpoena to answer this cross bill, but not on oath.

<sup>19</sup> This is the answer to bill in § 1050, *post*, which is based on *Vaughn v. Vaughn*, 16 Pick., 282. | The Supreme Court granted the subrogation prayed in the cross bill.

2d. That the title to said house and lot be declared in her, and vested in her.

3d. But if not entitled thereto that she be subrogated to the rights of said Building and Loan Association under said mortgage, and that said mortgage be foreclosed, and said lot sold for cash and in bar of redemption, the mortgage so stipulating, and out of the proceeds she be paid the amount paid by her on said mortgage, and interest on her payments. She also prays for a decree for the said medical and funeral expenses, and for such further and other relief as she may be entitled to.

RACHEL ROE.

JOHN RUHM, Solicitor.

[*Annex affidavit, as defendant's oath to her answer was not waived. See, ante, §§ 380; 789.*]

To perfect the answer as a cross bill, a prosecution bond must be given, or pauper oath filed in lieu, and a subpoena to answer the cross bill must issue and be served on the complainants.

## CHAPTER XX.

## ANALYSIS AND COMPARISON OF PLEADINGS.

ARTICLE I. Rationale of Pleadings.

ARTICLE II. Different Defences Distinguished.

## ARTICLE I.

## RATIONALE OF PLEADINGS.

§ 406. Object of Pleadings.

§ 407. Logic of Pleadings.

§ 408. General Rule, and Doctrine of Relations, Applied to Pleadings.

§ 409. Summary of the Principal Rules of Pleading.

§ 410. Some Minor Defects in Pleadings.

§ 406. **Object of Pleadings.**—The object of a pleading is to give the opposite party and the Court notice of what matters of fact and law the pleader intends to submit to the decision of the Court. As to these matters, and none others, proof must be made, if they are disputed; and on these, and none others, a decree must be based; if proof is made as to other matters, such proof is impertinent; and if a decree is based on other matters, to that extent it is *coram non jure* and void.<sup>1</sup>

While it is true, that no affirmative proof can be made by a party except as to matter by him alleged in his pleadings, nevertheless, it is not required that a pleader should go into the details of the facts by him set up; nor is it necessary for him to specify what particular facts he relies on, nor the proofs by which he expects to establish them. The rules of Chancery pleading have been relaxed since depositions have come to be taken in the presence of both parties, who can thus learn and have a full opportunity to meet the particular evidence set up in support or denial of the matters contained in the pleadings. But when, under the old practice, depositions were taken in secret, and their contents not known to the parties until the proofs were all closed, and publication passed, it was of very great importance that each party should have specific notice what his adversary expected to prove, otherwise surprises would have been inevitable, and either injustice done, or a remandment to the rules for rebutting proof made necessary. Nevertheless, it is, and must forever remain, a fundamental rule of pleading, that nothing is in issue except what has been alleged; and neither can proof be made, nor decrees be pronounced, as to matters not contained in the pleadings.<sup>1a</sup>

§ 407. **Logic of Pleadings.**—Every bill is of the nature of a syllogism, the major premise of which, consisting of the supposed general rule of law applicable to the case, is ordinarily not expressed, but taken for granted. The statement of facts contained in the bill constitutes the minor premise of the syllogism, and the special prayer is the conclusion of the syllogism.

Take an ordinary syllogism: All Europeans belong to the white race: John Samboyer is a European. Therefore, he belongs to the white race. In ordinary conversation, the major premise is taken for granted; and we say John Sam-

<sup>1</sup> One fundamental matter Courts and pleaders should ever keep in mind is, that adjudications must be based on issues; and that issues cannot arise, except between antagonistic parties whose pleadings create the issues; and who have, thus, a chance to introduce evidence, and to examine and cross-examine witnesses on these issues. If antagonism

exists between defendants, whose answers create an issue between them a decree can be based on such an issue. But, without an issue, there can be no proof, and no decree except by consent.

<sup>1a</sup> The maximum, *Debitè fundamentum fallit opus*, applies in such cases; for, if the pleadings be insufficient to raise an issue, and judgment and decree

boyer belongs to the white race, because he is a European. So, a bill ordinarily omits the major premise, (which is the supposed general rule of law applicable to the case,) and states only the minor premise, (or particular facts,) and the conclusion, (or special prayer).

To analyze a bill filed by an administrator to set aside a fraudulent conveyance made by his intestate: (1) the major premise, or supposed general rule of law, which is not stated in the bill, but taken for granted, is: that on application of an administrator by bill, the Chancery Court will set aside a fraudulent conveyance made by his intestate; (2) the minor premise, or statement of facts, is that the intestate of the complainant made the fraudulent conveyance alleged; and (3) the prayer, or conclusion, is that the conveyance be set aside.

1. A plea in abatement to this bill would say, in substance, that admitting the bill to be true, nevertheless the Court has no jurisdiction to grant the relief prayed, because neither is the land situated, nor was any material defendant served with process, in the county wherein the suit is brought. 2. A demurrer would say, in substance, admitting the facts alleged in the bill to be true, nevertheless the complainant is entitled to no relief, because the general rule of law is not what he supposes it to be, such relief being granted only when the estate is insolvent, and no suggestion of insolvency is alleged. 3. A negative plea in bar would deny that the complainant was administrator, or would deny that the conveyance was fraudulent. 4. An affirmative plea in bar would say, in substance, that admitting the facts alleged, and that on them the complainant is entitled to the relief prayed, that nevertheless, there is another fact not mentioned in the bill which destroys the right to relief, to-wit: that the defendant has been in adverse possession of said land under said deed for more than seven years before said suit was brought. 5. An answer need not admit anything, and it may deny complainant's right to relief, (1) on the ground that the complainant was not administrator; (2) on the ground that there was no fraud in the conveyance, as alleged; (3) on the ground that the estate was not insolvent; and (4) on the ground of seven years' adverse possession. 6. A disclaimer would deny that the defendant was in possession of the land, or claiming any interest in it, or exercising any acts of ownership over it, and would disclaim any interest in, or title to, said land under said deed, or otherwise; and would deny ever having had, or claimed, any title or interest therein.

And thus, 1, the plea in abatement disputes the right of the Court to determine the controversy; 2, the demurrer directly disputes the conclusion of the syllogism, and indirectly disputes the unexpressed major premise; 3, the negative plea in bar denies a material allegation in the bill, and thus negatives the minor premise; 4, the affirmative plea in bar sets up a new fact, which, if true, would constitute an exception to the general rule, or major premise; 5, the answer sets up (1) three facts, any one of which, if proved, negatives the minor premise, and (2) one fact which, if true, constitutes an exception to the major premise, or general rule; and 6, the disclaimer denies a material allegation in the bill, and, also, sets up a new fact, the joint effect whereof is to negative the minor premise.

It will, thus, be seen that every properly constructed bill is a syllogism, whose major premise, the supposed general rule of law, is suppressed; and when this conception of a bill is thoroughly grasped, the Solicitor of the complainant will find it of great practical value in formulating his bill, and in expressing it in an orderly and logical manner; and, on the other hand, the Solicitor of the defendant will the more readily understand what defences to set up, and when and how.

**§ 408. General Rule, and the Doctrine of Relations, Applied to Pleadings.** In drawing a bill where there are relations, the first matter to be considered is, what are the relations of the parties, and what the legal duties resulting from

those relations, in connection with the facts and circumstances of the case. Having settled these preliminaries, the next matter is to ascertain whether there is any general rule of law or Equity applicable to the facts of the case, and to the relations of the parties, entitling the complainant to relief. The general rule being determined (corresponding to the major premise in a syllogism,) such facts and circumstances of the case, and no more or other, should be alleged as will show that the case is within the general rule of law or Equity on which the suit is to be based. (These facts and circumstances are the minor premise of the syllogism.) The case being thus shown to be within the general rule, the relief prayed follows as an inevitable conclusion, both in logic and in law. Every general rule has its exceptions: these exceptions should not ordinarily be mentioned in the bill; for, if they are, it becomes necessary to negative them in order to make out a case, and in that event the complainant assumes unnecessary burdens.<sup>2</sup> It devolves on the defendant, as will be hereafter shown, to aver and prove that the case comes within one of these exceptions to the general rule.

To illustrate the foregoing, take the case of a promissory note held by the payee. The relation of the parties is that of debtor and creditor; and the facts are that the debtor has executed a promissory note to the creditor as evidence of his indebtedness. The general rule of law applicable to the facts of the case, is that the maker of a promissory note is bound to pay it after maturity to the payee, if he is the holder. But to this rule there are several exceptions, among them the following: (1) the maker is not bound to pay, if, when the note was executed and delivered, he was a minor; or (2) was of unsound mind; or (3) was drunk; or (4) was under duress; or (5) was fraudulently imposed on; or is he bound if (6) the consideration wholly failed; or (7) if the note is based on an illegal consideration, or (8) is barred by the statute of limitations. Complainant, in drawing a bill to collect the note, should content himself with alleging that the defendant executed the note to him, stating date and amount, and that it is over due.<sup>3</sup> These allegations bring the case within the general rule. It is not even absolutely necessary to allege that it is complainant's property, or that it is unpaid, the law presuming these facts, the note having been executed to the complainant, and he having the note in his possession. Much less is it necessary to allege that the note was given for a valuable and lawful consideration, or that the defendant was an adult, of sound mind, sober, free to act, and not imposed on by any artifice. These are all matters for the defendant to set up.

If, however, the note should be barred by the statute of limitations, and it becomes necessary to disclose this fact in the bill, in such case, it is essential to go further, and set up the facts which avoid the bar of the statute, such as non-residence of the defendant, or a promise to pay the note made within six years.

Of course, if the bill seeks a discovery from the defendant, it may and should go into a detail of the facts and circumstances as to which the discovery is sought, and on which the interrogatories, if any, are based.

If there should be no relations between the parties, the first question to be considered by the draftsman of the bill is the rights of the complainant, these rights being ordinarily rights to the title, use, control, or benefit, of particular property; the second question is wherein the defendant is interfering with those rights; and the third question is the general rule of law or Equity applicable to the facts of the case, and entitling the complainant to relief on those facts. Here, again, this general rule is the major premise of the syllogism, the facts, bringing the case within the general rule, constitute the minor premise

<sup>2</sup> But if the demand is barred by the statute of limitations the complainant must so show if he in-

tends to avoid the bar, as heretofore stated. See, *ante*, § 147.

<sup>3</sup> But if the note is barred. see. *ante* § 147.

of the syllogism, and the special relief prayed is the conclusion of the syllogism.<sup>4</sup>

§ 409. **Summary of the Principal Rules of Equity Pleading.**—The following summary of rules governing all pleadings, except demurrers, may be of benefit to the inexperienced pleader.<sup>5</sup>

1. All pleadings must state the essential facts: it is not necessary, however, as a rule, to state the evidence by which those facts may be proved.

2. It is not necessary to allege any matter of either law or fact, of which the Court will take judicial notice.

3. It is not necessary to state matters which would more properly come from the adverse party.

4. It is not necessary to allege circumstances that are necessarily implied from what is alleged.

5. It is not necessary to allege what the law will presume.

6. Where the items of an account sued on are numerous, it is sufficient to state their character, and the amount, without specifying them in the pleading. In such a case, however, they should be contained in an exhibit.

7. Less particularity in statement is required when the facts are shown to be better known to the opposite party than to the party pleading. One of the very objects of the bill may be to ascertain these facts.

8. Pleadings must not be argumentative: they must be confined to allegations of facts.

9. Pleadings should not contain mere recitals of what the pleader has been informed, or what he believes; but should specify what he alleges the facts to be: these facts, however, he may allege on information and belief.

10. All scandal, impertinence and surplusage must be avoided. The following matters are surplusage: (1) matters judicially known to the Court; (2) conclusions of law; (3) matters of evidence; (4) matters of information or belief, on which no positive allegation of fact is based; (5) all arguments and inferences; and (6) all displays of rhetoric, poetry, wit, sarcasm, or invective.

11. All pleadings should contain the truth, even when not under oath. No party should allege any affirmative matter that is not pertinent, and a fact capable of being proved. Not that he must be able to prove all that he alleges, but that his allegations must be facts believed by him to be provable.

12. All pleadings must be consistent: an inconsistent bill is demurrable for repugnancy; an inconsistent answer may be treated as no answer, and an inconsistent amendment will not be allowed.<sup>6a</sup>

13. Bills that pray injunctions or receivers, or charge fraud, or seek to undo what has been formally done, should be positive and precise, and give particulars and circumstances; in such bills general allegations only are insufficient.<sup>6</sup>

14. Answers to such bills should unequivocally deny all material allegations that are false, and explain away all that are true, giving particulars and circumstances.<sup>7</sup>

15. All pleadings should conform to approved precedents, both in form and phraseology.

§ 410. **Some Minor Defects in Pleadings.**—There are some minor defects in pleadings too insignificant to be reached by a demurrer, and generally of too little importance to be the subject of a motion, but nevertheless of a character that greatly impairs the merit of the particular pleading. Some of the defects are the following:

<sup>4</sup> No Solicitor, unless he be a genius, will ever succeed as a draftsman of bills, if he fails to thoroughly grasp the doctrine of relations, and the value of comprehending the general rule, applicable to the case. This failure is the cause of so many bills being confused, prolix, tautological, obscure, and chaotic, the equities whereof are enveloped in mists, submerged in surplusage, and nebulous to the eye of justice. See, *ante*, §§ 165-168.

<sup>5</sup> These rules are taken partly from Stephen on Pleading; and, while intended for Courts of law, are equally applicable to pleadings in Chancery.

<sup>6a</sup> See, *ante*, § 149; 285; 672; 64, sub-sec. 2; *Hardwick v. American Can Co.*, 7 Cates, 393.

<sup>6</sup> See, *ante*, §§ 142; 838-843.

<sup>7</sup> See, *ante*, § 361-367; *post*, 842.



1. **The Failure to Specify the Date** of an alleged transaction. It is not uncommon to see expressions of this sort in bills and answers: (1) "on the—day of —188—;" (2) "some time in the year 187—," and (3) "on the—day of —,"

2. **The Failure to Specify Quantity and Value.** Such allegations as the following are utterly inadmissible, and display gross negligence, carelessness, and indifference to, if not ignorance of, the fundamental rules of pleading: (1) "containing—acres, more or less," (2) "of the value of—dollars," (3) "amounting to at least—;" (4) "to the number of—;" and (5) "in the —district, adjoining the land of—."

3. **The Failure to Specify the Given Names of Persons.** An initial letter is too indefinite. J. Smith may stand for Joel, James, Jesse, Jacob, Joseph, Julius, Jeptha, Jared, or Jasper, as well as John, Smith. The first names of parties are often described by their initials: this often results in confusion and delay, and sometimes in loss. Where a party signs a paper sued on by initials, it is well to describe him both by his full given name and by the name subscribed to the paper, thus: T. J. Smith, otherwise called Thomas J. Smith.

4. **Erasions, Interlineations, and Other Changes on the Face of Pleadings.** Pleadings are sometimes so full of erasures and interlineations that it is almost impossible to decipher them, and to certainly determine whether various important matters are intended to be changed or not; and if to be changed, it is difficult to tell exactly what the changes are. No pleading should have any interlineations, except such as are authorized by the Court; nor should any considerable erasures, or other changes, be made on the face of any pleading. The pleadings should be certain and definite, and these qualities are incompatible with erasures, interlineations, or other changes, in the original text.

It is a fundamental rule of pleading, applicable to all of the foregoing matters, that whatever is alleged in a pleading must be alleged with certainty, to the end that the adversary may know exactly what is alleged, so that he may be able to deny or admit, or to confess and avoid, the particular matter.

5. **All Pleadings should be Properly Entitled.** Every suit has a name, and by that name it is known and distinguished from all other suits. The statute forbids the Clerk to change the style of a cause;<sup>8</sup> and the Chancellor should see to it that Solicitors, also, conform to this statute. No pleading should be allowed to go into a file unless its style entitles it to be so filed.

6. **All Pleadings should be in the Second and Third Persons.** It is no uncommon thing in some counties to find bills and answers partly in the first person and partly in the third person. This is execrable, whether viewed from a grammatical or a legal standpoint. The party pleading, in addressing the Chancellor, may use the second person, but he should refer to himself as complainant or defendant; and not as "I."<sup>9</sup>

7. **All Pleadings Should be Free from Scandal, Impertinence, and Surplusage.** A Chancery pleading is not the place for a display of wit, humor, sentiment, poetry, rhetoric, or pathos. Nor is it the place to indulge in sarcasm, irony, invective, insinuation, abuse, or any other scandalous or impertinent matter.<sup>10</sup> Such improprieties are not only exceedingly reprehensible in themselves, but they also incite similar reprehensible retaliations from the adverse side. These scandalous and impertinent displays are sure to excite the indignation of the Chancellor, and the ridicule or disgust of the bar. Solicitors, in drawing pleadings, should repress too great an enthusiasm for their client's supposed rights, and too great indignation at the defendant's supposed misconduct; and

<sup>8</sup> M. & V.'s Code, § 3664.

<sup>9</sup> In England, under the new practice, all answers are in the first person, the defendant saying: "I admit," "I deny," "I believe," "I do, say, aver, charge," etc. 3 Dan. Ch. Pr., 2111, note. But an answer is reprehensible that says: "The defendant,

for further answer, says that the charge that I acted fraudulently is false." Such a shifting, from the third, to the first person, is discreditible to the pleader, and shows that he is as unskilled in pleading, as in parsing.

<sup>10</sup> See, *ante*, §§ 150; 372; and, *post*, §§ 421; 1190.

thereby escape the mortification of being rebuked by the Court, or ridiculed by the bar, for excess of zeal, or deficiency of discretion.

8. **All Exhibits should be Lettered and Filed.** It is not uncommon for bills and answers to refer to, and profess to exhibit, a document not even in the party's possession, sometimes referring to it as on such a page of such a book in the Register's office, or as in the records of another Court. This is wholly inadmissible. All papers and documents referred to in pleadings must be filed with the pleadings,<sup>11</sup> and so lettered, or numbered, or described, as to be identified. No book belonging to any public office, and no original record of another Court, or office, can be made an exhibit to a pleading. If such a record is needed as an exhibit a certified copy must be exhibited; but an original record of the same Court may be referred without being exhibited, and the opposite party notified in the pleading that it will be read at the hearing. A document may be referred to thus: "*—as in said deed, [contract, will, letter, decree, book, record, or other written or printed thing, naming it,] will more fully appear, and which [or, a certified copy of which,] is herewith filed, marked A, and made a part of this bill [or answer.]*" Papers referred to in a bill or answer, and not numbered, lettered, or otherwise identified, will not be considered in the Supreme Court, even when actually copied into the transcript.<sup>12</sup>

ARTICLE II.

DIFFERENT DEFENCES DISTINGUISHED.

<p>§ 411. Various Kinds of Pleadings Contrasted.</p> <p>§ 412. Differences between a Demurrer and a Plea in Bar.</p> <p>§ 413. Differences between an Answer and a Plea.</p>	<p>§ 414. General Analysis of Defences on the Merits.</p> <p>§ 415. Summary of the Defences on the Merits.</p>
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§ 411. **Various Kinds of Pleadings Contrasted.**—If the bill shows a state of facts within a general rule<sup>1</sup> of law or Equity, the defendant must either deny one or more of the complainant's essential allegations of fact; or, admitting the facts in the bill, he must show such additional facts as will bring the case within at least one of the exceptions to the general rule. To take the illustration above used, the essential allegations in the bill are, 1st, That the defendant executed to complainant the note sued on; 2d, That the complainant holds it; and 3d, That it is overdue. If either of these three allegations is denied, a valid defence is set up. If, however, these allegations are true, the defendant must admit them, and make out a defence by showing additional facts, bringing the case within one or more of the exceptions to the general rule. In other words, he must admit the facts alleged in the bill, but avoid them by showing that, when he executed and delivered the note sued on, he was a minor, or deranged, or drunk, or under duress, or defrauded, or that the consideration was illegal, or has totally failed, or that the note is barred by the statute of limitations, or some other matter in avoidance.

If the bill shows on its face that it does not come within any general rule of law or Equity, entitling the complainant to relief, the defendant may demur to the bill. So he may demur, if the facts stated in the bill bring the whole case within some exception to the general rule, and no facts are alleged obviating the exception.

<sup>11</sup> Ch. Rule I., sec. 2; *post*, § 1190.  
<sup>12</sup> *Simmons v. Taylor*, 22 Pick., 729.

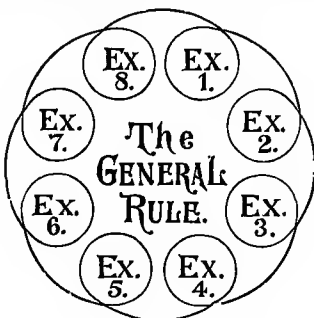
<sup>1</sup> See, *ante*, §§ 166; 275-277, notes; and see note 2, *infra*.

The purpose and office of a demurrer, then, is to show that the case made by the bill, either does not come within any general rule of law or equity entitling the complainant to relief, or else comes within some exception to the rule. And the purpose and office of a plea in bar is, by alleging some single fact suppressed in the bill, or by suppressing some single fact alleged in the bill, to show either that the complainant's case is not within the general rule, or else that it is, also, within some exception to that rule. The office of an answer is to deny enough of the facts alleged in the bill to destroy the case made; or to admit the bill, and set up such new facts as will take the case out of the general rule, or put it into some exception to that rule.<sup>2</sup>

§ 412. **Differences Between a Demurrer and a Plea in Bar.**—The office of a demurrer is, to raise a question of law on the facts as the bill gives them; and a demurrer maintains that, on those facts, the complainant is not entitled to some, or to any, of the relief he prays. The office of a plea in bar is, not to deny the Equity of the bill, but (1) either to deny some matter of fact in the bill, which, if false, destroys that Equity, or (2) to bring forward some new matter of fact, which, if true, obviates that Equity. A demurrer takes the facts as the complainant states them, but disputes the conclusions of law or Equity he seeks to draw from those facts. In short, a demurrer deals exclusively with questions of law, whereas a plea deals exclusively with questions of fact. A demurrer admits the facts of the bill, but disputes its law; whereas, a plea in bar admits the law of the bill, but disputes its facts.

An affirmative plea in bar does not dispute any fact alleged in the bill, or any alleged deduction from the facts stated; but seeks to bring before the Court a new fact, which, if true, destroys the complainant's right to belief. A negative plea in bar denies some substantial averment of fact in the bill, but never challenges any of the deductions of law or Equity the complainant seeks to draw from the facts he alleges. A demurrer to the relief, however, neither seeks to bring forward new matters, nor to deny any fact alleged in the bill, but merely disputes the deductions sought to be drawn from the matters of fact stated, the demurrer, for the purpose of testing the validity of the bill, admitting all the facts alleged.

<sup>2</sup> The following diagram is given as illustrative of the foregoing discussion:



#### EXPLANATIONS.

The large circle represents the *general rule* of law or Equity; see, *ante*, § 166; and the small circles represent the *exceptions* to the general rule. It will be noted that the small circles are not really within the circumference of the large circle, but are formed by loops in its circumference, thus limiting the area of the large circle, as exceptions limit the comprehensiveness of the general rule.

Using the case already supposed, the general rule, represented by the large circle, is: The maker of a promissory note is bound to pay it to the payee,

small circles represent eight exceptions to this general rule, the maker not being so bound if, when the note was executed, he was (1) a minor; or (2) deranged; or (3) drunk; or (4) under duress; or (5) was fraudulently imposed on; or (6) there was a want of a legal consideration; or (7) the consideration has wholly failed; or (8) the note is barred by the statute of limitations.

1. *The office of a Bill*, as a pleading, is to present a case within the general rule, entitling the complainant to relief.

2. *The office of a Demurrer* is to show (1) that there is no such general rule of law or Equity, as the bill presupposes; (2) that, if there is, the case made out by the bill does not come within such rule; or (3) that, if within the rule, the facts alleged in the bill show that the case falls within one, or more, of the exceptions to the rule.

3. *The office of an Affirmative Plea in Bar* is to allege some new fact that will bring the case within one of the exceptions to the general rule.

4. *The office of a Negative Plea in Bar* is to deny some material fact alleged by the bill, and thus show that the case is not within the general rule, as when (1) the plea of *non est factum* is put in; or (2) a plea that the complainant is not the payee, or not the holder, and not entitled to collect the note.

5. *The office of an Answer*, as a pleading, is (1) to deny some allegation of the bill necessary to bring the case within the general rule; or (2) to make some additional allegation, that will take the case out of the general rule, or force it into some exception to the rule. And, thus, an answer may perform the offices of both an affirmative, and a

The office of a plea in bar is to bring forward some matter of fact, which, if it had been alleged, or to deny some matter of fact, which, if it had not been alleged, would have made the bill subject to demurrer. Hence, any fact which, if it had been alleged, would have made the bill demurrable, is good matter for an affirmative plea; and any fact which, if it had not been alleged, would have made the bill demurrable, is the proper subject of a negative plea.

It results from these premises, that pleas in bar and demurrers are in the nature of correlatives; and that whatever fact, if alleged or omitted by the bill, would be a ground of demurrer, will, if not alleged or omitted, be a ground of plea.<sup>3</sup>

The following are the principal differences between a demurrer and an affirmative plea: (1) a demurrer applies to matters expressed; an affirmative plea applies to matter suppressed; (2) a demurrer applies to the case as brought before the Court by the bill; an affirmative plea applies to the case as modified by a new matter of fact which it has brought before the Court; (3) a demurrer demands the judgment of the Court on the case as the bill states it; an affirmative plea demands the judgment of the Court on the case as modified by the new fact brought forward by the defendant in his plea.

And the following are the principal differences between a demurrer and a negative plea: (1) a demurrer admits all the facts alleged in the bill, a negative plea positively denies, at least, one material fact; (2) a demurrer seeks to have the case decided on the facts contained in the bill, a negative plea seeks to have it decided after some material fact has been, in effect, stricken out of the bill.

A demurrer never raises any questions except those of law, a plea never raises any questions except those of fact. All pleas, however, admit every allegation in the bill not by them expressly denied.

**§ 413. Differences Between an Answer and a Plea.**—The office of an answer, as a pleading, is to contest the claim for relief set up in the bill; and this contest is made either, (1) by denying the truth of the case made by the bill, or (2) by bringing forward new matter which avoids that case.<sup>4</sup> A plea in bar has identically the same office; an affirmative plea bringing forward some new matter of fact in avoidance of the case made by the bill, and a negative plea denying the truth of some material allegation of the bill. The only substantial differences between an answer and a plea in bar are: (1) an answer is often both a pleading and a deposition, whereas a plea is always a pleading and never a deposition; (2) an answer may both deny and avoid a case made by the bill, whereas a plea in bar always does either one or the other, but never both; (3) an answer may deny or avoid every material allegation contained in the bill, whereas a plea can ordinarily deny or avoid only one material allegation. Hence it is that a plea in bar is sometimes called a special answer;<sup>5</sup> and an answer, as a pleading, is, in effect, merely a series of pleas of one or more kinds.

It will thus be seen that an answer includes all possible pleas in bar, and covers all the bill; and, as the greater includes the less, and the whole contains all its parts, it follows, both as a matter of pleading and of logic, that an answer supersedes and overrules a plea in bar to the same matter.

A plea in abatement does not question the merits of the controversy, but seeks to abate the suit for some reason outside of the merits. Both a plea in bar and an answer, in effect, admit that there is no ground of abatement, or else none the defendant cares to rely on; and each seeks to contest the bill on its merits. The result is that if, after filing a plea in abatement, the defendant

<sup>3</sup> Thus, if, in a bill for specific performance, the sale of the land is alleged to be in parol, that is a ground of demurrer; whereas, if this fact be omitted, it is a ground of an affirmative plea. So, if, in a bill by an administrator to sell land fraudulently conveyed by his intestate, the estate is not alleged to be insolvent, that is a ground of demurrer;

whereas, if this allegation be made, it is a ground of a negative plea.

<sup>4</sup> In this book, all pleas are divided into (1) pleas in abatement, and (2) pleas in bar. *Ante*, §§ 241; 243; 321.

<sup>5</sup> 1 Dan. Ch. Pr., 603; Sto. Eq. Pl., § 649.

either pleads in bar or answers, he in effect abandons his plea in abatement; and, hence, the universal rule that a plea in abatement is overruled by a plea in bar, and either or both pleas are overruled by an answer. This important qualification must, however, be kept in mind: an answer overrules a plea in bar only, when the former covers the ground occupied by the latter, for as heretofore and hereafter shown, a defendant may plead to part of the bill, and answer to the residue.

A demurrer contests the bill exclusively on the issues of law arising from the facts contained in the bill itself; a plea contests the bill on some single issue of fact which, if found in favor of the plea, will end the suit; and an answer contests the bill either by denying the facts it alleges or by avoiding them, or by both. It will thus be seen that every matter which is ground for a plea in bar may be set up in an answer; but inasmuch as an answer contests the bill exclusively on the merits, no ground of abatement which disputes the jurisdiction of the Court can be set up in an answer; nor can a plea in abatement be joined with any other kind of defence. The Courts favor defences on the merits, and when a defendant has once made defence to the merits, he will be deemed to have waived and abandoned all objections to the jurisdiction by him made, and not determined.<sup>6</sup>

**§ 414. General Analysis of Defences on the Merits.**—A bill in Chancery is generally filed to assert rights growing out of relations, or to assert rights which are independent of relations. In the former case, it ordinarily alleges (1) the relation between the parties; (2) the duties of the defendant, and the rights of the complainant arising from the relation; (3) the violation of those rights and duties by the defendant, and (4) prays for consequent relief.

In order, therefore, to meet these allegations on the facts, the defendant must (1) deny the alleged relation of the parties, or (2) must in some way invalidate that relation, if it ever existed, or (3) must deny that any of said rights and duties were violated as charged; or (4) must show affirmatively that, since such violation, there has intervened some act of the parties,<sup>7</sup> or some rule of law,<sup>8</sup> that avoids his liability and bars the suit.

The denial of the relation can often be made by a negative plea; the matters in avoidance are frequently proper for an affirmative plea, and any and all of the defences are proper to be set up in an answer.

If the bill is filed to assert rights which are independent of relations, it ordinarily alleges (1) the title, interest, or right sought to be enforced or protected, or the wrong sought to be prevented; (2) the manner in which the defendant is interfering with complainant's rights or property, or is committing or threatening the wrong complained of; and (3) prays for the consequential relief.

To meet these allegations on the facts, the defendant must (1) deny the alleged title, interest or right of the complainant; or (2) must deny the commission of the wrongs alleged; or (3) must set up, affirmatively, some bar or equal Equity.

The first defence may often be made by a negative plea, and the last by an affirmative plea; all three defences may be made by answer.

**§ 415. Summary of the Various Defences on the Merits.**—In order that the various defences that can be made on the merits, in a Chancery suit, may more

<sup>6</sup> The rationale of this ruling is this: A defence to the merits necessarily implies a willingness for the Court to determine the validity of such defence; and, as the Court cannot make the determination unless it has jurisdiction, the necessary implication is, that the defendant concedes the jurisdiction, when he submits such a defence to the decision of the Court.

A demurrer is a sword of slender blade and keen point, intended to reach the heart of the adversary through unguarded places in his armor. A plea is a

battle-axe intended to strike down the enemy by a single blow on his uncovered head. An answer is a shield intended to protect against the assaults of one's opponent; while an answer and cross bill combined are a shield for defence and a sword for assault.

<sup>7</sup> Such as payment, a release, accord and satisfaction, novation of the debt, assignment of the debt, an award, or a judgment.

<sup>8</sup> Such as the statute of limitations, laches, and estoppel.

specifically appear, the following table<sup>9</sup> has been prepared, giving (1) the defences where the bill alleges no relations, and (2) the defences where relations are alleged.

**TABLE OF DEFENCES ON THE MERITS.**

**A. WHERE NO RELATION IS ALLEGED IN THE BILL,**

the defences are :

**I. Non-existence of Rights Claimed,**  
because of

1. Want of privity between the parties ; or
2. Complainant having no title, interest or right ; or
3. Title in the defendant ; or
4. Title in a third person.

**II. Non-existence of the Injuries Alleged,**  
because of

1. The acts complained of not having been done ; or
2. The acts complained of having been committed by a stranger ; or
3. The acts complained of having been authorized by some law, or license.

**III. Matters in Avoidance,<sup>10</sup>**  
because of

1. Defendant being an innocent purchaser ; or
2. Accord and satisfaction ; or
3. Award ; or
4. Former judgment ; or
5. Statutes of limitations ; or
6. *Laches* ; or
7. Estoppel.

**B. WHERE A RELATION IS ALLEGED IN THE BILL,**

the defences are :

**I. Non-existence of the Alleged Relation,**  
because

1. No such contract or relation as charged existed ; or
2. The complainant does not possess the character he claims ; or
3. The defendant does not possess the character alleged ; or
4. *Non est factum*, (the deed, note, or other instrument sued, not having been executed by the defendant.)

**II. Invalidation of the Alleged Relation.<sup>11</sup>**  
because

1. Parties not competent to contract, by reason of :
  - (a) Mental unsoundness ; or
  - (b) Infancy ; or
  - (c) Coverture ; or
  - (d) Drunkenness ; or
  - (e) Duress.
2. Insufficiency of consideration, by reason of :
  - (a) Total failure of consideration ; or
  - (b) Gross inadequacy of consideration ; or
  - (c) Illegality of consideration.
3. Contract obtained by fraud, by means of :
  - (a) Misrepresentation ; or
  - (b) Concealment ; or

<sup>9</sup> This table has been mainly compiled from Lube's Equity Pleadings and Chitty's Pleadings. A careful study of it will enable the student to grasp, thoroughly, all possible defences, on the merits, to all possible bills; and he will find it of great value in preparing his defences.

<sup>10</sup> Matters in avoidance must be specially set up, and relied on, by plea or answer; and the burden of proving them is on the defendant.

<sup>11</sup> Where the defence seeks to invalidate the alleged relation it must be specially set up, and proved, by the defendant, as in other cases of avoidance.

- (c) Undue use of confidential relations.
- 4. Act to be done illegal or impossible.
- 5. Form of contract insufficient, either
  - (a) At common law, or
  - (b) By statute.<sup>12</sup>
- III. **Non-existence of the Alleged Violations of Complainant's Rights,**  
because
  - 1. The suit was prematurely brought ; or
  - 2. The acts complained of were not done ; or
  - 3. The acts complained of, if done, were authorized by some law, or license
- IV. **Matters in Avoidance,**<sup>13</sup>  
consisting of
  - 1. Acts of both parties, to-wit :
    - (a) Alteration, or rescission, of the contract ; or
    - (b) Account stated ; or
    - (c) Payment, or accord and satisfaction ; or
    - (d) Release of the debt sued for ; or
    - (e) Award for the same cause of action ; or
    - (f) Novation, (a new note or contract executed in lieu.)
  - 2. Acts of the complainant alone,  
consisting of
    - (a) Former recovery for the same cause of action ; or
    - (b) Non-performance of condition precedent ; or
    - (c) Pendency of another suit for same cause ; or
    - (d) Assignment of the debt to a third person ; or
    - (e) *Laches* ; or
    - (f) Estoppel.
  - 3. Acts of the defendant alone,  
consisting of
    - (a) Performance of the contract or duty ; or
    - (b) Tender of the money, property, or services due ; or
    - (c) Set-off.
    - (d) Recoupment.
  - 4. Acts of the law,  
consisting of
    - (a) Judgment for defendant in bar of the claim or demand now sued on ; or
    - (b) Statute of limitations.
    - (c) Bankruptcy.

<sup>12</sup> Such as the Statute of Frauds and Perjuries.

<sup>13</sup> These matters in avoidance must all be specifically set forth in a plea, or answer, and relied on

as a defence. In all such cases, the burden of proof rests on the defendant.

CHAPTER XXI.

HOW PLEADINGS ARE TESTED.

- ARTICLE I. Testing the Sufficiency of Pleadings.
- ARTICLE II. Exceptions to Answers.
- ARTICLE III. Suggestions as to Testing Pleadings.

ARTICLE I.

TESTING THE SUFFICIENCY OF PLEADINGS.

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| <p>§ 416. Testing of Pleadings.</p> <p>§ 417. Object and Results of Testing Pleadings.</p> | <p>§ 418. Testing the Sufficiency of Bills.</p> <p>§ 419. Testing Pleas and Demurrers.</p> |
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§ 416. **Testing of Pleadings.**—There is some method of testing the sufficiency of every pleading. The very pleadings that are used as tests are themselves the subjects of tests. All of these tests have reference to the fitness of the particular pleading, for the office it seeks to perform; and if such pleading is unfit for such office, the sooner this fact is ascertained the better for all the parties concerned. Pleading is a practical logic applied to matters of forensic controversy, and the severest scrutiny of reason is visited upon every bill, demurrer, plea, and answer, filed in the progress of a cause; and, on a challenge of insufficiency, the Court must hear argument, and determine whether the pleading challenged is equal to the duty it is commissioned to discharge. The sufficiency of a bill is tested by a motion to dismiss, or by a demurrer; the sufficiency of demurrers and pleas is tested by setting them down for argument, which is in the nature of a demurrer *ore tenus*; and the sufficiency of an answer is tested by written exceptions filed to it, these exceptions being in turn tested by argument, in order to ascertain whether they are well taken, or should be disallowed.<sup>1</sup>

As soon, therefore, as a pleading is filed, it is the duty of the opposite party to apply the proper test of its sufficiency; and if he fail to apply such test, then its sufficiency is conceded. Hence, when a bill is filed, the defendant must test its sufficiency by a motion to dismiss, or by demurrer; when a demurrer or plea is filed, the complainant must test it by having it set down for argument; and when an answer is filed, the complainant must test its sufficiency by filing exceptions.

§ 417. **Object and Results of Testing Pleadings.**—The general object of testing a pleading is to ascertain whether it, if true, will accomplish the purpose for which it was filed. Thus, a bill is filed to obtain the relief prayed, and the objects of a demurrer and motion to dismiss are, to test whether the allegations of the bill, if true, entitle the complainant to the relief he seeks. So, a plea is filed in order to defeat the bill, and the object of argument on the sufficiency of a plea is to test whether the plea, if true, will defeat the suit. Neither a bill

<sup>1</sup> Demurrers have been filed to answers, and pleas have been both demurred to, and excepted to, in order to test their sufficiency. 1 Dan. Ch. Pr., 542; 692; 758, notes. The sufficiency of answers, and pleas, cannot, of course, be tested that way; but, if a demurrer to an answer contain the essentials of an exception to an answer, it may be treated as

such; and, a demurrer, or exception, to a plea may be treated as a method of setting the plea for argument, as to its sufficiency. *Ante*, § 350. The sufficiency of a demurrer, itself, is tested by setting it down for argument, which is as much a test of the sufficiency of the demurrer, as the demurrer is a test of the sufficiency of the bill.



nor a plea becomes any stronger because proved to be true; and if they are insufficient, when admitted to be true, it necessarily results that it is useless to go to the trouble and expense of proving them to be true. The Court, therefore, refuses to allow any proof to be taken upon a bill, or a plea, which is insufficient, provided the proper tests are applied to such pleadings, and applied in due season.

It often happens, however, that these tests disclose the fact that the pleading under scrutiny, while defective, is nevertheless, capable of being made sufficient by amendment. In such a case, on proper application in due season, the Court will, ordinarily, allow a proper amendment to be made; for it is the duty of Courts to give a complainant a reasonable opportunity, to properly present his side of the controversy; and likewise to give the defendant an equal opportunity, to set up his defences.

The results of testing pleadings, are, therefore, generally, either (1) an amendment of the pleading tested; or (2) its total overthrow and disallowance; or (3) its vindication as sufficient, and the disallowance of the test.

§ 418. **Testing the Sufficiency of Bills.**—As already stated, the sufficiency of a bill is tested either by a motion to dismiss, or by a demurrer. If, when either or both of these tests are applied, the complainant sees that his bill needs amendment, he may avoid the effect of the test by making the necessary amendment. Or, he may, either before or after such tests, discover that his bill is defective, and insufficient to give him the relief he seeks; in which case he may amend, by leave of the Court, when such leave is necessary. Indeed, as will be seen,<sup>2</sup> the Court will allow a bill to be amended even after allowing a motion to dismiss, or, after sustaining a demurrer, provided the amendment avoids the objection allowed, and is made in due season. Motions to dismiss and demurrers have already been fully considered.

§ 419. **Testing Pleas and Demurrers.**—The sufficiency of all pleas, whether in abatement or in bar, is tested by setting them down for argument, as already fully shown elsewhere. When a plea is filed, the bill may be amended so as to avoid the point of the plea, and the plea may be amended so as to strike more unerringly the vulnerable part of the bill. And thus, argument, like a two-edged sword, may prove the bill deficient, or may prove the plea deficient. How pleas are tested, and the practice relative thereto, has already been fully stated.<sup>3</sup>

While motions to dismiss and demurrers are means of testing the sufficiency of a bill, they are themselves tested upon argument<sup>4</sup> as to their own sufficiency, and are often overruled because not well taken. And, as tests, they may be amended so as to make the tests more efficacious. But, as tests are critical in their nature, they should be free from criticism themselves; and, for this reason, Courts are slow in allowing motions to dismiss and demurrers to be amended.

<sup>2</sup> See Chapter on Amended and Supplemental Bills, *post*; and see Index for various sections on Amendments.

<sup>3</sup> See, *ante*, § 350.

<sup>4</sup> It will be seen, upon a critical survey of the foregoing tests, that, after all, *argument* is the final

and supreme test of the sufficiency of every pleading; and, authority, statute, and reason are the three arbiters, to determine the sufficiency of the argument. *Ratio et auctoritas duo clarissima mundi lumina.* (Reason and authority, the two brightest lights of the world.)

ARTICLE II.

EXCEPTIONS TO ANSWERS.

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| <p>§ 420. Testing the Sufficiency of Answers.</p> <p>§ 421. When Exceptions to an Answer will Lie.</p> <p>§ 422. When Exceptions to an Answer will not Lie.</p> | <p>§ 423. Frame and Form of Exceptions to Answers.</p> <p>§ 424. How Exceptions are Disposed Of.</p> |
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§ 420. **Testing the Sufficiency of Answers.**—It must be remembered, that an answer under oath is both a pleading and a deposition. As a pleading, it is not subject to any test as to its sufficiency except at a hearing on bill and answer, the test then being as to whether it is sufficient to bar complainant's right to relief. As a deposition, however, an answer can be excepted to, on the ground of the insufficiency of its responses to the charges and interrogatories contained in the bill. The exceptions challenge the sufficiency of the answer as a deposition, pointing out with particularity wherein the answer fails to respond to the discovery called for in the bill. These exceptions are, in their turn, tested by argument, and are often disallowed as not well taken.

§ 421. **When Exceptions to an Answer Will Lie.**—As already fully shown, a sworn answer must admit or deny every material allegation in the bill; and must set forth fully and frankly the details of particular matters called for by the bill; and must, at the same time, be free from all scandalous and impertinent matter. If the complainant, upon an examination of the answer, finds that (1) it does not admit or deny all the material allegations of the bill, or (2) does not set forth fully and frankly the particular matters called for,<sup>1</sup> or (3) contains matters that are scandalous or impertinent, he may test its sufficiency by filing written exceptions to it, pointing out such parts of the bill as are insufficiently answered, or such matters in the answer as are scandalous or impertinent.<sup>2</sup> The Court may, also, on its own motion, except to an answer because of its prolixity, and its unnecessary and false allegations, and may order the Master to strike out particular parts of it, or to revise it.<sup>3</sup>

When a partial demurrer, or a partial plea, has been overruled, and has left so much of the bill unanswered as was covered by the demurrer or the plea, the complainant must except to the answer, if he wishes a fuller answer; because, an answer being on file, the defendant is not bound to answer further, unless exceptions are taken. So, when a plea is ordered to stand for an answer, with liberty to except, the complainant may file exceptions to such answer, so as to obtain a response to so much of the bill as is not covered by the plea.

<sup>1</sup> Howsoever evasive and unresponsive an answer may be, it will stand as a sufficient answer, unless the complainant, by due exceptions, compel a more direct, and more responsive answer. *Phillips v. Overton*, 4 Hay., 292; *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 603.

<sup>2</sup> 1 Dan. Ch. Pr., 758-760, notes. Formerly, all answers were under oath, and one of the main objects of the bill was to extort testimony from the defendant, in support of the complainant's case. Then, answers were frequently evasive, insufficient, irrelevant, irresponsible, impertinent, and scandalous, and exceptions were constantly resorted to, in order to enforce fuller, and more direct answers, and to purge the answer of its irrelevant, irresponsible, impertinent, and scandalous matter. But, now that sworn answers are seldom called for, exceptions to answers have become correspondingly seldom. An-

swers were, formerly, both depositions and pleadings; now, they are, generally, pleadings only. See, *ante*, § 361. The best rule to ascertain whether the matter in question is impertinent is to see whether the subject of the allegation could be put in issue, or given in evidence between the parties. 1 Barb. Ch. Pr., 202. As to what matters are impertinent, and what scandalous, see, *ante*, § 150.

<sup>3</sup> Code, § 4316. It has been well said, that "The Court itself was concerned to keep its records clean, and without dirt, or scandal, appearing thereon." Lord Eldon said, with reference to the subject of scandal in proceedings, that he did not think that any application, by any person, was necessary; and that the Court ought to take care that allegations, hearing cruelly upon the moral character of individuals, and not relevant to the subject, should not be put upon the record. 1 Dan. Ch. Pr., 351.

In such a case, a plea is only a partial answer. But if a plea is ordered to stand for an answer without express liberty to except, no exceptions can be taken.<sup>4</sup>

Exceptions to an answer must be filed by the complainant's Solicitor, within twenty days after he receives notice of the filing of the answer, or the right to file them will be waived.<sup>5</sup>

§ 422. **When Exceptions to an Answer Will Not Lie.**—Exceptions for insufficiency of discovery will not lie to an answer, the oath to which the complainant has waived, because such an answer is not evidence, but only a pleading;<sup>6</sup> neither will exceptions for insufficiency of discovery lie to the answer of an infant, nor to the answer of a corporation, nor to the answer of an Attorney-General, nor to the answer of a guardian *ad litem*;<sup>7</sup> but they will lie to the answer of a general guardian.<sup>8</sup> Exceptions will not lie to an answer because it does not state fully and explicitly matters that are purely in avoidance.<sup>9</sup>

The complainant cannot except to an answer to an amended bill, on the ground that such answer does not respond to matters contained in the original bill; because, by not excepting to the answer to the original bill, he admitted the sufficiency of such answer. For a like reason, if, after filing exceptions, the complainant amends the averments of his bill, he will be considered as having waived his exceptions.<sup>10</sup>

Where there is a plea, or a demurrer, to a part of the bill, and an answer to the residue, if the complainant except to such answer before the argument of the plea or demurrer, the effect of such exception is to admit the validity of the plea or demurrer.<sup>11</sup>

§ 423. **Frame and Form of Exceptions to Answers.**—Exceptions to an answer must point out particularly in what respects the answer is insufficient, or what matter is scandalous or impertinent. A general exception will be deemed no exception. The complainant must put his finger on each material allegation in the bill not answered, or not sufficiently answered. Exceptions founded on verbal criticisms, slight defects, and immaterial matters, will be invariably disallowed, and treated as vexatious.<sup>12</sup> Each ground of exception should be separately and specifically stated, and the various exceptions consecutively numbered. They must be properly entitled, and signed by the complainant, or his Solicitor. Verbal exceptions to an answer will not be considered.

If there be separate answers by different defendants, separate exceptions must be filed to each answer.<sup>13</sup>

The frame of exceptions to answers will be better seen by reference to the following forms:

#### EXCEPTIONS TO AN ANSWER FOR SCANDAL, AND IMPERTINENCE.<sup>14</sup>

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.— In Chancery, at Knoxville.

The complainant, John Doe, excepts to the answer of the defendant, Roland Roe, because of its scandal.

1st. For that the words in paragraph 3 [*or*, on page 2] of said answer, beginning with the word, "Complainant," and ending with the words, "well knew these facts," are scandalous.

2d. For that the whole of paragraph 4 [*or*, page 3] of said answer is scandalous.

<sup>4</sup> 1 Dan. Ch. Pr., 761.

<sup>5</sup> As soon as an answer is filed, the Master must notify the complainant's Solicitor thereof, by letter, or otherwise; and such Solicitor, if he desires to except to the answer, must file his exceptions within twenty days after receipt of such notice. Code, § 4400; Ch. Rule, I., § 5; Jones v. Carper, 2 Tenn. Ch., 626; Stadler v. Hertz, 13 Lea, 317. See Waiver, *ante*, § 71.

<sup>6</sup> Sheppard v. Akers, 1 Tenn. Ch., 326; 1 Barb. Ch. Pr., 143. But an unsworn answer may be excepted for scandal and impertinence. *Ibid.*

<sup>7</sup> Sheppard v. Akers, 1 Tenn. Ch., 326; Smith v.

St. Louis M. L. Ins. Co., 2 Tenn. Ch., 599; 1 Dan. Ch. Pr., 760, note.

<sup>8</sup> 1 Barb. Ch. Pr., 177. In consequence of the ruling that an unsworn answer can not be excepted to for insufficiency of discovery, exceptions are now seldom filed. See, *ante*, § 361.

<sup>9</sup> Lanum v. Steel, 10 Hum., 284.

<sup>10</sup> 1 Dan. Ch. Pr., 762.

<sup>11</sup> 1 Barb. Ch. Pr., 178, 183.

<sup>12</sup> 1 Dan. Ch. Pr., 763-764.

<sup>13</sup> 1 Dan. Ch. Pr., 764.

<sup>14</sup> The foregoing form may be used in case of exceptions when taken by a defendant for scandal in the bill.

3d. For that the words in paragraph 5 [*or*, on page 4] of the answer, beginning with the words, "And complainant prompted," and ending with the words, "were well known in the community," are impertinent.

Wherefore, the complainant prays that said scandalous and impertinent matter be expunged from the answer.

LEWIS TILLMAN, JR., Solicitor.

**EXCEPTIONS TO AN ANSWER FOR INSUFFICIENCY.**

John Doe,

*vs.*

Richard Roe, *et al.* }

No. 618.— In Chancery, at Knoxville.

The complainant, John Doe, excepts to the answer of the defendant, Richard Roe, because of its insufficiency.

1st. For that the defendant has not answered to the best of his knowledge, remembrance, information and belief whether [*such an allegation or charge in paragraph 3 of the bill is true, specify the allegation, or charge.*]

2d. For that the defendant has not answered whether he did or not [*setting forth a charge*], as in paragraph 3 of the bill it is alleged he did.

3d. For that the said defendant has not in his said answer set forth and discovered how, when, and to whom he paid the money by him received from the complainant, as alleged in paragraph 4 of the bill.

4th. For that the said defendant has not fully answered as to the matters and charges set forth in paragraph 5 of the bill.

5th. For that the said defendant has not fully answered and discovered when, how, and to whom he transferred the funds that went into his hands as alleged in paragraph 6 of the bill.

6th. For that the said defendant has not to the best of his knowledge, remembrance, information and belief, answered and set forth a full, just and true inventory of the goods and chattels, notes and accounts, and other effects that came into his hands, or under his control, or should by due diligence have come into his hands, belonging to said estate [*or to said partnership, or to complainant,*] and how, when and to whom, and for how much, the same or any part and what part thereof has been sold or disposed of, and what part has not been disposed of, and what is become thereof, as he was called on and required to do in the bill.

Wherefore, the complainant prays that the said respondent may be compelled to put in a full and complete answer to complainant's bill.

T. S. WEBB, Solicitor.

**RULING OF THE MASTER ON EXCEPTIONS, AND APPEAL.**

[*The ruling of the Master is ordinarily written immediately beneath the exceptions, if there be sufficient room.*]

The 1st, 2d and 6th exceptions allowed, the others disallowed.

July 24, 1891.

W. L. TRENT, C. & M.

From the ruling of the Master on the 3d, 4th and 5th exceptions, complainant appeals to the Chancellor.

T. S. WEBB, Solicitor.

July 24, 1891.

From the ruling of the Master on the 1st, 2d and 6th exceptions, the defendant appeals.

July 25, 1891.

LEON JOUROLMON, Solicitor.

§ 424. **How Exceptions are Disposed of.**—The complainant must set his exceptions down for hearing before the Master, within ten days after they have been filed,<sup>15</sup> or upon failure to do so, the answer will be deemed sufficient. Upon the exceptions being thus set down for hearing, the Master shall act upon them immediately; and, if allowed, he shall notify the defendant's Solicitor to file a sufficient answer within thirty days. From the action of the Master allowing the exceptions, the defendant may, within the thirty days, appeal to the Chancellor.<sup>16</sup> If the defendant, in obedience to the Master's order, file an answer deemed sufficient by the latter,<sup>17</sup> he shall, by letter or otherwise, notify the complainant's Solicitor of the same, and he may appeal to the Chancellor within ten days after the notice. These various appeals must be acted on by the Chancellor at his earliest convenience; and he may hear them in vacation, and may make such order in the matter of the appeal as may be proper.<sup>18</sup>

<sup>15</sup> For good reasons, shown by affidavit, the Chancellor may allow further time to file exceptions. *Marsh v. Crawford*, 1 Swan, 116.

<sup>16</sup> Ch. Rule, I., §§ 4-5. The Chancellor can not pass on exceptions, except on appeal. The Master must first act upon them. If exceptions are filed in open Court, they may be stricken from the files.

*Wood v. McFerrin*, 2 Bax., 493; *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 604.

<sup>17</sup> The Master should, in such a case, refuse to receive and file an answer by him deemed insufficient. Exceptions to an answer to exceptions are wholly inadmissible, under our practice.

<sup>18</sup> Code, §§ 4402-4404; Ch. Rule, I., §§ 4-5; § 1190, *post*.

If the defendant, upon exceptions sustained to the sufficiency of his answer, neglects and refuses to put in a sufficient answer, or shall put in another insufficient answer, the complainant may take his bill for confessed as to the part to which his exceptions relate, and proceed with the cause as in other cases;<sup>19</sup> or he may, at his election, have the defendant attached, in which latter case the same procedure may be had as though no answer, at all, had been filed.<sup>20</sup>

The filing of exceptions to an answer does not delay the taking of depositions, or otherwise preparing the cause for hearing.<sup>21</sup>

If the Master allow the exceptions, or any of them, he will so find, putting his findings in writing, at the foot of the exceptions; and he will date and sign his rulings; and, at once, give the proper notice of his action. The party desiring to appeal from the rulings of the Master, will write his appeal immediately below the ruling appealed from, and will date and sign it.<sup>22</sup>

There is some difference in practice between exceptions for insufficiency and exceptions for scandal and impertinence: the latter exceptions may be filed and acted on at any time, by leave of the Court; indeed, the Court may, on its own motion, or upon application of the opposite party, refer the answer to the Master to be revised, or order scandalous and impertinent matter to be stricken out of the answer.<sup>23</sup>

#### ACTION OF THE COURT ON EXCEPTIONS TO AN ANSWER.

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.— In Chancery, at Knoxville.

The exceptions taken by the complainant to the answer of the defendant, Richard Roe, because of its insufficiency, coming on to be heard on appeals from the rulings of the Master, and the same having been argued by counsel, it is ordered that the 1st, 2d and 6th exceptions be allowed and the 3rd, 4th and 5th exceptions be disallowed; and it is ordered that the defendant, Richard Roe, file a sufficient answer within thirty days, or the complainant may take his bill for confessed as to the parts to which his said exceptions relate, and proceed with the cause as in other cases.<sup>24</sup>

### ARTICLE III.

#### SUGGESTIONS AS TO TESTING PLEAS.

§ 425. Suggestions to the Solicitor of the Complainant. | § 426. Suggestions to the Solicitor of the Defendant.

§ 425. **Suggestions to the Solicitor of the Complainant.**—It will be found important for you to keep in mind the following matters in reference to the testing of pleadings:

1. **Suggestions as to Demurrers.** Do not specially dread a demurrer: as a rule, demurrers are the complainant's friends: if the bill is utterly unmain-  
tainable, a demurrer will end it, at the least cost; if, on the other hand, it is at  
all maintainable, the demurrer will ordinarily point out to you some deficiency

<sup>19</sup> Code, § 4407. The complainant, in such a case, in Judge Cooper's opinion, may take the whole bill for confessed, if he so chooses. *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 605. See, also, *Marsh v. Crawford*, 1 Swan, 116, which holds that an answer, well excepted to, and adjudged imperfect, is no answer. *Lanum v. Steel*, 10 Hum., 280.

<sup>20</sup> *Marsh v. Crawford*, 1 Swan, 116; 1 Dan. Ch. Pr., 775. For the procedure, by attachment, see, *ante*, § 203.

<sup>21</sup> Ch. Rule, I, § 5; Code, § 4406.

<sup>22</sup> The practice, in acting on exceptions, and in appealing therefrom, is the same as on exceptions to depositions. See, *post*, § 501.

<sup>23</sup> Code, § 4316. The Chancery Rules require exceptions for insufficiency to be filed in twenty days, but do not limit the time within which exceptions for scandal and impertinence may be filed. Ch. Rule I, secs. 4 and 5; see, *post*, § 1190.

<sup>24</sup> Code, § 4407; 4369, sub-sec. 5. What is meant by complainant "proceeding with the cause as in other cases" is not clear: it probably means proceeding with the cause as in other cases where bills are taken for confessed, that is, if the part confessed entitles complainant to a final decree he may take it, otherwise he must make the necessary proof. See, *ante*, §§ 205-213.

in the bill which you can readily correct, and which might have greatly injured you at the hearing, had not the demurrer pointed it out to you in season. If the demurrer shows some deficiency, at once amend your bill, and have copy and notice thereof duly served on the defendant. If, however, you wish to obtain the benefit of argument, and of the Court's opinion, you will set the demurrer down with the Clerk to be argued. Remember, nevertheless, that you may amend before argument of the demurrer without leave of the Court, and at slight cost; while, after argument, you must obtain leave of the Court, and submit to such terms as the Court may impose;<sup>1</sup> and the Court may refuse to allow you to amend, or may tax your client with all the costs of the cause.<sup>2</sup>

**2. Suggestions as to Pleas.** As soon as you are notified<sup>3</sup> of the filing of a plea, you should consider it; and if you deem it sufficient you should file a replication; if you deem it insufficient you should set it down with the Clerk, in writing, to be argued.<sup>4</sup> If you fail to do this within twenty days, the defendant may proceed to take proof on it; or, if the local rule permit, may take his plea for confessed, for want of a replication. And remember, that a deficient plea, one you might have had adjudged insufficient, may defeat your suit, if you are forced to a hearing on an issue of fact as to its truth.<sup>5</sup>

**3. Suggestions as to Answers.** Whenever an answer is filed, it is the duty of the Clerk and Master to forthwith notify you.<sup>6</sup> On receiving such notice, you should within twenty days carefully peruse the answer, in order to see: (1) whether its disclosures are such as to necessitate an amendment of your bill; (2) whether you desire to except to it for insufficiency; and (3) whether its admissions are sufficient to justify you in setting the cause down for hearing on bill and answer.

If an amendment to your bill is necessary, you should take the requisite steps with all diligence: if you desire to except to the answer for insufficiency, you must file your exceptions within twenty days after receipt of notice of the filing of the answer; if you wish to set the cause for hearing on bill and answer, you must do so within twenty days after notice of the filing of the answer; or, in case of exceptions and a new answer, then within twenty days after notice of the filing of a sufficient answer.<sup>7</sup>

If you fail to except to an answer for insufficiency, within the twenty days, you thereby admit the answer to be sufficient; and the statute operates as a replication to the answer, and thus makes an issue of fact. If you have called for a discovery from the defendant on oath, you are not likely to obtain a full discovery without the coercion of exceptions to his answer for insufficiency. Hence, the vital importance of filing such exceptions within the twenty days.

Remember that, if you file exceptions to an answer for insufficiency, you must set them down for hearing before the Master within ten days after they are filed; or, upon your failure to do so, the exceptions will be deemed to be abandoned, and the answer will be deemed sufficient.<sup>8</sup>

**§ 426. Suggestions to the Solicitor of the Defendant.**—Inasmuch as you represent the defendant, the same measure of diligence and vigilance is not ordinarily required of you and your client as are required of the complainant. The following matters, however, demand prompt and intelligent attention:

**1. Suggestions as to the Bill.** As soon as you are retained, procure a copy of the bill, so that you may be able to apply the tests of its sufficiency in due season. Remember, that after a *pro confesso* has been entered against your client, it is too late to move to dismiss, and too late to demur. If, on inspecting

<sup>1</sup> Code, §§ 4333-4334.

<sup>2</sup> Crowder v. Turney, 3 Cold., 551; Code, § 2938. See, Amended Bills.

<sup>3</sup> It is the duty of the Clerk and Master to notify you of the filing of a plea, as well as of an answer, a plea being a special answer.

<sup>4</sup> See, form of setting down, *ante*, § 350.

<sup>5</sup> See, *ante*, § 351.

<sup>6</sup> Code, §§ 4400; 4422.

<sup>7</sup> Code, §§ 4322; 4400-4403; Ch. Rule, I, § 5, *post*; § 1190, sub-sec. 5.

<sup>8</sup> Ch. Rule, I, § 5; *post*, § 1190, sub-sec. 5.

the bill, you can have it dismissed on motion, enter your motion, specifying the particular ground, or grounds, on which it is based. If you can destroy the bill, or have any substantial part of it dismissed, by demurring, file your demurrer, being careful (1) to make it special, and (2) if it be to a part only of the bill, to confine it, by appropriate language, to such part. If the result of a demurrer will be merely to compel the complainant to amend his bill, consider whether such a demurrer will not profit him more than you.

2. **Suggestions as to the Answer.** If you receive notice that exceptions to your answer have been sustained by the Clerk and Master, at once consider whether you will file a further answer, or will appeal from the ruling of the Master. Remember, that if you fail to appeal, within thirty days after notice to file a sufficient answer, it will be too late to appeal; and, that if a sufficient answer is not filed in time, your client is liable to a *pro confesso*, or to an attachment, as the complainant may elect.

## CHAPTER XXII.

## AMENDED AND SUPPLEMENTAL PLEADINGS.

- ARTICLE I. Amendments Generally Considered.  
 ARTICLE II. Amended and Supplemental Bills.  
 ARTICLE III. Amended Demurrers and Pleas.  
 ARTICLE IV. Amended and Supplemental Answers.

## ARTICLE I.

## AMENDMENTS TO PLEADINGS GENERALLY CONSIDERED.

§ 427. What Matters May be Amended.

§ 428. General Rules as to Amendments.

§ 429. How to Prevent Amendments becoming Obstacles to Justice.

§ 427. **What Matters May be Amended.**—Perfection is the exception, and imperfection the rule, in all human proceedings;<sup>1</sup> and the right to amend what was defectively done without bad faith, is deemed sacred, provided such right is sought to be exercised in good faith, in good season, in due form, and before any contrary right has intervened. Imperfections and errors occur often in judicial proceedings, and both the Courts and the Legislature have endeavored to make rules whereby such imperfections and errors would work as little hardship as possible. It has been enacted that no summons, writ, pleading, process, return, or other proceeding in any civil action in any Court, shall be abated or quashed for any defect, omission, or imperfection;<sup>2</sup> and that no civil suit shall be dismissed for want of necessary parties, or on account of the form of the action, or for want of the proper averments in the pleadings; but the Courts shall have power to change the form of action, strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the Court, and to allow all proper averments to be supplied.<sup>3</sup>

These statutory provisions are full of beneficence, and all-comprehensive; and in construing them, the Courts hold that any and every paper filed, or proceeding instituted, in a Court of Justice is amendable, and cannot be brought to nought for any defect, omission, or imperfection, provided the defect or omission be supplied, or the imperfection be corrected, in the right way and at the right time.

Any and every paper filed in any proceeding in the Chancery Court is amendable, unless it be so defective as to be a nullity. If it has a root of substance, its trunk may be pruned, or new shoots may be added; but if it has no substance or virtue at all, then there is nothing to amend.<sup>4</sup> Amendments must be made to an existing substance, either by changing its form, or by adding omissions, or by correcting defects or imperfections. This rule applies to process of all sorts, to bonds and pleadings of all kinds, to motions, petitions, reports by the Master, proceedings in the Master's office, and to a limited extent, even to the orders and decrees of the Court. The law intends that suits shall be tried upon their merits, without being entangled in ceremonies, or strangled by formalities,<sup>5</sup> and the object of the statutes quoted was to place common

<sup>1</sup> *Nihil simul inventum est et perfectum.* (Nothing is made and perfected at the same time.) If thou, Lord, wilt be extreme to mark what is done amiss, O Lord, who may abide it? Psalm, 130.  
<sup>2</sup> Code, § 2863.

<sup>3</sup> Code, § 2869. The subject of amendments is specially treated of under the head of the various pleadings subject to be amended.

<sup>4</sup> *Maples v. Tunis*, 11 Hum., 111.

<sup>5</sup> *Hunter v. Sevier*, 7 Yerg., 136.



sense upon her native seat, from which she had been driven by technicalities." Forms were invented to aid, and not to impede, the administration of justice.

§ 428. **General Rules as to Amendments.**—Courts should be liberal in allowing all amendments to pleadings, necessary to enable a party to have his side of the controversy fully presented on its merits;<sup>7</sup> but the Court is under no obligation to favor a party who is interposing obstacles to a hearing on the merits. This liberality in allowing amendments should be balanced by an equivalent severity in the imposition of costs on the parties seeking to amend. The following are the general rules on the subject of amendments:

1. **The Proposed Amendment Must be Pertinent and Germane to the Controversy,** and must be of such a character that it will either enable the applicant the better to present his case, or will enable the Court the better to understand the controversy, and to do complete justice between the parties. No amendment that is impertinent, or multifarious, or that brings in foreign matters, or that is inconsistent with, or antagonistic to, the claims or prayers of the original bill, or that is proper matter for another suit, should be allowed on any terms.<sup>8</sup>

2. **The Application to Amend Should be Made at the First Opportunity** after the applicant has learned of the necessity of the amendment, or of the existence of the facts on which his application is based.<sup>9</sup> A party who allows his adversary to take steps, or costs to be unnecessarily incurred, after he has knowledge of a defect, and an opportunity to amend, should be held estopped to make the amendment. Good faith requires diligence in such cases. Courts are slow to help the slow.

3. **The Application to Amend should be Made Before the Court Acts on the particular pleading** sought to be amended. A party should not be allowed to experiment with his pleading, by waiting to see what the Court may think of it, after his attention has been called to its defects. A party who voluntarily assumes risks, should be bound by the result, and should not be heard to complain, or to ask another trial of chance.<sup>10</sup>

4. **The Application should Not Only be at the Right Time,** as stated in the two foregoing rules, but it should be made in the right way, and in accordance with the practice and rules of the Court. If affidavits of diligence and good faith are required by the rules or practice, they should be duly presented, in support of the application. Statements "as on affidavit," are almost in the nature of a contempt of Court on the part of a suitor or Solicitor who is already in default, because he is seeking to correct one error by making another.<sup>11</sup> If ever a Solicitor should diligently, fully, and cheerfully, comply with the requirements of every rule, however stringent, it is when, being in default, he is confessing it, and asking leave of the Court to make the necessary amendment. If the rules of the Court require that the proposed amendment should be reduced to writing, and sworn to before presented, this, also, should be done. And more: all the requirements of the rules should not only be complied with, but this compliance should be frank and prompt, not sullen and slow.

5. **And the Application to Amend should be Accompanied by an Offer to Pay Such costs,** or to comply with such other terms and requirements the Court may impose, as the price or condition of allowing the amendment to be made.<sup>12</sup>

<sup>7</sup> Henderson v. King, 4 Hay., 97. As, in some religions, images, invented to aid in the worship of God, became, in process of time, themselves the objects of worship, and thus supplanted God himself; so, in some Courts, the forms invented to aid in the administration of justice, have come to be regarded of more importance than justice itself. See, *ante*, § 43.

<sup>8</sup> Patton v. Dixon, 21 Pick., 97, citing the above section of this book, then § 427.

<sup>9</sup> 1 Dan. Ch. Pr., 402; 426, notes; Bosley v. Phillips, 3 Tenn. Ch., 649; Masson v. Anderson, 3 Bax., 290; Rogers v. Simpson, 10 Heisk., 655; Scott v. Tucker, 8 Tenn. 620.

<sup>9</sup> 1 Dan. Ch. Pr., 403; 415, note 5; Rodgers v. Rodgers, 1 Paige, (N. Y.), 424; Marr v. Wilson, 2 Lea, 329.

<sup>10</sup> Bills are sometimes allowed to be amended, after a demurrer has been sustained; but, in such cases, the complainant should be visted with costs. Code, § 4334.

<sup>11</sup> 1 Dan. Ch. Pr., 402; 403; 415; 424; 425; 704, notes. Rodgers v. Rodgers, 1 Paige, (N. Y.), 424. As to "showing cause," see, *ante*, § 62, sub-sec. 8.

<sup>12</sup> The Court may, in a proper case, charge the party amending with all the costs of the cause. Mt. Olivet Co. v. Budeke, 2 Tenn. Ch., 480.

When all the foregoing requirements are complied with, the applicant is ordinarily entitled, as a matter of right, to make the amendment desired; and if his application is denied, he is in the best possible condition to have the ruling of the Chancellor reversed in the Supreme Court. But when he fails to comply with the foregoing rules, then the granting of the amendment becomes a matter of discretion, and the Supreme Court will not, ordinarily, undertake to revise that discretion.

6. **But Where the Pleading is in Behalf of an Infant, or Person of Unsound Mind,** the Court will not require the same measure of diligence, in the matter of amendments, as when the party applying is under no disability. Courts consider infants and persons of unsound mind as under their general guardianship, and will not permit them to suffer either by error of omission, or by error of commission, in the pleadings of their next friends, or guardians. The Court will even act affirmatively in their behalf, when necessary, on its own motion; and will order an improper admission or submission in a pleading, filed in behalf of an infant, to be stricken out, or an affirmative amendment to be made, when necessary to the infant's rights.<sup>13</sup>

7. **But When an Amendment to a Bill or Answer is Manifestly in Furtherance of justice,** and necessary to prevent an irreparable injury, or to prevent the adverse side from obtaining the benefit of an unconscientious advantage, the Court will, as a general rule, allow any such amendment at any stage of the suit,<sup>14</sup> taking care, however, to punish any negligence or delay, by the imposition of penal costs.

§ 429. **How to Prevent Amendments Becoming Obstacles to Justice.**—It is manifest that if Courts were to allow amendments of any kind, at any stage of the litigation, without restriction, impediment, or penalty, it would not only be destructive of good practice and correct pleading, but great delays and difficulties in judicial procedure would be the result. License is as dangerous as tyranny, and want of forms is as detrimental to the administration of justice as is the excess of technicalities.

If amendments are allowed without affidavits showing diligence, good faith, and a good excuse, and without the imposition of penal costs, the practice of the Court will soon degenerate into a comedy of errors; the rules of pleading will be utterly ignored; confusion and uncertainty will reign where order and certainty should be supreme; and Justice will be obliged to grope her way, in her own temple, through dark labyrinths, without a guide.

If no penal costs are imposed, Solicitors will cease to object to defects in the pleadings or proceedings of their adversaries, inasmuch as their objections will avail them nothing; but, on the other hand, will be a downright benefit to the party in default, by enabling him to perfect his case. "The glorious uncertainty of the law" will become then a reality, and not a jest. The practice prevalent in our County Courts will become the course of procedure in all the Courts; and our Supreme Court will find itself so overwhelmed by irregularities and deficiencies that it will be unable to administer justice on appeal.

The remedy for these evils consists in stern rules, sternly enforced, requiring:

1. That every motion to amend shall be made in due season; and shall, in case of delay, be supported by an affidavit showing merits, diligence, and good faith.
2. The affidavit should specify the proposed amendment, and should give a sufficient excuse for any apparent delay.
3. If a pleading is to be amended, the truth of the amendment should be sworn to.
4. The amendment,

<sup>13</sup> Sto. Eq. Pl., § 892; 1 Dan. Ch. Pr., 72.

<sup>14</sup> As illustrations of an irreparable injury, and an unconscientious advantage: (1) An irreparable injury to a complainant would arise, should he be not allowed to so amend as to include in his suit some proven item that he would be harred from recovering in another suit; and, (2) on the other hand, the benefit of an unconscientious advantage would

be obtained by a complainant recovering on a claim, which, the proof shows, had been paid, released, or otherwise discharged, because the fact of payment, or release, had not been set up in the answer. See, *Furman v. North*, 4 Bax., 296; *Sto. Eq. Pl.*, § 902; *McEwen v. Troost*, 1 Sneed, 186; *McVey v. Ely*, 5 I. ea., 438.

if it causes any delay, or additional proof, should be granted only on the payment of a portion, or all, of the costs of the cause.<sup>15</sup>

Solicitors dislike to write affidavits, and clients dislike to pay costs. The Chancellor will be importuned to hear statements "as on affidavit," and to forego the imposition of costs; but affidavits and costs constitute the penalty parties must suffer for their negligence, and the price parties must pay for leave to amend; and the Chancellor who enforces the rule rigorously will soon find that applications to amend will seldom be made, that the practice in his Court will greatly improve, that diligence will characterize the members of his bar, and that general satisfaction and general commendation will be the result.

Patched-up pleadings are alike discreditable to the Chancellor and to the Solicitor responsible therefor — discreditable to the Chancellor for tolerating such looseness of pleading, and discreditable to the Solicitor because of his ignorance, or negligence.

## ARTICLE II.

### AMENDED AND SUPPLEMENTAL BILLS.

§ 430. When Bills May be Amended. | § 431. Supplemental Bills.

**§ 430. When Bills May be Amended.**—The consideration of Amended and Supplemental Bills requires so much space that a separate Chapter will be hereinafter devoted to them.<sup>1</sup> It may be stated generally, however, that a large liberty of amendment is allowed the complainant. Courts are made for complainants, and the law gives them all reasonable opportunities to so amend and perfect their bills as to be able to bring before the Court, in proper form, the particular matters they desire to submit to its adjudication. If the amendment is made before a plea or answer is filed, or before a demurrer is argued, it may be done as a matter of course, without any leave of the Chancellor, or Master, as hereafter more fully shown. In all other cases, the bill can be amended only by leave of the Chancellor, given in open Court.<sup>2</sup> Such leave, however, will readily be given when (1) the importance of the amendment is made to appear, and (2) diligence and good faith are shown by affidavit in support of the application. The bill may even be amended at the hearing, when (1) merits manifestly appear in the record, and (2) no *laches*, or bad faith, taints the conduct of the complainant, and (3) when such an amendment will not operate harshly, or unjustly, upon the defendant, or take him by surprise, or cut him off from a valid defence he might have made.

If new facts arise, or new parties acquire interests, after the original bill has been filed, a supplemental bill is the proper pleading to bring such new matters, or parties, before the Court; and application to file such a bill should be made as soon as the facts come to the complainant's knowledge; and it is good practice to accompany the application with an affidavit, explaining any seeming delay; and with a copy of the proposed supplemental bill duly verified, as will more fully be shown in the Chapter on Amended and Supplemental Bills, to which reference is made for a fuller consideration of the subject.

<sup>15</sup> There is no hardship in these rules. Why should your client suffer because of the negligence, or ignorance, of his adversary, especially if that adversary be the complainant? And, on the other hand, why should you not suffer the just penalty of your own want of diligence and skill? He who seeks *Eouity*. must do *Eouity*. To allow amend-

ments, without terms, tends to corrupt the practice, degrade the science of pleading, and to put negligence on a par with diligence, and ignorance on a par with skill. See *Waiver*, *ante*, § 71; and *Show Cause*, *ante*, § 62, sub-sec. 8.  
<sup>1</sup> See, *post*, §§ 666-697.  
<sup>2</sup> Code. §§ 4332-4334.

§ 431. **Supplemental Bills.**—Any change may be made in the matter of an original bill, or in the parties thereto, before an answer has been put in; and such changes may be made, of course, and without application to the Court.<sup>3</sup> These changes are made as amendments to the original bill, and the bill when so changed is called an amended bill. But when it becomes necessary to change the matter, or parties, of a bill, after an answer has been put in, this change is made by a supplemental bill, or, as it is often termed, an amended and supplemental bill.<sup>4</sup> In strictness, however, a supplemental bill is more comprehensive than an amended bill, and may include matter which has come into existence since the original bill was filed; whereas, an amended bill speaks as of the date of the filing of the original bill, and cannot, therefore, properly include matters which have come into being since the original bill was filed.<sup>5</sup>

The subject of supplemental bills will be hereafter fully treated in a separate Article; but it may be stated here that the office of a supplemental bill is to bring before the Court: 1, Matters pertinent to the original suit which have occurred since the bringing of the suit; 2, Matters which existed when the suit was brought, but which cannot now be added to the original bill, because it has been answered, and the issues are made up; 3, Matters necessary to obtain an additional discovery, the necessity often arising because of the disclosures in the answer; 4, To bring new parties before the Court; and 5, To remedy defects in the prayer of the original bill.<sup>6</sup>

### ARTICLE III.

#### AMENDED DEMURRERS AND PLEAS.

§ 432. When Demurrers May be Amended. | § 433. When Pleas May be Amended.

§ 432. **When Demurrers May be Amended.**—As already stated, any pleading may be amended; and while demurrers are not regarded with favor by the Courts, nevertheless, on application before argument, the Court will readily allow a demurrer to be amended. If the bill is without Equity, the Court may, and perhaps should, allow the demurrer to be so amended as to reach the vulnerable part of the bill. So, if the demurrer is to the whole bill when only a part of the bill is demurrable, the Court may, on proper application, allow the demurrer to be so amended as to apply exclusively to that part of the bill liable to demurrer.<sup>1</sup>

The amendment of demurrers has already been fully considered,<sup>2</sup> and need not therefore be further elaborated here.

§ 433. **When Pleas May be Amended.**—In cases where a plea discloses a substantial ground of defence to the bill, but the plea has not been so framed as to sufficiently make the defence, the Court will, on proper application, allow the plea to be amended. If the plea is too defective to be amended, and there is an apparent ground of defence disclosed by the plea, the Court will allow the defendant to plead *de novo*.<sup>3a</sup> Amendments to pleas in abatement are more slowly allowed than to pleas in bar, for a party who disputes the jurisdiction of the Court should not ask any favors of a tribunal whose authority he disputes.

This subject will be found further considered under the head of Pleas.<sup>4a</sup>

<sup>3</sup> Code, §§ 4332-4333. See, also, Chapter on Amended and Supplemental Bills, *post*, §§ 666-697.

<sup>4</sup> The name of the bill is immaterial; the Court will have regard to its substance, and not to its name. *Dodd v. Benthall*, 4 Heisk., 601; *Majors v. McNeilly*, 7 Heisk., 294; *Cheek v. Anderson*, 2 Lea, 194; *Northman v. Liverpool Ins. Co.*, 1 Tenn. Ch. 312; *Maddox v. Apperson*, 14 Lea, 599; *Murphy v. Johnson*, 23 Pick., 552.

<sup>5</sup> See Chapter on Am. and Sup. Bills, *post*, §§ 666-697.

<sup>6</sup> Lube's Eq. Pl., 187-188, and notes. The Court will, however, ordinarily allow the prayer to be amended, on motion.

<sup>1</sup> 1 Dan. Ch. Pr., 584. See, *Fitzgerald v. Cummings*, 1 Lea, 222; *Riddle v. Motley*, 1 Lea, 468; 1 Barb. Ch. Pr., 111.

<sup>2</sup> *Ante*, §§ 306, note 33; 316.

<sup>3a</sup> 1 Barb. Ch. Pr., 127; 1 Dan. Ch. Pr., 703-704.

<sup>4a</sup> *Ante*, § 354.

## ARTICLE IV.

## AMENDED AND SUPPLEMENTAL ANSWERS.

§ 434. Amended Answers generally Considered.

§ 435. What Amendments May be Made to Answers.

§ 436. How an Answer is Amended.

§ 437. When a Supplemental Answer Must be Filed.

§ 434. **Amended Answers Generally Considered.**—In amending answers there is some difference between answers required to be sworn to and answers not so required. An answer sworn to is in the nature of a deposition as well as a pleading, while an unsworn answer is a pure pleading. Courts are very slow to allow a sworn answer to be amended; and it is only under very special circumstances that a defendant will be allowed to make any material alteration in it, after it has once been filed.<sup>1</sup> If, however, the Court is satisfied that the error, mistake, or omission, was the result of accident or inadvertence, that the proposed amendment is meritorious, that there is no bad faith in the matter, and that the application has been promptly made after the discovery of the error or omission, the amendment will ordinarily be allowed, on such costs as are equitable. The Court must, ordinarily, be satisfied of these facts, by the affidavit of the party making the application.

If the Court allows an unsworn answer to be withdrawn because prepared by counsel in the absence of the defendant, and a new answer to be filed in lieu, the original answer cannot be read as evidence against the defendant at the hearing.<sup>2</sup>

There is no limit to the time within which an application to amend an answer, or file a supplemental answer, must be made;<sup>3</sup> but the longer the lapse of time since the answer was filed, the more slow the Court is in granting the application, and the greater the costs the defendant will be required to pay. But where the complainant cannot be placed in the same situation he would have been in had the new matter been set up in due season, the Court will not permit an amendment to be made, or a supplemental answer to be filed.<sup>4</sup> Nevertheless, where a refusal to allow an amendment will work irreparable injury to the defendant, and give the complainant an unconscientious advantage, the Court will, at any stage of the suit, allow any amendment to an answer that is in absolute furtherance of justice,<sup>5</sup> always punishing the defendant for any negligence, or delay, by a proportionate imposition of costs.

The Court will always allow time in which to take proof upon any new issue of facts raised by an amended or supplemental answer, for otherwise such an amendment would be nugatory.<sup>6</sup>

§ 435. **What Amendments May be Made to Answers.**—There is no limit to the character of the amendments that may be made to an answer, except that

<sup>1</sup> 1 Barb. Ch. Pr., 164; 1 Dan. Ch. Pr., 778; Cook v. Bee, 2 Tenn. Ch., 343. In this case, the question: When, and how, answers may be amended, and what amendments are not admissible, is fully considered. See, also, Wilson v. Wilson, 2 Lea, 17; Sto. Eq. Pl., §§ 896-903.

<sup>2</sup> Hurst v. Jones, 10 Lea, 8.

<sup>3</sup> Furman v. North, 4 Bax., 296.

<sup>4</sup> 1 Dan. Ch. Pr., 782. Flora v. Rogers, 4 Hay., 202.

<sup>5</sup> In Furman v. North, 4 Bax., 296, the Supreme Court remanded the cause, with leave to the defendant to amend his answer, if desired, so as to put in issue a release of the debt sued for, such re-

The bill, in this case, was filed and answered in 1865; the release was executed in 1867, was proved in the cause in 1870, or 1871; and, in 1874, the Supreme Court granted leave to amend. Manifest justice required this amendment. In McVey v. Ely, 5 Lea, 438, the amended answer was allowed to be filed two years after the filing of the original answer, in order to give the defendant an opportunity to set up a defence, discovered since he filed his original answer. The defence, in this case, was the fraudulent alteration of the note sued on; and the refusal to allow the amendment would have been a violation of justice.

<sup>6</sup> Stull v. Goode, 10 Heisk., 58.

after one defence has been set up and proof taken thereon, the Court will not allow another and inconsistent defence to be set up by way of amendment, or by a supplemental answer.<sup>7</sup>

Amendments may be allowed to correct (1) a mistake or error in a matter of fact, or in the statement of a fact, or (2) a mistake in the admission of assets, or (3) to set up new matters of defence that have come to the defendant's knowledge since his answer was filed. Mistakes by counsel in drawing the answer, or in advising his client that it was not necessary to set up an omitted defence, may be corrected by prompt affidavit of the facts.<sup>8</sup> But no amendment will be allowed in order to plead the statute of limitations, or the statute of frauds,<sup>9</sup> unless, perhaps, where the application to amend is made with great promptness; nor will an amendment be allowed to set up any unconscientious defence. Where, however, such defences are defectively set forth, an amendment will be allowed to give the defendant the benefit of the defence he intended to set up.<sup>10</sup>

The Court is very reluctant to allow amendments after the proof has been taken;<sup>11</sup> nor will it allow an amendment based on the ground that the defendant answered under a mistake of law.<sup>12</sup> Amendments that contradict the statements in the first answer, or that change the ground of the defence, are inadmissible. The defendant must clearly show that it is due to justice to permit the defence already made to be altered in the manner proposed.<sup>13</sup>

**§ 436. How an Answer is Amended.**—If the amendment desired is in a small matter, not going to the merits, the Court will allow it to be made on motion; but if the defendant desires to amend his answer in a material point, he must present his own affidavit verifying the proposed amendment, explaining how the error, mistake, or omission happened, and excusing any apparent delay.<sup>14</sup> An application to file a supplemental answer must be supported in the same way.<sup>15</sup>

Applications to amend answers are, usually, made in open Court. In matters of urgency and moment, however, the application may be made to the Chancellor in vacation, on due notice to the complainant.

Unsworn answers are allowed to be amended with somewhat more liberality than where the defendant is required to answer on oath; nevertheless, the same rules apply. An unsworn answer is as much the solemn averment of record of the defendant as if sworn to.<sup>16</sup>

**§ 437. When a Supplemental Answer Must be Filed.**—If the proposed amendment is one that materially changes the nature of the defence set up, or necessitates any erasures, or serious interlineations, or brings forward new matter, or makes explanations, the defendant will be required to file a supplemental answer, and will not be allowed to make any erasures, or considerable interlineations, in his original answer.

The supplemental answer should be drawn and duly verified before being presented to the Court, and the application for leave to file should be supported by the affidavit of the defendant, and, if necessary, of his agent, or Solicitor, showing a sufficient reason why the facts contained in the supplemental answer were not introduced into the original answer, accounting for any apparent

<sup>7</sup> 1 Barb. Ch. Pr., 167; 1 Dan. Ch. Pr., 778-782; *Hardwick v. American Can Co.*, 7 Cates, 393. See *ante*, § 409.

<sup>8</sup> 1 Barb. Ch. Pr., 164-165; *Hurst v. Jones*, 10 Lea, 8.

<sup>9</sup> 1 Dan. Ch. Pr., 781; *Cook v. Evans*, 9 Yerg., 288; *Stull v. Goode*, 10 Heisk., 58; *Cook v. Bee*, 2 Tenn. Ch., 344; *Wilson v. Wilson*, 2 Lea, 17.

<sup>10</sup> 1 Barb. Ch. Pr., 164.

<sup>11</sup> An amendment to an answer should be made before the taking of proof when the matter of amendment is within the defendant's knowledge.

*McCarthy v. Catholic Knights*, 18 Pick., 345; *Peterson v. Turney*, 2 Ch. Apps., 519.

<sup>12</sup> 1 Dan. Ch. Pr., 779; *Stull v. Goode*, 10 Heisk., 66.

<sup>13</sup> *Cook v. Bee*, 2 Tenn. Ch., 343; *Wilson v. Wilson*, 2 Lea, 17.

<sup>14</sup> *Cook v. Bee*, 2 Tenn. Ch., 343. The affidavit of the Solicitor is not sufficient, unless the facts are exclusively within his knowledge. *Wilson v. Wilson*, 2 Lea, 17.

<sup>15</sup> 1 Dan. Ch. Pr., 781.

<sup>16</sup> *Cook v. Bee*, 2 Tenn. Ch., 343; *Wilson v. Wilson*, 2 Lea, 17.

delay, and averring that justice requires that he should be permitted to alter the defence already made.<sup>17</sup>

While by the strict rules of pleading, a defence arising after the cause is at issue, such as a payment, or release, or award, must be set up by a cross bill in the nature of a plea since the last continuance, nevertheless, under our liberal practice, a supplemental answer might be filed by leave of the Court, setting up such a defence,<sup>18</sup> and any other defence that has arisen since the original answer was filed.

An amended or supplemental answer may be in the following form :

**AMENDED OR SUPPLEMENTAL ANSWER.**

John Doe,	}	In the Chancery Court, at Nashville.
<i>vs.</i>		
Richard Roe, <i>et al.</i>		

The amended [*or*, supplemental] answer of Richard Roe to the bill filed against him and others in this cause.

This defendant, in addition to [*or*, in explanation of, *or*, in correction of,] the answer heretofore filed by him in this cause, leave of the Court having first been obtained, says that, [*Here set out the additions, explanations, or corrections, stated or referred to in the order of the Court allowing the amended or supplemental answer to be filed; and conclude as in an ordinary answer.*]

An amended or supplemental answer should be signed and sworn to; but if leave to file it has been previously obtained, and the oath of the defendant is waived by the bill, it need not be sworn to.

<sup>17</sup> 1 Dan. Ch. Pr., 781-782.

<sup>18</sup> *Furman v. North*, 4 Bax., 276; Sto. Eq. Pl., §§ 902-903.

## PART IV.

### PROCEEDINGS IN A SUIT IN CHANCERY, FROM THE CLOSE OF THE PLEADINGS TO THE CON- CLUSION OF THE HEARING.

#### CHAPTER XXIII.

##### HEARING A CAUSE ON BILL AND ANSWER.

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| § 438. Motion to Set a Cause for Hearing on Bill and Answer. | § 440. Form of Decree When a Cause is Heard on Bill and Answer. |
| § 439. Hearing a Cause on Bill and Answer.                   |   |

§ 438. **Motion to Set a Cause for Hearing on Bill and Answer.**—If, on reading the answer, the complainant is willing to admit the truth of the answer, he may, by motion, specially set the cause for hearing on bill and answer.<sup>1</sup> This motion may be made before the Master by the complainant, and entered on the rule docket; or it may be made in open Court. It must, however, be made within twenty days after complainant's Solicitor has notice of the filing of the answer; or, in case of exceptions and a new answer, within twenty days of his notice of the filing of a sufficient answer,<sup>2</sup> unless the Court allows the motion to be made after said time, which allowance the Court will readily make,<sup>3</sup> on due application, especially if no proof has been filed. The motion may be in the following form:

##### MOTION TO SET A CAUSE ON BILL AND ANSWER.

John Doe, }  
*vs.* }  
 Richard Roe. }

This cause is by the complainant this day specially set for hearing on bill and answer.

§ 439. **Hearing a Cause on Bill and Answer.**—When a cause has been set down for hearing by the complainant, on bill and answer, the answer is admitted by the complainant to be true; and therefore, no proof is needed,<sup>4</sup> unless it becomes necessary to prove some of the exhibits to the bill which have not been fully admitted, or to produce some record of the Court, to which the answer refers.<sup>5</sup>

<sup>1</sup> Code, §§ 4322; 4430. Setting a cause for hearing on bill and answer is in the nature of an oral demurrer to the answer.

<sup>2</sup> The reason of this is, that the lapse of twenty days is equivalent to the filing of a replication; Code, §§ 4322; 4328; and, under the former practice, a cause could not be set for hearing, on bill and answer, after replication; because a replication denied the truth of the answer; whereas, on setting a cause for hearing, on bill and answer, complainant admits the truth of the answer. 1 Barb. Ch. Pr., 318; 249-252. The Court, however, will permit a cause to be specially set for hearing, on bill and answer, after issue made up.

<sup>3</sup> 1 Dan. Ch. Pr., 834.

<sup>4</sup> *Bowers v. McGavock*, 6 Cates, 438. As to when, and how, causes are set for hearing, on bill and answer, see, *ante*, § 438.

<sup>5</sup> 1 Dan. Ch. Pr., 829; 1 Barb. Ch. Pr., 308; 318. A cause stands for trial at the first term after it is at issue, even though no proof be filed by either party. Code, §§ 4328; 4401; 4432. And the setting of a cause for hearing, by the complainant, expressly on bill and answer, within the twenty days allowed for that purpose, must not be confounded with the regular hearing of a cause, on the call of the docket, after the lapse of twenty days from the filing of a sufficient answer. In the latter case, the cause is not set for hearing, by the complainant, on bill and answer; but it is set for hearing, by the Clerk and Master, in obedience to law. Code, § 4431, and sections above cited; and, when so set for hearing, by the Clerk and Master, instead of the answer being admitted to be true, it is deemed denied, by the complainant. Code, §§ 4432; 4328.



On the hearing of a cause on bill and answer, every matter set up in the answer, whether responsive to the bill or purely in avoidance, must be taken as true. This rule includes even those matters which the defendant avers that he believes and hopes to be able to prove.<sup>6</sup> And matters which the defendant neither admits or denies will be deemed denied, when a cause is thus heard on bill and answer.<sup>7</sup> Exhibits to the answer are, also, taken as true and duly proved.<sup>8</sup>

But the rule that the answer is to be considered true in all points, does not mean that the *legal* deductions insisted on in the answer are to be considered as true, but only such matters of *fact* as are stated in the answer.<sup>9</sup>

If the complainant sets the cause down for hearing on bill and answer, and the Court should be of opinion that there is not sufficient matter confessed by the answer, to entitle the complainant to any of the relief prayed, the bill will be dismissed with costs. But, as a rule, where a cause has thus been heard, and the complainant fails to make out his case for want of sufficient admissions in the answer, the suit will either (1) be dismissed without prejudice; or, (2) the complainant will be given leave to withdraw his application to have the cause heard on bill and answer, and the cause will be remanded to the rules for proof: in either case, however, the complainant will be taxed with all the costs of the cause.<sup>10</sup>

§ 440. **Form of a Decree When Cause is Heard on Bill and Answer.**—The following form will show the commencement of a decree when a cause is heard on bill and answer.

#### DECREE ON BILL AND ANSWER.

John Doe, }  
*vs.*  
 Richard Roe. }

This cause, having been heretofore specially set for hearing by the complainant on the bill of complaint, and the answer of the defendant thereto, came on to be heard, this June 4, 1891, before Hon. John P. Smith, Chancellor, upon the bill and answer, as aforesaid, and argument having been heard, on consideration thereof, the Chancellor is of opinion that the answer fully meets and overcomes all the equities and causes of suit alleged in the bill. It is, therefore, ordered and decreed by the Court, that the bill be dismissed; and that the complainant and David Doe, his surety for the costs, pay all the costs of the cause, for which execution will issue. [*If the Chancellor should be of opinion that the complainant is entitled to relief, then say after the words, "on consideration thereof," the Chancellor is of opinion that the complainant is entitled to the relief by him prayed. It is, therefore, ordered, adjudged and decreed, by the Court, that [following the prayer of the bill.] See, post, §§ 566-568.*]

<sup>6</sup> The reason of the rule is that, by setting the cause for hearing on bill and answer, the complainant has debarred the defendant from the opportunity of proving what he hopes to prove. *Brinkerhoof v. Brown*, 7 Johns. Ch., 223. This rule prevails whether the oath to the answer is waived or not. *Ibid.*, note.

<sup>7</sup> 1 Barb. Ch. Pr., 318; 2 Dan. Ch. Pr., 982; *Rodgers v. Rodgers*, 6 Heisk., 489; *Railroad v. Marrell*, 11 Heisk., 717. Under the old practice, if the defendant intended to dispute the truth of the answer, he filed a replication; if he did not file a replication, the truth of the answer was admitted, and the cause was set for hearing, on the bill and answer. *Lowry v. McGee*, 5 Yerg., 238; 1 Barb. Ch. Pr., 249. Under our present practice, the lapse

of twenty days after answer filed, operates as a statutory replication; and, if a suit is set down for hearing, by the complainant, on bill and answer, before the lapse of the twenty days, the effect of such act is to admit the truth of the answer. It, therefore, behooves the complainant to diligently scrutinize the answer, before setting the cause down for hearing, on bill and answer; and to examine carefully into the exhibits filed to the answer, and the records referred to in it; and to the force of all matters set up in avoidance; and to the effect of all denials, and of all matters the defendant says he believes to be true, and hopes to prove.

<sup>8</sup> *Milligan v. Humbard*, 11 Heisk., 139.

<sup>9</sup> *Rodgers v. Rodgers*, 6 Heisk., 495.

<sup>10</sup> 1 Barb. Ch. Pr., 318; 2 Dan. Ch. Pr., 982.

## CHAPTER XXIV.

## EVIDENCE IN CHANCERY.

- ARTICLE I. Evidence Generally Considered.  
 ARTICLE II. When Proof is, and is not, Necessary.  
 ARTICLE III. Pleadings When Evidence.  
 ARTICLE IV. When Proof Must be Filed.  
 ARTICLE V. Practical Suggestions Concerning Proof.

## ARTICLE I.

## EVIDENCE GENERALLY CONSIDERED.

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| <p>§ 441. General Rules of Evidence.<br/>         § 442. When Parol Evidence is Admissible to Vary, or Annul, Writings or Records.<br/>         § 443. Burden of Proof.<br/>         § 444. Presumptions Generally Considered.<br/>         § 445. Amount of Evidence Necessary.<br/>         § 446. The Probative Force of Court Records.</p> | <p>§ 447. Amount of Evidence Necessary to Vary, or Annul, Writings or Records.<br/>         § 448. Fraud Proved by Circumstances.<br/>         § 449. When Fraud Will be Presumed.<br/>         § 450. Inspection in Aid of Proof.<br/>         § 451. What Facts the Chancellor Cannot Consider.</p> |
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§ 441. **General Rules of Evidence.**—Evidence is the means whereby the mind is induced to believe, or disbelieve, an allegation of fact; and legal evidence includes all oral statements by parties, or witnesses, and all writings, or other documents, proper to be heard by a Judge in determining an issue of fact. The office of evidence is to prove or disprove what is alleged; and to contradict or weaken, or corroborate or strengthen, other evidence already made. Proof is sufficient evidence to satisfy the mind that an allegation of fact is probably true.<sup>1</sup> The production of evidence is governed by four general rules:

1. **The Evidence Must Correspond With the Allegations in the pleadings,** and be confined to the points put in issue by the pleadings.<sup>2</sup> This rule includes facts and circumstances relating to the matters in issue, and facts that tend to strengthen, or weaken, the evidence introduced.<sup>3</sup>

2. **The Substance, Only, of the Issue Need be Proved.** As a rule, allegations of time, place, quantity, quality, and value need not be proved strictly as alleged, unless the jurisdiction of the Court, or the right of action, depends upon such matters, or they are otherwise essential.<sup>4</sup>

3. **The Burden of Proving a Proposition in Issue Lies Upon the Party Who Substantially Asserts the Affirmative**<sup>5</sup> The best tests for ascertaining on whom the burden of proof lies, are to consider who would lose, if (1) no evidence were introduced by either side; or, (2) if the allegation to be proved were stricken

<sup>1</sup> Proof and evidence are often used as synonymous terms, but they differ in meaning. Proof is the *end*, and evidence is the *means*. Proof establishes the truth; evidence only tends towards it. Bump, *Fraud Conv.*, 578. Proof convinces, makes certain, demonstrates, creates full belief; evidence influences, indicates, makes probable, creates partial belief.

<sup>2</sup> *Kelley v. Fletcher*, 10 Pick., 1.

<sup>3</sup> 1 Greenl. Ev., §§ 51-55; *Johnson v. Luckadoo*, 12 Heisk., 273.

<sup>4</sup> 1 Greenl. Ev., §§ 56-62. The substance of the case, made by the pleadings, must be proved; that is, all the facts alleged in his pleading, which are necessary to the case of the party alleging them,

must be established by evidence, unless they are admitted by the opposite party, either in his pleading, or in a separate writing. The complainant, however, is required to prove so much, only, of his bill as is necessary to entitle him to a decree. A party must not only prove the substance of the case alleged by him, but he must prove, substantially, the same case as that stated in his pleading; he cannot prove a different case, even though it be a good one; for that would be a surprise to the other party which the Court would not permit. Each party's proof must be confined (1) to proving what he affirmatively alleges, and (2) to disproving what he denies. 1 Dan. Ch. Pr., 857-860.

<sup>5</sup> See, *post*, § 443.

out of the record; the burden of proof rests upon the party who, in such a case, would lose.<sup>6</sup>

4. **The Best Evidence of Which the Case, in its Nature, is Susceptible, Must Always be Produced.**<sup>7</sup> This rule ordinarily excludes hearsay, and parol evidence of the contents of writings, records and other documents; and requires that the originals, or certified or examined copies of records be produced; and that writings be duly called for, or their loss duly shown, before allowing parol evidence of their contents.<sup>8</sup>

The rules of evidence as to the competency of witnesses, and the methods of obtaining testimony, are the same in Courts of Chancery as in the other Courts of this State, except so far as changed by statute.<sup>9</sup> In all causes in Chancery, except divorce cases, and when a trial by jury is had, the testimony of witnesses is required to be taken in writing, without compelling their personal attendance.<sup>10</sup> In divorce cases, and in trials by jury, either party may examine the witnesses in open Court, or take their testimony by depositions, as in other cases.<sup>11</sup> Exhibits to bills, or answers, may be proved by affidavit filed with the exhibits in the Clerk's office, at any time before the hearing, or by witnesses at the hearing.<sup>12</sup>

§ 442. **When Parol Evidence is Admissible in Chancery to Vary, or Annul, Writings or Records.**—As a rule, parol contemporaneous evidence is inadmissible to contradict, or vary, the terms of a valid written instrument.<sup>19</sup> This rule was one of the most sacred known to the common law Courts, and was based upon the principle that the contracts of parties, deliberately written and signed, could safely be evidenced and perpetuated only by the writings themselves; and to permit the enlargement, diminution, or change, of their terms to be made by the frail and treacherous recollections of witnesses, would be to make the writings themselves useless, and the rights intended to be secured by them uncertain and doubtful, and would, also, furnish a strong temptation and incentive to perjury and fraud.<sup>20</sup>

Inasmuch, however, as under the protection of this rule, the fraudulent sometimes gain inequitable advantages; and, in the formation of written contracts, however solemn, the necessitous sometimes yield to oppression, and the ignorant and rash sometimes blunder into mistakes, the rigor of the rule has been, in many cases, relaxed by Courts of Equity, in order that fraud may be thwarted, mistakes corrected, accidents relieved against, trusts set up and enforced, and usury exposed and eliminated.<sup>21</sup> Most of the cases in which Courts of Equity admit parol evidence to vary, reform, contradict, enlarge, diminish, or annul, written instruments, may be classified as follows:

1. **Cases of Fraud, Accident, or Mistake.** When, by some accident or mistake, the writing does not truly and adequately express the real intent of the contracting parties;<sup>22</sup> or, when by fraud, some undue and inequitable advantage has been taken by the defendant, either in framing the contract, or in obtaining the consent of the complainant thereto, or otherwise, on a bill being filed for the express purpose of correcting, or annulling, such a written contract, parol evidence will be heard to show the accident, mistake, or fraud complained of.<sup>23</sup>

<sup>6</sup> 1 Greenl. Ev., § 74; Best Pr. Ev., § 269.

<sup>7</sup> *Melius est petere fontes quam sectari rivulos.* (It is better to seek the fountains, than to follow the rivulets.)

<sup>8</sup> 1 Greenl. Ev., §§ 82-96.

<sup>9</sup> Code, § 4455; Hardin v. Stanly, 3 Yerg., 381. The maxim, *Æquitas sequitur legem*, applies in questions of evidence. Gres. Eq. Ev., 3. But only in part. See, *ante*, § 53; and *post*, § 442.

<sup>10</sup> A Court of Chancery, as a rule, *sees* and determines; while a court of law, ordinarily, *hears* and determines.

<sup>11</sup> Code, §§ 4456; 4467; 4470.

<sup>12</sup> Code, § 4458. The Chancery Rule of 1858, (Rule, XVI), requiring notice to the adverse party, one day before the hearing, was not carried into the rules of 1871; and is therefore repealed.

<sup>19</sup> 1 Greenl. Ev., § 275; Ellis v. Hamilton, 4 Sneed, 514; Bridges v. Robinson, 2 Tenn. Ch., 723.

<sup>20</sup> Richardson v. Thompson, 1 Hum., 154.

<sup>21</sup> *Ibid*; 3 Greenl. Ev., §§ 360-365; 2 Sto. Eq. Jur., § 1531; 1 Perry on Trusts, §§ 216; 226. As to the amount of proof required to overcome the presumption in favor of the correctness of writings, see §§ 445; 447, *post*.

<sup>22</sup> As to what constitutes accident, and mistake; and what accidents and mistakes, will be relieved against, see, Index.

<sup>23</sup> 2 Sto. Eq. Jur., § 1531; Greenl. Ev., § 296a; 3 *Ibid*, 360; 363; 2 Pom. Eq. Jur., § 859; Wood v. Goodrich, 9 Yerg., 266; Perry v. Pearson, 1 Hum., 431; 1 Meigs' Dig., §§ 471; 526; 543. For cases when instruments will be reformed or rescinded, see *Index*.

**2. Cases to Set Up, or Enforce Trusts.** When, by parol, some trust is engrafted upon a will, deed, or other written instrument, a Court of Equity will, on a bill filed for that purpose, hear parol proof to set up, and establish, such trust.<sup>24</sup> On a bill filed to have a resulting or implied trust declared and enforced, the complainant may prove, by parol, that he, or the alleged beneficiary, paid or furnished the consideration, even when the deed shows otherwise. The complainant may, also, show, by parol, that the defendant made the purchase, or took the title, as his agent, or for his benefit in whole, or in part. The declarations and admissions of the holder of the legal title may be proved, even after his death, to set up a trust in favor of another in the property so held. And so the defendant may prove, by parol, that the money, or other consideration, paid or advanced, was intended to be a gift; and that no trust was intended.<sup>25</sup>

**3. Cases to Have Deeds Declared Mortgages.** Upon a bill being filed to have a deed, absolute on its face, declared to be a mere mortgage, or security for a debt, a Court of Chancery will allow the complainant to show the truth of his allegations by parol testimony. So, a complainant may, upon a bill being filed for that purpose, show by parol evidence, that when a deed absolute on its face was executed, there was coupled with it, by parol, the right of re-purchase, or the right to repay the purchase-money and have a re-conveyance.<sup>26</sup>

**4. Cases for a Specific Performance.** Upon a bill to enforce a specific performance of a written contract, the defendant may show, by parol evidence, that, because of fraud, surprise or mistake, the written contract sought to be enforced does not express or contain the real agreement between the parties; or, else, that the agreement was entered into through mistake, or was obtained by fraud.<sup>27</sup>

**5. Other Cases Where Parol Evidence is Admissible.** There are other cases wherein parol evidence will be heard by the Chancery Court to vary, reform, or annul writings, the most important of which are the following: 1, In cases of settled accounts, when the bill alleges specific errors, mischarges, or omissions; and seeks to surcharge and falsify the account, because of fraud, or mistake, in relation to said errors.<sup>28</sup> 2, In cases of decrees and judgments, when the bill alleges that the decree or judgment complained of was obtained by fraud, accident or mistake, the facts constituting the alleged fraud, accident or mistake, may be proved by parol, even when they contradict, or vary, the record itself.<sup>29</sup> 3, In cases of bills filed for a rescission of a written contract, because the complainant was drunk, insane, under duress, unduly influenced, or an imbecile, or that some fraud or imposition was practiced upon the complainant, the facts alleged as a ground of rescission may be proved by parol, even though the writing is thereby contradicted.<sup>30</sup> 4, In cases of latent ambiguity in a will, or other writing, parol proof is admissible to show the meaning of the testator, or other party to the writing.<sup>31</sup> 5, Parol evidence is admissible to show (1) that a written contract has been totally discharged; or, (2) that a new and distinct agreement upon a new consideration has been made, either as a substitute for the old, or as an addition to it; or, (3) that the time or place of performance has been changed; or, (4) that damages for the breach of a

<sup>24</sup> For cases of trust, see, Index; 1 Meigs' Dig., § 553; 1 Perry on Trusts, §§ 76-77.

<sup>25</sup> For the law in reference to parol proof, to set up trusts, see, 3 Greenl. Ev., § 365; 2 Pom. Eq. Jur., §§ 1040-1041; 1 Meigs' Dig., 553; 1 Perry on Trusts, §§ 134-140; 143-150.

<sup>26</sup> 3 Greenl. Ev., § 364; 3 Pom. Eq. Jur., §§ 1195-1196; Lewis v. Bayliss, 6 Pick., 280; 1 Meigs' Dig., § 527. Parol proof may, also, be heard to show that a title bond, or other executory agreement, was really a mere mortgage. Jones v. Jones, 1 Head, 105; James v. Fields, 5 Heisk., 394. The proof, in all such cases, must be clear, and leave no reasonable doubt. Lewis v. Bayliss, 6 Pick., 280. But see, *post*, §§ 445; 447.

<sup>27</sup> Pom. Eq. Jur., § 860; 3 Greenl. Ev., § 361; 1 Meigs' Dig., § 548.

<sup>28</sup> 1 Meigs' Dig., § 459.

<sup>29</sup> Walker v. Cottrell, 8 Bax., 77; Maddox v. Apperson, 14 Lea, 604.

<sup>30</sup> 1 Meigs' Dig., § 543.

<sup>31</sup> 1 Greenl. Ev., §§ 287-295; 297; 2 Meigs' Dig., § 1430; 2 King's Dig., § 2577; Weatherhead v. Sewell, 9 Hum., 271; Mumford v. M. & C. R. R. Co., 2 Lea, 393. In this case, it is shown that all contracts should be construed in the light of the circumstances connected with their execution, these circumstances to be shown by parol. See, also, on this point, 2 Meigs' Dig., § 1430, page 1478; Insurance Co. v. Mathews, 4 Lea, 509.

contract have been waived, or remitted; or, (5) that the contract was founded upon an insufficient, or an unlawful consideration, or was without consideration.<sup>32</sup> So, it may be shown by parol, that only a part of the contract was, in fact, reduced to writing, or intended to be reduced to writing, and that there was a part of the contract intentionally left in parol; or, that there was an additional and suppletory agreement in parol.<sup>33</sup> 6, Receipts may be varied, or contradicted, by oral testimony, in so far as they are receipts, both at law and in Equity.<sup>34</sup> 7, The recitals in a Sheriff's deed as to notice having been given, and as to the order of sale having been in his hands,<sup>35</sup> and the recitals in any deed, as to the consideration, or the payment of consideration, may be disproved by parol evidence.<sup>36</sup>

§ 443. **The Burden of Proof.**—The duty of proving, or disproving, the facts in dispute on an issue between the parties to a suit, is termed the burden of proof. This burden rests on that party against whom, on the state of the pleadings, the issue would be decided if no proof in regard to it was introduced. Inasmuch as the complainant would generally lose the suit if no evidence was introduced, the burden of proof generally rests on him; but, sometimes, it rests on the defendant; for there are cases in which the defendant would lose the suit if no evidence was introduced, as where he admits the material allegations of the bill but sets up new matter in avoidance. Where the material allegations of the bill are denied by the answer, the burden of proof rests upon the complainant; but where the plea, or answer, expressly or constructively concedes the material allegations of the bill, and sets up new matters in avoidance of the bill, the burden of proof rests upon the party who maintains the affirmative of the issue,<sup>37</sup> or, as it might be more definitely expressed, it rests upon that party whose material affirmative allegations are not expressly, or impliedly, admitted by his adversary.<sup>38</sup> So, when a complainant alleges facts in his bill to avoid some bar, such as the statute of limitations, payment, an award, a release, a former judgment or decree, the burden of proving such facts rest on him. In general, when ever a *prima facie* right is disclosed by the pleadings, the burden of proof rests upon the party disputing that right; and whenever, at any stage of the proof, one party would be entitled to a decree, the burden of proof devolves upon the other party until he becomes entitled to a decree, and in this way the burden of proof may shift several times before the proofs are finally closed.<sup>39</sup> The Court will always treat a deed, or other instrument, as being the thing which it purports to be, until the contrary is shown. Wherever there is a presumption that a fact exists, he who makes an allegation to the contrary must prove it. In cases where the presumption of law is in favor of one party, the other party must overcome it, even if it be necessary to prove a negative, as where the child of a married woman is alleged to be illegitimate.<sup>40</sup>

§ 444. **Presumptions Generally Considered.**—A presumption is (1) a conclusion of law, or (2) an inference of fact<sup>41</sup> drawn from experience and observation, or deduced from proven facts, that a certain fact not proven exists.

<sup>32</sup> 1 Greenl. Ev., §§ 302-304; 284; 2 King's Dig., § 2741.

<sup>33</sup> 1 Greenl. Ev., §§ 302-304; Bissenger v. Guite-man, 6 Heisk., 277; 2 Meigs' Dig., § 1430; 2 King's Dig., § 2744.

<sup>34</sup> 1 Greenl. Ev., § 305; 2 Meigs' Dig., § 1439; 2 King's Dig., § 2777.

<sup>35</sup> 2 Meigs' Dig., § 1174; Randolph v. Metcalf, 6 Cold., 410; Loyd v. Anglin, 7 Yerg., 428; Code, §§ 3039-3042; 2 King's Dig., § 2861.

<sup>36</sup> 2 Meigs' Dig., § 1179; 2 King's Dig., § 2778.

<sup>37</sup> The leading maxims are: *Ei incumbit probatio qui dicit non qui negat.* (The burden of proof rests upon him who asserts a fact, not upon him who denies.) This is the great rule. Best Pr. Ev., § 269. *Affirmanti non neganti, incumbit probatio.* (The burden of proof rests upon him who affirms, not upon him who denies.) *In genere, quicumque aliquid*

*dicit sive actor sive reus, necesse est ut probat.* (In general, whoever asserts a fact, whether he be complainant or defendant, is bound to prove it.)

<sup>38</sup> These allegations, while generally affirmative, are sometimes negative; as where a complainant grounds his right of action upon a negative allegation, and where the establishment of this negative is an essential element of his case. 1 Greenl. Ev., § 78.

<sup>39</sup> In strictness, the burden of proof does not shift in such a case, but it is the weight of the evidence that shifts. 1 Greenl. Ev., § 74, note.

<sup>40</sup> 1 Dan. Ch. Pr., 851.

<sup>41</sup> Facts from which inferences are drawn are termed "evidentiary" facts; the facts inferred are termed "ultimate" or "principal" facts. McKelvey on Ev., 8.

Presumptions are of two kinds: presumptions of law and presumptions of fact. 1. Presumptions of law are rules which, in certain cases, either forbid, or dispense with, any proof as to the truth, or falsity, of the fact presumed. 2. Presumptions of fact are inferences of the existence of some fact not otherwise proved, deduced from the existence of other facts which have been proved: these inferences being such as the common sense and common experience of mankind show to be the facts usually occurring in such cases.<sup>42</sup>

Presumptions are either conclusive or disputable. Conclusive presumptions will yield to no proof, however strong; but disputable presumptions may be overcome by proof. As illustrations of conclusive presumptions of law may be mentioned: 1, that every one knows the criminal law; 2, that every sane man contemplates the probable consequences of his own acts; and 3, that every one has knowledge of a deed duly registered.

Disputable presumptions of law are *prima facie* proof of the fact, and throw the burden of proof on the party disputing them.<sup>43</sup> As illustrations of disputable presumptions of law, the following may be mentioned: 1, that everyone is innocent of the fraud charged upon him; 2, that the possessor is the owner; 3, that the acts of persons having apparent authority are rightful; 4, that a state of facts once known to exist continues a reasonable time; 5, that all children are legitimate; 6, that all persons are sane; 7, that everyone over seven years of age is competent to testify; 8, that everyone who has not been heard from for seven years, after due inquiry by those best informed, is dead; and 9, that a man and woman cohabiting as husband and wife are lawfully married.

The following presumptions are, also, disputable, and may be rebutted by parol evidence in Chancery: 1, that the recitals in Sheriff's deeds are correct; 2, that a receipt is correct; 3, that a resulting trust arises in favor of the person paying the consideration when the deed is taken in the name of a stranger; 4, that such a trust does not arise when the deed is taken in the name of a wife, child, or dependent; 5, that a deed absolute on its face is not a mortgage; 6, that an account stated or settled is correct; 7, that every writing fairly expresses the intention of the parties thereto; and 8, that the judgments and decrees of Courts having jurisdiction of the subject-matter are correct.

Time is a witness in Chancery that what has long been acquiesced in must originally have been founded on some right: this presumption is wholly independent of the statutes of limitation.<sup>44</sup> Presumptions, also, arise from acquiescence.<sup>45</sup>

**§ 445. Amount of Evidence Necessary.**—Civil causes are determined in accordance with the preponderance of the proofs. The party upon whom the burden of proof rests must introduce sufficient evidence to satisfy the mind of an impartial Judge that the fact he alleges is probably true.<sup>46</sup> Courts proceed upon the preponderance of probabilities; and a mere preponderance of evidence, however slight, must necessarily turn the scale.<sup>47</sup> If a party is charged with a great moral wrong, he may introduce evidence of his good character, and invoke the legal presumption of innocence.<sup>48</sup>

There are, in almost every suit, certain presumptions of law which are in the

<sup>42</sup> Greenl. Ev., § 14; Best on Presump., 4-20; 1 Phillips Ev., 599; 2 Whart. Ev., § 1237. *Presumptio ex eo quod plerumque fit.* (A presumption arises of that which generally happens.)

<sup>43</sup> *Stabit presumptio donec probetur in contrarium.* (The presumption will stand good until the contrary is proved.)

<sup>44</sup> See, *ante*, § 70.

<sup>45</sup> See, *ante*, § 68.

<sup>46</sup> Hamilton v. Zimmerman, 5 Sneed, 44.

<sup>47</sup> Hills v. Goodyear, 4 Lea, 233; Harding v. Waters, 6 Lea, 329; Chapman v. McAdams, 1 Lea, 500; Cage v. Railway Co., 4 Pick., 724; McBee v.

Bowman, 5 Pick., 132. Hughes' Instructions to Juries, § 382. Preponderance of testimony is not measured by a mere numerical preponderance of witnesses, but by the weight, credit, and value of the aggregated testimony on the respective sides. Coles v. Wrecker, 2 Shan. Cas., 341. *Ponderantur testes non numerantur.* (Witnesses are weighed not counted.) *Dignioribus est credendum.* (The most worthy are to be believed.) The preponderance is ascertained by considering the weight, credit and value of the evidence on each side. Hills v. Goodyear, 4 Lea, 233.

<sup>48</sup> McBee v. Bowman, 5 Pick., 132.

nature of evidence, and must be overcome by evidence, before there can be even an equiponderance of evidence. These presumptions have created, what is sometimes termed, exceptions to the general rule that a mere preponderance of evidence is sufficient in civil cases. When, however, it is considered that these presumptions stand for evidence, it will be seen that they constitute no exception to the rule.<sup>49</sup> Presumptions vary in cogency from the slight to the indisputable, or conclusive; but inasmuch as conclusive, or indisputable, presumptions necessarily shut out all proof, and make evidence absolutely inadmissible, it follows that only disputable presumptions of law can be met and overcome by evidence. In the absence of any other evidence, these presumptions are plenary proof of the fact presumed; and will sustain a decree as effectually as though the fact presumed had been proven by parol, or written, evidence. It follows, therefore, that when a disputable presumption of law exists in a lawsuit, it throws the burden of proof on the party who disputes the presumption. This burden varies in degree from the very weak to the very strong; presumptions, like witnesses, or other proofs, differing in cogency, some being easily overcome, and others being almost conclusive.

When, therefore, we read in the books that, in various cases, such as suits to reform writings, to set up a resulting trust, to have a deed declared a mortgage, and the like, a mere preponderance of evidence will not suffice, nothing more is meant than that a mere preponderance of evidence on the side of the complainant will not overcome the defendant's evidence, reinforced, as the latter is, by a presumption of law in favor of the writing assailed.<sup>50</sup> If, however, the complainant's evidence outweighs both the presumption and the other evidence in favor of the defendant, then the complainant has made out his case, even though the preponderance in his favor be very slight; and this is true, whatever the character of the suit, and howsoever strong the presumption to be overcome.<sup>51</sup> In ascertaining the preponderance of evidence, in any case where a presumption exists, such presumption will equal in weight so much of the adverse evidence as is necessary to neutralize the presumption.

It may, therefore, be laid down as a general rule, without exception, that treating presumptions as evidence, the complainant will be entitled to a decree when he makes out his case by a preponderance of evidence, however slight.<sup>52</sup> In this connection, it must not be forgotten that there are presumptions in the complainant's favor, as well as presumptions against him; and when a presumption arises in favor of the complainant, it throws the burden of the proof on the defendant, as to the fact presumed.<sup>53</sup>

#### § 446. The Probative Force of Court Records.—A Court record is some-

<sup>49</sup> Disputable presumptions of law are witnesses; and, like other witnesses, vary in probative force, from very weak to very strong. All disputable presumptions are based on the probabilities of the happening of the thing presumed. If the probabilities are weak, the presumption is proportionately weak; if they are strong, the presumption is proportionately strong. But these probabilities have no reference to the particular fact presumed: they have reference to the happening of such fact, as a rule, that is, generally, or in a majority of cases; and, because it happens that way generally, or in a majority of cases, we infer, in the absence of contrary proof, that it has happened that way in the particular case in question;—and this general inference is termed a presumption, and is sufficient proof of the fact presumed, when there is no sufficient actual evidence to the contrary. *Presumptio ex eo quod plerumque fit.* (A presumption arises from that which happens very often.)

<sup>50</sup> The presumption in favor of the correctness of a writing may be greatly weakened by interlineations, erasures, bad penmanship, gross illiteracy, or other defects upon its face not fully explained, and, also, by circumstances of secrecy, haste, collusion or imposition attending its execution.

<sup>51</sup> *Stone v. Manning*, 19 Pick., 232, citing the above section of this book, then § 447.

<sup>52</sup> *Bennett v. Mass. M. L. Ins. Co.*, 23 Pick., 371, citing the above section, then § 447.

<sup>53</sup> Supposing that 100 chances (the whole number) equals certainty, then any number of chances less than 50 equals possibility, and any number more than 50 equals probability. The nearer the number of chances that an allegation is true approaches 50, the nearer the possibility of its truth approaches probability; and the nearer the number of chances, over 50, approaches 100, the nearer the probability of its truth approaches certainty. Thus, the possible gradually takes on the color and substance of the probable as the number of chances of the allegation being true increases; and when that number reaches 51 out of the 100, then the possible is merged into the probable; and as the number of chances that the allegation is true increases from 51 to 100, so the probable takes on the color and substance of the certain; and when the number of chances reaches 100, then the probable is merged into the certain. So, in a suit in Court, whenever the complainant shows by proof that there are over 50 chances out of the 100 that his contention is true, then his contention is probable, and he is entitled to have it considered proved, and entitled to a decree accordingly. When over 50 out of the 100 chances thus favor any proposition then there arises a presumption or inference that the proposition is true.

times offered in evidence to show what one or the other of the parties stated in his pleading, or in some affidavit or deposition in the cause, and is then used mainly for purposes of contradiction or of estoppel. But the probative force of a Court record is, ordinarily, contained in the judgment or decree. A judgment or decree imports absolutely verity,<sup>13</sup> and is conclusive on the parties, and on all claiming under them; and when offered in evidence cannot be assailed or discredited by proof outside of the record containing it; but, if attacked at all, must be attacked because of some infirmity appearing in the record itself, or by another decree declaring it to be void.<sup>14</sup>

As to their efficacy and probative force, judgments and decrees are of three sorts:

1. **Valid Judgments and Decrees**, being those based on jurisdiction of both the subject-matter and the person, and justified by the pleadings and proofs, or the consent of the parties: they are proof against direct attacks by appeals or writ of error, or by bill in Chancery, and, of course, also, against collateral attacks.<sup>15</sup>

2. **Voidable Judgments and Decrees**, being those which are valid on their face, and, therefore, proof against collateral attack, but are reversible on direct attack by appeal or writ of error, or by bill in Chancery.<sup>16</sup>

3. **Void Judgments and Decrees**, being those that appear on the face of the record itself to have been rendered without jurisdiction of the parties or the subject-matter, or without being justified by the pleadings, or the consent of parties. Void judgments have no efficacy or probative force, and yield to collateral attack.<sup>17</sup>

In a valid decree the Court has jurisdiction of the parties and of the subject-matter, and the decree is justified<sup>18</sup> by the pleadings, or by the consent of the parties, such consent appearing in the record. In a voidable decree, the record falsely shows jurisdiction of parties and subject-matter, or such consent, if the decree is at variance with the pleadings, no fatal infirmity being disclosed in the record itself: and this is why it is invulnerable to collateral attack. Whereas, a record containing a void decree discloses its fatal infirmity on its face, shows a want of jurisdiction of parties or subject-matter, or a decree at variance with the pleadings and not consented to by the parties in interest.

§ 447. **Amount of Evidence Necessary to Vary, or Annul, Writings or Records.**—In all civil suits, in the absence of a statute prescribing the *quantum*<sup>54</sup> of proof, a preponderance of probabilities prevails, however slight such preponderance may be.<sup>55</sup> It is sometimes said that to vary, reform, or rescind, a settled or stated account, or a written instrument, or a judgment or decree of a Court, on the ground of fraud, accident, or mistake, or to have a deed declared a mortgage, or to set up a trust, by parol evidence, such evidence must be of the clearest and most convincing nature;<sup>56</sup> but, if the writing, or decree, itself, be considered a witness, and is given the degree of probative force to which it

<sup>13</sup> *Judicium semper pro veritate accipitur.* (A judgment is always taken to be the truth.) Russell v. Houston, 7 Cates, 336.

<sup>14</sup> It can be shown by a supplement to the record that the decree has been reversed in the Supreme Court. A final decree in an ejectment suit in Chancery and the entries on the rule docket are admissible in evidence, when it is shown that the papers in the case are lost. Russell v. Houston, 7 Cates, 536. See, *post*, §§ 564-565; and especially § 619, note 3. The decree alone should be conclusive, unless the party objecting to it produces competent evidence to nullify or impair it. The presumption is in favor of the decree, and a presumption needs no corroboration until impeached by competent evidence. See, *ante*, § 445.

<sup>15</sup> See, *post*, §§ 564-565; 814, note 43.

<sup>16</sup> Such judgments and decrees are sometimes miscalled "void"; but they are as efficacious as valid judgments and decrees,—indeed, are valid until reversed by direct attack. See, *post*, § 814, note 43.

<sup>17</sup> *Ibid.*

<sup>18</sup> A decree may be abundantly justified by the

pleadings when not at all justified by the proof: Such a decree, while correctible in the Supreme Court, is absolutely impregnable to attack when offered in evidence. On a collateral attack no evidence can be looked at, whether it is in the record or out of it. The decree is judged of by the pleadings, process and its own contents; and, unless these show that the decree is void, it is valid in every Court when offered in evidence. Kindell v. Titus, 9 Heisk., 727; Campbell v. Bryant, 2 Shan. Cas., 146; Freeman on Judgts., §§ 120; 124.

<sup>54</sup> If a statute prescribes the *quantum* of proof, the Court cannot find the fact on less evidence than that prescribed. Simmons v. Leonard, 7 Pick., 194. Thus deeds and wills of realty and agreements within the statute of frauds, must be proved as prescribed by the statute.

<sup>55</sup> Hills v. Goodyear, 4 Lea, 233.

<sup>56</sup> Wray v. Cutter, 12 Heisk., 28; Hall v. Fowlkes, 9 Heisk., 753; Haynes v. Swan, 6 Heisk., 560; Holder v. Nunnally, 2 Cold., 288; McCammon v. Pettitt, 2 Sneed, 242; 2 Pom. Eq. Jur., § 862.



is entitled under all the circumstances, then the general rule of preponderance of probabilities will prevail.<sup>57</sup> When relations of trust and confidence exist between the parties to a written instrument, and in cases where the parties do not deal upon an equality, less proof is needed to overcome the writing, or decree.<sup>58</sup>

In a suit to set up a resulting trust, if the money is proved to have been paid by A, and the legal title is taken in the name of a stranger, the Court will presume a resulting trust in favor of A; but if the title be taken to a wife, child, or other person for whom A is morally bound to provide, the Court will presume that it was a provision, advancement, or gift: either of these presumptions will, however, yield to satisfactory contrary proof.<sup>59</sup>

§ 448. **Fraud Proved by Circumstances.**—Fraud is seldom established by direct and positive proof, and such proof is not necessary. Generally, the first effort of a man, who intends to commit a fraud, is to throw a veil over the transaction, to conceal it from discovery, to baffle all attempts at detection, and to shield it against attack. No man willingly furnishes the proof of his own turpitude. Fraud is, for this reason, rarely perpetrated openly and in broad daylight. It is committed in secret, and is usually hedged about by every guard that can be devised to prevent its discovery and exposure. Its path is crooked and circuitous, its footprints are carefully covered up, the signs of its operations are diligently removed, or attempted to be removed, and the mask of honesty and good faith is put over the face of the real transaction. For these reasons, fraud is usually proved by circumstantial evidence.<sup>60</sup>

In consequence of the abhorrence with which fraud is regarded by Courts of Conscience, in consequence of the heinousness of the offence, and, in consequence of the artifices, devices and coverings used to conceal it, and to baffle detection, a wide range of evidence is allowed in proving its existence; and Courts of Equity do not restrict themselves by the same rigid rules that Courts of law do, in the investigation of fraud, and in the evidence and proofs required to establish it.<sup>61</sup>

Fraud assumes many shapes, disguises and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances, which are frequently trivial, remote and disconnected, and which cannot be interpreted without bringing them together, and contemplating them all in one view. In order to do this it is necessary to pick one fact or circumstance here, another there, and a third yonder, until the collection is complete. Each detached piece of evidence is not, therefore, to be rejected when offered, because apparently trivial. A wide latitude of evidence is allowed; and if a fact or circumstance relates directly, or indirectly, to the transaction, it is admissible, however weak or slight it may be, its relevance depending, not upon its weight or force, but upon its bearing or tendency.<sup>62</sup>

<sup>57</sup> See the reasoning of Judge Cooper, in *Hills v. Goodyear*, 4 Lea, 233.

<sup>58</sup> *Snell v. Elam*, 2 Heisk., 88.

<sup>59</sup> *Dudley v. Dodsworth*, 10 Hum., 12; *Pillow v. Thomas*, 1 Bax., 120; 2 Pom. Eq. Jur., §§ 1037-1041; 2 Sto. Eq. Jur., §§ 1201-1205; 1 Perry on Trusts, §§ 133-150.

<sup>60</sup> *Bump*, on Fraud. Conv., 600; *Wait* on Fraud Conv., §§ 6, 17, 13, 224; 1 Sto. Eq. Jur., § 188. See Article on Fraudulent Conveyances, *post*, §§ 1009-1017. *Smith v. Harrison*, 2 Heisk., 243. In charging the jury, in the case of *Floyd v. Goodwin*, 8 Verg., 490, the Circuit Judge said: "In most instances, the evidence of fraud must be gathered more from the circumstances attending the transaction, than upon tangible proof; such things are not generally told or done openly. Lord Coke says, It is hatched in secret; and another great man has gone further, and says, It is hatched in the hollow of a tree. It, therefore, has to be ferreted out by carefully following its marks and signs; for fraud will, in most instances, though never so artfully and secretly contrived, like the snail in its passage, leave

its slime, by which it may be traced." This charge was sustained by the Supreme Court, and has often been quoted approvingly. *Harris v. Smith*, 2 Cold., 308. Fraud is usually hatched in secret, *in arbore cava et opaca*. *Bump*, Fraud. Conv., 31.

<sup>61</sup> Sto. Eq. Jur., § 190; *Bump*, Fraud. Conv., 579; *Wait* on Fraud. Conv., § 281.

<sup>62</sup> *Bump*, Fraud. Conv., 579; 1 *Wharton* on Ev., § 33, note. The proof of fraud, usually, consists of many items of evidence, which, standing detached and alone, would be immaterial; but which, in connection with others, tend to illustrate, and shed light upon, the character of the transaction, and show the position of the parties, and their motives, conduct, and relation to each other. *Quæ singula non prosunt, juncta juvant*. Circumstances may stamp upon a transaction the indelible marks of fraud, and are quite as reliable as positive evidence. *Bump*, Fraud. Conv., 601. The evidences of fraud are often so intangible and indistinct yet so convincing that Chancellors are said sometimes to *smell* it rather than *see* it.

Issues of fact in civil cases are determined by a preponderance of testimony, and the rule applies as well to cases in which fraud is imputed as to any other; and if the evidence is of sufficient force to produce a preponderance of assent in favor of the allegation of fraud, that is all that the law requires, and the fraud will be deemed proved, although there be some doubt of its existence.<sup>63</sup>

The Court of Chancery is the arch enemy of fraud; and to that Court those who are the victims of bad faith generally apply for redress, not only because the Chancery Court can grant more perfect relief, but, also, because it will often grant that relief upon weaker presumptive evidence than will a Court of law.<sup>64</sup> Where the Court can pronounce a decree that will place each of the parties in substantially as good a condition as they were in respectively at the time the alleged fraud was committed, it will act upon less evidence than would ordinarily be required to support a verdict.<sup>65</sup>

§ 449. **When Fraud Will be Presumed.**—It is often said, that fraud will not be presumed:<sup>66</sup> by this nothing more is meant than that fraud will not be presumed merely because it is alleged.<sup>67</sup> When, however, certain states of facts are once shown to exist, a presumption of fraud will arise sufficiently strong to throw on the defendant the burden of proving that there was nothing fraudulent, or inequitable, in the transaction sought to be impeached.<sup>68</sup> Among these states of facts, the following are the most common:

1. **Where Confidence Has Been Violated.** When an advantageous conveyance, contract, or gift, is obtained from another by a person standing to him in a relation of trust and confidence, as in case of advantageous conveyances, contracts, and gifts, obtained by guardians from wards, attorneys from clients, trustees from beneficiaries, agents from principals, parents from their children, physicians from patients, priests from parishioners, the trusted from the trusting, in any and all such cases, on the relationship and advantage being proved, fraud will be presumed.<sup>69</sup>

2. **Where a Trustee Deals With Himself.** When a person acting in a fiduciary capacity, directly or indirectly deals with himself for his private and personal benefit, as when a trustee, administrator, guardian, agent, or sheriff, sells property to himself, or makes a personal profit out of a transaction by him in his fiduciary capacity, in any and all such cases, fraud will be presumed.<sup>70</sup>

3. **Where the Consideration is Shockingly Inadequate.** Where the consideration paid, or promised, is so grossly inadequate as to shock the conscience, espec-

<sup>63</sup> Bump, Fraud. Conv., 605.

<sup>64</sup> Smith v. Harrison, 2 Heisk., 243; 3 Greenl. Ev., § 254; 1 Sto. Eq. Jur., § 190.

<sup>65</sup> The reason a Court of Equity will presume fraud, when a Court of law will not, is this: When a Court of law finds fraud, it is incapable of restoring the parties to their original condition, and of giving to each his own: it simply destroys the contract, and often leaves the defendant poorer, and the plaintiff richer, than they were at the making of the contract; and, thus, a judgment at law will, sometimes, put the plaintiff in a better position, and the defendant in a worse position, than strict justice will justify. On the other hand, a Court of Equity, while doing full justice to the complainant, requires him to do full justice to the defendant; and when a contract is rescinded, on the ground of fraud, by a Court of Chancery, on complaint of the person defrauded, the defendant is restored to all of his original rights; and, if he has paid the complainant any money, or has otherwise benefitted the complainant, the Court will make him whole. In short, the Chancery Court can, and will, so adjust the rights of the parties, that a rescission of the contract, on the ground of fraud, will give each of the parties his exact dues; and, for this reason, the Court will often find fraud, on comparatively slight evidence, well knowing that such a finding can do the defendant no great harm; whereas, a failure to find fraud, would ruin the complainant. But, where parties cannot be placed *in statu quo*, the evidence of fraud should be as clear in a Court of Equity as in a Court of law.

<sup>66</sup> Presumption and inference are sometimes confounded. Fraud can always be inferred from facts and circumstances proved; indeed, it is seldom directly proved, and is nearly always inferred. What is meant by "badges of fraud," is, certain signs by means of which fraud is inferred. See, *post*, § 1010.

<sup>67</sup> Wait on Fraud. Conv., § 7.

<sup>68</sup> See, *post*, § 1011.

<sup>69</sup> 2 Pom. Eq. Jur., §§ 955-963; Birdsong v. Birdsong, 2 Head, 297; Bayliss v. Williams, 6 Cold., 440; Martin v. Martin, 9 Heisk., 644.

Where fiduciary or confidential relations exist between the complainant and the defendant, and the bill alleges that the latter took advantage of that relation to obtain an unfair bargain, on proof of the relation, the burden of proof is, at once, shifted to the shoulders of the defendant; and he must satisfy the Court that he acted in good faith. The great principle, by which Courts of Equity are governed, in such cases, is: That he who obtains an advantageous bargain, from a person placing confidence in him, is bound to show that no undue advantage was taken of that confidence; and the burden of proof is devolved on him to establish, affirmatively, the perfect fairness, adequacy, and Equity of his claims. This rule applies to parents, guardians, trustees, pastors, attorneys, physicians, and all others standing in confidential relations with those with whom they bargain. 3 Greenl. Ev., § 253. See, *ante*, § 46.

<sup>70</sup> 2 Pom. Eq. Jur., § 958; Collins v. Smith, 1 Head, 256.

ially when accompanied by other inequitable circumstances, such as (1) concealments, misrepresentations, undue advantage or oppression on the part of the person obtaining the benefit, or (2) ignorance, weakness of mind, sickness, old age, incapacity or pecuniary necessity, on the part of the other party, in such cases, fraud is presumed.<sup>71</sup>

4. **Where a Person of Weak Mind is Imposed On.** Where a very advantageous bargain, or a very valuable gift, is obtained from a person of great mental weakness, especially when accompanied with other inequitable circumstances similar to those in the preceding paragraph, fraud is presumed.<sup>72</sup>

5. **Where Gifts by Debtors Injure Their Creditors.** Where the debtor makes a voluntary conveyance of his estate, or of any part thereof, without leaving enough in his hands to satisfy his creditors, fraud is presumed.<sup>73</sup> Equity requires a man to be just before it allows him to be generous.

6. **Where Property is Held in Trust for an Insolvent Debtor.** Where a debtor, against whom an execution has been returned unsatisfied, has property, or money, held in trust for him, fraud is presumed, except where the consideration proceeded from a third person, and the trust is evidenced by will duly recorded, or deed duly registered.<sup>74</sup>

7. **Where Misrepresentations Have Misled.** When the misrepresentations made by the defendant were of such a character as would naturally induce any ordinary person to act upon them, and the complainant did act upon them to his detriment, then the defendant will be presumed to have made the misrepresentation to induce the complainant so to act.<sup>75</sup>

§ 450. **Inspection in Aid of Proof.**—Although Courts of Chancery determine every matter by written or printed evidence, nevertheless, when the subject-matter of the evidence can be readily produced in Court, and is of a character to elucidate the evidence, the Chancellor will order the production of such subjects before him, for his better satisfaction as to the truth.<sup>76</sup> Thus, he will (1) order an infant to be produced in Court for satisfactory proof of its existence, age, and discretion; or, (2) will order an original document, or book, to be produced, in order to ascertain its genuineness, and integrity, or its age, or meaning, or precise state, and character; or, (3) will require models, machines, and patented articles to be brought into Court, especially when a comparison becomes important; and, (4) where the subject is immovable;<sup>77</sup> or, (5) where the inspection of the inside of a house, or of a room, or of a lot or tract of land, is necessary to enable the party out of possession to make proper proof, the Court will order the party in possession to permit an inspection by witnesses.<sup>78</sup>

§ 451. **What Matters the Chancellor Cannot Consider.**—Solicitors are sometimes not clear as to what matters a Chancellor can or cannot consider, in determining the facts of a case; and the following general rules are given on this subject:

1. **Evidence as to Matters Not Alleged in the Pleadings** cannot be considered by the Chancellor,<sup>79</sup> no matter how good a cause of action they indicate, or how strong a defence they present. The Chancellor can no more make a decree on proof not justified by the pleadings than on pleadings not justified by the proof.<sup>80</sup>

<sup>71</sup> 2 Pom. Eq. Jur., §§ 927-928; *Wright v. Wilson*, 2 Yerg., 296; *Hardeman v. Barge*, 10 Yerg., 204; *Birdsong v. Birdsong*, 2 Head, 291; *Merriman v. Laceyfield*, 4 Heisk., 219; *Meath v. Porter*, 9 Heisk., 227.

<sup>72</sup> 3 Pom. Eq. Jur., § 947; *Cass v. Mason*, 4 Sneed, 506; *Craddock v. Cabiness*, 1 Swan, 474; *Walker v. McCoy*, 3 Head, 106; *Parrott v. Parrott*, 1 Heisk., 687; *King v. Cohoon*, 6 Yerg., 75; *Tally v. Smith*, 1 Cold., 291; *Knox v. Haralson*, 2 Tenn. Ch., 236.

<sup>73</sup> 2 Pom. Eq. Jur., § 972.

<sup>74</sup> Code, § 4283; 2 Pom. Eq. Jur., § 1042; 1 Meigs' Dig., p. 676.

<sup>75</sup> 2 Pom. Eq. Jur., § 880.

<sup>76</sup> Sometimes, on motion, the Chancellor will order an original document to be sent up to the Supreme Court on appeal. See *Ross v. Scott & Russell*, 15 Lea, 485.

<sup>77</sup> 3 Greenl. Ev., §§ 328-329; *Gresl. Eq. Ev.*, 449-455.

<sup>78</sup> 2 Dan. Ch. Pr., 1663.

<sup>79</sup> *Kelley v. Fletcher*, 10 Pick., 1.

<sup>80</sup> A decree must stand on two feet, one foot supported by the pleadings, the other foot by the proof. A decree on proof alone is *coram non iudice*, and void. See, *post*, § 555, note 4.

2. **His Own Knowledge of the Facts** cannot be considered by the Chancellor, any more than a juror can take into consideration his own personal knowledge of facts pertinent to the case. Every suit must be determined on the facts found in the record of the cause. The Chancellor's private knowledge of facts is the knowledge of the *man*, and not the knowledge of the *officer*.<sup>81</sup> Were the rule otherwise, the Chancellor might decide the case on a state of facts that would not appear in the transcript on appeal, and would, therefore, be unknown to the Supreme Court.

3. **His Own Knowledge of the Character of a Witness** cannot be regarded by him. If the party most concerned is content to allow a man of bad reputation to testify, without proving his reputation, it is not for the Chancellor to impeach the witness by his own private knowledge of his character. On the other hand, the Chancellor cannot prefer the testimony of a witness, because of his personal knowledge of his integrity. The tests of a witness' credibility must be found in his deposition, or elsewhere in the record.

4. **That One of the Parties is Poor, or is a Woman, or is Unfortunate, is a matter that the Chancellor cannot consider.** As a *man*, he may and must commiserate the poor and the unfortunate; but if, as a Judge, he took such matters into consideration, he would not only sink the Judge into the man, but would be guilty of deciding the cause according to favor and affection. Such conduct would not only be grossly partial, but would savor of corruption and oppression. A Judge is sworn to determine causes by his head, and by a cool head at that, and not by the sympathies of his heart.<sup>82</sup>

5. **What Does Not Appear in the Record Does Not Exist, so far as the Court is Concerned,**<sup>83</sup> except as to matters that are judicially known; and this fundamental rule has no exceptions, and it includes the three rules already given. Nor should the Chancellor allow a Solicitor in his argument to allude to matters not in the record; such allusions necessarily imply that the Solicitor either does not know his own duty; or thinks that the Chancellor does not know his, and can be swayed by undue influences.

## ARTICLE II.

### WHEN PROOF IS, AND IS NOT, NECESSARY.

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| <p>§ 452. What Need Not be Proved.</p> <p>§ 453. When Evidence by the Complainant is Not Necessary.</p> <p>§ 454. When Evidence by the Defendant is Not Necessary.</p> | <p>§ 455. What Facts are in Issue.</p> <p>§ 456. What is in Issue Upon a Plea.</p> <p>§ 457. What is in Issue Upon an Answer.</p> |
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§ 452. **What Need Not be Proved.**—Often a great deal of unnecessary evidence is injected into the record of a litigation. To aid the inexperienced Solicitor in determining what need not be proved, the following summary of rules is given:

1. **Whatever is Not Put in Issue by the Pleadings Need Not be Proved.** Evidence as to matters not in issue is immaterial, irrelevant, impertinent, and illegal: the Court will reject such evidence on objection being made to it; and will dis-

<sup>81</sup> *Non refert quid notum sit iudici, si notum non sit in forma iudicii.* See, *ante*, § 62, sub-sec., 1.

<sup>82</sup> The Judge is sworn "to administer justice without respect of persons, and impartially to discharge all the duties incumbent on him, as a Judge, to the best of his skill and ability." Code, § 309. Hence, a Judge cannot have "respect of persons," whether they be male or female, rich or poor, friends or foes; and he must decide controversies "to the best of his skill and ability," and not ac-

ording to the sympathies of his heart or the inclinations of his feelings. If his heart prompt him to aid the unfortunate, let him do so by contributing from his own pocketbook, and not by forcing a litigant to contribute.

<sup>83</sup> *Idem est non esse et non apparere.* A Judge should be near-sighted as to the facts, and see nothing outside of the record; but should be far-sighted as to the law, and see all the law applicable to the case. See, *ante*, § 62, sub-sec., 1.

regard it, as mere worthless rubbish, if not objected to.<sup>1</sup> The sole object of evidence is to prove what the pleadings show to be in dispute, and thus enable the Court to determine the controversy. No decree can be based on evidence as to matters not alleged in the pleadings.<sup>2</sup>

2. **What is Judicially Known to the Court Need Not be Proved.**<sup>3</sup> This judicial knowledge includes our form of government, National and State; the Constitution and public laws of the United States, and of our own State;<sup>4</sup> the general officers of these two governments; the main facts in the public history of the two governments; the main geographical facts of the United States, and of this State; the subdivisions of the State, its counties, towns, rivers, and general geography; the officials of the county where the Court is sitting; the religion and general customs of the people; their language and the meaning of words; the rules of grammar and arithmetic; and a great multitude of other matters, which every well-informed citizen of the State is presumed to know.<sup>5</sup>

3. **Whatever is Admitted in the Pleadings, Expressly or by Necessary Implication, Need Not be Proved.** If a defendant confesses and avoids, the complainant need not prove his cause of action; he must confine his efforts to resisting the defence set up. What a plea does not deny it admits, by necessary implication; and the complainant need concern himself only as to the issue raised by the plea.

4. **Whatever is Admitted by Written Agreement of the Parties Need Not be Proved.** Such admissions are absolutely conclusive, and partake of the nature of solemn admissions of record. Neither will the Court hear evidence to explain, or vary, such an agreement.

§ 453. **When Evidence by the Complainant is Not Necessary.**—No evidence is necessary to sustain the bill:

1. Where the bill has been taken for confessed against an adult defendant, not *non compos*, who has been served with subpoena, or who has voluntarily entered his appearance, or who has been brought into Court by attachment of his property and publication.<sup>6</sup>

2. Where the answer confesses the Equity of the bill, and sets up new matter in avoidance of that Equity. But after the matter in defence is proved, the complainant must rebut it.

3. Where the foundation of the suit is a written contract, note, or other instrument, and the execution thereof is not denied under oath.<sup>7</sup>

§ 454. **When Evidence by the Defendant is Not Necessary.**—The defendant is not required to make any proof:

1. Where no relief is prayed against him; as where he is made a party because an officer of the law having process, or is made a defendant as officer of a corporation whose sworn answer is called for, or is made a party as a mere agent, or otherwise, no decree being sought against him.

2. Where he disclaims, and no attempt is made to show that he has been setting up any claim to the property involved in the suit, or exercising any acts of ownership over it.

3. Where he has denied the material allegations of the bill, and none of them have been sustained by proof.

4. Where, though some relief may be prayed against him, he does not seek

<sup>1</sup> *Non potest probari quod probatum non relevat.* (That cannot be proved, which, when proved, is irrelevant.)

<sup>2</sup> *Shaw v. Patterson*, 2 Tenn. Ch., 171; *Henderson v. Bigham*, 12 Heisk., 58; *Rogers v. Breen*, 9 Heisk., 679; *Bedford v. Williams*, 5 Cold., 207. But in the Chancery Court, it is not necessary in order to put a matter in issue that it shall be alleged by one party and denied by the other, for a matter in avoidance alleged in the answer is in issue, as is a matter alleged in the bill and neither denied nor admitted in the answer.

<sup>3</sup> *Quod constat Curia obere testium non indiget.*

(What is known [judicially] to the Court needs not the aid of witnesses.)

<sup>4</sup> But the laws of another State must be proved, as any other fact, or they will be presumed to be the same as the laws of our own State. *Bagwell v. McTighe*, 1 Pick., 618; *Templeton v. Brown*, 2 Pick., 53. *Prasumitur Iudex habere omnia jura in scrinio pectoris sui.* (A Judge is presumed to have all the laws in the book-case of his breast.)

<sup>5</sup> 1 Greenl. Ev., §§ 4-6a.

<sup>6</sup> *Ante*, § 206.

<sup>7</sup> Code, § 3777.

to dispute the complainant's right thereto, and is willing he may have the relief he prays.

5. When he has, by his answer, admitted the material allegations of the bill, or the bill has been taken for confessed by him. In the latter case, however, if the bill pray an account, the defendant may, and should, introduce his evidence before the Master at the taking of the account.<sup>8</sup>

§ 455. **What Facts are in Issue.**—The object of pleadings is, (1) to notify the opposite party what matters will be offered in evidence; and (2) to inform the Court what matters are submitted to its adjudication. It is, therefore, (1) a fundamental rule of pleading that no facts are in issue, unless they are alleged in the pleadings; and (2) it is a fundamental rule of evidence that no proof is admissible, unless it relates to the facts alleged in the pleadings.<sup>9</sup> The Court cannot notice matter, however clearly proved, unless it be alleged in the pleadings;<sup>10</sup> and omissions in the allegations of the bill cannot be supplied by evidence.<sup>11</sup>

It may be laid down as an indisputable proposition, that whatever facts are necessary to entitle a complainant to a decree, or to enable the defendant to sustain the defence in avoidance by him set up, must be proved, unless they are admitted by the other party.<sup>12</sup> In strictness, any fact alleged by one side and admitted by the other, in their respective pleadings, is not in issue, and need not be proved, whether the admission be express, or constructive.<sup>13</sup> Any matter alleged in the bill, and neither admitted nor denied in the answer, must be proved.<sup>14</sup>

§ 456. **What is in Issue upon a Plea.**—A plea in bar admits every material allegation of the bill not covered by the plea. This is necessarily so from the fact that the complainant is entitled to an answer to every allegation and charge contained in the bill; and so much of the bill as the defendant does not dispute by his plea, is deemed admitted, for all the purposes of the issue made by the plea.<sup>15</sup> On the argument of a plea in bar, every fact stated in the bill, and not denied by the averments in the plea, and by the supporting answer, if any, must be taken as true;<sup>16</sup> and so, when a replication is filed to a plea, the complainant need not prove the truth of such of his allegations as are not denied by the plea. The only facts in issue, and on which proof need be taken, are those put in issue by the plea. Thus, if the statute of frauds is pleaded to a bill for a specific performance, the agreement not being alleged in the bill to be in writing, nothing is in issue except the existence of a written agreement, the balance of the bill being admitted. So, if such a bill allege the agreement to be in writing, and a negative plea is filed denying that allegation, the only matter in issue is whether the agreement is, in fact, in writing, all the other facts alleged in the bill being admitted. Hence, the rule may be laid down that on the trial of a plea in bar, nothing is in issue but the truth of the plea; if the plea be affirmative, the burden of proof is on the defendant; if the plea be negative, the burden of proof is on the complainant.<sup>17</sup>

<sup>8</sup> 1 Dan. Ch. Pr., 525, note.

<sup>9</sup> Gres. Eq. Ev., 229. Mr. Gresley says that all evidence is impertinent when it relates to (1) matters not in issue; (2) matters admitted in the pleadings; (3) matters that are immaterial, and (4) matters that are needlessly prolix. *Ibid.*, 229-246.

<sup>10</sup> *Sheratz v. Nicodemus*, 7 Yerg., 9; *Bedford v. Williams*, 5 Cold., 207; *Austin v. Ramsey*, 3 Tenn. Ch., 121; *Johnson v. Luckadoo*, 12 Heisk., 273; *Turley v. Turley*, 1 Pick., 260; *Merriman v. Lacey*, 4 Heisk., 209.

<sup>11</sup> *Shaw v. Patterson*, 3 Tenn. Ch., 174; *Woodward v. Walton*, 7 Heisk., 50. The failure of the bill to set up matters in avoidance of a defence cannot be cured by proof: the proper practice is to amend the bill and allege the matters in avoidance. See *ante*, § 147.

<sup>12</sup> 1 Dan. Ch. Pr., 836.

<sup>13</sup> Gres. Eq. Ev., 236.

<sup>14</sup> *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 603, and cases there cited; *Bank v. Jefferson*, 8 Pick., 537; *Nichols v. Cecil*, 22 Pick., 455. In some of the States, all facts well alleged in the bill, and not denied, or explained, in the answer, are deemed admitted. 1 Dan. Ch. Pr., 837, note 4. This is the rule in our Circuit Courts. Code, § 2910; and it is the true rule. The holding of our Supreme Court to the contrary is unfortunate, when the oath of the defendant is waived; because (1) it, without reason, makes the law of pleading in Chancery different from that in the Circuit Court; (2) it violates a fundamental rule of pleading; and (3) it encourages imperfect and evasive answers. An unsworn answer is a mere pleading, and the rule of pleading in the Code, § 2910, should be applied to it.

<sup>15</sup> 1 Dan. Ch. Pr., 837. See, Code, § 2910.

<sup>16</sup> 1 Dan. Ch. Pr., 694.

<sup>17</sup> 1 Dan. Ch. Pr., 837.

So, on a plea in abatement: if the plea brings forward new matter, nothing is in issue but the truth of the new matter; in which case the burden of proof is on the defendant: if the plea in abatement deny some allegation of fact in the bill, the truth of that allegation is the only matter in issue; and, on that issue, the burden of proof rests on the complainant. And, in general, it may be stated that the rules applicable to the frame, form and proof, of pleas in bar, affirmative and negative, apply to the frame, form and proof of pleas in abatement, affirmative and negative.

The admission of the truth of so much of the bill as is not denied by the plea, or by the plea and supporting answer, when such answer is filed, is called a constructive admission.<sup>18</sup>

§ 457. **What is in Issue upon an Answer.**—When a bill has been answered, every material fact, alleged in the bill and not admitted by the answer, is in issue. At law, every fact alleged in the declaration, and not denied in the plea is taken as true;<sup>19</sup> but in Chancery, every allegation of fact in the bill not admitted or denied in the answer, must be proved, the failure to admit or deny being equivalent to a denial.<sup>20</sup>

It is a fundamental rule in Chancery, as in the courts of law, that no evidence will be admitted in reference to any matter not noticed in either the bill, or the answer.<sup>21</sup> For this reason, if a complainant proves a case outside of the pleadings, such proof will not entitle him to any decree; and if, on the other hand, the defendant proves a defence, outside of the issues raised by the pleadings, such a defence will not profit him,<sup>22</sup> except the defence be that of champerty.

If the defence consists in a denial of the material allegations of the bill, then the truth of those allegations is the main issue, and the burden of proof is on the complainant; if the defence consists of matters in avoidance, then the truth of those matters is the main issue, and the burden of proof is on the defendant.<sup>23</sup>

It must be kept in mind, however, that evidence of particular facts may be given under an allegation of the general fact; thus, where the character of an individual, or his general behavior, or the state of his mind, is charged generally, evidence of particular facts and acts, bearing directly on the charge, may be proved.<sup>24</sup> The rule that no evidence will be admitted in support of facts not mentioned in the pleadings, does not require that the evidence containing those facts should be mentioned, nor does it require that the materials, of which those facts consist, should be detailed in the pleadings.<sup>25</sup> And if the facts and circumstances which constitute a ground of relief be stated, these may be proved, although the ground of relief be not designated in technical language.<sup>26</sup>

<sup>18</sup> *Ibid.*

<sup>19</sup> Code, § 2910.

<sup>20</sup> *Hill v. Walker*, 6 Cold., 429; *Hardeman v. Burge*, 10 Yerg., 202; *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 602; *Bank v. Jefferson*, 8 Pick., 537, citing the above section; *Nichols v. Cecil*, 22 Pick., 455; 1 Dan. Ch. Pr., 837, note. See, *ante*, § 452, note 2.

<sup>21</sup> This subject will be found fully considered in the Chapters on Bills and Answers; and the reason of the rule there given, requiring parties to allege in their pleadings every matter they expect to prove. *Ante*, §§ 140-142; 358. The very object of pleading is to inform the Court of what the charges and the defences are; and to notify the opposite side what facts he must meet.

<sup>22</sup> 1 Dan. Ch. Pr., 853. *Sappington v. Ruther-*

*ford*, 3 Hay., 271. In such cases, the Court will, sometimes, allow the pleadings to be amended, so as to let in the proof. See Article on Amendments.

<sup>23</sup> But, if the complainant sets up matters in avoidance of an anticipated defence, and such defence is made, then, as to such matters, the burden of proof is on the complainant. *Jenkins v. DeWar*, 4 Cates, 684; *Gross v. Disney*, 11 Pick., 592; *Sully v. Childress*, 22 Pick., 109. See, *ante*, § 147.

<sup>24</sup> 1 Dan. Ch. Pr., 853.

<sup>25</sup> 1 Dan. Ch. Pr., 855.

<sup>26</sup> *Weatherhead v. Boyers*, 7 Yerg., 545; *Bartee v. Tompkins*, 4 Sneed, 624; *Cunningham v. Wood*, 4 Hum., 417; *Cox v. Waggoner*, 5 Sneed, 543. Indeed, it is always safe pleading to set out the facts on which the pleader relies, whether the pleading be a bill, a plea, or an answer.

ARTICLE III.

PLEADINGS WHEN EVIDENCE.

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| <p>§ 458. Admissions in the Bill.<br/>         § 459. Admissions in the Answer.<br/>         § 460. Answer When Evidence for the Defendant.</p> | <p>§ 461. Answer When Not Evidence for the Defendant.<br/>         § 462. When the Bill is Evidence in Behalf of the Complainant.</p> |
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§ 458. **Admissions in the Bill.**—The facts, positively and directly alleged in the bill, are in the nature of admissions by the complainant; and the defendant may use them as such at the hearing. Whether such allegations are true, or not, is immaterial, they being put forth as true are of the nature of judicial admissions, for the purposes of that particular trial. If, however, an amended bill has been filed correcting, or changing, any of the facts alleged in the original bill, the original bill cannot be read against the complainant, in so far as it has been changed, or corrected, by the amended bill.<sup>1</sup> Where damaging admissions are inadvertently made in a bill, especially in a bill not required to be sworn to, the Court will, on proper application, allow the bill to be so amended as to omit, or avoid, or explain, the injurious admission.

§ 459. **Admissions in the Answer.**—All admissions in an answer, whether the answer is under oath or not, are conclusive against the defendant; and may be read against him as evidence at the hearing,<sup>2</sup> whether the facts admitted are on his own personal knowledge, or merely on information and belief. What a defendant states in his answer, on information only, will not be deemed an admission; but if he answers that he “believes,” or is “informed and believes,” that the fact is so, this will be deemed a sufficient admission of the fact, in the absence of qualifying or contrary clauses; for, the general rule is, that what the defendant believes the Court will believe.<sup>3</sup>

The answer of one defendant cannot be read against a co-defendant, unless such co-defendant claims through him whose answer is proposed to be read, or is a partner, or jointly interested in the transaction in question, or they are otherwise identified in interest; or, unless the answer is adopted, in whole or in part, by the defendant against whom it is read.<sup>4</sup>

§ 460. **The Answer when Evidence for the Defendant.**—When the complainant makes the defendant a witness, by calling for his answer on oath, such answer is not only evidence in favor of the complainant in so far as it admits the allegations of the bill, but it is, also, evidence in favor of the defendant, in so far as it directly and positively denies such allegations, or is otherwise responsive to the bill. The general rule is, that such an answer is evidence in so far as it is directly responsive<sup>5</sup> to the allegations and charges made in the bill; and if it directly and positively denies the material allegations and charges of the complainant, his bill must be dismissed; unless he can overcome the answer,

If the bill propounds an interrogatory, or makes a charge, and calls on the defendant to answer it, if the answer give the precise information called for, in whole, or in part, or directly and positively admits or denies the charge, it is responsive. If the answer is, in effect, “yes, but;” or “no, but;” it is responsive in so far as it admits, or denies, but not responsive as to the “buts,” excuses, explanations, and avoidances, these not having been called for. The complainant must take what he called for, but cannot be compelled to take what he did not call for. The defendant must make out his part of the suit for himself.

1 3 Greenl. Ev., § 275; 1 Dan. Ch. Pr., 838.  
 2 1 Dan. Ch. Pr., 837, note; 846, note; Wilson v. Waters, 24 Pick., 398.  
 3 3 Greenl. Ev., § 282; 1 Dan. Ch. Pr., 840.  
 4 3 Greenl. Ev., § 283; 1 Dan. Ch. Pr., 841; Turner v. Collier, 4 Heisk., 95. But see Sawyers v. Sawyers, 22 Pick., 597, which holds that the answer of one defendant cannot be read against a co-defendant claiming under him when he had transferred the property or interest before he filed his answer.  
 5 The test of the responsiveness of an answer is: Was the response one directly called for by the bill. If so, it is responsive; if not so, it is not responsive.



(1) by the testimony of two witnesses to the substantial facts, or (2) by one witness and corroborating circumstances, or (3) by circumstances of greater weight than the evidence of one witness; or (4) by documentary evidence of greater weight than one witness.<sup>6</sup> These corroborating circumstances may be found in the answer itself, or in the evidence in the cause, the corroboration requisite being only so much as may be necessary to produce a clear preponderance of proof in favor of the complainant.<sup>7</sup>

When issues are submitted to a jury, a sworn answer may be read as evidence on behalf of the defendant; in which case it will be given the same weight it would be entitled to if the issues of fact were submitted to the decision of the Chancellor.<sup>8</sup>

**The Weight of a Sworn Answer, as Evidence,** is ascertained by the same rules as are applicable to a deposition, as evidence; and if it contain elements that impair, or destroy, its effect as credible testimony, it may be overcome by one witness. The rule, that a sworn answer is equal to one credible witness, does not prevail:

1. Where the answer makes new averments, or brings forward matters in avoidance, or discharge.<sup>9</sup>

2. Where the answer is unreasonable, or contradictory in itself, or sets forth circumstances corroborative of the bill.<sup>10</sup>

3. Where the answer is not direct, positive and unequivocal in its denials, or explanations.<sup>11</sup>

4. Where the answer is on information and belief.<sup>12</sup>

5. Where the answer itself shows, or it is apparent from the defendant's situation, or condition, that, though the answer is positive, he swears to matters of which he could not have personal knowledge.<sup>13</sup>

But the weight of the answer as evidence for the defendant is not to be lessened because he is an interested party,<sup>14</sup> nor can the complainant assail the character of the defendant in order to weaken the effect of his answer.<sup>15</sup>

§ 461. **The Answer when Not Evidence for the Defendant.**—The rule that an answer is evidence for the defendant has several exceptions, besides those referred to in the preceding section, the most important of which are the following:

1. **When the Oath of the Defendant is Waived** by the complainant in his bill, the answer is entitled to no more weight than the bill as evidence. In such a case, the answer merely makes an issue.<sup>16</sup>

2. **Answer of a Corporation** merely creates an issue, even when sworn to by one of its officers.<sup>17</sup>

3. **Answer in a Divorce Suit,** though sworn to, merely creates an issue,<sup>18</sup> both by operation of the statute, and because of the fact that the bill, also, is required to be under oath.

4. **Whenever the Law Requires a Bill to be Sworn to,** as in case of an injunction

<sup>6</sup> 3 Greenl. Ev., §§ 289; 354; 1 Dan. Ch. Pr., 844-848, notes; *Overton v. Bigelow*, 3 Yerg., 517; *Bogard v. McClung*, 11 Heisk., 113; *Baker v. Barfield*, 4 Hum., 514; *Smith v. Kincaid*, 10 Hum., 73.

<sup>7</sup> *Raines v. Jones*, 4 Hum., 490. The answer of the defendant may be overcome by one witness, and any circumstances which may turn the balance. The corroboration may be very slight, for the defendant is an interested witness. *Gres. Eq. Ev.*, 4-5.

<sup>8</sup> *Pearce v. Suggs*, 1 Pick., 724.

<sup>9</sup> *Alexander v. Wallace*, 10 Yerg., 105; *Davis v. Clayton*, 5 Hum., 446. In such cases, the burden of proof rests on the defendant: but if the matters in avoidance are a direct and proper response to the charges or interrogatories in the bill, then the answer is evidence of those matters. *Beech v. Haynes*, 1 Tenn. Ch., 570; *Gass v. Simpson*, 4 Cold., 288; *Walter v. McNabb*, 1 Heisk., 703. This rule does not apply where the answer admits the contract sued on, but insists it contained other material provisions. *Nichols v. Cecil*, 22 Pick., 455, citing the

10 *Brown v. Brown*, 10 Yerg., 84; *Raines v. Jones*, 4 Hum., 490; *Smith v. Kincaid*, 10 Hum., 73.

11 *Rhea v. Allison*, 3 Head, 179.

12 An answer on information and belief simply makes an issue, and may be overcome by a single witness. *McKissick v. Martin*, 12 Heisk., 313; *Wilkes v. May*, 3 Head, 175. See Article on Affidavits, *post*, § 788.

13 *Boyd v. Reed*, 6 Heisk., 631. On the general question, when one witness will overturn a sworn answer, see *Sto. Eq. Pl.*, § 849a, note; 1 Dan. Ch. Pr., 845-846, notes; 3 Greenl. Ev., § 289.

14 3 Greenl. Ev., § 284.

15 1 Dan. Ch. Pr., 845, note; *Murray v. Johnson*, 1 Head, 354.

16 Code, § 4317; *Lindsley v. James*, 3 Cold., 487; *Dunlap v. Haynes*, 4 Heisk., 479; *Overton v. Holinshade*, 5 Heisk., 683.

17 *Van Wyck v. Norvell*, 2 Hum., 192; *Smith v. St. Louis M. L. Ins. Co.*, 2 Tenn. Ch., 600.

bill, then a sworn answer thereto merely creates an issue, and one credible witness will be sufficient to overturn the denials in the answer.<sup>19</sup>

5. **Answer of an Infant, or of a Person of Unsound Mind**, though called for on oath and sworn to, cannot be read as evidence against them. The answers of infants, and persons of unsound mind, are generally framed and sworn to by their regular guardians, or their guardians *ad litem*; and the Court will not hold them bound by any admissions such guardians may make, and will often order damaging admissions to be stricken out of their answers. As a rule, the answer of an infant, or *non compos*, merely makes an issue of fact on every material allegation of the bill affecting such defendant.<sup>20</sup> The answer of a married woman, however, may be read against her, if she is not an infant, or of unsound mind.<sup>21</sup>

6. **When the Answer Sets up Matter in Avoidance** it is not evidence for the defendant, as to such matter, because he is not a witness, except in so far as he is required to answer. When, therefore, he sets forth in his answer matters in avoidance, or other matters not referred to in the bill, to that extent his answer is not responsive, and not, therefore, a deposition, but a mere pleading.<sup>22</sup> Hence, matters in avoidance set up in an answer must be proved by the defendant; and, if he fail to prove them, the complainant will be entitled to a decree.<sup>23</sup>

7. **When an Answer Required to be on Oath** is not properly sworn to it only makes an issue.<sup>24</sup>

8. **When a Complainant Answers the Petition** of an intervening creditor, his answer merely makes an issue.<sup>25</sup>

§ 462. **When the Bill is Evidence in Behalf of the Complainant.**—Ordinarily, a bill is a mere pleading, but, when it is required by statute, or the practice of the Court, to be sworn to, it partakes of the nature of an affidavit, and has a probative character. Thus a sworn bill, with proper allegations, will justify a writ of injunction, attachment, *ne exeat* or replevin, or the appointment of a receiver, or administrator, or guardian *ad litem*, or a publication to bring the defendant before the Court, the bill in such case being regarded both as a pleading and an affidavit.

Ordinarily, a bill when fully met by a sworn answer must be overcome by two witnesses, or by one witness and corroborating circumstances,<sup>26</sup> for the sworn answer has the force of a deposition. But if the bill is one required to be sworn to, and is sworn to, it also, has the force of a deposition, and thus neutralizes the probative force of the answer:<sup>27</sup> it is witness against witness. While this is generally true, nevertheless if the sworn bill be weak and indefinite, or general, in its allegations, or its allegations be sworn to on information and belief, and especially if sworn to by some one not appearing to know the facts, its probative force is greatly impaired.<sup>28</sup> And so with the answer.<sup>29</sup> If, on the other hand, a sworn bill be full, clear and emphatic, and the sworn an-

<sup>19</sup> The reason of this rule would seem to include bills for attachments, *ne exeat*s, and the appointment of receivers, as well as in case of bills for injunctions. Nevertheless, it has not been so expressly adjudged. The decisions all refer to injunction bills. The reason of this rule is, that where both bill and answer are sworn to, the oath of the complainant neutralizes the oath of the defendant. *Searcy v. Pannell, Cooke, 110; McLard v. Linnville, 10 Hum., 163; Boyd v. Reed, 6 Heisk., 631; Trabuc v. Turner, 10 Heisk., 447; Montgomery v. Rich., 3 Tenn. Ch., 664.* It seems, however, that if a bill required to be under oath, is not based upon the *personal knowledge* of the complainant, but merely upon *information and belief*, and the answer is direct and positive, and on the personal knowledge of the defendant, one witness only will not overcome such an answer. *Spurlock v. Fulkes, 1 Swan, 289.* The report of this case contains several misprints. The sentence referred to (pp. 290-291) should read: "True, the bill was sworn to, but \* \* \* not upon the personal knowledge of the complainant," etc. See syllabus of the case. The complainant was defendant in the Circuit Court. The

word "*resumed*," near the close of the opinion, should be "*received*." *Carrick v. Prater, 10 Hum., 270.*

<sup>20</sup> 1 Dan. Ch. Pr., 169; 177; 178; 841.

<sup>21</sup> 1 Dan. Ch. Pr., 185.

<sup>22</sup> 3 Greenl. Ev., 290; 1 Dan. Ch. Pr., 845, note.

<sup>23</sup> 3 Greenl. Ev., 290; 1 Dan. Ch. Pr., 844-846, notes; *Napier v. Elam, 6 Yerg., 108; Beech v. Haynes, 1 Tenn. Ch., 569; Davis v. Clayton, 5 Hum., 446.*

<sup>24</sup> *Chester v. Canfield, 25 Shan. Cas., 309.* But see 5 Paige, (N. Y.) 654, construing a similar statute.

<sup>25</sup> *Irvine v. Dean, 9 Pick., 346.*

<sup>26</sup> *Ante*, § 460.

<sup>27</sup> *Searcy v. Pannell, Cooke, 110; McKissick v. Martin, 12 Heisk., 311; Carrick v. Prater, 10 Hum., 270; Montgomery v. Rich., 3 Tenn., Ch., 664; McLard v. Linnville, 10 Hum., 163.* See, also, § 460, note 19.

<sup>28</sup> *Topp v. White, 12 Heisk., 201; McKissick v. Martin, 12 Heisk., 311; Wilkins v. May, 3 Head, 173.* See, also, §§ 142; 838; 851-852.

<sup>29</sup> *Ante*, § 460.

swer weak, indefinite or general, the probative force of such an answer is so weak that very slight corroboration of the bill will justify a decree.<sup>30</sup> Or, if a sworn answer be full, clear and responsive, and the sworn bill weak, indefinite, and general, one witness in behalf of the bill will not justify a decree, unless he is corroborated.<sup>31</sup> The relative probative force of bills and answers is not only often decisive at the hearing on the merits, but often decisive, also, in determining motions to grant or dissolve injunctions, and to appoint receivers.

#### ARTICLE IV.

##### WHEN PROOF MUST BE FILED.

§ 463. Steps Preliminary to the Taking of Proof.  
 § 464. When a Cause is at Issue.  
 § 465. The Time Allowed for Taking Proof.  
 § 466. When Documentary Evidence Must be Filed.

§ 467. When Documents Will be Ordered to be Produced.  
 § 468. When and How Exhibits Must be Proved.

§ 463. **Steps Preliminary to the Taking of Proof.**—As soon as the issue of fact is made, each party should narrowly scrutinize the pleadings in order to ascertain (1) exactly what matters are in issue, and (2) on whom the burden of proof rests, and (3) in what event, and how, such burden may be cast upon the other side. The parties must consider not only what must be proved by each of them, respectively, but, also, how the proof is to be made.

The complainant should consider whether he can risk setting the cause for hearing, on bill and answer; or whether he had better except to the answer, for insufficiency: if he have a *pro confesso* he should consider whether such *pro confesso* is a confession of the bill, or only makes an issue of fact.

The defendant should remember that if his defence is in avoidance, the burden of proof rests upon him, and not upon the complainant. All parties should be diligent in getting in their evidence, and keep in mind that the cause stands for hearing at the first term after answer filed.

§ 464. **When a Cause is at Issue.**—A cause is at issue for the taking of proof whenever a plea or answer has been filed to the bill by all of the defendants, or a *pro confesso* has been entered against those not pleading or answering, and a replication has been filed to the plea in case a plea is filed, or twenty days have elapsed since answer filed. The issue usually consists of an allegation of a fact or facts by one party and a denial of such allegation or allegations by the other party. The allegation of facts is usually made by the complainant, and the denial by the defendant; but this is not always so; the allegation upon which the issue is made is sometimes made by the defendant, and the denial is sometimes made by the law.<sup>1</sup> Thus, 1, The defendant may, in his answer, confess the material allegations in the bill, and set up new affirmative matters in avoidance, in which case the law makes an issue by interposing a denial of these new matters, and requiring the defendant to establish them by proof; 2, The defendant may, and often does, answer without denying all the material facts alleged in the bill, in which case, unless the complainant except to the answer for insufficiency, the law interposes a denial, and requires the complainant to prove

<sup>30</sup> Rhea v. Allison, 3 Head, 179; Cox v. Wagoner, 5 Sneed, 544.

<sup>31</sup> Carrick v. Prater, 10 Hum., 270.

<sup>1</sup> Formerly, a replication to the answer was necessary to put a cause at issue in the Chancery Court,

the issue is regarded as made in the same way as if a replication had been filed, unless the cause is set for hearing expressly on bill and answer. The statute, *proprio vigore*, operates as a replication filed at the end of the time allowed for putting in excep-

what is neither admitted, nor denied, in the answer; 3, Where a plea is filed, and the complainant, without filing a replication, takes proof as to its truthfulness, or acquiesces in the taking of proof by the defendant as to the truth of his plea, in such a case, the Court will consider the plea as having been denied, and as being at issue, and will allow a replication to be filed as of a date prior to the taking of the proof, or will consider such a replication as filed;<sup>2</sup> and 4, In those cases, where a *pro confesso* is not deemed a confession, the law makes it equivalent to a denial of all the allegations of the bill.<sup>3</sup>

It will thus be seen that an issue, for the purpose of taking proof, is ordinarily made either (1) by the filing of a replication to a plea; or, (2) by an answer; or, (3) by an order *pro confesso* for want of a plea, or answer. The filing of exceptions to an answer for insufficiency does not prevent the taking of proof; and for all purposes of taking proof, or otherwise preparing for a hearing, a cause becomes at issue as soon as an answer is filed, whether the answer be excepted to or not.<sup>4</sup>

The complainant's Solicitor is allowed twenty days, after notice of the filing of the answer, to put in exceptions to the answer for insufficiency; or to set the cause for hearing on bill and answer. If he fail to except, or to set the cause for hearing on bill and answer, within that time, the cause becomes at issue.<sup>5</sup> If the complainant put in exceptions to the answer, various steps are taken in consequence that result in the answer being adjudged sufficient or insufficient; if adjudged sufficient, the cause becomes at issue upon such adjudication being made; if, however, the answer be adjudged insufficient, the cause does not become at issue until a sufficient answer has been filed.<sup>6</sup> Hence, the rule may be stated to be, that a cause is at issue, after answer filed, for the purposes of a hearing (1) at the end of twenty days after complainant's Solicitor receives notice of the filing of the answer, unless within that time he excepts to the answer; and (2) if he excepts, then the cause is at issue for the purposes of a hearing whenever the exceptions are finally disallowed; or (3) if the exceptions are allowed, then the cause is at issue, and stands for trial whenever a sufficient answer is filed.<sup>7</sup>

A *pro confesso* makes an issue as against all defendants who are (1) infants, (2) persons of unsound mind, (3) executors, (4) administrators, (5) defendants to divorce bills, (6) defendants to bills without attachment of property who are non-residents, and (7) defendants whose names and residences are unknown; the issue in all such cases being the same as though the allegations of the bill had been denied by an answer not sworn to.<sup>8</sup>

A cause is, also, at issue for the purposes of taking proof, and also of a hearing, at the return term of the process on which a *pro confesso* is taken against a defendant for failure to make defences, when duly brought into Court (1) by service of subpoena, or (2) by publication, or (3) by attachment and publication. In all other cases where a *pro confesso* is taken, the cause stands for hearing at the next term after the bill is taken for confessed.<sup>9</sup>

If time is granted a defendant to plead, or answer, "so as not to delay," such a grant has the same effect as though a plea or answer was then filed; and the cause is then at issue for all the purposes of taking and filing proof.

When a cause is set down by the complainant for hearing on bill and answer, it is not deemed at issue for the purpose of taking proof; but the complainant, by such act, is deemed to admit everything alleged in the answer, and to acquiesce in the truth of the defendant's denials, thus rendering the taking of proof wholly unnecessary.<sup>10</sup>

<sup>2</sup> 1 Dan. Ch. Pr., 834; 1 Barb. Ch. Pr., 252.

<sup>3</sup> Code, §§ 4371; 4373.

<sup>4</sup> Code, § 4406; Ch. Rule, I, § 6, *post*, § 1190. Code, § 4457, dates the right of the defendant to take proof from the filing of a sufficient answer; but this section is impliedly repealed by the Chancery Rules. See the 1st section of the Act of 1871, ch. 97, *post*, § 1189.

<sup>5</sup> Code, §§ 4322; 4328; 4401; 4430; 4432.

<sup>6</sup> The procedure on exceptions to answers has heretofore been stated. *Ante*, §§ 420-424.

<sup>7</sup> Code, §§ 4328; 4401; 4403; 4432.

<sup>8</sup> Code, §§ 4371; 4373.

<sup>9</sup> Code, §§ 4369-4370; 3524-3528.

<sup>10</sup> See, *ante*, § 439.

§ 465. **The Time Allowed for Taking Proof.**—All proof in chief must be taken within four months, and all rebutting proof within six months, after the cause becomes at issue.<sup>11</sup> If an order is made giving the defendant time to plead or answer, “so as not to delay,” the time for taking proof will begin to run from the date of the order. The Chancellor, or Master, may, however, extend the time for taking proof by either party, upon sufficient cause shown by affidavit, and upon terms.<sup>12</sup> Proof in chief, in the meaning of the Chancery rule, is proof that tends to establish the affirmative allegations of the pleadings;<sup>13</sup> and rebutting proof is proof that tends to refute these allegations, or that assails the evidence, or witnesses, of the other party. Proof of matters in avoidance is proof in chief. Rebutting proof may be taken at any time within the six months after the time for taking proof begins to run; but proof in chief, whether by the complainant or the defendant, must be taken within the four months.<sup>14</sup>

§ 466. **When Documentary Evidence Must be Filed.**—The Chancery Rule requiring each party to take his proof in chief within four months, and his rebutting proof within two months, does not apply to documentary evidence,<sup>15</sup> but is confined to depositions. This is shown by the following considerations: 1. The expression “take proof,” in the Rule, is applicable exclusively to taking depositions, and not to filing documentary evidence. Documentary evidence is not “taken.” 2. The Code and the Chancery Rules both provide for exceptions to depositions, because not filed in reasonable time;<sup>16</sup> but do not provide for exceptions to documentary evidence, on any such ground. 3. Exhibits to bills and answers may be provided by witnesses at the hearing.<sup>17</sup> Such exhibits are always documentary. 4. Documentary evidence consists ordinarily of notes, bonds, deeds, wills, records, books, and other writings, and these are often (1) of too much value to suffer the risks and hazards of a Court file; and (2) they are generally well known to the opposite side, and (3) they are often muniments of title, or choses in action, and are consequently private property, and not proper matters to be filed in Court after the manner of depositions, and for these reasons may be retained by the party by special order of the Chancellor, or Master.<sup>18</sup> 5. The Chancery rules of 1830, and of 1858, allowed deeds, trans-

<sup>11</sup> Ch. Rule, II, § 4, says: “After a cause is set for hearing, the same shall be open to both parties for proof, without leave of the Court.” A cause is “set for hearing” as soon as it is at issue. Code, § 4431. As to when a cause is at issue, see, *ante*, § 464.

As to when documentary evidence must be filed, see the next section.

The statute does not give the parties six months in which to take proof, but makes six months the maximum limit, and allows the case to be tried at any time after it is at issue. *Rather v. Williams*, 10 Pick., 543, citing the above section, then § 463. *Harris v. Bogle*, 7 Cates, 701. See, *post*, § 1191. On a continuance each party has only the remainder of the four and two months in which to take his proof, unless his time be extended by the Court, the Chancellor or the Master, as elsewhere shown, or by consent of the other party.

The object of Chancery Rule, II, § 4, *post*, § 1191, was to ensure a trial at the second term after the bringing of the suit; and to give a right of trial at the first term, if the answer has been filed in time to take the requisite proof, especially if such proof is documentary, or in a narrow compass. The statutory time for taking proof is ample, and the Chancellor should vigorously enforce the limit prescribed. The 69th rule of the United States Equity Courts provides that three months, and no more, shall be allowed for the taking of testimony, after the cause is at issue; unless the Court, or a Judge thereof, shall, upon special cause, shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. In England, the evidence in chief, on both sides, must be closed within eight weeks after

of Tennessee should keep abreast of the times; and, in these days of railroads, telephones and telegraphs, Court business should not be conducted on a slow-coach schedule. See *Wood v. Frazier*, 2 Pick., 508.

<sup>12</sup> Ch. Rule, II, § 4; *ante*, § 62, sub-sec. 8. The affidavit should be special; and should not only show a good excuse for not taking the proof within the limit allowed, but should, also, give the names of the witnesses sought to be examined, and specify the facts each is expected to prove. The order extending the time should designate the witnesses allowed to be examined, and should operate the party applying with the costs of all the proof thereafter taken, both by him and the opposite party. This rule as to costs should never be relaxed, except in cases where the failure to take the proof in time was caused by some act of the opposite party, or by some accident or mistake of the applicant, unmixed with negligence on his part.

The fact that the evidence of the other party was filed at the last moment allowed for so doing is no ground for enlarging the time for taking evidence in chief, if it is confined to matters distinctly put in issue by the pleadings. 1 Dan. Ch. Pr., 890.

<sup>13</sup> Proof in chief is proof necessary to produce a result contrary to what would be the decree if no proof at all were introduced.

<sup>14</sup> When a bill or answer is allowed to be amended so as to raise a new issue of fact, additional time may be allowed to take proof on such issue. *Stull v. Goode*, 10 Heisk., 58.

<sup>15</sup> Documentary evidence, in practice, is deemed to comprise all written evidence. 2 Dan. Ch. Pr., 1820, note. See, *post*, § 468.

<sup>16</sup> Code, § 3868; Ch. Rule, II, § 5; § 1191, *post*.

<sup>17</sup> Code, § 4458.

scripts of records, or other written documents, to be filed at any time before the cause was heard.<sup>19</sup> 6. Under the general rules of Chancery practice, documentary evidence may be filed, and the execution of writings proved, at the hearing, and after the taking of evidence has been closed.<sup>20</sup>

When, however, documents and papers are exhibited to pleadings, or depositions, they must be filed in the Master's office at the time the pleading or deposition, is filed, unless, by special order of the Chancellor, or Master, it is otherwise ordered. In case of such an order, the party offering the documents may retain them until the hearing, unless required by the Chancellor, or Master, to file them sooner.<sup>21</sup>

§ 467. **When Documents will be Ordered to be Produced.**—The Chancery Court has inherent authority to order a party to produce documents<sup>22</sup> in his possession, or control, provided (1) he admits that the documents are in his possession, or control; and (2) it satisfactorily appears that their production is necessary, to enable the party demanding their production to make out his case.<sup>23</sup> This order is usually made on the defendant, in which case it is based on an admission in his answer, or in his deposition; but it may, also, be made on the complainant, if he admits in a pleading, or in a deposition, that he has in his custody, or control, a document necessary to the defendant's case. If the complainant, however, has documents whose production is valuable to the defendant, the latter may file a cross bill, and pray a discovery;<sup>24</sup> or he may file interrogatories under the statute.<sup>25</sup> The Court, however, in its general disposition to aid in discovering all facts material to the controversy,<sup>26</sup> will, on motion of either party, compel the other party to produce any document admitted, or proved, to be in his possession, and material to the party seeking its production.

The Court will not, however, compel the production of a document when such production would violate professional confidence, or would tend to subject the party having it to a criminal charge, or to a penalty, or forfeiture. In such cases, however, the party objecting to an order of production, on any of these grounds, must distinctly swear that he believes the document to be privileged, or that its production would tend to criminate him, or expose him to a penalty, or to a forfeiture.<sup>27</sup>

An order for the production of documents is enforced by attachment for contempt, which will issue on proof of service of the order to produce, and of failure to produce as required by such order.<sup>28</sup> Or, when necessary, the Court may appoint sequestrators, and order them to seize the documents required to be produced.<sup>29</sup>

The document must be produced in the Clerk's office, and filed with him;<sup>30</sup> and if any part of the document is privileged from production, the Chancellor will, upon proper affidavit of the fact, allow the party ordered to produce, to seal up such privileged part.<sup>31</sup>

Documents not in the possession of a party to the suit may be obtained, or their production enforced, by a subpoena *duces tecum*. If this subpoena is not obeyed, the person upon whom it is served may be attached and punished for contempt, on proof that the document is in his possession.<sup>32</sup>

<sup>19</sup> Cooke, 448; 456.  
<sup>20</sup> 1 Dan. Ch. Pr., 881-883. See *Wood v. Neeley*, 7 Bax., 590.

<sup>21</sup> *Ibid.* Where either party has, in his pleading, notified the other that he will, at the hearing, read certain deeds, contracts, decrees, or other documentary evidence, referred to in his pleading, but not exhibited, such evidence need not be filed until the hearing. If the opposite party desires such documentary evidence filed earlier, he must obtain an order to that effect from the Chancellor, or Master.

<sup>22</sup> The word "documents" comprises all written, or printed, evidence. 2 Dan. Ch. Pr., 1820, note.

<sup>23</sup> *Clift v. Clift*, 3 Pick., 21.

<sup>24</sup> 3 Greenl. Ev., § 302; *Lewis v. Brooks*, 6 Yerg., 184.

<sup>25</sup> *Post*, §§ 483-485.

<sup>26</sup> An inspection of an original document is often necessary when its authenticity or validity is in question. See *Walker v. Walker*, 6 Cold., 573.

<sup>27</sup> 2 Dan. Ch. Pr., 1833-1835; 3 Greenl. Ev., § 300.

<sup>28</sup> 2 Dan. Ch. Pr., 1839.

<sup>29</sup> 2 Dan. Ch. Pr., 1056.

<sup>30</sup> 2 Dan. Ch. Pr., 1836.

<sup>31</sup> This affidavit is conclusive. 2 Dan. Ch. Pr., 1824.

<sup>32</sup> 3 Greenl. Ev., § 305.

## ORDER TO PRODUCE A DOCUMENT.

John Doe,  
vs.  
Richard Roe. }

In this cause, on motion of the complainant, supported by the averments of his bill [or by affidavit, or by the deposition of E. F., filed in the cause, or by admissions in the answer,] it is ordered by the Court that complainant in person, or by his Solicitor, have the right to inspect, and take a copy of the document referred to in the bill [or in said affidavit, or deposition] as the will of G. H. [or, the letter, deed, contract, or other written or printed document, describing it,] in the office of the Clerk and Master of this Court on the 1st day of April, 1905, and for ten days thereafter; and, if the complainant so desire the Clerk and Master will certify in writing thereon that such copy is correct. [In case it is desired to inspect a book or other large document, either printed or written, and make a copy of only a part thereof, the order should give leave to make a copy of so much thereof as complainant may desire, giving the defendant the right to file the whole book, or other document, should he so desire.] And the defendant is ordered to deliver said will, [or other paper, naming it.] to the Clerk and Master on or before said date for such inspection and copy.

§ 468. When and How Exhibits Must be Proved.—Exhibits comprise all writings, printings, and other things,<sup>33</sup> (1) exhibited, or annexed, to a bill, answer, petition, affidavit, report, deposition or other paper, filed in a cause, or (2) proved in a cause when not exhibited, or annexed, to any pleading or other paper.

1. Exhibits to Pleadings May be Proved (1) by affidavits, filed with the exhibits in the Clerk's office at any time before the hearing; or (2) by witnesses, at the hearing.<sup>34</sup>

Ordinarily, no exhibit can be proved at the hearing by witnesses, if it requires more evidence than the mere proof of its execution, or of hand-writing, to substantiate it. If the authenticity of the exhibit is questioned, and a cross-examination becomes necessary, it cannot be proved *viva voce* at the hearing. The examinations of the witnesses is restricted, at the hearing, ordinarily to three or four very simple points, such as (1) the custody and identity of an ancient document produced by its custodian, (2) the accuracy of an office copy by the proper officer, (3) the execution of a deed, or other writing, by the attesting witness, and (4) the hand-writing of a letter, receipt, note, or other writing. The Court may ask the witness questions suggested by adverse counsel, and a limited cross-examination may be allowed.<sup>35</sup> If, however, the Court should see that the adverse party is surprised by the introduction of *viva voce* evidence, and that a cross-examination would not be sufficient to enable the adverse party to test the authenticity, or genuineness, of an exhibit, the hearing of the cause should be suspended, and proof allowed to be taken as to the authenticity, or genuineness, of such exhibit.

2. Exhibits to Depositions Should be Proved by the witnesses to whose deposition they are exhibited. The depositions of subscribing witnesses to deeds, or other writings, should be taken with such instruments annexed thereto.<sup>36</sup>

The following form is given as an illustration of how such exhibits are proved:

## AFFIDAVIT TO PROVE AN EXHIBIT.

John Doe,  
vs.  
Richard Roe. } No. 30.—In the Chancery Court, at Brownsville, Tenn.

John Jones, being duly sworn, says:

## I.

[When the exhibit is proved by an attesting witness.] That he was present on [or about] the day the deed [or other writing] now here shown him, marked "A," and made an exhibit hereto, was executed by the parties thereto; and that he saw Richard Roe [give the name or

<sup>33</sup> Exhibits include not only deeds, wills, choses in action, accounts, written contracts of all sorts, letters, plats, drawings, plans, models, specifications, maps, books, pamphlets, records, transcripts, and all other written or printed matter; but include, also, samples of things, and even things themselves, when convenient, for inspection, or as illustrative, or explanatory, of the pleading, deposition, or affidavit

to which it is appended, or of which it is an exhibit. *Gres. Eq. Ev.*, 98, note; 1 *Dan. Ch. Pr.*, 881-883, notes.

<sup>34</sup> *Code*, § 4458.

<sup>35</sup> *Gres. Eq. Ev.*, 188; 1 *Dan. Ch. Pr.*, 882-883; *Consequa v. Fanning*, 2 *John. Ch.*, (N. Y.), 481.

<sup>36</sup> *Code*, § 4459.

names of the signers of the exhibit] sign, [or, heard him acknowledge,] said deed [or other writing,] and that the affiant signed his name thereto as a witness, at the request of said Richard Roe.

II.

[When the exhibit is not proved by an attesting witness.] That he is well acquainted with the handwriting of Richard Roe [the signer of the exhibit,] and that the deed now here shown him [describe it] marked "A," and made an exhibit hereto, was signed by said Richard Roe, and that his name thereto is in the proper handwriting of said Roe.

Affiant, also, says that he is well acquainted with the handwriting of George Roe, and that the name of said George Roe subscribed to said deed, [or other exhibit,] as an attesting witness, is in the proper handwriting of the said George Roe.

And further this affiant saith not.

[Add jurat.]

JOHN JONES.

The Master should attach the exhibit to the affidavit, and mark it filed, giving the date, and sign his name to the endorsement so that the exhibit may be fully identified.

When a writing, not exhibited to any pleading, or to other paper in a cause, is to be proved, at the hearing by a witness, reasonable notice thereof should be given the other party. But the Chancellor has the discretion to allow an exhibit to be proved *viva voce* at the hearing.<sup>37</sup>

ARTICLE V.

PRACTICAL SUGGESTIONS CONCERNING PROOF.

- § 469. When to Begin Taking Proof.
- § 470. What Must be Proved.
- § 471. As to Documentary Evidence.

- § 472. When and What Agreements to Make in Reference to Proof.
- § 473. Danger of Negligence and Excess of Confidence, in Preparing Proofs.

**§ 469. When to Begin Taking Proof.**—If you have any witness whose testimony is vital, you should take his deposition at the earliest moment possible. If the witness is aged, or infirm, or going out of the county, or State, or is the only witness to a material fact, you may take his deposition at any time after filing your bill,<sup>1</sup> without waiting for an answer, or plea. In no event allow any delay in taking your proof, especially if the burden of proof rests upon you.<sup>2</sup> Many good causes are lost by negligence in preparing a cause for trial; and, on the other hand, many doubtful causes are won by diligence and skill in taking testimony.

Keep in mind, that all proof in chief must be taken within four months after issue joined, and all rebutting proof within two months thereafter.

**§ 470. What Must be Proved.**—A great deal of unnecessary proof is taken in almost every contested suit.<sup>3</sup> This is generally the result of parties and Solicitors not really knowing exactly what proof is requisite. The first question you are called on to determine after the plea has been replied to, or the answer filed, is:

1. **What are the Matters Really in Issue.** To ascertain this, it is necessary to examine the bill, and see what the essential affirmative allegations are, and which of them have not been admitted by the answer. Nothing admitted by the answer is in issue; but every material affirmative allegation in the bill not admitted by the answer, and every material affirmative allegation, by way

<sup>37</sup> Barrow v. Rhinelander, 1 Johns. Ch., 550; Consequa v. Fanning, 2 Johns. Ch., 481.

<sup>1</sup> Code, §§ 3836; 3838; 4462. See, *post*, § 474.

<sup>2</sup> If your adversary has obtained time to amend or answer, so as not to delay, this will not prevent you proceeding to take your proof: you are not re-

quired to wait for the amendment to be made, or the answer to be filed, before beginning to take proof.

<sup>3</sup> In preparing for a suit conform your pleading to your proof, but in preparing for the trial conform your proof to your pleading.



of avoidance, in the answer, is in issue, and must be proved by the party making the allegations.

The question next in importance to be determined in preparing to take proof, is:

**2. On Which Side Rests the Burden of Proof.** Ordinarily, the burden of proof rests on the complainant; but, whenever the defendant admits the material allegations of the bill, and sets up new matters by way of avoidance, the burden of proving these new matters rests upon him.<sup>4</sup> The general rule is, that whichever party makes a material affirmative allegation, on him rests the burden of proving it, unless it is admitted by the opposite party. The defendant must prove: (1) payment; (2) a release; (3) failure, or illegality, of consideration; (4) fraud, when set up to defeat the deed, or contract, alleged in the bill; (5) a former judgment; (6) a new contract set up in lieu of the one sued on; or (7) any other affirmative matter by him set up to defeat the cause of action alleged by the complainant.

Defendants often lose when they have really good defences, because they are not aware that the burden of proof is on them.

**3. Some Important Rules of Evidence.** The following rules of evidence should be kept in mind in the preparation of proof:

1. The best evidence possible must be produced.
2. The evidence must be pertinent to the pleadings.
3. Nothing is evidence at the hearing that is not on file in the cause.
4. Presumptions prevail until rebutted by other proof.
5. Facts known to the Chancellor as an individual are not evidence.
6. He who asserts a material fact in his pleading must prove it, unless admitted.
7. He who confesses a material fact, and avoids it, must prove the matter in avoidance.
8. A preponderance of proof prevails.

**§ 471. As to Documentary Evidence.**—If you file a copy of any record, or of a registered deed, or other registered, or recorded, instrument, see to it that it is (1) properly copied, (2) properly certified, and (3) properly endorsed and marked filed in the cause. Note the names and dates in such copies to see that they are correct.

Remember, you cannot file a copy of a registered deed, or of any other instrument, that should be in your client's possession, unless you have proved that the original has been unintentionally lost, destroyed or mislaid, and cannot be found on diligent search. Nor can you introduce parol evidence of the contents of a writing in the possession of the other side, unless you show that you have served reasonable notice on the possessor to produce the original. This notice should be given before the parol proof is taken; but if given in a reasonable time before the parol proof is read in evidence, that would be sufficient.<sup>5</sup> This notice may be in the following form:

**NOTICE TO PRODUCE DOCUMENTS AT THE TAKING OF PROOF.**

John Doe, }  
*vs.* } In Chancery, at Loudon.  
 Richard Roe. }

To the said Richard Roe:

You are hereby notified to produce before the Master, at his office, on the [*day fixed for taking the depositions*] the following books of account, [letters, deeds, and papers, *describing them particularly so as to identify them,*<sup>6</sup>] or I will prove their contents by secondary evidence.

JOHN DOE,  
 By J. E. CASSADY, Solicitor.

This notice may be added to the notice of the taking of the depositions.

<sup>4</sup> As to the burden of proof, see, *ante*, §§ 441; 443; 445.

<sup>5</sup> Notice should be sufficiently long to enable the party to produce the papers called for. <sup>1</sup> Greenl. Ev., § 562.

<sup>6</sup> The notice must describe the writing or instrument demanded, so as to identify it. <sup>1</sup> Greenl. Ev., § 562; <sup>1</sup> Dan. Ch. Pr., 878.

**§ 472. When and What Agreements to Make in Reference to Proof.**—It frequently happens that there are important facts which are indisputably true, such as decrees of Courts, registered deeds and other matters of record, dates of well known events, names of heirs or distributees, contents of a book, or of a corporation's minutes, and the like. In all such cases, it is almost reprehensible for a Solicitor to refuse to agree that the fact is as he knows it to be, or, as he can, without much trouble, ascertain it to be. Often a deed, or a Court record, or a book of accounts, or other document, is needed only to show a simple fact, or date: in such a case, it is a great saving of costs to have an agreement, in writing, as to the particular fact, or facts, contained in such document, and needed in evidence.

Agreements as to proof should be made as soon as the need for them appears; and, if possible, should be made before any of the acerbities incident to a litigation arise. Admissions and agreements should always be in writing, and duly signed; and they should be clear and distinct, and duly entitled, and filed in the cause.<sup>7</sup> If not in writing, they should be incorporated in the decree, if the decree is, to any extent, based on them.<sup>8</sup>

The practice of making such agreements is one greatly to be commended; and, in construing them, the Courts will give them the force and effect contemplated by the parties at the time they were executed.<sup>9</sup>

For the purpose of the suit, an admission made by counsel is conclusive; and full authority to make admissions is presumed. Chancellors eagerly lay hold of such admissions as the basis of their decrees; and they are deemed better evidence of the facts than the finding of a jury.<sup>10</sup> Such admissions once made, and acted on, cannot be retracted: if made without authority, the party's remedy is against his counsel, unless his consent was obtained by fraud.<sup>11</sup>

The following matters are proper to be included in written agreements between counsel, if the facts will abundantly justify such a course:

1. That a decree, to such and such an effect, was pronounced by such and such a Court, on such and such a day, between such and such parties.
2. That deeds, or grants, exist between such and such parties, for such and such a tract of land, dated so and so,—especially when such deeds are registered.
3. That both parties derive title from a common source, and the date of each party's title.
4. That the land in dispute is granted land, and was granted prior to such and such a day: these facts are ordinarily important only when a party is seeking to make out his case by means of adverse possession under a color of title.<sup>12</sup>
5. That such and such a book, such as a merchant's book, a corporation book, a family Bible, a diary, or memorandum book, contains such and such a statement, or entry, or date, or other fact. In such a case, it would be well to copy the statement, entry, or fact desired, in full, showing its date, the number of the page, and the connection in which it is found.
6. That such and such a witness will swear so and so, and that the agreement shall have all the force and effect of a deposition by such witness, but no greater or other force and effect.

<sup>7</sup> 3 Greenl. Ev., § 292; 1 Dan. Ch. Pr., 849.

<sup>8</sup> The Court should by rule, require all such agreements to be in writing.

<sup>9</sup> It is to be regretted, that many Solicitors stand in such awe of their clients that they are unwilling to make any agreement, whatever, in reference to the evidence; and, as a consequence, the adverse side is frequently forced to obtain copies of deeds, and records, and to take depositions, in order to prove facts well known to all the parties, thereby greatly and unnecessarily increasing the costs; and, to that extent, bringing the Courts into disrepute because of the expenses of litigation. On it being made to appear at the hearing, that the side filing

such proof, in vain, requested his adversary to admit it, the Court would be justified in taxing the refusing party with a proportionate part of the costs, even though such party was successful in the suit.

<sup>10</sup> Gres. Eq. Ev., 456-458. See, also, Gates v. Brinkley, 4 Lea, 710.

<sup>11</sup> Jones v. Williamson, 5 Cold., 371; 2 Whart. Ev., § 1184.

<sup>12</sup> The time has come for our Courts to presume that all land in litigation has been granted, such presumption to be rebuttable. A presumption of fact arises when a great majority of the probabilities are uniformly in favor of the fact presumed.

**AGREEMENT AS TO FACTS.**

John Doe, }  
*vs.* } In Chancery, at Knoxville.  
 Richard Roe. }

In this case we agree as to the following facts :

1st. That [*Here set out what the complainant agrees to.*]

2d. That [*Here set out what the defendant agrees to.*]

3d. That [*Here set out any other facts agreed to.*]

We agree that this agreement may be filed and read as evidence in said cause.

This ..... day of ....., 19.....

JOHN DOE, by Eugene Webb, Solicitor.

RICHARD ROE, by Charles H. Smith, Solicitor.

**§ 473. Danger of Negligence, and Excess of Confidence, in Preparing Proofs.**

Some Solicitors, because of negligence, indifference, or excess of confidence, often tempt fate, by (1) failing to make their pleadings sufficiently full or sufficiently definite; (2) by failing to prove with sufficient certainty certain links in their chain of evidence; and (3) by relying too much on presumptions of law which are disputable, or do not certainly exist in the case. Very often, a doubtful suit may be made certain by (1) the addition of a single allegation in a pleading, or (2) by the answer to a single question in a deposition, or (3) by the filing of a single paper as evidence in the cause, or (4) by the giving of notice to the adverse side that a certain document will be read at the hearing, or (5) by due notice that parol proof of the contents of a written instrument will be offered on the trial of the cause.

Many suits for a long time hang trembling in the balance, ready to yield to a very slight increase in the weight of the evidence on either side. In such cases, diligence reaps golden harvests, and negligence is overwhelmed with avalanches of disaster. A pound of preponderance turns the scales of justice as effectually as a ton. The failure to make the necessary proof often arises from the fact that the matters are so notoriously true, that the party who should prove them hopes that the adverse side will admit them, or that the Chancellor may take a sort of quasi-judicial cognizance of them, or that they may not be disputed at the hearing.

The following are cases illustrative of the foregoing general statements :

1. Where a son claiming as heir failed to prove that he was a son.
2. Where heirs failed to prove the death of their father.
3. Where a legatee failed to prove that he was the nephew, Thomas, referred to in the will.
4. Where a party offered in evidence a copy of his deed, without accounting for the absence of the original.
5. Where a party failed to notify the adverse side to produce a particular writing, or he would prove its contents by parol.
6. Where a person performing a marriage ceremony, was not shown to be a minister, or a magistrate.
7. Where a party failed to file the deed under which he was claiming.
8. Where a party failed to notify the adverse side that he would read a record of the same Court on the hearing.
9. Where a party erroneously supposed that the burden of proof was on his adversary.
10. Where an unregistered deed filed in evidence was not proved by witnesses.
11. Where a party claiming under a will failed to file the will.

It is true, in many of such cases, the Courts will, ordinarily, allow the cause to stand over until the defect of proof can be remedied; but, as a rule, they impose on the delinquent party one-half, or more, of the costs of the cause, as a penalty for his negligence, and as a warning to all others.

CHAPTER XXV.

DEPOSITIONS IN CHANCERY.

- ARTICLE I. Depositions Generally Considered.
- ARTICLE II. Notice to Take Depositions.
- ARTICLE III. Depositions Taken on Interrogatories.
- ARTICLE IV. Formalities of a Deposition.
- ARTICLE V. Powers and Duties of Commissioners, and Rights and Duties of Witnesses.
- ARTICLE VI. Exceptions to Depositions.
- ARTICLE VII. Amendment of Depositions.
- ARTICLE VIII. Practical Suggestions About Depositions.

ARTICLE I.

DEPOSITIONS GENERALLY CONSIDERED.

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| <p>§ 474. When Depositions May be Taken.</p> <p>§ 475. Depositions of Parties to the Suit.</p> <p>§ 476. How Depositions are Taken.</p> <p>§ 477. Before What Officers Depositions May be Taken.</p> | <p>§ 478. How Commissioners are Appointed to Take Depositions.</p> <p>§ 479. Value of Depositions Compared With Oral Testimony.</p> |
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§ 474. **When Depositions May be Taken.**—In the Circuit Court, the evidence of witnesses *may* be taken by deposition,<sup>1</sup> in certain specified cases; but the statute requires that in all causes in Chancery, excepting divorce causes, and cases tried by jury, the testimony of witnesses *shall* be taken in writing, without compelling their personal attendance. In divorce causes, and on the trial of issues by a jury, either party may examine the witnesses in open Court, or take their proof by depositions.<sup>2</sup>

1. **Taking Proof Before Suit Brought.** The depositions of notaries, and other important witnesses, may be taken and perpetuated before any suit, in the manner specified in the statutes.<sup>3</sup>

2. **Taking Proof Before Answer Filed.** When witnesses are aged, or infirm, or are going out of the Chancery Division, or do not reside in such Division, the Court, or Clerk and Master, upon affidavit of the facts, may, at any time after the bill is filed, either before or after a cause is at issue, authorize the depositions of such witnesses to be taken *de bene esse*, on such notice as may be thought just; and depositions thus taken may be read as if taken regularly, unless retaken by order of the Court, upon application of the opposite party.<sup>4</sup> The Court will not, however, except for strong reasons, suppress the depositions thus taken; but will, ordinarily, on mere motion, give the opposite party leave to cross-examine the witnesses upon giving proper notice to the party who took their depositions.

<sup>1</sup> Code, § 3836.

<sup>2</sup> Code, §§ 4456; 4467; 4470. These sections would not prevent the Court from ordering, on motion of any party, a witness to be subpoenaed to attend Court in order that his deposition might be taken instant, sufficient grounds appearing to sustain such motion. Nor would they prevent the Court from ordering an attachment for a recalcitrant witness. Code, §§ 4106; 4455; Ch. Rule, VII, §§ 6-7.

<sup>3</sup> The statute as to Notaries is as follows: The evidence of a Notary Public, in any matter officially done by him, may be taken and perpetuated, without petition, upon notice to the other side by actual ser-

vice or publication, as provided in section 1802, as if suit were pending. Code, § 3889.

The deposition of a Notary may be taken, whether a suit be pending or not, on ten days' notice to the opposite party, if resident in the State, and forty days' notice if out of it; to be read as evidence between the same parties in any suit then or afterwards depending, should the Notary die or remove out of the State before the trial. Code, § 1802.

As to the perpetuation of the testimony of other witnesses, see Code, §§ 3876-3888; and *post*, §§ 1125-1132, where the practice is fully set forth.

<sup>4</sup> Code, § 4462.

If the witness is the only one to a material fact, his deposition may, also, be taken at any time after the suit is commenced, upon giving the usual notice.<sup>5</sup>

**3. Taking Proof After Answer Filed.** The complainant may take testimony at any time after answer filed, or after a decree *pro confesso*; and the defendant may take testimony at any time after filing a sufficient answer.<sup>6</sup> The pendency of an appeal from the ruling of the Master on exceptions to an answer will not, however, prevent either party from proceeding to take his proof.<sup>7</sup>

**4. Taking Proof on a Plea.** The statute does not expressly state when a plea is to be put at issue; but as a plea is a special answer, it would seem from analogy that a plea should be put at issue by filing a replication within twenty days after notice of its being filed.<sup>8</sup> Of course, whenever the complainant actually files a replication, that puts the plea at issue.<sup>9</sup> Proof may be taken on a plea at any time after issue taken. Indeed, if both parties take proof on a plea before any replication is filed, the Court will allow a replication *nunc pro tunc*, or will treat the case as though a replication had actually been duly filed.

**§ 475. Depositions of Parties to the Suit.**—In all Chancery causes, and proceedings in the nature of Chancery causes, the depositions of parties may be taken upon notice simply as in the case of other witnesses: the fact that a person is a party, or interested in the suit, or the wife or husband of a party, is no disqualification.<sup>10</sup>

If a party to a suit, whose testimony is desired, resides beyond the limits of the State, the person wishing his evidence may file interrogatories with the Clerk and Master, which shall be answered before such party can be allowed to proceed to hearing.<sup>11</sup>

Should such person delay to answer in a reasonable time, to be judged of by the Court, or Clerk, a peremptory order may be made by the Court, or Clerk, requiring the interrogatories to be answered by a given day, and on failure, if the delinquent is the complainant, the bill may be dismissed, notice of which shall be given by the Clerk and Master to the party, or his Solicitor; or the answer may be taken off the file, and the bill taken for confessed, if the defendant be in default.<sup>12</sup>

**§ 476. How Depositions are Taken.**—Depositions may be taken (1) by consent, (2) on notice, or (3) upon interrogatories. A party's consent is conclusively presumed if he cross-examines the witness. When there is no consent, notice of the time and place of taking the deposition must be given; and, if the deposition is to be taken on interrogatories, notice of their being filed must be given.

No permission need be obtained in order to take a deposition, unless: (1) the witness has already been examined as to the same facts, by the same party; or (2) the cause is not at issue; or (3) the time for taking proof has expired. Each party may begin the taking of proof as soon as his right accrues, as heretofore shown; and may continue taking until his time has expired.

The details of the time, place, manner, and form, of taking depositions, the

<sup>5</sup> Code, §§ 3836; 3838. While these two sections were probably primarily intended for suits in the courts of law, they, no doubt, were intended by the codifiers of the Code to apply to suits in Chancery also, as the chapter is general, and includes all civil actions. Code, § 3836. See, also, § 3869. Indeed, the universal practice in Chancery is to take depositions, and to test the correctness of their taking, according to the provisions of the Code contained in the Chapter concerning Depositions; and this is authorized by the Code, § 4455, which reads as follows: The rules of evidence as to the competency of witnesses; and the methods of obtaining testimony, are the same in Courts of Chancery as in the other Courts of this State, except so far as they may be altered by the express provisions of this Code. As to taking proof *de bene esse*, see, *post*,

<sup>6</sup> Code, § 4457. The complainant is allowed twenty days after notice that the answer has been filed to except to such answer; and, if he fail to except within said time, the cause shall be at issue. Code, §§ 4400-4401; *post*, § 1190; Ch. Rule, I, § 5. Hence, in strict law, the defendant cannot begin taking his proof until the time for excepting to his answer has expired.

<sup>7</sup> Code, § 4406; Ch. Rule, I, § 6; *post*, § 1190, sub-sec., 6.

<sup>8</sup> Code, §§ 4322; 4328; 4432. See, *ante*, § 350.

<sup>9</sup> Code, § 4393.

<sup>10</sup> Code, § 3890; Act of 1879, ch. 200.

<sup>11</sup> Code, § 4463.

<sup>12</sup> Code, § 4464; see, also, §§ 4389-4392.

various steps preliminary to their filing, and the time and manner of excepting to them, will all be found in the subsequent sections.

§ 477. **Before what Officers Depositions may be Taken.**—Depositions in Chancery are, usually, taken before the Clerk and Master, but depositions may also be taken by any Judge, Justice of the Peace, Mayor or chief magistrate of a town or city, the Clerk of any Court, a Notary Public, or any other person properly appointed, or commissioned by the Court or Clerk, not being interested, of counsel, or related to either of the parties within the sixth degree, computing by the civil law.<sup>13</sup>

Commissioners of the State of Tennessee, appointed by our Governor in the different States, may, also, take depositions.<sup>14</sup>

§ 478. **How Commissioners are Appointed to Take Depositions.**—Any person, qualified as above stated, may be commissioned to take depositions either in or out of the State, upon application of either party, and without any affidavit laying grounds.<sup>15</sup> This commission is issued by the Clerk and Master, or his Deputy, and it has long been the practice to issue commissions in blank,<sup>16</sup> to be filled by the party applying therefor, his attorney or agent, on obtaining a suitable person to act at the place where the deposition is to be taken. The following is the form of

#### A COMMISSION TO TAKE DEPOSITIONS.

The State of Tennessee,

TO MELVIN NORTON.

Confiding in your prudence and fidelity, you are hereby given full power and authority to summon before you John Clark, and his examination on oath, or affirmation, to take in writing, on behalf of John Doe, [upon the interrogatories hereto annexed,<sup>17</sup>] in a cause pending in our Chancery Court at Maynardville, wherein John Doe is complainant, and Richard Roe and Peter Poe are defendants, said deposition when taken to be signed by said witness, and certified, sealed, addressed, and transmitted, by you to the Clerk of our said Court, in the manner and form prescribed by our laws.

Witness, Coram Acuff, Clerk and Master of our said Court at office in Maynardville, this July 1, 1891.

CORAM ACUFF, Clerk and Master.

§ 479. **Value of Depositions Compared with Oral Testimony.**—While often the oral examination of witnesses in open Court, before a jury, will enable an expert Solicitor to more effectually expose and crush a false witness; or to extort the truth from a hostile or unwilling witness; or to involve him in gross self-contradiction, or manifest inconsistencies; and while the appearance of the witness, and his demeanor in testifying, and his general conduct on the witness-stand,<sup>18</sup> are great aids in judging of his intelligence, sincerity, impartiality, and reliability, there are nevertheless many weighty considerations in favor of taking proof in writing. These are:

<sup>13</sup> Code, §§ 3865; 1802a-1802b; Acts of 1885, ch. 11. The statement in the caption, or certificate, of a deposition, that the person taking the deposition is a Justice of the Peace or other officer authorized to take depositions, or signing the certificate officially as such officer, is sufficient evidence of that fact. *Hoover v. Rawlings*, 1 Sneed, 287; *Wilson v. Smith*, 5 Yerg., 379; *Carter v. Ewing*, 1 Tenn. Ch., 212; *Read v. Patterson*, 11 Lea, 433.

<sup>14</sup> The notaries should affix their seals, and if they live in another State should certify the date and expiration of their commissions. Code, § 1802, b; Acts of 1885, ch. 11, § 2. The official character of the Commissioners when not stated may be proved *aliunde*. *Cooke*, 431, note.

<sup>15</sup> Code, §§ 3865; 4456. In Courts of law the taking of depositions is not a matter of course as in Chancery; and, hence, a party applying for a commission to take depositions in a law Court must make it appear, by oath or otherwise, that the case is one where, under the Statute, he has the right to take depositions. Code, §§ 3844-3845.

<sup>16</sup> This blank, however, should be filled either before, or at the time of, the taking of the deposition.

*McCandless v. Polk*, 10 Hum., 617; *Oliver v. Bank*, 11 Hum., 74.

<sup>17</sup> The method of taking depositions by means of a commissioner, on interrogatories annexed, or questions appended, is very useful in sections where a suitable officer cannot be had. In some States they have Examiners to take depositions, but as they are not authorized to take depositions for our Courts, they can be appointed Commissioners, and thus be authorized to act.

<sup>18</sup> The portion in brackets will be inserted only in case the deposition is to be taken upon interrogatories. If the deposition is to be taken in another State, the Solicitor should forward, along with the commission, full directions how to take the deposition, and enclose a caption, certificate, and an addressed and endorsed envelope; or the deposition will almost certainly be defectively taken and transmitted.

<sup>19</sup> When we read a deposition we see the witness, as it were, "through a glass, darkly"; but, when he is examined in open Court, we see him "face to face."

1. Where testimony is in writing there can be no dispute as to what a witness has testified.<sup>19</sup>

2. Witnesses are often more precise, and more clear, when giving in their depositions, than when testifying orally.

3. Witnesses are more apt to tell the truth, when they know that their words are being taken down, and therefore cannot be denied, or retracted, than when testifying orally in open Court.

4. When the evidence in a cause is all in writing, there is no danger of a party being surprised at the trial, (1) by his witnesses failing to appear; or (2) becoming sick; or (3) failing to testify as expected; or (4) testifying to what was not expected.

5. Where the evidence is in writing, a party knows when he is ready for trial, and the risks incident to oral evidence are all avoided. No new evidence can be sprung, no witness can be tampered with, no evidence can be lost.

6. A party who is in the right, is, as a rule, much more certain to be able to win his case when the proof is in writing, than when witnesses are required to attend and testify orally. It is difficult for a party to have all of his witnesses in attendance at one time. Some will be sick; some absent on business, or pleasure; some forget the day; some have sick families; some leave the State; some get tampered with; some become hostile, or unwilling; and some, for various other reasons, fail to attend, or, attending, do not testify as expected. But by ordinary diligence, the depositions of all such witnesses can be readily taken from time to time, and all disappointment avoided.

7. And lastly, the expenses of a litigation are much less when depositions are taken, than when witnesses give their personal attendance in open Court. It is safe to say, that the costs in an ordinary Chancery suit are less than one-half of the costs in an ordinary suit in the Circuit Court.

And, as either party may demand a trial by jury in the Chancery Court, and enforce the attendance of witnesses for oral examination in open Court, whenever such a course is promotive of justice, it will be seen that a Court of Chancery offers each party every means to enable him to overcome the machinations of his adversary, the enmity or dishonesty of witnesses, the dangers of perjury, and the risks of accident and mistake, and to get the real facts before the Court.<sup>20</sup>

## ARTICLE II.

### NOTICE TO TAKE DEPOSITIONS.

§ 480. Length of Notice.

§ 481. Form and Requisites of Notice.

§ 482. Service of Notice.

**§ 480. Length of the Notice.**—The notice to take depositions shall be served on the opposite party at least five days beforehand, when the depositions are to be taken in the county in which the suit is pending. When the depositions are to be taken out of the county, the notice shall be as follows: for fifty miles or under, five days; from fifty to one hundred miles, ten days; over one hundred and not exceeding two hundred and fifty miles, fifteen days; if over two hundred and fifty and not exceeding five hundred, twenty days; if over five hundred, thirty days. When the deposition is to be taken in any State or Territory

<sup>19</sup> *Vox emissa volat, littera scripta manet.* (A word when spoken flies away, a letter when written remains.)

<sup>20</sup> Both witnesses and parties should remember that the Chancellor is a man of large acquaintance with the ways of the world; and that he is not a mere machine to be stuffed with absurd, unreason-

witness through and through, and writes him down as reliable, doubtful, or worthless. The witness who thinks he can impose false evidence on the Court, either overvalues his own ability in that particular, or undervalues the ability of the Court to distinguish the true from the false; and will find his testimony cast into the rubbish box where frauds,

of the United States west of the Rocky Mountains, such time as the Court, or Clerk, may order, not exceeding forty days; in foreign countries, such time as the Court, or Clerk, may order.<sup>21</sup> The Court, or the Clerk and Master, may, upon good cause shown, either restrict or enlarge the periods of notice above set forth;<sup>22</sup> and, in all cases in which more than one person is complainant or defendant, the Court, or Clerk, may determine whether notice shall be given to each person, and, if not, to whom notice shall be given; a memorandum of the order being kept among the papers.<sup>23</sup>

**ORDER DISPENSING WITH NOTICE AS TO CERTAIN PARTIES.**

John Doe, *et al.*,  
*vs.*  
 Richard Roe, *et al.* } In Chancery, at Loudon.

In this case it is ordered that notice to take depositions need not be served on Sarah Doe, a complainant, or on Julia Roe and Charles Roe, defendants. May 20, 1891.

N. H. GREER, C. & M.

The fact that this order was made should be noted on the rule docket, and the order itself kept among the papers of the cause.

**§ 481. Form and Requisites of Notice.**—The statute allows either party litigant to take the depositions of witnesses, upon giving the opposite party legal notice of the time and place, or by filing interrogatories.<sup>24</sup> The only object of this notice is to give the opposite party due opportunity to be present and cross-examine the witnesses whose depositions are to be taken. The notice should therefore state: (1) the style of the cause; (2) the Court where pending, (3) the names of the witnesses,<sup>25</sup> (4) where to be examined,<sup>26</sup> (5) in what house, room, or office, (6) on what day, (7) beginning at what hour, (8) in whose behalf, (9) for what purpose, (10) should be duly signed by the party, or his Solicitor, (11) should be addressed to the opposite party, and (12) should be served on him in due time.<sup>27</sup> These requisites need not appear in the notice in any particular order. If the substance is in the notice, the form is immaterial. The following is a good form:

**NOTICE TO TAKE DEPOSITIONS.**

John Doe,  
*vs.*  
 Richard Roe, *et al.* } In the Chancery Court, at Nashville, Tenn.

Richard Roe, the defendant, is hereby notified that I will, on the 2d day of June next, at the house of George Jones, in the city of Nashville, No. 76 Summer Street, take the depositions of Ann Jones and Julia Jones, to be used as evidence on my behalf in said cause, beginning said depositions at 10 a. m. on said day, and continuing the taking from day to day, if necessary, until completed.<sup>28</sup> May 20, 1891.

JOHN DOE.

To Richard Roe.

By JACK BAKER, Solicitor.

The notice need not be dated, nor need it be formally addressed to the opposite party; it is sufficient if its form shows that it is intended as a notice to him; nevertheless, it is well to date it, and formally address it.

If a party, in person or by agent, participate in the taking of a deposition that is a waiver of notice.

<sup>21</sup> Code, §§ 3851; 3853.

<sup>22</sup> Code, § 4460; see, also, § 3846. The "good cause," should be shown by affidavit; and the length of notice should be readily shortened in cases of emergency when, by railroad or steamboat, the place for taking the depositions can be easily reached in a shorter time than the Code prescribes. Railroads and steamboats were unknown in 1817, when the length of notice was fixed by our statute. As to "good cause," see, *ante*, § 62, sub-sec., 8.

<sup>23</sup> Code, § 3850.

<sup>24</sup> Code, § 3847.

<sup>25</sup> Robertson v. Campbell, 1 Tenn. (Overt.,) 172.

<sup>26</sup> A party cannot be required to attend at two different places on the same day. But he must elect which place he will attend, and attend accordingly, or he will not be in an attitude to except to either deposition. Blair v. The Bank, 11 Hum., 84.

<sup>27</sup> The mention of the hour is not essential, if the

taking of the deposition continues through one-half of the business hours of the given day; but a deposition begun and ended at an unusual hour, or ended in a short time and at once closed, and the witness dismissed, in consequence whereof the adverse party, though present before noon, had no opportunity to cross-examine, should be suppressed on these facts appearing in the certificate of the Commissioner, or by the affidavit of the party injured, or his Solicitor. Smith v. Cocke, 1 Tenn. (Overt.,) 296.

<sup>28</sup> Unless the notice provides for continuing the taking of depositions from day to day, the taking must begin on the day specified, and the Commissioner has no power to adjourn the taking to the next day. But, see Read v. Patterson, 11 Lea, 434. If the taking is actually begun on the day named in the notice, the Commissioner may finish the taking on the next day. Brandon v. Mullenix, 11 Heisk., 446. Read v. Patterson, 11 Lea, 434.



Notice of the filing of interrogatories must be given, when the deposition is to be taken on interrogatories. The following is a form:

**NOTICE OF THE FILING OF INTERROGATORIES.**

John Doe,

vs.

Richard Roe, et al.

In the Chancery Court, at Kingston, Tenn.

Mr. John Doe: I have this day filed, in the office of the Clerk and Master, at Kingston, interrogatories to be propounded to John Jones, a witness in my behalf in the above named case. June 13, 1891.

RICHARD ROE,

By F. D. OWINGS, Solicitor.

§ 482. **Service of Notice.**—The Code provides that the Sheriff, coroner, or constable, of any county in this State, into whose hands a notice to take depositions has been put, shall deliver a copy of such notice to the proper person in due time, and return the original notice with the time of delivery marked thereon, to the Court, or Justice, before whom the suit is pending;<sup>29</sup> but a private person may serve a copy of the notice, in which case he must make affidavit of the fact and time of service, and exhibit the original notice to his affidavit. Counsel frequently accept service for their clients.<sup>30</sup>

Service is effected by delivering a true copy of the notice to the person to whom it is addressed, if he be a resident of the State; but if he be a non-resident, the notice may be served upon his agent, or Solicitor.<sup>31</sup>

In all cases in which more than one person is complainant or defendant, the Court, or Clerk, may determine whether notice shall be given to each person, and, if not, to whom notice shall be given; a memorandum of the order being kept among the papers.<sup>32</sup>

**ARTICLE III.**

**DEPOSITIONS TAKEN ON INTERROGATORIES.**

§ 483. When Depositions May be Taken on Interrogatories. | § 484. Notice of Filing of Interrogatories.  
| § 485. Form of Interrogatories.

§ 483. **When Depositions May be Taken on Interrogatories.**—It sometimes happens that it is too inconvenient, or too expensive, to take the deposition of a distant witness upon notice; or it may be difficult to ascertain where a distant witness will be at any given time. The Code accordingly provides that when the witnesses reside out of the State, or over one hundred and fifty miles from the place of trial, either party may take their depositions by filing interrogatories with the Clerk, giving the opposite party notice thereof, who shall have ten days thereafter to file cross interrogatories, to which rebutting interrogatories may then be put; at any time after which the deposition may be taken upon a certified copy of the interrogatories, to be issued by the Clerk.<sup>1</sup>

If the opposite party is a non-resident, or if a judgment by a default, or *pro confesso*, has been taken for want of appearance, and defence, the depositions may be taken by filing with the Clerk a copy of the interrogatories, with a memorandum of the time and place of taking the depositions, for twenty days before taking the same.<sup>2</sup>

<sup>29</sup> Code, § 3854.

<sup>30</sup> The verbal waiver of service should never be asked or given, for it is apt to result in difference of recollection, and consequent disagreement. The acceptance, or waiver, should always be in writing.

<sup>31</sup> Code, § 3854 a; Ch. Rule, II, § 3, *post*, § 1191. If the party to be served has left the State, on business or pleasure, service on his agent, or Solicitor, would probably be sufficient.

<sup>32</sup> Code, § 3850. Such order may be entered by the Master on his rule docket. Code, § 4417.

<sup>1</sup> Code, § 3855. Formerly, the general mode of ex-

hibiting by the party, complainant or defendant, to be propounded to the witnesses in the cause. 1 Dan. Ch. Pr., 887.

<sup>2</sup> Code, § 3856. If the opposite party is a non-resident, ten days' notice is sufficient. Code, § 4374. The conflict between these two sections (3856 and 4374,) may be reconciled by confining section 3856 to courts of law, and applying section 4374 exclusively to suits in Chancery. Section 4374 was originally enacted expressly for the Chancery Court, and appears in the Code under the head of Chancery Practice. And see Code, § 4455.

And, in cases where a *pro confesso* has been taken against a defendant, and the testimony is required on behalf of the complainant, and the defendant does not reside within the State, the complainant may take depositions by interrogatories filed ten days beforehand, or by the usual notice of the time and place of taking, entered on the rule docket.<sup>3</sup>

When interrogatories are filed with the Clerk, he shall give notice thereof to the counsel of the opposite party, and such notice shall be sufficient if such opposite party be a non-resident.<sup>4</sup>

When a deposition has once been taken on interrogatories, their efficacy is exhausted; and another deposition cannot be taken on them, unless they are re-filed, and new notice given.<sup>5</sup>

**§ 484. Notice of Filing of Interrogatories.**—The party desiring to take depositions on interrogatories must prepare his interrogatories in due form, numbering them numerically, giving them a proper caption and signing them, and file them with the Clerk. He must, then, give due notice of such filing. In giving this notice he must consider, 1st, the residence of the witnesses; 2d, the residence of the opposite party, and 3d, the state of the pleadings.

1. If the witnesses reside out of the State, or over 150 miles from the place of trial, ten days' notice is sufficient.<sup>6</sup>

2. If the witnesses live in the State, but the opposite party is a pro-confessoed non-resident, ten days' notice is sufficient.<sup>7</sup>

3. If the witnesses live in the State, but the opposite party is a non-resident who has made defence, or is a resident who has been pro-confessoed, twenty days' notice must be given.<sup>8</sup>

When witnesses reside out of the State, or over one hundred and fifty miles from the place of trial, they should be asked in one of the interrogatories where and in what State they reside, and how far distant from the place of trial. When the witness gives the name of the place where he resides, but does not give the distance, the Court will take judicial notice of the geography of the country, and thereby determine the distance.

The following is a form of

**NOTICE OF FILING INTERROGATORIES.**

John Doe, }  
*vs.* } In the Chancery Court, at Nashville, Tenn.  
 Richard Roe, *et al.* }

Richard Roe, defendant, is hereby notified that I have this day filed with the Clerk and Master, at Nashville, interrogatories to be propounded to John Jones, a witness in said cause in my behalf, who resides in Arkansas [or in Bristol, Tenn.]

May 20, 1891.

JOHN DOE,

To Richard Roe.

By JACK BAKER, his Solicitor.

If the opposite party is a non-resident, notice to his counsel is sufficient.<sup>9</sup>

**§ 485. Form of Interrogatories.**—The form of the interrogatories may be substantially as follows:

**INTERROGATORIES.**

John Doe, }  
*vs.* } In the Chancery Court, at Nashville, Tenn.  
 Richard Roe, *et al.* }

Interrogatories to be propounded to John Jones, who resides in Arkansas, [or in Bristol,<sup>10</sup> Tenn.] a witness for the complainant in said cause.

Interrogatories<sup>11</sup> by the complainant:

1st. State your name, age, and occupation.

2d. State where you reside, and whether or not the place is over one hundred and fifty miles from the Court House in Nashville, Tenn.

<sup>3</sup> Code, § 4374. When the notice is entered on the rule docket it must be for the same length of time as when personally served.

<sup>4</sup> Code, § 3856 *a*. This should be a ten days' notice, and is intended to enable the counsel to cross the interrogatories.

<sup>5</sup> *Foster v. Smith*, 2 Cold., 474.

<sup>6</sup> Code, § 3855.

<sup>7</sup> Code, § 4374.

<sup>8</sup> Code, § 3856.

<sup>9</sup> Code, §§ 3854 *a*; 3856 *a*.

<sup>10</sup> Or, at some other place over 150 miles from the Court House in Nashville.

<sup>11</sup> Objections to the form of interrogatories must be taken before they are crossed. 1 Dan. Ch. Pr., 921.

3d. State whether you know any of the parties to this suit. If so, which of them?

4th. [*Proceed to interrogate the witness fully and particularly as to the matters to be proven by him, being careful to avoid scandalous, irrelevant, and leading questions; and it may be well to close with a general interrogatory<sup>12</sup> like this:*]

20th. If you know any other fact, or facts, which may be of any benefit to any of the parties to this suit, or that may be material to the matters you have testified about, or to the matters in question in this suit, please now state such fact, or facts, fully and particularly.<sup>13</sup>

JACK BAKER, Sol. for Complt.

If the opposite party desires to cross the original interrogatories, he may do so within the time allowed, following substantially the foregoing form; or he may attach his cross interrogatories to the original, and head them, "Cross Interrogatories," without more. After they have been crossed, the party filing the original may, at any time before taking the deposition, file rebutting interrogatories for the purpose of re-examining the witness.

**SOME GENERAL INTERROGATORIES FOR CROSS-EXAMINATION OF WITNESSES WHO ARE TO BE EXAMINED ON INTERROGATORIES.**

Interrogatory 1. Have you talked with any one in reference to your evidence in this case?

Int. 2. If so, give the names of the persons you talked with.

Int. 3. Did you rely on your memory alone in your answers? or, have you talked with others? If so, with whom have you talked?

Int. 4. Have you used any writings, letters, papers, books, or other memoranda, to refresh your recollection of facts or dates, in answering any of the questions in this case?

Int. 5. If so, specify the writings, books, papers, or other memoranda you have used.

Int. 6. Please file with your deposition the writings, letters, books, papers, or other memorandum you have used.

Int. 7. Give the names of all persons who have at any time been present while you have been giving this deposition.

Int. 8. What interest have you in this suit?

Int. 9. If you have any business relation or connection with any of the parties to the suit, state what it is, and with which party.

Int. 10. If you are of any kin to any of the parties to this suit state to whom and the relation.

Int. 11. Were you sworn as a witness before your examination was begun.

Int. 12. If you have been requested not to say anything about any matter connected with your deposition, or with this lawsuit, state what that matter was, and state it fully, and state who made the request.

Int. 13. If you have any letter, telegram, paper, book, or memorandum that in any way relates to this lawsuit, or to this deposition, state what it is, and file it.

Int. 14. If you know any fact, or have heard any of the defendants, [*or complainants*] say anything, that will be of benefit to the complainant [*or defendant*] please give such fact or statement as fully as though specially questioned about it.

<sup>12</sup> 1 Dan. Ch. Pr., 924.

<sup>13</sup> There should be a rule of Court requiring this | interrogatory in all cases. Rules of U. S. Eq. Courts, § 71; Cooke, 412.

ARTICLE IV.

FORMALITIES OF A DEPOSITION.

- |   |  |
|---|--|
| <p>§ 486. Caption of Deposition.<br/>                 § 487. Body of Deposition.<br/>                 § 488. Certificate to Deposition.<br/>                 § 489. Depositions When and How Taken in Shorthand, or in Typewriting.</p> | <p>§ 490. Enveloping and Transmitting Deposition.<br/>                 § 491. Receiving and Filing a Deposition.</p> |
|---|--|

§ 486. **Caption of a Deposition.**—The form of a deposition is prescribed by the statute, and this form must be closely adhered to. The caption must be substantially as follows:<sup>14</sup>

GENERAL FORM OF THE CAPTION.

A B, }  
 vs. } In the Chancery Court, ——— county, Tennessee.  
 C D. }

Depositions of ——— and ———, witnesses for complainant, [*or* defendant,] in the above case, taken upon notice, [*or* interrogatories] on the——day of——, 189—, [*giving the date specified in the notice.*] at [*the place specified in the notice.*] in the presence of the complainant and defendant, [*show the fact.*]

The said witness, —— aged ——, being duly sworn,<sup>15</sup> deposed as follows: [*Then follow the questions and answers.*]

Or, to conform the foregoing general caption to the notices given in a preceding section, and thus make a special form:

SPECIAL FORM OF A CAPTION.

John Doe, }  
 vs. } In the Chancery Court of Davidson County, Tennessee.  
 Richard Roe, et al. }

Depositions of Ann Jones and Julia Jones, witnesses for the complainant in the above cause, taken upon notice on the 2d day of June, 1891, at the house of George Jones, in the city of Nashville, No. 76 Summer Street, in the presence of the complainant and the defendant, Richard Roe, and their Solicitors.<sup>16</sup>

The said witness, Ann Jones, aged 16 years,<sup>17</sup> being duly sworn, deposed as follows:

Q. 1, by the complainant.—[*Then follow the questions and answers.*]

§ 487. **Body of Deposition.**—The caption having been written out, the witness duly sworn, his or her name and age written down, the party or his Solicitor will then proceed to write<sup>18</sup> his questions as follows:

QUESTIONS BY EUGENE WEBB, SOLICITOR OF COMPLAINANT,  
 [OR DEFENDANT.]

Q. 1. If you are acquainted with any of the parties to this suit, state which; and how long you have known them.

Ans. I know all the parties, and have known them for a year, or more.

Q. 2. If you are in any way related to any of the parties to this suit, state which, and how.

Ans. I am not related to any of them, to my knowledge.

Q. 3. If you have any agreement, letters, or other writing, relating to the matters in dispute signed by the defendant, Richard Roe, please produce the same. State what you know about their execution, and make them exhibits to your deposition.

Ans. I have an agreement signed by Richard Roe, and left by him with me to be kept, by consent of John Doe. I saw Richard Roe sign the paper, and I witnessed it at his request. This agreement I herewith file, and mark it Exhibit A to this my deposition.

<sup>14</sup> Code, § 3848.

<sup>15</sup> The witness should be sworn before his examination is begun. Code, § 3859.

<sup>16</sup> Show which of the parties was present, and which had Solicitors present, if any, giving their names. It is often important to know what Solicitors were present. Sometimes the questions and answers are more intelligible when it is known what Solicitor examined the witness.

<sup>17</sup> The age should always be stated. The weight to be given the testimony of a witness often depends to some extent upon his age; and the Chancery

cannot know a witness' age otherwise than by the proof.

<sup>18</sup> It is not essential to the admissibility of a deposition that the questions should be reduced to writing; they may be oral. Code, § 3859, is directory. Read *v. Patterson*, 11 Lea, 430. In England, under the new practice, depositions are taken down "not ordinarily by question and answer, but in the form of a narrative." 1 Dan. Ch. Pr., 904. Indeed, in England, affidavits are now largely used instead of depositions. 1 Dan. Ch. Pr., 887-904.

It is important to see to it that all papers proved by a witness should be made exhibits to his deposition, and should be lettered, or numbered, and attached to the deposition. If this cannot, for any reason, be done, then the exhibit should have the style of the cause written upon it, and, also, the fact that it is an exhibit to the deposition, and should be marked filed by the Clerk when he opens the deposition. The Commissioner would do well to write his name, and official designation, on the exhibit when he signs the deposition.

**ENDORSEMENT ON AN EXHIBIT.**

John Doe vs. Richard Roe, *et al.*  
Exhibit A, to the Deposition of John Jones.  
SAMUEL BRIGHT, J. P.

The complainant will proceed with all his questions, writing them down in order as soon as each preceding question has been fully answered, being careful to ask no leading, scandalous or irrelevant question. He may conclude with a general question like the last one in the interrogatories;<sup>19</sup> if the opposite party is not present. If he is present, any general question may be omitted. After the complainant has asked his last question, he will turn the witness over to the opposite party to cross-examine as follows:

**CROSS-QUESTIONS BY WILLIAM B. FORD, SOLICITOR OF DEFENDANT,  
[OR COMPLAINANT.]**

- Q. 1. In what way are you interested in this suit?  
Ans. I have no interest in it whatever.  
Q. 2. [*The defendants will proceed with all their questions, and having ended their cross-examination, the complainant will again take the witness for re-examination.*]

**RE-EXAMINATION BY COMPLAINANT.**

- Q. 1. Please explain more fully how you happened to be at the place spoken of in answer to cross-question 5.  
Ans. I was there on a visit to my aunt; had gone there a week before.  
Q. 2. [*The complainant will ask all questions he desires, proper on a re-examination, and when the last one has been answered, the Commissioner will add:*]  
And further this deponent saith not.  
Witness to mark:  
SAMUEL BRIGHT, J. P.

Her  
ANN X. JONES.<sup>20</sup>  
mark

**DEPOSITIONS TAKEN ON INTERROGATORIES.**

[*If the deposition is to be taken on interrogatories, after the proper caption has been written, the witness will be sworn, and will then answer each direct interrogatory, as follows:*]

- 1st To the 1st interrogatory, the witness says:  
My name is John Jones, I am 70 years old, and a merchant.  
2d To the 2d interrogatory, the witness says:  
I reside at Eureka Springs, Arkansas, which place is over one hundred and fifty miles from the Court House at Nashville, Tenn.  
[*And so continue, until all the direct interrogatories have been fully answered; then let him answer the cross-interrogatories, if any, as follows:*]  
1st. To this the 1st cross-interrogatory, the witness says: [*After the cross-interrogatories have all been answered, the Commissioner will add:*]  
And further this deponent saith not.

JOHN JONES.<sup>21</sup>

§ 488. **Certificate to Deposition.**—After all the depositions have been duly taken and signed by the witnesses, the Commissioner will add the following certificate:<sup>22</sup>

**CERTIFICATE TO A DEPOSITION.**

The foregoing depositions were taken before me, as stated in the caption, and reduced to writing by me, [or, by the witnesses.] And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up and delivered them to John Doe, [or, put them in the express office at Nashville, Tenn., or, in the post-office,] without being out of my possession, or altered after they were taken. Given under my hand, the 2d day of June, 1891.

SAMUEL BRIGHT, J. P. for Davidson Co.

<sup>19</sup> *Ante*, § 485.  
<sup>20</sup> In many of the States, it is no objection to a deposition that the witness omitted to subscribe his name to it. 1 Dan. Ch. Pr., 917, note. Our Code

does not require the signature. See, Code, §§ 3848; 3859; 3860; 3863.

<sup>21</sup> The witness will write his own answers, and sign his own name, if he well can.

<sup>22</sup> Code, § 3848.

The last clause may be written across the back of the envelope on the sealed side, instead of inserting it in the certificate,<sup>23</sup> in which case, there may be omitted from the foregoing certificate all the words between "parties" and "given under."

The Commissioner will then annex a

**BILL OF COSTS.<sup>24</sup>**

Commissioner: Samuel Bright, taking 2 depositions.....		\$2.00
Witnesses: <sup>25</sup>		
Julia Jones, one day's attendance.....	\$1.00	
25 miles of travel, @ 4 cts.....	1.00	2.00
Ann Jones, one day's attendance from another county.....	1.50	
30 miles of travel, @ 5 cts.....	1.50	
2 ferriages, @ 10 cts.....	.20	3.20

SAMUEL BRIGHT, J. P.

If the deposition is taken by the Clerk and Master of the Court wherein the suit is pending, the certificate is ordinarily omitted, and often the caption is quite informal. Indeed, in such cases, and in many others where both parties are present, the certificate is often waived. Where, however, only one party is present, and the deposition is not taken by the Clerk and Master, such party should see to it that the caption, certificate, sealing, and transmitting are all done in exact compliance with all the requirements of the law.

**§ 489. Depositions When and How Taken in Shorthand, or in Typewriting.** Persons authorized to take depositions may take them in shorthand, and subsequently reduce the same to manuscript or typewriting, or may take them directly on a typewriting machine; provided, that in case the deposition be taken in shorthand, the person taking it can truthfully certify, and does certify substantially, as follows:

**CERTIFICATE WHEN DEPOSITION IS TAKEN IN SHORTHAND.**

I certify that.....being a stenographer, I took the foregoing deposition in the exact language of the witness, and reduced it to typewriting [*or* manuscript]; that it was then read over by the witness in my presence [*or* was read over by me to the witness], and was approved and signed by him; and I also certify that I am not, in any capacity, in the regular employ of the party in whose behalf this deposition is taken, nor in the regular employ of his attorney; and I certify that I am not interested in the case, nor of kin or counsel to either of the parties, and that I sealed up said deposition and delivered it to..... [*or*, delivered it to the express office, or, put it in the postoffice] without its being out of my possession, or altered after it was taken.

No deposition taken under this section shall be signed by the witness until it shall have been reduced to manuscript or typewriting.<sup>26</sup> Depositions may be taken by stenographers in the regular employ of the litigant taking the deposition, or his attorney, where the opposite party consents.<sup>27</sup>

**§ 490. Enveloping and Transmitting a Deposition.**—The deposition, when complete, shall, together with the commission, and interrogatories, if any, and all documents which may have been deposited to, and all exhibits, be duly enveloped and sealed, with the Commissioner's name written across the seal, and directed to the Clerk of the Court where the cause is pending, with the title of the cause endorsed on the envelope: it may be sent by mail, express, or private conveyance.<sup>28</sup>

The Commissioner will be careful to put everything in the envelope that belongs to the deposition,<sup>29</sup> including the interrogatories, if any, the notice and

<sup>23</sup> Code, § 3849.

<sup>24</sup> Ch. Rule, II, § 1; *post*, § 1191.

<sup>25</sup> Witnesses living in the county where examined get one dollar a day, and four cents a mile; but witnesses living out of the county get one dollar and a half a day and five cents a mile. Code, § 2830 a-2830 b.

<sup>26</sup> Acts of 1899, ch. 276, § 1.

<sup>27</sup> *Ibid*, § 2.

<sup>28</sup> Code, §§ 3860; 3861 c.

<sup>29</sup> If proof of the notice to take depositions is made before the Commissioner by affidavit, or the notice is returned to him by the officer, let such affidavit or notice be, also, enclosed with the deposition. Ch. Rule, II, § 2; *post*, § 1191.

proof of service, if any, and all exhibits; and, having sealed the envelope, or moistened the mucilage on its flap and securely closed it, and written his name across where the flap is joined to the body of the envelope, will address the envelope to the Clerk and Master of the Court, and endorse on the left end of the envelope the title of the cause, thus:

**ENDORSEMENTS ON THE ENVELOPE.**

JOHN DOE, <i>vs.</i> RICHARD ROE, <i>et al.</i>	<b>THE CLERK AND MASTER,</b>  NASHVILLE,  TENN.	POSTAGE STAMP
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The Commissioner may, also, write across the back of the envelope the certificate mentioned in the preceding section, as follows:

SAMUEL BRIGHT, J. P.	<p>I hereby certify that I sealed up the within depositions, and delivered them to John Doe, [<i>or</i>, put them in the post-office, <i>or</i>, in the Southern Express office,] without being out of my possession, or altered, after taken, June 2, 1891.</p> <p style="text-align: right;">SAMUEL BRIGHT, J. P.</p>
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The Commissioner may, however, deliver the deposition to the Clerk and Master in person, in which case he need not envelope it at all. But he must take the messenger's oath before the Master on delivering the deposition, unless his certificate shows that he delivered it to the Master.<sup>30</sup>

§ 491. **Receiving and Filing a Deposition.**—When the depositions are received by the Clerk, he shall certify upon them whether they were received by mail, express, or private conveyance. If sent by private conveyance he shall require the person delivering them to make affidavit that he received the depositions from the Commissioner, and that they have not been out of his possession, or opened by him while in his possession.<sup>31</sup> The Clerk is required to endorse upon the deposition the day it is filed, and to make an entry upon the docket giving the style of the cause, the names of the witnesses, and the date of filing.<sup>32</sup> Depositions may be opened by the Clerk at any time after they are

<sup>30</sup> *Hutson v. Hutson*, 9 Lea, 354.

<sup>31</sup> Code, § 3861; Acts of 1870, 2d Sess., ch. 16.

<sup>32</sup> Code, § 3867. This endorsement must be on

the deposition itself, and not on the envelope. The envelope may get lost.

filed, at the request of either of the parties, or his attorney; and copies may be furnished the parties on demand. The Clerk shall note on the deposition the fact that it was opened by him.<sup>33</sup>

ARTICLE V.

POWERS AND DUTIES OF COMMISSIONERS, AND RIGHTS AND DUTIES OF WITNESSES.

§ 492. General Powers of Commissioner.

§ 493. General Duties of Commissioner.

§ 494. Rights and Duties of Witnesses.

§ 495. When an Interpreter is Needed.

§ 496. Exceptions Taken Before Commissioner.

§ 492. **General Powers of Commissioner.**—Every officer authorized by law to take depositions is, for that occasion, termed a Commissioner, whether a commission is issued to him by the Clerk and Master or not; and such officer is, while engaged in the discharge of his duties, vested with all the powers of a Court to preserve order, prevent interruption, and control the conduct of the parties in the examination of the witness.<sup>1</sup> He may accordingly fine any person guilty of wilful disobedience, or resistance, to any lawful command he may make during the examination, such fine not to exceed ten dollars.<sup>2</sup>

The Commissioner, or person authorized to take depositions, has power to issue subpoenas for witnesses, which may be served by the Sheriff, or any constable; and the certificate of the Commissioner, or person authorized, that the witness failed to appear, together with the return of the officer, is proof of the facts.<sup>3</sup> Any witness who fails to appear in such cases, according to the terms of the subpoena; or who fails to answer the questions which may be lawfully put to him, is subject to the penalties provided for enforcing the attendance of witnesses to give testimony in Court, and compelling them to testify.<sup>4</sup> The penalty for non-attendance may be enforced by the tribunal having cognizance of the suit, upon *scire facias* as in other cases.<sup>5</sup>

If any witness refuse to give testimony when legally bound, he shall be committed to the common jail, by the Commissioner before whom he is bound to testify, there to remain without bail or main-prize, until he is willing to testify as the law directs.<sup>6</sup>

If a witness fail to appear when summoned before a Commissioner, the subpoena is returned to the Chancery Court, with the endorsement of such failure made thereon, by the Commissioner; and *scire facias* issues as in other cases.<sup>7</sup>

If a deposition is begun on the day fixed in the notice, and it is impracticable to finish it on that day, it may be finished on the next; but the Commissioner cannot postpone the beginning of the deposition.<sup>8</sup>

A subpoena for witnesses may be substantially in the following form:<sup>9</sup>

<sup>33</sup> Code, § 3870. Under the old practice, no deposition was allowed to be opened, nor was the Commissioner allowed to divulge its contents, until all the proof in the cause had been taken, and the cause set for hearing. The seals of the depositions were then broken, and the contents of the depositions were made known to the parties. This was called "passing publication." Cooke, 431; 1 Dan. Ch. Pr., 945. Gres. Eq. Ev., 71. Under our practice, the opening of a deposition by the Clerk is equivalent to publication in the English practice; 1 Dan. Ch. Pr., 945, note 7; and the expiration of the time for taking proof is, with us, equivalent to passing publication, in England.

<sup>1</sup> Code, § 3858.

<sup>2</sup> Code, §§ 4106-4107; 4112. The authority of the

Clerk and Master in such cases, is greater. See, *post*, § 1196.

<sup>3</sup> Code, § 3862.

<sup>4</sup> Code, § 3863.

<sup>5</sup> Code, § 3864. All other penalties for contempts before the Commissioner would probably be enforced in the same way, the Commissioner certifying the facts.

<sup>6</sup> Code, § 3823.

<sup>7</sup> Code, § 3825. This section requires the subpoena to be returned to the Circuit Court of the county; but in view of the Act of 1877, increasing the jurisdiction of the Chancery Court, and Code, 3864, the Chancery Court probably has jurisdiction when the Commissioner is acting as one of its officers.

<sup>8</sup> Read v. Patterson, 11 Lea, 430.

<sup>9</sup> Code, § 3814.



## SUBPOENA FOR WITNESSES.

The State of Tennessee.

To the Sheriff, or any Constable, of Knox County :

Summon Jane Brown and George Smith to appear before me, at the house of John Wilson, in the 10th civil district of said county, on June 25th, 1891, at 10 a. m., [*naming the place and time specified in the notice,*] to give testimony in behalf of the complainant in a suit pending in the Chancery Court, at Knoxville, between Richard Roe, complainant, and John Doe and others, defendants. Notify said George Smith, that he is required to bring with him a written contract deposited with him by the defendant, John Doe, on or about May, 1890, [*or other paper needed, and in the witness' possession, describing it so as to identify it.*]

Witness my hand, May 30, 1891.

I. C. GRANT, J. P. and Commissioner.

§ 493. **General Duties of Commissioner.**—The Commissioner, having first sworn the witness according to law, should require the questions to be reduced to writing before being put, and then read to the witness; and should take down the answers in writing, or cause the same to be done by the witness himself, as near as may be in the witness' own words.<sup>10</sup>

It is the duty of the Commissioner: (1) to preserve order; (2) to see that the witness is fairly dealt with; (3) to require a witness to answer all proper questions; (4) to examine each witness separate and apart from all the others named in the notice, when either party makes oath before him that he verily believes justice so requires; (5) to prevent a witness being taken aside privately by either party during his examination; (6) to read over to the witness, or allow the witness to read over, his deposition, if so requested, before it is signed, and to correct it, or allow the witness to correct it, where erroneous;<sup>11</sup> (7) to annex to the deposition a bill of costs, showing what each witness is entitled to for attendance, mileage and ferriages, and what his own costs are, and (8) to properly certify, envelope, endorse and transmit the deposition when taken, without allowing it to be out of his possession, or in any way altered, after it has been taken. Commissioners should make and enforce all rules and orders necessary to prevent a witness from being tampered with, or instructed, or intimidated, while being examined, or while attending to be examined.<sup>12</sup>

§ 494. **Rights and Duties of Witnesses.**—First of all a witness is entitled to courteous treatment not only while being examined, but while in attendance, and is entitled to protection from insult, menace, disturbance, or interruption.<sup>13</sup> He has the right to make any changes in his deposition before he has signed it, but cannot make changes by erasures or interlineations,<sup>14</sup> if objection be made; but must make his changes or explanations in writing at the foot of his deposition.

A witness may use notes to refresh his recollection as to dates, names and amounts, but he cannot be allowed to copy a writing into his deposition, nor to use a deposition previously prepared.<sup>15</sup> If he has a writing he wishes to use he may exhibit it to his deposition, if either party desires it.

A witness may properly refuse to answer a question which may criminate him, or tend to criminate him, or expose him to a penalty or to a forfeiture, or which would involve a breach of professional confidence.<sup>16</sup>

It is the duty of a witness to answer every question fully without reservation, to the best of his knowledge, telling not only the truth, but the whole truth, and nothing but the truth. A witness should not be allowed to spar with counsel; but should be required to confine himself to his duties as a witness,<sup>17</sup> and not be allowed to comport himself as an entertainer, or as a judge of the

<sup>10</sup> Code, § 3859. This section is directory as to the manner of putting the questions; they may be put verbally. *Reed v. Patterson* 11 Lea, 432.

<sup>11</sup> Blake's Ch. Pr., 133; Barb. Ch. Pr., 282.

<sup>12</sup> Objections are sometimes made to questions and answers expressly to help the witness, or to show him how to answer, or how not to answer, or else to intimidate him, or otherwise unduly influence him. A Commissioner who tolerates such conduct is either grossly ignorant of his duty, or lamentably deficient in courage to do his duty. Parties should be re-

quired to reduce their objections to writing, and no arguments should be allowed.

<sup>13</sup> Blake's Ch. Pr., 133.

<sup>14</sup> 1 Barb. Ch. Pr., 282.

<sup>15</sup> 1 Barb. Ch. Pr., 282; Blake's Ch. Pr., 133.

<sup>16</sup> 1 Dan. Ch. Pr., 942-945. But if such questions are answered without objection by the witness, they cannot be objected to at the hearing by a party.

<sup>17</sup> He is under pay as a witness, and should conduct himself accordingly.

character of the questions, or as having large liberties or discretion as to when or what he should answer, and how fully he should answer.

§ 495. **When an Interpreter is Needed.**—If a witness whom it is proposed to examine does not understand and speak English, an interpreter must be used. The interpreter should be sworn, 1st, that he understands the tongue of the proposed witness, and 2d, that he will interpret truly. The oath may be administered by the Commissioner, in the following form. “You do solemnly swear that you understand the tongue of the witness, [*naming him*], and that you will truly and faithfully interpret to him the oath to be administered to him, and the questions to be put to him, out of the English language into the [*German, or other language of the witness, stating it;*] and that you will truly and faithfully interpret his answers thereto out of the [*German or other language of the witness, stating it;*] into the English language.”<sup>18</sup>

The deposition of a person who is deaf and dumb may, in like manner, be taken by the aid of a person skilled in the sign language, unless the witness can read and write, in which case he can, of course, read the questions and write his answers, being first sworn in writing.

Leave to use an interpreter may be obtained from the Chancellor in Court, or at Chambers, on notice to the adverse party.<sup>19</sup>

§ 496. **Exceptions Taken Before the Commissioner.**—If the form of a question is objectionable, it must be excepted to in writing before it is answered;<sup>20</sup> if the substance of the question is objectionable, it may be excepted to in writing before the Commissioner, or may be excepted to orally before the Court when read at the hearing. The reason of the distinction is: if the form of a question could be first excepted to in Court, it would enable the excepting party to reserve his objection until it was too late for the other party to remedy, or obviate, the defect; whereas, if the objection is raised before the question is answered, the form of the question can be changed, or a new question asked; and if the party questioning fails or refuses to change the form of his question on objection being duly made, he voluntarily assumes the risk of his question, and the answer thereto, being ruled out at the hearing. The ordinary objection to the form of a question is, that it is leading.

So, if an answer is objectionable because not responsive to the question, it must be excepted to on that ground in writing, before the Commissioner; because, if then excepted to, the questioner may ask a question expressly to get the benefit of the irresponsive matter, and thus make it competent evidence. All of the reasons and rules, applicable to objections to the form of a question, equally apply to objections to the form of an answer.

What is meant above by exceptions to the substance of a question are exceptions because the question is (1) impertinent, irrelevant, or immaterial, or (2) calls for hearsay, or (3) for parol proof of a writing, or (4) for privileged communications, or (5) for matter that would tend to criminate the witness, or (6) seeks to change a written agreement, or a will, by oral evidence, or (7) otherwise violates some rule as to the admissibility of evidence.

The Commissioner should never undertake to rule out a question, unless it is so manifestly ridiculous, or scandalous, as to be a matter of contempt. The opposite party should be allowed to write his objection to a question or answer, upon the face of the deposition; but he must not call upon the Commissioner to rule on his objection.<sup>21</sup>

<sup>18</sup> 1 Barb. Ch. Pr., 285; Dan. Ch. Pr., 855.

<sup>19</sup> Dan. Ch. Pr., 1063; *post*, § 775.

<sup>20</sup> 1 Dan. Ch. Pr., 921, note; 2 Scott's Rev., 866, note.

<sup>21</sup> If Commissioners were given the right to pass on the admissibility of evidence, it would result in giving them the right to decide the lawsuit itself; for the Chancellor would be restricted to such evidence as the Commissioners saw fit to allow. It is a gross usurpation of authority for a Commissioner to exclude any evidence from the consideration of the

Court, and the party invoking such action on the part of the Commissioner should be operated with all the costs occasioned thereby.

Commissioners should, however, suppress all wrangling between parties, or their Solicitors, or agents, at the taking of depositions; especially wrangling over the admissibility of evidence, or the legality of questions or answers. What parties wish to say by way of objection, let them reduce it to writing on the face of the deposition, or on a separate paper to be attached to the deposition.

## ARTICLE VI.

## EXCEPTIONS TO DEPOSITIONS.

§ 497. Exceptions to Depositions Generally Considered.

§ 498. Various Grounds of Exception.

§ 499. When Exceptions Must be Taken.

§ 500. How Exceptions are Taken and Ruled on.

§ 501. When and How Exceptions Must be Disposed of.

§ 497. **Exceptions to Depositions Generally Considered.**—Exceptions to evidence are of three kinds: 1, Exceptions taken to the competency of the witness; 2, Exceptions taken to the competency of the evidence; and 3, Exceptions taken to the admissibility of the deposition because not taken according to law. The last kind of exceptions do not question the competency of the witness, or the competency of the evidence, but merely questions the manner in which such evidence has been obtained, and brought before the Court.<sup>1</sup>

In order (1) to give the opposite party an opportunity to be present and cross-examine the witness whose deposition is taken, and (2) to have the testimony fairly taken down, and (3) to secure it from alteration after it is taken, the law provides certain preliminaries, requirements, and safeguards, the violation or non-observance of any one of which will vitiate the deposition, if it is excepted to on that ground. As such exceptions, however, do not go to the substance of the deposition, but to its form, and are in the nature of matters in abatement, the law requires that they be made and disposed of before the trial is commenced, or they will be considered as waived. On the other hand, exceptions to the competency of the witness, or of his evidence, may be taken at the trial when the deposition is offered, or the evidence is sought to be read.

The object of exceptions to a deposition is to suppress it, or rule it out of the case; and, if the exceptions are sustained, the deposition is suppressed, and cannot be read at the hearing. The suppression of a deposition will not prevent the party taking it from, at once, retaking it, unless his time for taking such proof has expired.

§ 498. **Various Grounds of Exception.**—The grounds of exception to the admissibility of a deposition have reference mainly to the form, manner, and time, in which it was taken, and transmitted, and to the various formalities prescribed to secure a fair deposition, and preserve it from alteration.

The following are the principal grounds of exception to the admissibility of depositions:

1. **Exceptions for Want of Notice.** The statute requires that notice of the time and place of taking depositions, shall be served upon the opposite party; and a deposition may be excepted to for want of such notice. The requisites of this notice have been given in a previous section.<sup>2</sup> The opposite party may waive notice or may attend, or have an agent in attendance, without notice, in any of which cases he is estopped from excepting for want of notice.<sup>3</sup> A notice that is not sufficiently long is, in effect, no notice, and may be disregarded by the party on whom it is served. Notice cannot be given to take depositions at two different places on the same day;<sup>4</sup> nor can the Commissioner postpone the commencement of the taking.<sup>5</sup>

<sup>1</sup> An exception to a deposition is one thing; an exception to the evidence contained in the deposition is an entirely different thing. The deposition may be subject to exception, while the evidence, contained in the deposition, is absolutely unexceptionable; and so, the deposition may be utterly free from exception, while the evidence it contains is wholly inadmissible.

<sup>2</sup> *Ante*, § 481.

<sup>3</sup> *Boyd v. Johnson*, 5 How. 155.

<sup>4</sup> *Blair v. The Bank*, 11 Hum., 84. But the party notified must attend at one place or the other; or he cannot be heard to object. *Ibid.*

<sup>5</sup> Where the notice is to take the deposition on a certain day, the Commissioner cannot postpone it to another day; but if the notice be to take on a certain day, and the deposition is then commenced, and it becomes impracticable to finish it on that day, it may be finished on the next day. *Read v. Patterson*, 11

2. **Exceptions Because Not Taken at a Proper Time.** A deposition may be excepted to if taken before suit was brought, if the statutory prerequisites were not complied with.<sup>6</sup> So may a deposition be excepted to if taken after suit was brought, but before issue joined, when such taking was not authorized by the statute, or by the Court, or by the Clerk and Master; or, if authorized, was not taken in the manner authorized.<sup>7</sup> If a deposition is taken after the time for taking proof has expired, or during the trial term, it may be excepted to on that ground, unless taken on a proper order, or by consent of the opposite party.<sup>7a</sup> So, if proof in chief is taken after the time for taking proof in chief has expired, but while proof in rebuttal may be taken, the deposition may be excepted to in so far as it contains proof not in rebuttal.<sup>8</sup>

3. **Exceptions Because Irregularly Taken.** A deposition may be excepted to: (1) when taken by a person not authorized to take depositions, or who is interested, or of kin, or counsel, to one of the parties; or, (2) when it does not appear that the witness was sworn; or, (3) when a witness makes answers prepared for him by another, or adopts another's evidence; or, (4) when a witness copies a form of deposition previously by him prepared, or merely re-swears to a former deposition;<sup>9</sup> or, (5) when a witness fails, or refuses to answer proper interrogatories; or, (6) when a deposition was not reduced to writing by the witness, or the Commissioner;<sup>10</sup> or, (7) when a deposition is not signed, or sworn to, by the witness; or, (8) when the deposition is illegible; or, (9) when the deposition has been altered since it was taken; or, (10) when the witness was re-examined to the same facts by the same party without an order;<sup>11</sup> or, (11) when the witness refused to answer proper questions;<sup>12</sup> or, (12) when the party excepting was not allowed to ask a proper question, or proper questions were ruled out by the Commissioner; or, (13) when the questions are leading, to an excessive degree;<sup>13</sup> or, (14) when the witness was allowed to retire during his examination, and to have private conferences with the party examining him, or with his counsel; or, (15) when the witness was deeply intoxicated during his examination; or, (16) when his testimony is scandalous; or, (17) when he refused to be cross-examined, or the exceptant had no opportunity to cross-examine him;<sup>14</sup> or, (18) when any other irregularity occurred during the taking of the deposition, or since, whereby the excepting party has been injured without his fault.<sup>15</sup>

4. **Exceptions Because of Informalities in the Deposition.** The statute prescribes the forms of the caption and of the certificate of a deposition, and if these forms are substantially departed from, an exception will lie for that reason. Such informalities consist of: (1) omission or misstatement of the style of the cause, or of the Court where pending; (2) failure to show that the witness was sworn; (3) or other defect in the caption; (4) failure to show who reduced the dep-

<sup>6</sup> *Ante*, § 474.

<sup>7</sup> *Ante*, § 474. But a party who cross-examines a witness cannot except to the deposition on the ground that the cause was not at issue when it was taken. *Harton v. Lyons*, 13 Pick., 180.

<sup>7a</sup> *Stadler v. Hertz*, 13 Lea, 315.

<sup>8</sup> In case of such exceptions, the Chancellor, on appeal, will allow the deposition to stand *de bene esse*, and will reserve his decision on the exceptions until the hearing. 1 Dan. Ch. Pr., 951, note; otherwise, it might be necessary to hear the pleadings and proof all read before he could determine the correctness of the exceptions.

<sup>9</sup> *Shea v. Mabry*, 1 Lea, 331; 1 Dan. Ch. Pr., 907, note; 929.

<sup>10</sup> A deposition cannot be reduced to writing by a third person even when he is so directed by the Commissioner. *E. T. V. & G. Railroad Co. v. Arnold*, 5 Pick., 107. The parties may, however, consent that a third person may write the answers of the witness.

<sup>11</sup> Ch. Rule, 11, § 6. In such a case, on appeal, the Chancellor will, unless the point be very clear, permit the deposition to stand *de bene esse*, and reserve the decision of the appeal until the hearing. 1 Dan. Ch. Pr., 951, note.

<sup>12</sup> 1 Dan. Ch. Pr., 951, note.

<sup>13</sup> 1 Dan. Ch. Pr., 922.

<sup>14</sup> 1 Dan. Ch. Pr.; 930.

<sup>15</sup> Some of the foregoing grounds of exception are of such a character that their sufficiency must be largely a matter of discretion; *Underhill v. Vau Cortland*, 2 Johns. Ch., 339, and note; 1 Dan. Ch. Pr., 951; depending on the aggravation of the particular irregularity. The irregularities may be shown by affidavit; *Smith v. Cocke*, 1 Tenn. (Overt.), 296; or by the evidence of the Commissioner, or of the witness himself, or of other witnesses. In *Oliver v. The Bank*, 11 Hum., 74, the defect in the deposition not appearing on its face, it was proved by a witness, and the deposition ruled out. It was said in *Wilson v. Smith*, 5 Yerg., 407, that when a Commissioner sustains the necessary official character to act as such "the Court will give credence to all he certifies." Can then a Commissioner certify to matter, transpiring at the taking of the deposition, which would make it subject to exception? See *Carter v. Ewing*, 1 Tenn. Ch., 212; 3 Greenl. Ev., § 346. Where the questions in a deposition are grossly leading, the Court may disregard the evidence at the hearing, without any motion being made to suppress it, or any exceptions being taken to it. 1 Dan. Ch. Pr., 922.

osition to writing; (5) or showing that it was reduced to writing by an unauthorized person; (6) failure to show that the Commissioner was not interested, or not of kin, or of counsel; or, (7) failure to show that it was sealed up, and properly transmitted, without being altered or out of his possession; or (8) failure of the Commissioner to sign it; or (9) other defect in the certificate.

5. **Exceptions Because of Irregularities After the Taking.** A deposition may be excepted to for irregularities occurring after it was taken, such as, (1) the Commissioner may not properly envelope, or seal it; (2) he may not properly endorse the title of the cause on the envelope; (3) he may not write his name across the seal of the envelope; (4) he may not show what he did with the deposition after it was taken; (5) the person to whom it was delivered may not have made the affidavit required by the statute; (6) the Clerk and Master may not have endorsed on the deposition the source whence received, and that it was opened by him.

§ 499. **When Exceptions Must be Taken.**—The Code requires that all exceptions to depositions for want of notice, because not filed in reasonable time, or for other causes going to the admissibility thereof, except objections to the competency of the witness, or of his evidence, shall be made and disposed of before the commencement of the hearing, or trial, otherwise they will be considered as waived.<sup>16</sup> Hence, all exceptions to a deposition, not based on the incompetency of the witness, or of his evidence, must be taken before the trial is commenced. It is not too late to take an exception after a cause has been reached on a call of the docket. The hearing, or trial, of a cause does not commence until some affirmative step has been taken, such as beginning to select the jury, or to read the declaration, or the bill, or to make a verbal statement of the case preliminary to reading the declaration, bill, or petition. The mere announcement of a readiness to try would not be the commencement of the hearing, or trial; but any affirmative step taken thereafter, such as swearing the jury, or reading the bill, or the like, would constitute such a commencement. Nevertheless, it would perhaps be too late for a party to file exceptions after announcing his readiness to try, on the case being called; but he would probably be allowed after such announcement, and before the commencement of the trial, to appeal from the action of the Clerk sustaining exceptions to his depositions, or to demand the action of the Court on appeals from the Clerk's ruling, in cases where he had had no notice of such exceptions, or ruling.<sup>17</sup>

§ 500. **How Exceptions are Taken, and Ruled On.**—Exceptions to depositions must be in writing, and must specifically point out the precise ground of exception to the deposition, after the manner of a special demurrer, or of exceptions to a Master's report. A general exception to a deposition should always be overruled.

#### EXCEPTIONS TO A DEPOSITION.

The defendants except to the foregoing deposition of John Doe:

- 1st. Because the defendants had no notice of the time and place of taking the same.<sup>18</sup>
- 2d. Because the deposition was taken after the complainant's time for taking proof had expired.
- 3d. Because the deposition was taken by a person not authorized by law to take depositions.
- 4th. Because the certificate does not show what was done with the deposition after it was taken.
- 5th. Because there is nothing on the deposition, or annexed thereto, showing whence, how, or from whom, the Clerk and Master, received the deposition, or that the messenger made the required affidavit.<sup>19</sup> July 2, 1891.

JAMES C. FORD, Solicitor.

<sup>16</sup> Code, § 3868; *Campbell v. Baird*, 11 Pick., 345.  
<sup>17</sup> There should be a rule of Court requiring the Clerk to notify the opposite party of the filing of exceptions, or the taking of appeals. Code, § 4422.

insufficiency is of time, place, name, style of cause, or other matter of substance.

<sup>19</sup> Ordinarily, only one or two grounds of exception will appear; more are given in the text merely

The Clerk and Master will at once consider the exceptions, and forthwith write under them his rulings,<sup>20</sup> as follows:

**RULING OF THE CLERK ON EXCEPTIONS.**

The foregoing exceptions are allowed [*or*, sustained.]  
July 2, 1891.

JOHN J. GRAHAM, C. & M.

[*Or*,]

The foregoing exceptions are disallowed, [*or*, overruled.]  
July 2, 1891.

JOHN J. GRAHAM, C. & M.

[*Or*,]

The 1st and 3d of the foregoing exceptions are sustained; and the others are overruled.  
July 2, 1891.

JOHN J. GRAHAM, C. & M.

§ 501. **When and How Exceptions Must be Disposed of.**—All exceptions to depositions, for want of notice, or for failure to comply with any statutory requirement, or formality, or on any other ground, not going to the competency of the witness, must be made in writing before the Clerk,<sup>21</sup> and be disposed of before the commencement of the hearing, or trial, or they will be considered as waived.<sup>22</sup> The ruling of the Clerk on the exceptions disposes of them, if such ruling is submitted to by the party ruled against. If, however, either or both of the parties are dissatisfied with the decision of the Clerk, an appeal may be taken therefrom to the Chancellor.<sup>23</sup> The entry of the appeal should be immediately under the entry of the Clerk's ruling, in form substantially as follows:

**APPEAL FROM THE CLERK'S RULING.**

Complainant appeals to the Chancellor from the foregoing decision.  
July 2, 1891.

JAMES H. LEWALLEN, Solicitor.

Appeal taken July 2, 1891.<sup>24</sup>  
JOHN J. GRAHAM, C. & M.

This appeal should be brought by the exceptant to the attention of the Chancellor, at the earliest moment possible. If the appeal is acted on in vacation, the Chancellor will endorse his action on the paper containing the exceptions, or on a paper annexed thereto, as follows:

**CHANCELLOR'S RULING ON THE APPEAL.**

The foregoing appeal heard; and the exceptions overruled, [*or*, sustained.]  
July 3, 1891.

JOHN P. SMITH, Chancellor.

If Court is in session, the action of the Chancellor may be entered on the minutes, instead of endorsed on the paper containing the exceptions.

If the Clerk overrules the exceptions to a deposition, the exceptant must take and prosecute an appeal from the ruling of the Clerk, or he will be deemed to have waived his exceptions. If the Clerk sustains the exceptions, the party taking the deposition must appeal, or he will not be allowed to read the deposition at the trial.<sup>25</sup> An appeal vacates the ruling of the Clerk, and leaves the deposition as though the exceptions had never been acted on by the Clerk. If, therefore, the Clerk sustains an exception, and an appeal is taken, the appeal vacates his ruling; and, unless the exceptant calls upon the Chancellor to act upon his exceptions, before the trial begins, they will be considered as waived. The exceptant must see to it that his exceptions are finally disposed of, before the commencement of the hearing, or trial. Therefore, when the Master sustains his exceptions, and the Master's ruling is appealed from, inasmuch as such appeal vacates the Master's action and leaves the exceptions undisposed of, the duty devolves on the exceptant, and not on the appellant, to have the ex-

<sup>20</sup> He must act on the exceptions as soon as they are filed. Code, § 3869.

<sup>21</sup> *Travis v. Laurance*, 2 Shan. Cas., 109; *Railroad v. Harris*, 17 Pick., 527.

<sup>22</sup> Code, § 3868. Ch. Rule, II, § 5; *post*, § 1191. If the regularity or admissibility of the deposition, regardless of the evidence it contains, is to be excepted to, the exceptions must be filed, and finally acted on, before the trial begins. *Travis v. Laurance*, 2 Shan. Cas., 109; *Railroad v. Harris*, 17 Pick., 527. If the evidence contained in the deposition is to be excepted to, regardless of the regularity or admis-

sibility of the deposition, the exceptions must be made after the trial has begun, and when the exceptable evidence is offered, or at least before the evidence is closed. *The State v. N. Bank*, 16 Lea, 116.

<sup>23</sup> Code, § 3869. Ch. Rule, II, § 5; *post*, § 1191, sub-sec. 5.

<sup>24</sup> It is prudent, and perhaps necessary, to have the Clerk note the fact and date of the appeal, and attest it with his signature.

<sup>25</sup> *Hawkins v. McNamara*, 1 Heisk., 352.

ceptions acted on by the Chancellor; and, if he fails to do so before the trial begins, his exceptions will be considered as waived, and the deposition may be read.<sup>26</sup> In short, a deposition may always be read, unless there is standing against it, when the trial begins, an exception sustained without appeal; and it is too late after the trial begins either to take exceptions, or to appeal from the Master's ruling, or to call for the action of the Chancellor on an appeal already taken.<sup>27</sup>

## ARTICLE VII.

### AMENDMENT OF DEPOSITIONS.

§ 502. Amending Depositions Generally Considered.

§ 503. What Amendments to Depositions May be Made.

§ 504. How Amendments to a Deposition are Made.

§ 502. **Amending Depositions Generally Considered.**—Under the old practice, when the contents of a deposition were kept secret from every one except the Commissioner himself, when it was considered a grave matter to allow the testimony to be known until all the proof in the cause had been taken, and when this secrecy was deemed essential to prevent perjury, amendments to either the form, or the substance, of the deposition, were allowed with very great hesitancy, and only for extraordinary reasons. But now that depositions are openly taken in the presence of both parties, and especially as the Commissioners have often but little experience in taking depositions, it would seem that there should be the same opportunity to amend depositions as is allowed in other proceedings in Court,<sup>1</sup> to the end that justice may be attained, and causes be tried on their merits without being entangled in the nice formalities of the law.<sup>2</sup> And it is accordingly, a common practice now to allow depositions to be amended when there is an informality or imperfection in the taking or transmitting of it, or when there is some error, omission, or mistake, in the evidence contained in it.

§ 503. **What Amendments to Depositions May be Made.**—Any defect, omission, or imperfection, resulting from accident or mistake, either in the form of the deposition, or in the transmission of it, or in the substance of it, may be amended, when the fact of the defect, omission, or imperfection, and of the accident or mistake causing it, is clearly made to appear in the manner stated in the next section.

1. **Amendments to the Substance of a Deposition.** When a witness has made a mistake in his testimony, or has omitted to answer some part of the interrogatories, or the Commissioner has omitted to take down, or has erroneously taken

<sup>26</sup> Code, §§ 3868-3869; *Carter v. McBroom*, 1 Pick., 378; *Campbell v. Baird*, 11 Pick., 345.

<sup>27</sup> If your exceptions are overruled by the Clerk, you must take and prosecute an appeal before the trial begins, or your exceptions will go for naught. If your exceptions are sustained by the Clerk, and the other party appeals, you must have the Chancellor act on your exceptions before the trial begins, or they will be considered as waived. *Carter v. McBroom*, 1 Pick., 378. If exceptions to your depositions are sustained by the Clerk, you must appeal, or your depositions go for naught. *Brandon v. Mullenix*, 11 Heisk., 446; *Hawkins v. McNamara*, 1 Heisk., 352. If you have grounds of exception to your adversary's deposition, you must take them and have them finally acted on before the trial begins, or you will be deemed to have waived them. *Suson v. Ellis*, 11 Heisk., 80; *Shea v. Mabry*, 1 Lea, 319. A deposition may be read, if not specially excepted to before the trial begins, even when it is accompanied by neither caption, certificate, notice, commission, or authority of any kind for taking the same; and when nothing appears but the style of

to. A general objection to such a deposition will be construed as referring merely to the competency, or relevancy, or legal effect, of the testimony contained therein, and not as embracing any matter of form, or question of regularity, or authority, in the taking of such deposition. *Garvin v. Luttrell*, 10 Hum., 16; *Miller v. State*, 12 Lea, 223.

<sup>1</sup> Code, § 2863; *Bewley v. Ottinger*, 1 Heisk., 354.  
<sup>2</sup> *Hunter v. Sevier*, 7 Yerg., 136.

Many errors in pleadings, depositions and decrees, some ludicrous, others perplexing, and still others downright injurious, result from typewriters and stenographers either misunderstanding the words dictated, or misreading their stenographic notes. Even our statutes contain many such errors: thus by the Act of 1885, ch. 93, Milliken and Vertrees were "authorized, directed and empowered to revise, digest and qualify [codify intended] all the general statutes in force in this State;" and the Act of 1887, ch. 156, refer to their work as "Milliken & Vertrees' compilation [meaning compilation] of the laws of Tennessee." Courts should be very liberal in allowing such and similar errors to be corrected, even at

down, some part of his answer; and in other like cases, where the defect of evidence has resulted from accident or inadvertence, leave to supply the defect and correct the error by a re-examination of the witness will be granted by the Court. In such cases, however, the re-examination will be restricted to the supply of the defect, or the correction of the error, without retaking any other parts of the testimony, unless the entire original deposition has been suppressed.<sup>3</sup>

2. **Amendments to the Form of a Deposition.** Any defect, omission, error, or imperfection, in the form of the caption, or of the certificate, or in the signing of the deposition, or of the certificate, or in the endorsements on the envelope, or in the affidavit of the messenger, or in the endorsement of the Clerk, may be amended when such defect, omission, error, or imperfection is evidently the result of accident, or mistake, or inadvertence.

§ 504. **How Amendments to a Deposition are Made.**—Amendments may be desired either in, or to, the evidence contained in the deposition, or in the formalities incident to its taking.

1. **Amendments in, or to, the Evidence.** A witness has the right to read, or have read to him, the whole of his deposition, before he can be required to sign it. He may make any correction in his testimony, by an explanatory addition thereto, at any time before he departs from the presence of the Commissioner, though the deposition be signed and closed, but he can make no change or addition after he departs, except by leave of the Court for that purpose,<sup>4</sup> which leave the Court will sometimes grant, on proper application therefor.

The ordinary method of showing to the Court the fact and circumstances of the mistake, is by the affidavit of the witness; but the mistake may, also, appear from the certificate of the Commissioner, or upon the face of the deposition itself, or otherwise. Knowledge of the mistake is the important fact, and the Court, when once it has knowledge of the fact, will act upon that knowledge, regardless of the manner in which it may have been obtained.<sup>5</sup>

Sometimes, in cases of clear mistake, involving only a verbal alteration, the Court, instead of ordering a re-examination of the witness, will permit the deposition to be amended on its face in open Court. This has been done by the alteration of a date stated by the witness by mistake, or by the correction of a mistake by the examiner; especially where the witness was old, and very deaf, the mistake being first clearly shown and proved, to the entire satisfaction of the Court.<sup>6</sup> So, the Court would allow a witness to sign his deposition in open Court, when he had inadvertently neglected to do so, at the taking.

2. **Amendments in, or to, the Form of the Deposition.** If there has been any error or mistake by the Commissioner, in any matter of form in the caption, or certificate, of the deposition, or in the signing of the certificate, or in the endorsements on the envelope, the Commissioner, on motion for that purpose by any party interested, may, in open Court, under the direction and supervision of the Court, correct such error or mistake, making the amendment under his official oath.<sup>7</sup> Such amendments, however, must state the facts as they really existed at the time the deposition was taken; and are made *nunc pro tunc*.

In like manner, if the Clerk and Master has neglected or failed to make the proper endorsements on the deposition after receiving or opening it, he, on motion, may be allowed in open Court to correct any error, or supply any defect, in such endorsements.

So, any failure on the part of the messenger to make the necessary affidavit,

<sup>3</sup> 3 Greenl. Ev., § 346.

<sup>4</sup> 3 Greenl. Ev., § 324; Gres. Eq. Ev., 69; 1 Dan. Ch. Pr., 929.

<sup>5</sup> 3 Greenl. Ev., 346. But proof of the fact of a mistake should be clear. 1 Dan. Ch. Pr., 930, note. The Chancellor may, unless the case is very clear, examine both the witness and the Commissioner, or

require their affidavits, or even their depositions, so that cross-questions may be asked. See, 1 Dan. Ch. Pr., 953.

<sup>6</sup> Greenl. Ev., § 347.

<sup>7</sup> Bewley v. Ottinger, 1 Heisk., 354; Eller v. Richardson, 5 Pick., 575; Carter v. Ewing, 1 Tenn. Ch., 212.



when the deposition is sent by private conveyance, may be corrected at any time, by the messenger in person making the necessary affidavit; and it is probable that this may be done without the leave of the Court.<sup>8</sup>

Amendments to the form of a deposition may be made, even after the deposition has been ruled out by the Clerk on exceptions based on the very deficiency sought to be corrected by the amendments. In such case, the proper practice is, not to appeal from the Clerk's ruling, but to obviate that ruling by applying to the Court for leave to make the amendment, and then making it accordingly.<sup>9</sup>

Amendments must, however, be made before the beginning of the hearing, or trial, if the deposition stands ruled out, or suppressed, on exceptions.

## ARTICLE VIII.

### PRACTICAL SUGGESTIONS ABOUT DEPOSITIONS.

§ 505. Rules for Questioning Witnesses.

§ 506. How to Examine a Witness.

§ 507. How to Examine Your Own Witness.

§ 508. How to Cross-Examine a Witness.

§ 509. Frame and Forms of Questions for Depositions.

§ 510. Rebutting Evidence.

§ 511. As to Exceptions to Depositions.

§ 512. Exceptions to Evidence, When, Where and How Taken.

§ 513. How to Read Depositions at the Hearing.

§ 505. **Rules for Questioning Witnesses.**—Oftentimes, many unnecessary questions are propounded to witnesses, thereby unduly prolonging the examination, and needlessly swelling the record. This vexatious prolixity of aimless interrogation ordinarily arises from a failure to comprehend the real matters in issue. No question should ever be asked without a definite object, and that object should be either (1) to prove, or disprove, a matter in issue; or (2) to corroborate, or contradict, evidence already taken, or a witness already examined; or (3) to lay grounds for such corroboration or contradiction; or (4) to test the accuracy, veracity, or credibility, of a witness; or (5) to shake his credit by injuring his character, or general reputation; or (6) to give him an opportunity to explain.<sup>1</sup> Hence, it is indispensable to a lawyer-like examination that the questioner shall have well in mind (1) the issues contained in the pleading, (2) the evidence already taken in the cause, and (3) what can be proved or disproved by the witness.

1. **Complainant's Questions** should, ordinarily, seek to draw out of the witness what he knows: (1) in reference to the truth of the affirmative matters of fact alleged in the bill; (2) in reference to the falsity of the affirmative matters of fact set up in the answer by way of avoidance; (3) in reference to the character, or hostile testimony, of the defendant's witnesses; (4) in reference to any facts, or circumstances, tending to sustain the allegations of his bill, or to corroborate the evidence, or witnesses, he has already introduced; and (5) in reference to any facts, or circumstances, tending to rebut the evidence, or discredit the witnesses, of the defendant.

2. **Defendant's Questions** should, ordinarily, seek to show what the witness knows: (1) in reference to the falsity of the claims set up in the complainant's bill; (2) in reference to the truth of any affirmative allegations set up by himself, by way of avoidance; (3) in reference to the character, or hostile testi-

<sup>8</sup> The Clerk and Master may administer the oath to the messenger at any time before the hearing begins.

<sup>9</sup> *Bewley v. Ottinger*, 1 Heisk., 354. In such a case, an appeal from the Clerk's ruling would be in vain, as his decision would be correct, and would

to the Court to have the defects and omissions in the depositions corrected according to the facts. *Ibid.*

<sup>1</sup> All evidence should be pertinent, material, probative, explanatory, rebutting, corroborative, or cumulative.

mony, of the complainant's witnesses; (4) in reference to any facts, or circumstances, tending to refute the evidence, or witnesses, of the complainant; and (5) in reference to any facts, or circumstances, tending to sustain his matters in avoidance, or to corroborate the evidence, or witnesses, he has already introduced.

Solicitors should avoid putting leading questions to their own witnesses: such a practice is not only grossly illegal, but is a direct injustice to the other side. And if the witness is easily led, and led too far, the opposite side will be apt to expose his ignorance, or his dishonesty. If, however, a witness is hostile to the party calling him, or is unwilling to testify, the Court will allow leading questions to be asked.<sup>2</sup>

§ 506. **How to Examine a Witness.**—As a rule, begin your direct examination of a witness by asking him his name, age, business, place of residence, how near he lives to the parties, or the property in dispute, his relationship to any of the parties, and how long he has known them, and what interest he has in the subject-matter in controversy, if any. These questions are generally of value in weighing the evidence of the witness; and they, also, have the effect of putting the witness at ease. As the Chancellor cannot see and hear the witness give in his evidence, the facts called forth by the above questions are often the only means he has of testing the comparative credibility of disagreeing witnesses.

Insist upon your adversary's witnesses being put under the rule, and examined separate and apart from each other, if you have any reason to suspect any concocted evidence, or false swearing. Witnesses on the same side often conform their testimony to that of those who have already testified.<sup>3</sup> Oftentimes, your only chance to destroy false evidence is by having the witnesses examined out of each other's hearing, and thereby involving them in conflict as to particulars and circumstances.<sup>4</sup>

Before you examine a witness, ascertain what he knows material to the controversy: this will render it unnecessary to ply him with a multiplicity of fishing questions, or to run a drag-net of general interrogations through his memory, in order to discover what he knows.

Never attempt to mislead an honest witness, or to entrap him. Deal fairly with those disposed to deal fairly with you. Be gentle with the young and timid; courteous to those disposed to tell the truth; firm and dignified with the flippant and impertinent; forbearing towards the ignorant and stupid; shrewd with the shrewd, and crafty with the crafty.

While a witness is being examined by the other side, keep a memorandum of points suggested by or during the examination, so that you will not forget to interrogate the witness in reference to them, when your turn comes to examine him. You should pay the closest attention to the examination when conducted by the other side, so that you may be able to object to the form, or substance, of any question propounded; and to see that anything favorable to your side in the answer of the witness is not omitted to be written down; and to prevent the entry of any thing unfavorable to your side, not said by the witness. Make all of your objections to the form, or substance, of questions, in writing, and neither argue them yourself before the Commissioner, nor allow the other side to argue them. The Chancellor, and not the Commissioner, is the proper officer to hear the arguments and pass upon the objections.

<sup>2</sup> The Court may, at the hearing, disregard the evidence drawn from a witness by questions grossly leading. 1 Dan. Ch. Pr., 922.

<sup>3</sup> Weak witnesses are sometimes intentionally given a chance to hear other witnesses testify in advance of their examination, so that their recollection may be refreshed, and their confidence strengthened. By such means, a weak, or timid, or partial witness may be converted into a false witness, and learn to echo what he has heard others swear. Formerly, in Chan-

cery, all witnesses were examined in secret, no one being present but the witness and the examiner, even Solicitors being excluded.

<sup>4</sup> Witnesses often testify falsely because of defective memories, intending to swear the truth. When such witnesses are examined out of each other's hearing, the deficiencies in their memories will become apparent from their conflicts; whereas, if they hear each other testify, they are apt to endeavor to make their testimony harmonize.

§ 507. **How to Examine Your Own Witnesses.**—It requires fully as much art and thought to properly examine witnesses, as it does to draw a pleading, or make a brief. In examining your own witnesses, you must keep in mind what proof you need to make, and what you can make by the particular witnesses you are examining.

1. **Objects of the Direct Examination** are (1) to prove the material affirmative allegations in your pleading; (2) to disprove the material affirmative allegations in your adversary's pleading; (3) to destroy, or weaken, the evidence filed by the opposite party; and (4) to corroborate or sustain your own witnesses. Hence, in examining one's own witnesses, it is all important to know (1) what you need to prove generally, (2) what has already been proved in the case, and (3) what you can prove by the particular witness you are examining. To know the first two you must know the contents of the pleadings, and the proof on file; to know the last, you, or your client, should have conferred with the witness before he was summoned. Solicitors who examine a witness without this three-fold knowledge, are like men groping for something in the dark, and they run like risks.

If your witness is young, timid, or diffident, ask him where he lives, how far he lives from the place in controversy, whether he knows the parties, or some similar questions, in order to put him at ease. If he is old, experienced in business, or self-possessed, observe a respectful courtesy in your demeanor, and proceed at once to the material facts you wish to prove. If he is flippant, or conceited, or disposed to be humorous or impertinent, be grave and dignified in your manner, and somewhat ceremonious, so as to impress the witness with the importance and solemnity of the examination.

2. **Objects of the Re-examination** are (1) to obtain from the witness an explanation of matters which are either not fully stated on the cross-examination, or which are apparently in conflict with his evidence on the direct examination; and (2) to prove by the witness some new fact, the proof of which is made necessary by the evidence elicited on the cross-examination. If the witness has been confused, or entangled, by the cross-examination, he may be given an opportunity to restate his evidence, and to disentangle himself.

Do not allow yourself to become annoyed because your witness has been worsted by the cross-examination; preserve your temper and equanimity, and open your re-examination by a reassuring tone and comforting manner, and so shape your questions as to enable the witness to readily recover his self-possession, and to correct, or explain, his inconsistencies, if any. By means of a skilful re-examination, a battered witness may often be repaired, and be enabled to leave the stand with his credit fully restored.

§ 508. **How to Cross-Examine a Witness.**—Never cross-examine a witness without a definite and pertinent object. Aimless, hap-hazard and random questions are not only of no benefit to the questioner, but they often result in drawing out answers that are a downright damage to him. Cross-examinations have, ordinarily, four objects: 1, To destroy, or weaken, the force of the evidence the witness has already given; 2, To draw forth some evidence in favor of the cross-examiner; 3, To destroy, or weaken, the credibility of the witness; and 4, To lay ground for contradicting him. Unless the witness is friendly, or wholly impartial, beware of trying to prove by him any fact material to your case, for an adverse answer from him may counterbalance your own proof on that point.

Witnesses to be cross-examined are, ordinarily, either (1) prejudiced against your side, or (2) friendly to your side, or (3) indifferent to both sides.

1. **Witnesses Prejudiced Against Your Side** should be cross-examined with great caution. If you can get along with your case without proving anything by them, never ask them any questions, except as to matters that may tend to impeach their evidence, or otherwise weaken its force. Show by their testi-

kinship to the party calling them, their interest or feeling in the case, their unacquaintance with the facts, and any other matter that will impair the effect of their testimony. If, however, the witness knows the facts on which your success depends, and you cannot prove those facts by any other witness, but are obliged to tear the truth from the witness' throat, or wring it out of his heart, begin by asking him leading questions, as to the most remote circumstances of the case, circumstances so unconnected with each other that he cannot see the drift of your questions. Then, interrogate him as to circumstances nearer to the transaction, and draw nearer and nearer, until you reach the very time and place of the main fact. Do not, however, call on him to answer as to the truth of the main fact, until a contrary answer will be grossly inconsistent with the circumstances he has already sworn to, and will involve him in irreparable contradiction, and then demand of him whether, considering all he has testified to, the main fact is not as you claim it to be. Coerce a concession out of him, or demand an explanation of his glaring inconsistencies.

When an adverse witness, on cross-examination has answered several consecutive questions, by saying that he did not remember, inject a question covering a matter he has already sworn that he does remember; and, if he is dishonest, the chances are he will answer such question by saying that he does not remember, and will thus expose his wilful dishonesty, or gross unfairness.

When an adverse witness answers all of your questions in the negative, so change the form of your questions that a negative answer will make in your favor. Thus, if you wish to prove so and so, ask the witness if the contrary of so and so is not the fact. If, for instance, you wish to prove that A was not sober, ask such adverse witness if A was not perfectly sober on the occasion in question. An adverse witness will, on cross-examination, under the influence of seductive leading questions, and courteous demeanor, often admit some small circumstance, not deeming it worth an evasion. Truth, however, is so linked to truth, that a very small admission often necessitates another in confirmation, or explanation. In this way, admission after admission may be obtained, until the witness is hopelessly enmeshed in a web of contradictions of his own spinning. In order to get a witness to make an admission of remote circumstances, begin your cross-examination, as though you believed all he said, and had full confidence in his honesty, but wanted some small particulars which the other side had not called for.

**2. Witnesses Friendly to Your Side**, when introduced by the other side, are, as a rule, of more value to you than when introduced by yourself, because, (1) you can ask them leading questions, and (2) they cannot ordinarily be impeached, or contradicted, by the party introducing them. You should endeavor to prove by them every pertinent and material fact in their knowledge; and you may, as a rule, question them freely and unreservedly, for a witness friendly to you is apt to be somewhat hostile to the other side, because made a witness by them against his inclination.

**3. Witnesses Who are Indifferent** are dangerous, oftentimes, and must be cross-examined with care, lest they give you a damaging answer. If their indifference arises from general sullenness, be careful not to offend them, but be as courteous and suave as possible. If their indifference is the result of impartiality, then question them freely, but no further than the truth will warrant. If the heart of an indifferent witnesses can be won, he may prove a valuable acquisition; but if he is inclined to resent your advances, let him go: *cave canem!*

**4. Witnesses When Intoxicated, Insubordinate, or Tampered With.** If any irregularity occurs while taking a deposition, or depositions, prove it by a witness, or by the Commissioner. Among such irregularities may be mentioned (1) That a witness was intoxicated, or insubordinate, or quarrelsome; or (2) was tampered with by the opposite party, or his attorney. If a witness was in any

way tampered with by the opposite side during his examination, or in any way approached, or stuffed, prove it by him while his deposition is being taken.

If important to show who is present at the taking of proof, show it by some witness, or by the Commissioner. You may question the witness as follows on the above matters:

#### QUESTIONS TO SHOW TAMPERING.

Have you not talked with X<sup>s</sup> since the last question?

Did you not have a talk with X after I asked the preceding question, and before you answered it?

Have you not refreshed your recollection as to facts, figures, or dates, since your deposition began? or since you were summoned as a witness?

Please state in what way you so refreshed your recollection.

Please file the paper you so used in refreshing your recollection, and mark it exhibit A to your deposition.

Is not X present at the taking of your deposition, and is he not assisting in asking questions?

Has he not asked you some questions? If so, what ones?

Did X show you any papers when he talked with you about this case? What papers were they? Give their contents.

**§ 509. Frame and Forms of Questions for Depositions.**—It is a great saving of time and annoyance for proper questions to be propounded to a witness, whether his examination is on notice or on interrogatories; and is especially important in the latter case, as the opportunities of remedying any defect in question or answer is much less when the deposition is taken on interrogatories. To aid counsel in framing his questions, in the latter case, some common forms are here given. Counsel would do well, however, to divide many of these questions, 1st, because the witness may be confused by too many or too complicated, questions being propounded at once; 2d, because Commissioners do not always take the trouble to have the witness answer all of the questions, main and subordinate, included in one interrogatory.

#### QUESTIONS FOR DEPOSITIONS.

##### 1. Preliminary Questions.

Q. State your age and occupation and post-office address. Do you know what this suit is about, and are you in any way interested in it? If so, state how.

##### 2. To Prove Knowledge of Parties or Other Persons.

Q. Do you know the parties to this suit [or O. P.] or any of them? and if any, which ones? And how long have you known them? [or, O. P.] If related to any of them, to whom and in what degree?

##### 3. To Prove a Paper-Writing.

Q. Look at the paper-writing here shown you, marked A, [or some other letter], and state whether you are acquainted with the hand-writing of [naming person,] and whether the name [giving name] subscribed to said paper-writing is in his hand-writing. State whether or not the body of said paper writing, or any part of it, and if any what part is in his hand-writing?

##### 4. To Prove an Oral Agreement.

Q. State whether you were present some time in the year 19...., when a conversation took place between complainant and defendant about [naming the subject]. If so, state that conversation fully, and what if anything was said about [naming the particular matter.] State the agreement of said parties fully as to such matter.

##### 5. To Prove a Written Agreement.

Q. [Repeat the interrogatory above as an introduction]. State whether the said agreement or any agreement was then and there, or afterwards, reduced to writing and signed by said parties, or either of them and which one. Look at the paper-writing here shown you, marked [state how marked,] and say whether or not it is the writing so signed. [If this witness is a witness to said agreement, then add:] Did you witness the signature of either or both parties to said paper-writing, and if either, which one. Did you, or not, subscribe your name to said writing as a witness? And is, or not, your name subscribed to said writing your own hand-writing?

##### 6. To Prove Hand-Writing.

Q. Look at the paper writing now produced, marked A, purporting to be a promissory note for ..... dollars from B. C. [now deceased] to the complainant, dated the ..... day of

....., 19...., and state whether or not you ever saw said B. C. write, or are you by any other means acquainted with his hand-writing? If so, state whether the body of said note is in his hand-writing? or whether his name subscribed thereto is in his own hand-writing?

**7. To Prove Books of Account.**

Q. If you were ever in the employment of A. B., so state, and state in what capacity. Look at the book, here and now produced, and state whose book it is, and for what purpose it was used, and if it had a name or designation state it.

**8. To Prove a Statement or Admission.**

Q. State whether or not you are acquainted with A. B.? If so, and you heard him say anything about [*state briefly what,*] give all he said on the subject. And if you know how he happened to make these statements, tell the circumstances.

**9. To Prove an Account Stated.**

Q. Did you ever, and if so when, make out an account in writing of the dealings and transactions between the complainant and defendant? If so, state how you happened to do so, and whether the complainant and defendant furnished you with any books, papers or memoranda to aid you, and if so what books, papers or memoranda? Specify them.

Look at the writing here shown you, marked A [*or some other letter,*] and state whether or not it is the account so drawn out by you, or a true copy thereof? State whether the paper-writing here shown and marked A contains a just and true account of all dealings and transactions between the complainant and defendant during the time appearing on its face, or are there errors, omissions or false charges therein, and if any point them out.

State whether you delivered, or mailed, a copy of said account so drawn out by you to the defendant, and if so which and when; and if you know whether the defendant received the same, so state.

**10. To Prove a Deed, Note, Contract, or Other Writing.**

Q. Look at the paper-writing here and now shown you, marked A, [*or some other letter,*] and state whether it was signed, or acknowledged by any person or persons in your presence as his, [*her*] or their act and deed. If so, state what person or persons, and whether he [*or she*] or they signed his, [*her*] or their names to, or acknowledged, said paper-writing. If either party signed by mark, state which party, and state who wrote the name of such party to said paper-writing.

[*If this witness witnessed the paper-writing then add :*]

Q. Are you, or not, a subscribing witness to the signing and delivering of said paper-writing? In whose hand-writing is your name subscribed to said paper?

**11. To Prove a Payment.**

Q. Were you present when the deed [*mortgage, note, bill of sale, or other contract, stating it*] was executed and delivered? If so, did you see the consideration money paid? If so, how much was paid and by whom and to whom? If the real consideration is not stated in said deed, tell what it was.

**12. To Prove Acknowledgments of an Instrument.**

Q. If you are acquainted with A. B., state whether or not and when you have heard him speak of a certain deed [*note of hand, mortgage, deed of gift, bill of sale, or other written instrument,*] alleged to have been given by him to C. D., and whether or not he made any and what admissions or declarations in reference thereto. State all he said upon the subject.

**13. To Prove a Tender of Money, or Other Thing.**

Q. If you were present when A. B. is alleged to have made a certain tender to C. D., so state; and state all that then took place, and whether A. B. had the money [*or other thing*] present; and if so, how much money did he have, and whether he offered it to C. D., and whether C. D. accepted it. Give the date and place of this tender.

**14. To Prove a Death.**

Q. State whether or not you knew A. B.? If so, is he living or dead? If dead, how do you know that fact, from being present at his death, or at his funeral, or by public repute? or otherwise?

**15. To Prove Service of a Notice, or Other Writing.**

Q. State whether or not, on or about the ..... day of ....., 19...., [*stating the date,*] or at any other time, and when, you delivered to C. D. a paper-writing, purporting to be a notice [*or, a copy of a notice*]; [*state what it purported to be,*] from A. B.? If so, was or not it signed by said A. B.? Did you or not keep a copy [*or the original?*] Look at the paper-writing now shown you, marked A, and state whether or not it is a true copy [*or the original*] of the writing by you so delivered?

**16. To Prove an Examined and Compared Copy of a Record.**

Q. Look at the paper-writing here shown you, marked A, and state whether or not it is a true copy of any and what record of any and what Court [*or office?*] State whether or not you have carefully examined and compared said paper writing, here produced, with the original, and with whom,<sup>6</sup> if anyone?

<sup>6</sup> That is, who aided you, if any one, in making the comparison? Usually, one person reads the original while the other compares the copy.

**17. To Lay Grounds to Contradict a Witness.**

X. Q. Did you not have a conversation with A. B. at ..... [stating the place] on or about the ..... day of ....., 19...., [stating the time,] about [state briefly what,] and did you not then and there tell him that [stating what he is supposed to have said?]. If you did not so state to him, tell what you did say to him at that time.

**18. To Impeach a Witness on His Reputation.**

Q. Are you acquainted with the general reputation of A. B. among his neighbors? Answer yes, or no, to this question. State what that reputation is—good, bad or what? State whether from that reputation you would believe A. B. on his oath?

**19. Concluding Question.**

Q. If you know of any other matter or thing relating to this suit that may throw light on it, or be of benefit to either the complainant or the defendant, please state it as fully as though specially and particularly questioned about it.

**§ 510. Rebutting Evidence.**—Never fail to do all the rebutting you can. Many good cases are lost, or greatly crippled, by failure to rebut. If your client has been proved to have done a damaging act, or made a damaging statement, or admission, be sure to put him on the stand to rebut the injurious evidence, if it be false, or if it be capable of a satisfactory explanation. Solicitors frequently fail to re-take their client's depositions to rebut admissions, or acts, proved on them by the other side. Courts pay great attention to admissions by a party, when such admissions are clearly proved, and are not denied.

If the character or evidence of any of your witnesses is assailed, sustain them vigorously by rebutting evidence; and if they can aid you in this rebuttal, re-examine them. Corroborate your material witnesses as much as possible. A case is often lost for want of corroboration easily obtainable. The skill and diligence of a Solicitor are exhibited to the best advantage in marshaling his proofs so as to corroborate his own witnesses, and to rebut the proofs of the adversary.

**§ 511. As to Exceptions to Depositions.**—Remember, that all exceptions to depositions, (1) because not taken in time; or (2) for want of notice; or (3) for any defect in caption, or certificate, or in transmission; or (4) for other causes going to the admissibility of the deposition, must be made and disposed of, before the commencement of the hearing, or trial. Be careful, then, to get in all of your exceptions, and have them finally disposed of, before the cause is reached on a call of the docket; and, if any of your own depositions are expected to, take all steps necessary to get rid of the exceptions: appeal, if the Clerk's rulings are wrong; or apply to the Court for leave to have the informality corrected, if it be correctible. Remember, that an appeal from the Clerk's ruling on exceptions annuls his rulings: therefore, if your adversary has appealed from the action of the Clerk sustaining your exceptions to his depositions, you must have his appeal acted upon by the Chancellor before the hearing is commenced, or your exceptions will go for naught.

**§ 512. Exceptions to Evidence,<sup>7</sup> When, Where, and How Taken.**—The following are the principal rules governing the time and place for taking exceptions to evidence:

1. **Objections to the Competency of a Witness** may be made before he is examined, or as soon as his incompetency appears during the examination; but they must be made when his deposition is offered to be read at the hearing. The grounds of these objections will be stated hereafter.<sup>8</sup>

2. **Objections to the Form of the Question** must be made when the question is asked, and before the answer is given, whether the question is asked while the witness' deposition is being taken, or while he is being examined orally. Objections to the form of a question in a deposition must be in writing before the Commissioner, and must be repeated when the question is read in his deposition at the hearing; or the objection will be considered as waived. The opposite

<sup>7</sup> Be sure to keep in mind the great difference between exceptions to a deposition and exceptions to

<sup>8</sup> See, *post*, § 535, sub-sec., 1.

party will not be allowed to wait for an answer to an objectionable question, and object if he does not like the answer. His silence is a consent that the question may be answered: this same rule applies to objections to the substance of a question.<sup>9</sup>

3. **Objections to the Substance of the Question** may be made in writing before the Commissioner when it is asked, and before the witness answers it, and this is good practice; but it must be made when the question is read in his deposition at the hearing, or it will be deemed to be waived.<sup>10</sup>

4. **Objections to Answers Because Not Responsive** must be made before the Commissioner before another question is asked, and cannot be first made at the hearing. If the answer is illegal or irrelevant it may be objected to when made before the Commissioner, but must be objected to at the hearing.<sup>11</sup>

5. **Objections to Both Question and Answer** because the evidence called for and given is irrelevant, incompetent or illegal, may be made before the Commissioner, but must be made before the Court when the question is read.<sup>12</sup>

6. **Objections to Evidence Heard by the Master on a Reference.** When evidence is taken by, or offered before, the Master, on a reference to state an account, or make a report, incompetent evidence must be objected to before he closes the proof, or it cannot be objected to at the hearing of exceptions to the report. If the rule were otherwise, the evidence before the Chancellor might be different from that before the Master; besides, if the evidence had been objected to before the Master, the party offering it would have had the opportunity of curing or supplying the deficiency, if any.

§ 513. **How to Read Depositions at the Hearing.**—In reading depositions at the hearing, omit all formal parts, such as the style of the cause, the caption, the certificate, the number of questions, and the like. State the name of the witness and his age, and then read the first question and the answer thereto without any preferatory remarks. It is, ordinarily, unnecessary to say “question” before reading the question, or to say “answer” before reading the answer; the distinction between question and answer can, ordinarily, be indicated by the inflection of the voice.

A deposition taken by one party and not read by him may be read by the other party,<sup>13</sup> if the evidence is competent. In such a case, the fact that the deposition was taken by the other party may be stated before the reading of it is begun.

<sup>9</sup> See, *post*, §§ 496; 535.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See, *post*, § 535.

<sup>13</sup> *Saunders v. Railroad*, 15 Pick., 130.



## CHAPTER XXVI.

## MOTIONS PREVIOUS TO THE HEARING.

- ARTICLE I. Motions Before the Case is Called.  
 ARTICLE II. Motion for a Continuance.  
 ARTICLE III. Motions to Dismiss the Bill.  
 ARTICLE IV. Suggestions How to Prevent Delays, Arising  
 from Amendments and Continuances.

## ARTICLE I.

## MOTIONS BEFORE THE CASE IS CALLED.

§ 514. Motions by the Complainant.  
 § 515. Motions by the Defendant.  
 § 516. Motions Common to Both Parties.

§ 517. Motions by a *Quasi* Party.  
 § 518. Motions by a Stranger to the Suit.

§ 514. **Motions by the Complainant.**—Motions have already been defined,<sup>1</sup> and will hereafter be fully considered in a separate Chapter.<sup>2</sup> The principal motions made by the complainant, between the perfection of his pleadings and the hearing of the cause, are the following:

1. **Motions to Prepare His Case for the Hearing.** These are: (1) motions to take a non-resident defendant's answer off the files, and to take the bill for confessed, because the defendant has failed to answer interrogatories in obedience to a peremptory order; (2) motions for a *scire facias*, and for a revivor of the cause; (3) motions for leave to file an amended bill to set up matters in being, but not known, when the original bill was filed; and (4) motions for leave to file a supplemental bill to set up matters that have come into being since the original bill was filed.

2. **Motions to Protect, or Enforce, his Rights, Pending the Litigation.** These motions are: (1) motions for an injunction, or a restraining order; (2) motions for a receiver; (3) motions for an attachment for contempt against the defendant, or against a witness; (4) motions by a wife for alimony; (5) motions to require money, choses in action, or other personalty, in possession of the defendant, to be deposited with the Master; (6) motions to impound, or loan out money; and (7) motions for an order on the defendant to produce and file deeds, contracts, or other documents, in his possession, which the complainant has the right to inspect.

§ 515. **Motions by the Defendant.**—The principal motions made by a defendant, after the issue has been made up, are the following: (1) for a rule on the complainant to take some step necessary to keep the suit in progress; (2) motions to dismiss the bill of a non-resident complainant because he has failed to answer interrogatories in obedience to a peremptory order; (3) motions to abate the suit for failure to revive on the death of the complainant; (4) motions for leave to file a crossbill to set up matters of defence that have arisen since the answer was filed; (5) motions to dissolve an injunction, or discharge an attachment; and (6) motions for leave to withdraw the answer, and file a plea or a demurrer.

<sup>1</sup> *Ante*, § 214.

<sup>2</sup> The Chapter on Motions deals in detail with the

consequence, motions will be dealt with very briefly in this Chapter. See, *ante*, §§ 214-219; 256-262; 266-

§ 516. **Motions Common to Both Parties.**—The following motions may be made either by the complainant or the defendant: (1) motions to require the adverse party to produce documents in his possession; (2) motions to shorten, or lengthen, the notice for taking depositions; (3) motions to extend the time for taking proof; (4) motions for leave to re-examine a witness, or retake a deposition; (5) motions in reference to exceptions to depositions; (6) motions for a trial by jury; (7) motions to consolidate two or more causes; (8) motions to revive on the part of the mover; and (9) motions for a continuance.

§ 517. **Motions by a Quasi Party.**—Receivers, guardians, and trustees, appointed by the Court, sureties on notes taken by the Master, purchasers at a Master's sale, and the officers of the Court, may move the Court in reference to any matter wherein they are interested or concerned, connected with a suit. (1) Receivers may apply for instructions; (2) guardians may apply for an allowance for their wards; (3) purchasers may ask to be relieved from their purchase; (4) the Master or Sheriff may apply for instructions as to his duty in any particular matter before the Court; and (5) persons who come in under a decree, to file and prove claims, may make motions in reference to their claims.

§ 518. **Motions by a Stranger to the Suit.**—A person, who is neither a party nor a *quasi* party to a suit, is termed a stranger. Such a person cannot, ordinarily, make any motion in the cause. The Court will, however, hear him, on petition, in the following cases: (1) on petition for leave to become a party to set up claim to property involved in the litigation; (2) on petition for leave to file a claim, or to come in under a bill, order, or decree, which allows creditors or claimants to become parties; (3) on petition for leave to reclaim property in the custody of the Court, or its officers; (4) on petition for leave to sue a receiver in order to establish a money demand against him, or to prove title to property in his possession; and (5) on petition in reference to a bid for property which the Master or receiver refused to receive, or to report.

## ARTICLE II.

### MOTION FOR A CONTINUANCE.

§ 519. Motion for a Continuance.

§ 520. Form of an Affidavit for a Continuance.

§ 521. Terms Imposed on Continuances.

§ 522. Effect of a Continuance.

§ 519. **Motion for a Continuance.**—When a case is reached on the docket and called for trial, either party not ready for trial may move the Court to continue the cause, supporting his motion by affidavit or affidavits, unless the opposite side agree to the continuance.<sup>3</sup> The affidavit must be both special and very strong, when the time for taking proof in chief has expired. An affidavit for a continuance should be made by the party in person; unless (1) he is prosecuting the suit by an agent, and then by the agent; or (2) unless he is unable to attend Court for any sufficient reason, in which case the affidavit may be made by his Solicitor, or any other person who has personal knowledge of the facts.

The affidavit for a continuance should show, with particularity:

<sup>3</sup> If your client wishes a continuance on any ground at all debatable present such ground to the Court; and, if an affidavit in its support is advisable,

present such affidavit. If a continuance is refused, and you lose the suit, your client will be less dissatisfied.

1. The names and residences of the witnesses, whose depositions are desired to be taken and read at the hearing.

2. A detailed statement of the particular facts expected to be proved by each of these witnesses, such facts to be material to the issues involved, and favorable to the party asking a continuance.

3. The efforts put forth by the applicant to take the depositions of said witnesses. Such efforts should ordinarily be due attempts to take their depositions, or a sufficient reason given for not making the attempts. The efforts put forth must be such legal process as the law provides.

4. If the testimony was discovered too late to take their depositions, show that there was due diligence used in searching for evidence, and why these witnesses were not previously interviewed.

5. Show that the desired witnesses are within the jurisdiction of the Court, and amenable to process; and that their depositions can and will be taken within such reasonable time as the Court may allow.

6. If the desired witnesses live out of the State, show what grounds the affiant has for believing that their depositions can be taken in a reasonable time.

7. Show that the evidence of the desired witnesses could not have been supplied by any other known proof; and that there was no other witness or witnesses known to affiant by whom he could prove the same facts.

8. If affiant has been misled, or hampered, by the other party; or if his witnesses have in any way been interfered or tampered with by the other party, state the facts in detail, and show how he was thereby prevented from being ready for trial.

9. Aver that this application for a continuance is made not for delay, but in order that the affiant may have a reasonable opportunity to make his defence, and that justice may be done.

10. The affidavit should be based on the personal knowledge of the affiant; and, if on information and belief, the name of the informant should be given, and his affidavit should be presented in corroboration.

§ 520. **Form of an Affidavit for a Continuance.**—The following is a form of an affidavit for a continuance, based on the foregoing rules:

**AFFIDAVIT FOR A CONTINUANCE.<sup>4</sup>**

John Doe,  
vs.  
Richard Roe, et al. } In the Chancery Court, at Knoxville.

In this cause, the complainant [*or, defendant.*] moves the Court to grant him a continuance, with leave to take further proof; and in support of his motion makes oath that he cannot go safely to trial at the present term [*or, that he cannot safely have this cause heard at the present term.*] for want of the depositions of George Jones, Henry Williams, John Smith, and Charles Fen.

I.

By George Jones, who lives in Claiborne county, he has good reason to believe, and does believe, that he can prove that [*Here set out in detail what you expect to prove by him, giving the particulars. General statements will be insufficient.*] Affiant would have taken said Jones' deposition, but he did not learn the foregoing facts, or any of them, until six days ago, which was too late to have his testimony taken. Said Jones lives in Claiborne county, and affiant had no reason to suppose that he knew said facts, and [*Here show why affiant did not interview Jones before, and why he did not suppose that Jones knew any material facts.*]

II.

By said Henry Williams, who lives in this county, affiant has good reason to believe, and does expect and believe, that he will be able to prove that [*Here set forth particularly what you expect to prove by him, stating the precise facts, and avoid general and sweeping averments of fact.*] Affiant would have taken said Williams' deposition in due season, had it not been that said Williams was so sick that his physician forbade his examination. [*Or, give such other reason for not taking his deposition as will show that you have not been negligent.*]

<sup>4</sup> This affidavit may, by paying proper attention to the matter in brackets, be used as a form and guide, either by a complainant or by a defendant.

III.

By said John Smith and Charles Fen, who live in Union county, affiant expects, on good grounds, to be able to prove that [*Here give the particular facts you expect to be able to prove by each witness. Statements that you expect to prove by a witness that you own the property in dispute, or that the defendant owes (or, does not owe,) the debt sued for, or that the defendant had (or, had no,) notice, or that the defendant did (or, did not do,) the wrongs charged in the bill, or that the defendant was (or, was not,) guilty of the fraud or other inequitable conduct alleged,—all such statements are too general: they are conclusions of law or inferences of fact rather than facts.*] Affiant would have had the depositions of these two witnesses taken in time to read at the present term, if [*Here show your excuse for not taking their depositions, stating particularly what efforts you made, if any, to take them, and why you were unsuccessful. If no efforts were made, state fully and clearly why not. If the adverse party has tampered with the witnesses, or has misled you, or in any way impeded or hampered you, show all the facts and circumstances connected with the conduct of which you complain.*]

IV.

Affiant cannot safely go to trial at this term without the testimony of the foregoing witnesses; and he could not and cannot prove said facts so fully by any other witnesses. Their evidence will, as he has good reason to believe, and as he is advised by his Solicitor, fully prove [*or, disprove,*] the material allegations of the bill, and will show that the relief prayed should [*or, should not,*] be granted in whole or in part; whereas, without the testimony of said witnesses, the real truth of the controversy will not appear to the Court, and great and irreparable injury will, in consequence, be suffered by affiant.

Affiant will be able to take the depositions of said witness within such reasonable time as the Court may allow. This application for a continuance is not made for delay, but that affiant may have a fair chance to take said depositions, and thereby to prove his case, [*or, make his defence,*] and to have the real facts of the controversy before the Court, that justice may be done him in this suit. And if, on consideration of the whole record, the Court shall be of opinion that there has been any lack of due diligence on affiant's part, he offers to submit to such terms as to the Court may appear equitable.

JOHN DOE.

Sworn to and subscribed }  
before me, this May 26, 1891.  
W. L. TRENT, C. & M. }

§ 521. **Terms Imposed on Continuances.**—When a cause on the docket is called for trial, if either party be not then ready for trial, he may apply to have the cause continued.<sup>5</sup> If he has had as much as six months in which to take his proof, no motion for a continuance should be entertained, unless supported by an affidavit showing that he has very strong evidence not yet taken, or filed, and a very strong excuse for not having taken or filed it, in due season. If the Chancellor, in such a case, should continue the cause, it should ordinarily be only upon the payment of one-half of the unadjudged costs of the cause; and if it be the second continuance by such party, then only upon the payment of all the unadjudged costs of the cause.<sup>6</sup> If the applicant for a continuance has had a reasonable opportunity to get ready for trial, even though he has had less than six months in which to take his proof, the Chancellor should not heed his

<sup>5</sup> Courts are made for complainants; defendants neither need nor desire Courts. The Constitution of Tennessee says all Courts shall be open; and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Const., Art. 1, § 17. Justice delayed is justice denied. The old maxim of the Civil Law, that defendants are more to be favored than complainants, (*Favorabiliores rei potius quam actores habentur.*) announced a just rule for the ancient Roman forum, where an insolvent debtor could be condemned to be sold into slavery, or even killed, by his creditor, if no purchaser could be found. The maxim was, also, a just one in England and America in former days, when an insolvent debtor could be imprisoned, and all of his property sold. But now there are not only no penalties attached to insolvency, but there are large exemptions, both real and personal. The reason of the maxim, therefore, no longer existing, the maxim itself should no longer be observed in our Courts. *Cessante ratione legis cessat ipsa lex.* The Court should really favor the party on whom the burden of proof rests, so as to give him a reasonable opportunity to prove his case. Parties who are conscious of their guilt often put on the mask of injured innocence, and

loudly and complainingly insist on a speedy hearing, prompted really by the secret fear that criminating proof may be discovered. The proper maxim is: *In preparatorius ad iudicium favetur actori.* (In matters preparatory to trial the complainant should be favored.)

The old stage-coach methods of practice heretofore pursued in Tennessee are not adapted to these days of railroads, telegraphs and telephones. The Courts should keep up with the times. Chief Justice Turney said: "Until communities have the assurance that they may command a ready redress of grievances and protection of rights, they will lack energy and thrift and respect for law. It is expected—rightfully expected—of the Courts that they will do their whole duty in declaring and enforcing such rules as will secure speedy trials, and just judgments, in all causes coming before them." Wood v. Frazier, 2 Pick., 508.

<sup>6</sup> Nothing spurs parties to diligence so effectually as the certainty that negligence will be visited with costs. No continuance should be granted except on affidavit showing good cause, and not then except on terms. Hart v. Scruggs, 1 Tenn. Ch., 1. The rule requiring a party to pay costs, as the price of a continuance, is based on the maxim that "He who seeks Equity must do Equity." The Court

application, unless it be supported by an affidavit showing diligence, and a good excuse for not having the desired evidence on file.<sup>7</sup>

If the parties have had less than two months in which to take proof, the cause will ordinarily be continued on mere motion of either party, and without terms. But where as much as four months' time for taking proof has elapsed, the cause should not be remanded for taking proof for a longer period than four months.<sup>8</sup>

Complainants in injunction and attachment suits should be required to put forth extraordinary diligence in preparing for trial; and severer tests should be applied, and harder terms imposed on complainants in such cases than in ordinary suits, if the injunction or attachment operates harshly on the defendant.

§ 522. **Effect of a Continuance.**—A party applies for a continuance because he is not ready to further proceed in the cause at that term, and when a continuance is ordered the cause is no longer before the Court for the balance of that term, and no further step can be taken in it at that term,<sup>9</sup> unless (1) by consent of all parties in interest, or unless (2) the order of continuance is set aside on due notice to all parties interested.<sup>10</sup>

#### RULING ON A MOTION FOR A CONTINUANCE.

John Doe, }  
*vs.* }  
 Richard Roe, *et al.* }

This cause having this day been reached on the docket, the complainant, [or defendants,] moved for a continuance, and read the affidavits of himself and John Laggard in support of his, [or their,] application, on consideration whereof the Court continued the cause, and remanded the cause to the rules for two months, for the further taking of proof in chief, and for one month for proof in rebuttal, he to pay all the costs of the cause hereafter accruing. [Or, if the application is denied, omit all after the word "Court," and insert:] overruled the motion, and ordered the hearing to proceed; and thereupon the cause coming on to be further and finally heard this May 20, 1905, before Hon. Hal. H. Haynes, Chancellor, upon the original [and amended] bill [ &c. See, post, § 568.]

should have no favorites as between persons not under disability, except in so far as it favors those who are diligent; and the Chancellor has no right to grant a favor to one party at the expense of another. Favors should be paid for in costs; otherwise the party in default is rewarded and the party who has done his duty is punished.

A continuance always works an injury to one of the parties; and another maxim of Equity says that "where a loss must fall on one of two parties, it should fall on him whose act or default occasioned the loss," for otherwise, he would derive an advantage from his own wrong. A Chancellor should never deprive one party of the just rewards of his diligence, in order to relieve the other party of the just penalty of his negligence; for that would be to punish him who had done his duty, and to reward him who had failed to do his duty.

Judge Abraham Caruthers, in his History of a Lawsuit, (§ 341,) says: "The Court, in granting continuances, may impose terms upon the party at whose instance the cause has been continued, by making him pay costs, or otherwise, as may best further the progress of the cause, and the ends of justice." (Code, § 2942.) The Courts always had this power. The theory of the law is, that continuances are in the sound discretion of the Court. It is the strict legal right of the parties to have the cause tried at the time appointed by law; and if one asks delay, he asks what deprives the other of a strict legal right; and the Court may exact of him, as the condition upon which it will grant his request, that he shall yield to his adversary something which he is not in strict law entitled to, but which may be equal-

ly as necessary 'to the ends of justice.' He may be compelled to admit a deposition, or document, in evidence which ought to be, but cannot be admitted by the strict rules of law. He may be compelled to pay such part of the costs as the Court may, under the circumstances, think just, although by strict rules of law the costs are to abide the event of the suit. The Court, however, will take care that the terms exacted are not such as will defeat the ends of justice."

A party applying for a continuance is at the mercy of the Court. *Cbeatham v. Pearce & Ryan*, 5 Pick., 668.

A party applying for a continuance is at the mercy of the Court which can impose terms as to the time, place and manner of taking proof. *Cbeatham v. Pearce & Ryan*, 5 Pick., 668. If the applicant does not accept the terms he can withdraw his application.

If a longer period is allowed, the parties will often delay taking their proof until the week before Court; and then one side or the other will want a second continuance to rebut the proof thus recently taken; whereas, if only four months are allowed the Chancellor, or Master, may, in vacation, allow another month, when necessary, in which to take the rebutting evidence; and in this way the cause will become ready to be heard.

For various suggestions how to prevent the delay arising from amendments and continuances, see *post*, §§ 526-529.

<sup>7</sup> *Hurst v. Selvidge*, Thomp. Cas., 17; *Crouch v. Mullenix*, 1 Heisk., 481.

<sup>10</sup> A continuance obtained by fraud or imposition may be set aside on notice to the party obtaining it.

ARTICLE III.

MOTIONS TO DISMISS THE BILL.

§ 523. When Complainant Can or Cannot Dismiss His Bill.

§ 524. Motion by Complainant to Dismiss His Bill.

§ 525. When the Court May, on its Own Motion, Dismiss a Bill.

§ 523. **When Complainant Can or Cannot Dismiss his Bill.**—The complainant is, ordinarily, the master of the suit,<sup>1</sup> and, as a rule, can dismiss it at any time, before a decree, at his pleasure.<sup>2</sup> But there are a few important-exceptions to this rule, based on reason and good faith, and growing out of the fact that the Chancery Court, when justice requires it, will give a defendant all the rights of a complainant, and impose on the complainant all the liabilities of a defendant. This arises from the fact that the Court regards where a party stands on a *vs.* line as of less importance than where he stands on the line of justice and right, as shown by the pleadings and proof in the case.

The following are the principal exceptions to the rule which gives the complainant the right to dismiss the suit:

1. Where, on a bill for an accounting, there has been an interlocutory decree ordering an account.<sup>2</sup>

2. Where a decree has been pronounced, adjudicating the principles involved in favor of the defendant.<sup>3</sup>

3. Where the bill has been filed in behalf of others having concurrent rights, and one of these others offers a bond to cover all the costs of the cause and asks to be made a complainant.<sup>4</sup>

4. Where the bill has been filed as a general creditors' bill, and, on an account being taken the complainant is found to be a debtor and not a creditor, but various creditors have been duly made parties under the bill and proved their claims.<sup>5</sup>

5. Where, in any case on the pleadings, a decree may be rendered in favor of the defendant, and steps have been taken to prepare the case for hearing since the answer was filed.<sup>6</sup>

6. The dismissal of an original bill by the complainant will not be allowed to carry with it a cross-bill, or answer filed as a cross-bill, setting up grounds for affirmative relief, on which proof has been taken.<sup>7</sup>

7. Where a husband and wife are co-complainants, and she a necessary complainant, the husband cannot dismiss the suit, without her consent given in open Court, or in the manner prescribed by the statute.<sup>8</sup>

<sup>1</sup> *Dominus litis*; 1 Sto. Eq. Jur., § 548, note 3.  
<sup>2</sup> Code, § 3199; 1 Dan. Ch. Pr., 793; *Fisher v. Stovall*, 1 Pick., 316. He may dismiss his bill in writing in vacation. Code § 3199. At common law a plaintiff has the right to dismiss his suit whenever he may choose, except where the defendant pleads a set-off, as to which the defendant is a plaintiff, a plea of set-off being a sort of cross action. *Riley & White v. Carter*, 3 Hum., 230; *Galbraith v. E. T. V. & G. R. Co.*, 11 Heisk., 173.

<sup>3</sup> *Fisher v. Stovall*, 1 Pick., 316.  
<sup>4</sup> 1 Dan. Ch. Pr., 794.

<sup>5</sup> See *Fall v. B. & L. Asso.*, 21 Pick., 26.

<sup>6</sup> In such and similar cases the defendant has a vested right to a hearing on the merits. When a complainant has instituted a suit that may benefit the defendant, or defendants, and especially a suit in part for their benefit, and after the defendant, or defendants, have come into Court, at his instance, and filed an answer, or answers, setting up equities and asking for relief, it would be reprehensible trifling with the Court, and a gross exhibition of bad faith towards the defendant or defendants, for the complainant to try to dismiss the suit, and thus wilfully waste the time and labor of the Court, and

unjustly disappoint the reasonable expectations of the defendant, or defendants, and require the matters in controversy to be litigated anew, with new expenditures of time, labor, and money.

<sup>7</sup> *Partee v. Goldberg*, 17 Pick., 664. But complainant's right to dismiss his bill is not defeated because defendant's answer has been filed as a cross bill, when no cost bond is given for a cross bill, and no appearance or answer thereto. *Moore v. Tillman*, 22 Pick., 361.

<sup>8</sup> No action in the name of husband and wife, commenced by the issuing of process, or pending in any Court, for slander of the wife, or for any other cause of action in which it is necessary to sue in the name of husband and wife, when the action survives to the wife, shall be dismissed by the husband, without the consent of the wife, given in open Court in term time; or in vacation, without the written order of the wife, witnessed by two witnesses with both of whom the Clerk of the Court is personally acquainted. And though such order be presented to the Clerk, yet the suit shall not be dismissed until ordered by the Court in term time. Code, §§ 2487-2488.

The fact that the statute gives the complainant's Solicitor a lien on his right of action from the filing of the bill does not deprive the complainant of the right and power to dismiss his bill, whenever he chooses so to do.<sup>9</sup> A bill filed by a District Attorney, on the relation of another person to impeach the title of the defendant to a public office, may be dismissed by the District Attorney notwithstanding the protest of the relator.<sup>10</sup>

§ 524. **Motion by Complainant to Dismiss His Bill.**—Subject to the exceptions in the preceding section, the complainant may, at any time before a decree, dismiss his bill on motion in open Court, or by writing filed with the Clerk in vacation. If there be several complainants, any one of them may dismiss his bill as to himself, when such dismissal will not injure his co-complainants. The complainant may dismiss his bill as to all of the defendants, or as to any one or more of them.

The following is a form of an

**ORDER DISMISSING A BILL.**

John Doe, }  
*vs.* } No. 618.  
 Richard Roe, *et al.* }

In this cause, came the complainant this day by his Solicitor, and moved that he be allowed to dismiss his bill [as to the defendant, Richard Roe,] which motion was allowed, and the bill [as to said Richard Roe] was dismissed accordingly. It is therefore ordered by the Court, that the bill in this cause stand dismissed [as to said Richard Roe,] and that the defendants recover of the complainant, and David Doe, his prosecution surety, all the costs of the cause [accrued in consequence of said Richard Roe having been made a party,] for which an execution is awarded.

If the dismissal is as to Richard Roe, only, the words in brackets will be inserted in the order; if the bill is dismissed as to all of the defendants, the words in brackets will, of course, be omitted.

If the complainant is not ready for trial, and is refused a continuance, he should dismiss his bill, and thereby avoid the bar that would result from his bill being dismissed at the hearing, by the Chancellor.

The dismissal of bills at the hearing will be fully considered hereafter.<sup>11</sup>

But the Court may, at any time within thirty days, if the Court hold so long, for good cause shown and on due notice to the defendant, or his Solicitor, rescind the order of dismissal, and restore the cause to the docket.

§ 525. **When the Court May, on its Own Motion, Dismiss a Bill.**—The Court may, on its own motion, dismiss any bill that presents a case the subject-matter of which is wholly without the jurisdiction of the Court, or manifestly unfit for its consideration. If a bill has no equity on its face; if, on the facts alleged, the complainant is clearly entitled to no relief whatsoever, the Chancellor is not obliged to wait until the bill has been demurred to, or pleaded unto, or answered, or the cause brought regularly to a hearing; but he may, summarily, and on his motion, dismiss the bill; for if, on his own statements, the complainant has manifestly no case whatever, and the dismissal of the bill at some stage of the cause is clearly inevitable, he has no right to complain if the Chancellor dismisses the suit before further costs have accrued.<sup>12</sup> If the suit is being prosecuted under the pauper oath, and the burden of the costs for that reason is likely to fall on the officers of the Court, and the witnesses, there is all the greater reason why the Chancellor should, on his own motion, dismiss a frivolous bill.<sup>13</sup> The Chancellor should not, however, dismiss a bill on his own motion, merely because it is inartificially drawn, if there be any Equity in it; nor because its cause of suit is defectively stated. If the bill is probably capable of being so amended as to develop a cause of action, the complainant should not be debarred from that right by the summary act of the Court, on its own motion. The true rule is probably this: If the affirmative facts stated in the

<sup>9</sup> *Tompkins v. Railroad*, 2 Cates, 157.

<sup>10</sup> *State ex rel. v. Ager*, 21 Pick. 588. *State ex* |

<sup>11</sup> See Chapter on Decrees, *post*, §§ 569-570.

<sup>12</sup> *Connor v. Erierson*, 14 Pick. 192.

bill show clearly and conclusively that no relief whatever can be grounded on these facts, the Chancellor may dismiss the bill on his own motion; but though the allegations of the bill are too defective to entitle the complainant to any relief, yet if those defects are capable of being supplied without contradicting any of the positive averments of the bill, in such a case the Chancellor has no right to dismiss the bill on his own motion: before he can have that right, the facts affirmatively alleged must manifestly oust the complainant of any right to any relief whatsoever.<sup>14</sup>

The Chancellor may, on his own motion, dismiss a bill because, on its face, it claims usury, or seeks to enforce a contract that is illegal, immoral or against public policy, or is filed to obtain a collusive or *pro forma* decree,<sup>15</sup> or to punish the defendant for a crime or misdemeanor, or because of champerty,<sup>16</sup> or the gross uncleanness of the hands of the complainant, as shown by his own bill. A Court of Equity will not lend its aid to enforce an illegal, or grossly inequitable, contract at the instance of a party who was an active participator in the iniquity, his own bill disclosing the turpitude.<sup>17</sup>

ARTICLE IV.

SUGGESTIONS HOW TO PREVENT DELAYS ARISING FROM AMENDMENTS AND CONTINUANCES.

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| <p>§ 526. Applications to Amend, or Continue, How Considered.</p> <p>§ 527. Rules to Prevent Delay.</p> | <p>§ 528. Exceptions to the Foregoing Rules as to Costs.</p> <p>§ 529. Continuances by Consent, How Dealt With.</p> |
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**§ 526. Applications to Amend, or Continue, How Considered.**—The Constitution says that “justice shall be administered without sale, denial, or delay.”<sup>18</sup> Chancellors are sworn to support, that is, to obey and enforce, this Constitution. To sell justice would be a crime, to deny justice would be an outrage akin to crime, and to delay justice is an intolerable wrong, for delay is equivalent to a denial while the delay continues: the virtue of justice often evaporates during the delay. Denial and delay are man and wife, and injustice and injury are their children.<sup>2</sup> Nearly all the delays in a suit grow out of amendments and continuances.

1. If Defendant asks to Amend, or Continue, the Chancellor should consider (1) that a delay of justice is a *pro tanto* denial; (2) that it is ordinarily to the interest of a defendant to have delay; and (3) that it is often part of a defendant’s tactics to seek delay, and to invent excuses for delay; and (4) that a defendant’s affidavit that his “application for leave to amend or continue is made not for delay, but that justice may be done,” means often, at most, justice from his point of view; and that generally his idea of justice is, merely to get a chance to prevent the complainant from obtaining the decree he is fairly and rightfully entitled to at the hands of the Court.

14 See, *ante*, §§ 268; 290.  
 15 *Ward v. Alsop*, 16 Pick., 738.  
 16 *Webb v. Armstrong*, 5 Hum., 379; *Dowell v. Dowell*, 3 Head, 502.  
 17 *Ante*, § 42, *Isler v. Brunson*, 6 Hum., 277, and cases cited in the syllabus of this case.  
 1 *Const. of Tenn.*, Art. I, § 17.  
 2 Procrastination is an epidemic that infects all who minister in the Courts. The Sheriff who serves the writs, the parties and witnesses who are summoned, the Clerk who gets up the reports, the Solic-

itor who prepares the pleadings and takes the proof, and the very Judge himself, whose duty it is to see that all others do their duty, and that there is no procrastination, are all infected with the same epidemic, until Court files become hoary with age, the equities set up in them become stale and unprofitable, the Court itself falls into odium, and its proceedings are mentioned only to be the target for the feeble shafts of idle wit, or the flaming thunder-bolts of public indignation.



2. If Complainant asks to Amend, or Continue, the Chancellor should consider (1) that the complainant has brought the suit, and forced the defendant to appear, and defend; (2) that all delays by the complainant increases the costs of the cause, and the fees of adverse counsel, and thereby works injustice to the defendant; and (3) that a complainant, who fails to diligently prepare his case for trial, converts the machinery of the Court into an engine of oppression; and transforms the spirit of justice into a Moloch of torture.<sup>3</sup>

When a party is ready for trial, due time for preparation having elapsed, the Court should not rob him of the advantages of his diligence. Such a practice paralyzes diligence, demoralizes both parties, and degrades a Court of Justice to the low level of a dispensary of favors, and gives just occasion for the suspicion that either partiality and favoritism prevail, or that the Chancellor is deficient in the great virtues essential to his high office.<sup>4</sup>

§ 527. **Rules to Prevent Delay.**—How to prevent delay becomes, therefore, a problem every conscientious Chancellor should studiously endeavor to solve. Down to the present, no solution has been found so simple, and yet so effectual, as the vigorous enforcement of the following rules:

1. That every motion to continue, made after the lapse of five months after issue, and every motion to amend made after the lapse of one month after answer, shall be supported by affidavit, showing clear merits, and fully excusing delay.

2. That the allowance of such motion to continue shall be conditioned on the payment of the costs of all proof thereafter filed; and if eight months shall have elapsed since issue, then the applicant for a continuance shall pay all the unadjudged costs of the cause.

3. That, if any amendment, made as above stated, necessitates a continuance, the party amending shall pay the costs of all proof thereafter filed; and if a term has intervened since the answer was filed, the party amending shall pay all the unadjudged costs of the cause, if his amendment necessitates a continuance.

No man has a right to cast his burdens upon his adversary, and compel him to bear them. We are commanded to love our enemies, but not to tax them to pay for our own losses. When, therefore, a party is prevented by sickness, death, accident, or mistake, from being ready for trial, it is grossly unreasonable for him to ask the Court to compel his adversary to bear, without compensation, the burdens resulting from a continuance, or an amendment. He who seeks Equity should do Equity; and he who seeks a continuance, or leave to amend, should do Equity, by paying costs proportionate to the benefits received by him, or to the burden imposed on his adversary.

The fact that the party seeking a continuance or an amendment, has been prevented from getting ready by reason of sickness, death, accident, or mistake, may be a just ground for allowing his motion; but it is no just ground for heaping burdens upon the other side. Continuances and amendments, when granted, should be paid for in costs. He who seeks a favor should do a favor. When one of two innocent persons must suffer a loss, he must bear it whose act, or neglect, caused the loss. The party continuing or amending causes an increase

<sup>3</sup> The "law's delay" is one of the wails of the world; it has filled all the ages of history. Complainants inaugurated this wail, and have kept it alive through all the thousands of years of its existence. Hence, complainants should always put forth extraordinary diligence, and not be themselves guilty of that delay for which they have anathematized the Courts, and invoked the wrath of heaven upon their Judges.

<sup>4</sup> The law of man cannot be more just than the law of God. Both laws are made to do the greatest good to the greatest number. Under the law of God the dilatory suffer; then why should they not suffer under the law of man? The four seasons come and go; and he who is not ready for each season

time is not delayed because the farmer was negligent, or sick, or otherwise burdened. Under the laws of Nature, each case is tried when reached, and there are no continuances; and yet no one blames the laws of Nature. The very reason that parties are negligent in preparing for trial is, because they believe they will be able to get a continuance. When they realize that no continuances will be granted, except for the most extraordinary causes, then they will prepare for the sessions of the Court as they will prepare for the seasons of nature; and continuances will become exceedingly rare. And then will come to pass that prophecy of our Constitution: "The Courts shall be open, and right and justice administered, without sale, denial, or delay."

of costs and expenses, and should bear the burden thereof. If there has been ample time to prepare for trial, the party continuing or amending should be taxed with all the costs of the cause: in any event, he should, in such case, be taxed with the costs of all proof thereafter filed.

Parties dislike to pay costs before final decree; and Solicitors are fully aware of this dislike. The effect of this dislike and knowledge is to greatly stimulate diligence, both on the part of Solicitors and their clients. Parties who know that they will have to pay for favors will be slow to ask them, and quick to avoid the necessity of asking. The result is, great promptness in preparing for trial.

The application of the two foregoing maxims, (He who seeks Equity must do Equity, and, He who causes the loss should bear the loss,) regulates the discretion of the Court on the subject of continuances and amendments, by fixed equitable principles, readily understood, and easily applied. The party asking the favor gets it, and, therefore, cannot say he was denied the chance to present his case or proof fairly and fully before the Court; and the party resisting the application to continue or amend, cannot say that he was made liable for the costs occasioned by the favor granted to his adversary — and thus justice is done to all, and injustice to none.

§ 528. **Exceptions to the Foregoing Rules as to Costs.**—When, however, the suit is against an executor, administrator, guardian, partner, agent, trustee, or other person occupying a fiduciary relation toward the complainant, and the bill charges a breach of trust, it would be prudent for the Court, when the complainant is granted a continuance, or leave to amend, to reserve the adjudication of costs until the hearing; and if, at the hearing, the defendant should be found in the wrong, the costs incident to the favor granted should not ordinarily be adjudged against the complainant. The reason of this exception is, that no one should be allowed to take advantage of his own wrong. It is the duty of a fiduciary to fully disclose to the beneficiary every matter connected with the trust; and if, by reason of his failure or refusal so to do, a suit is brought, and a continuance or an amendment becomes necessary, such defaulting trustee should not be allowed to profit by his own default.<sup>5</sup>

Where, also, a continuance is necessitated by the fraud, or contrivance, of the opposite party, as a rule no costs should be adjudged against the party applying for such continuance; otherwise, the party guilty of the fraud would derive an advantage from his own wrong. It would be a fraud for a party to make an agreement, out of Court, with his adversary looking to a compromise, and then repudiate the agreement too late for his adversary to prepare for trial. The Court must not allow its rules to be used as snares by the artful to entrap the unwary. This would be to allow Justice to be wounded in her own temple, and with her own weapons.

Where the application for a continuance is based on accident or mistake, un-mixed with fault or negligence on the part of the applicant, or is based on some misconduct of some officer of the law, without fault on the part of the applicant, the terms imposed as the price of a continuance might be reduced, or remitted entirely.

§ 529. **Continuances by Consent,<sup>6</sup> How Dealt With.**—After the lapse of six months after issue, no continuance should be allowed on consent of parties, unless, (1) the agreement provides for the payment of at least one-half of the unadjudged costs of the cause; or (2) unless at least one-half of the unadjudged costs is divided between the parties by order of the Court. There should be a rule of Court to this effect. Continuances by consent, without the payment of costs, should not be allowed:

<sup>5</sup> Loveman v. Taylor, 1 Pick., 1.

<sup>6</sup> Chancery Rule VIII, § 1, was repealed at a | called session of the Legislature, and the Act is probably unconstitutional. See, *post*, § 1197.

1. Because if parties intend to litigate, they should be required to litigate, and if they do not so intend, the suit should be terminated. They should not be allowed to confederate to defeat the rules of the Court in reference to continuances: such agreements are often mere evasions of the rules, and akin to a contempt of Court.

2. The officers of the Court, and the witnesses, are entitled to their fees; and the parties should not be allowed to deprive them of their just dues, by agreements to continue the suit.

3. The Chancellor owes it to the public to keep his dockets clean, and not to allow his Court to become a Rip Van Winkle cave for the slumber of lawsuits.

4. Unless costs are taxed in case of continuances by consent, the efficacy of all rules imposing costs in case of continuances will be greatly impaired; for Solicitors, ready in one case and not ready in another, will equalize their respective advantages and disadvantages by consenting to the continuance of both cases.

CHAPTER XXVII.

THE HEARING, OR TRIAL OF THE CAUSE.

- ARTICLE I. The Hearing by the Chancellor.
- ARTICLE II. Incidents of the Hearing.
- ARTICLE III. Trial by Jury.

ARTICLE I.

THE HEARING BY THE CHANCELLOR.

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| <ul style="list-style-type: none"> <li>§ 530. The Rationale of Courts and Their Jurisdiction.</li> <li>§ 531. When a Cause is Ready for a Hearing.</li> <li>§ 532. The Ordinary Routine of the Court.</li> <li>§ 533. When a Cause Stands for Trial.</li> <li>§ 534. How Causes are Heard.</li> <li>§ 535. Objections to Evidence at the Hearing.</li> </ul> | <ul style="list-style-type: none"> <li>§ 536. Hearing on a Matter Appealed From the County Court.</li> <li>§ 537. The Argument of Counsel.</li> <li>§ 538. How Exceptions to Evidence, and the Chancellor's Rulings Thereon, are Made a Part of the Record for Purposes of Review.</li> </ul> |
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§ 530. **The Rationale of Courts, and of their Jurisdiction.**—The State having prohibited parties from settling their disputes by fraud or force is, therefore, under obligations to devise a better method of settling them. She has, accordingly, provided Courts and their ways and means of enabling a complainant to assert his just rights, and of giving a defendant a fair opportunity of disputing an unjust claim; and has empowered her judicial officers to decide the issues raised by the parties on their pleadings and proofs, and to right all wrongs, and to give to each party what is his due, and to require from each party what is due from him to the other.

Parties, having thus an opportunity to have their rights redressed, or to resist unjust demands, if they fail to take due advantage thereof, either by faults in their pleading, or deficiencies in their proof, or by negligence in preparation for trial, forfeit all right to complain of the decree pronounced against them, when such decree is based on the case as the Court found it, and the day for its determination had arrived in a due and orderly course of procedure, such case being made by themselves, and each with full and equal liberty to present everything he desired, or considered of value to his contention.

Hence it is that all disinterested men respect the vast majority of Court decisions, and consider Courts the best means of settling the contentions that arise among men.

§ 531. **When a Cause is Ready for a Hearing.**—Hearings take place whenever any matter is ready to be disposed of by the Chancellor, and the Court is in session. Matters are often apparently ready for such disposition, when some one or more of the parties are not ready, so that it is important to know when a matter is ready for the action of the Chancellor.

1. **A Demurrer is Ready to be Heard** as soon as it is filed, if Court is in session; and, if not in session, as soon as Court meets; and continues ready to be heard until the Chancellor takes it up and disposes of it; and this he may do when the cause is regularly reached on the call of the docket, or when motions are in order and one of the parties calls it up for the action of the Court; or at Chambers, on due notice.

2. A Plea is Ready to be Heard, as to its sufficiency, as soon as filed, and continues so ready for twenty days, and if not then heard or set for argument, its sufficiency is deemed to be admitted. After replication filed, a plea is ready to be heard on the issue of fact at the first term of the Court after its filing, and continues ready thereafter, when reached on a regular call of the docket, until heard; or may be heard at Chambers, on due notice.

3. A Cause is Ready for Hearing on Bill and Answer, after being specially so set, whenever regularly reached on the call of the docket. In such a case no proof is heard, except the exhibits to the pleadings, if any; or may be heard at Chambers, by consent of parties.

4. A Cause is Ready for a Final Hearing at the first term of the Court after the bill has been answered, and continues ready for a hearing at every term of the Court thereafter, if not then heard.<sup>1</sup> If any of the defendants have not answered, and a *pro confesso* has not been entered against them, it should be taken when the cause is reached on the docket for hearing, for strictly a cause is not ready for a final hearing until all of the defendants have answered or been *pro confessoed*. A cause may, also, be heard at Chambers by consent of parties.

5. A Cause is Ready for Hearing on the Master's Report whenever regularly reached on the call of the docket. If the report has been excepted to such exceptions may be heard and disposed of whenever motions may be heard.<sup>2</sup> If not excepted to the report may be confirmed, on motion, at any time after the second day of the term, when motions are in order.

6. A Cause is Ready for Motions to be Entered and Heard at such times as the rules of the Court wherein the cause is pending permit.<sup>3</sup>

§ 532. **The Ordinary Routine of the Court.**—When the hour for the meeting of the Court arrives, the Chancellor takes the bench, and rapping for attention, directs the Sheriff to make proclamation that the Court is open.<sup>4</sup> The Sheriff, thereupon, cries out: "*Oyez! oyez! oyez!*"<sup>5</sup> *The Chancery Court for Knox County is now open for the dispatch of business.*" The Clerk and Master then delivers to the Chancellor the Court docket, unless the same is already on his desk. If it is the first day of the term, the Clerk and Master will also deliver to the Chancellor his Financial Report<sup>6</sup> of money on hand, and his Report of Supreme Court Reports<sup>7</sup> on hand; and will acquaint the Chancellor with any defect in any of his bonds by reason of the death, insolvency, or removal, of any of the sureties.<sup>8</sup>

If there be minutes to be read, the Clerk will then deliver to the Chancellor, or to some Solicitor, the orders and decrees that have been entered on the minutes, and will either read the minutes himself, or have some other competent person read them, while the Chancellor, or Solicitor, having the orders and decrees, compares them with the minutes as the latter are being read.<sup>9</sup>

The minutes of the first day of the term should be preceded by a caption,<sup>9a</sup> in substance, as follows:

<sup>1</sup> Code, § 4432; see, *post*, § 533.

<sup>2</sup> Ch. Rule IV, § 15; § 1193, sub-sec. 15.

<sup>3</sup> Each Court has its own rules for hearing motions, demurrers, exceptions to pleas, appeals from the Master, and other preliminary matters.

<sup>4</sup> The Constitution says that all Courts shall be open. Tenn. Const., Art. 1, § 17. This means: 1, That the Courts are always open for the filing of pleadings, and even for the filing of petitions when necessary to save the bar of the statute of limitations. *Bledsoe v. Wright*, 2 Bax., 471. 2, That the business of the Court should be transacted, and the minutes read and signed, in the Court House, and in public view; or, at least, in a place where the people may attend at pleasure. Code, § 4101; *Bass v. State*, 6 Bax., 583. But by consent, divorce suits and similar suits may be heard in a private room.

<sup>5</sup> These words are French, and mean: "Hear ye! hear ye! hear ye!" French was, at one time, the language of the Courts of England.

<sup>6</sup> See, *post*, § 1161.

<sup>7</sup> See, *post*, § 1162.

<sup>8</sup> Code, § 335 a.

<sup>9</sup> This comparison of the original orders and decrees with the minutes is indispensable to the accuracy of the latter, especially in the matter of names, dates, amounts, metes and bounds of lands, shares in case of partition, and other matters not inferable from the context.

<sup>9a</sup> This, technically, is also the caption of every order and decree made during the term; and when an order or decree is certified for any purpose it should be preceded by the captions of the term, and of the day, the order or decree was made.

CAPTION OF THE MINUTES OF THE TERM.<sup>9b</sup>

State of Tennessee :

Be it remembered that, at a regular [*or, special,*] term of the Chancery Court, for Knox county, begun and held at the Court House in Knoxville, on the first Monday in January, 1885, present and presiding Hon. William B. Staley, Chancellor of the Second Chancery Division, the following proceedings were had :

The proceedings of the Court will follow this caption in the order of time, as nearly as practicable. The caption of the minutes of subsequent days of the term may be in this form :

## CAPTION OF THE DAY'S MINUTES.

TUESDAY, JANUARY 5TH, 1885.

Court met pursuant to adjournment, present and presiding Chancellor William B. Staley. The minutes of yesterday [*or, of last Wednesday,*] were read and signed, and the following further proceedings had :

Then follow the proceedings in order of time as near as possible.

After the minutes of the day have been read, and corrected, the adjourning order is written, unless it has already been written, and the Chancellor attests the accuracy of the minutes by signing them officially, just below the entry of adjournment. Such entry and signature, are, ordinarily, as follows :

## ENTRY OF ADJOURNMENT.

The Court, thereupon, adjourned until tomorrow morning at 8 o'clock,<sup>10</sup> [*or, until the next term.*] W. B. STALEY, Chancellor.

After the minutes have been signed by the Chancellor, he usually announces his conclusions as to the matters and causes that were submitted to him for his determination on the previous day. The Clerk is then directed to call the roll of Solicitors in order that they may make motions, read their drafts of decrees prepared for entry on the minutes, and bring before the Court such other matters as they may desire to have the Court pass on. The hearing of motions has been elsewhere considered,<sup>11</sup> and will not be repeated here ; but if there be any exceptions to depositions to be acted on, or any appeals from the ruling of the Clerk on such exceptions, or any notices of the introduction of documentary evidence to be given, or any other matter that must be done before the hearing of a cause is begun, this is a good opportunity to attend to such matters.

After all motions have been disposed of, the docket is called ; and, as each case is called, it is continued, or set for a given day, or heard.

§ 533. **When a Cause Stands for Trial.**—A cause stands for trial at the first term after it becomes at issue. Where there are no exceptions filed to an answer, a cause is at issue at the end of twenty days after the complainant's Solicitor has notice of the filing of the answer, and such notice will be presumed, in absence of any question raised, to have been received on the day the answer was filed. It may, therefore, be stated as a general rule, that a cause is at issue at the end of twenty days after the filing of the answer, in case no exceptions to the answer are put in.<sup>12</sup>

The Code, in at least three sections, declares that a cause shall stand for trial at the first term after answer filed.<sup>13</sup> Construing these sections along with those allowing twenty days within which to except to an answer, the conclusion is reached (1) that a cause stands for trial at the first term coming twenty or more days after the complainant's Solicitor has notice<sup>14</sup> of the filing of the answer, if no exceptions to the answer are put in within that time ; and (2)

<sup>9b</sup> See note 9a, on preceding page.

<sup>10</sup> For other captions of the minutes, see, *post*, § 1138.

<sup>11</sup> *Ante*, §§ 514-521. And see Chapter on Motions, *post*, §§ 739-769.

<sup>12</sup> Code, §§ 4328;4401, says that, if no exceptions to the answer are filed, the cause shall stand for trial at the first term after answer filed; but how can it be known that no exceptions will be filed, without waiting for the twenty days to expire? Suppose a term should begin within twenty days after answer filed, would not the complainant, nevertheless, have the whole of the twenty days within which

to except? Most certainly. The statute then must mean that the cause is at issue at the end of twenty days after notice to complainant's Solicitor, when no exceptions are filed within that period. *Ante*, §§ 420-424.

<sup>13</sup> Code, §§ 4328; 4401; 4432; *ante*, § 439. In *Harris v. Bogle*, 7 Cates, 701, it is said that where the terms of Court are long, issue will be made, proof taken, and the cause stand for trial, all within the period of a single term.

<sup>14</sup> Notice will be presumed to have been received by the Solicitor on the day the answer is filed unless the contrary appears.

that if exceptions are put in, a cause stands for trial at the first term after they are disallowed, or (3) if allowed, at the first term after the filing of a sufficient answer.

But, although a cause thus stands for trial at the first term after it is at issue, it does not by any means follow that it will be tried at that term. Nevertheless, it is the duty of the Clerk and Master to set the cause for hearing, and transfer it to the trial docket;<sup>15</sup> and when called will be subject to be tried, or continued, as to the Chancellor may appear proper.<sup>16</sup>

§ 534. **How Causes are Heard.**—The cause having been called on the docket, and both parties having announced their readiness for trial, or the motion for a continuance having been overruled, the Chancellor directs that the case be taken up.<sup>17</sup> The complainant's Solicitor, thereupon, makes a brief statement of the nature of his bill. The defendant's Solicitor then states his defence, or reads the material part of his answer.<sup>18</sup> If there be any defendants in default, as to whom no judgment *pro confesso* has been entered, the complainant may now have a *pro confesso* entered against them. The evidence is then read in the following order: 1st, the evidence in support of the bill is read by the complainant's Solicitor; 2d, the evidence of the defendant is read by his Solicitor; and 3d, if the complainant has any rebutting evidence it is read last.<sup>19</sup>

The evidence having been all read, the junior counsel for the complainant opens the argument; he is followed by the junior and senior counsel for the defendant in turn; and then the senior counsel for the complainant is heard in reply.<sup>20</sup>

On the conclusion of the argument, the Chancellor announces his decision, if he has reached one; if not, he reserves his decision until a future day, and the papers and briefs of counsel and authorities relied on, are sent to his Chambers; or he may hold the case under advisement for thirty days after the adjournment of the Court.<sup>21</sup>

§ 535. **Objections to Evidence at the Hearing.**—Objections to a deposition as a whole because (1) of want of due notice of the taking; or (2) because of some defect in the caption, or certificate; or (3) because not taken, or written, by a person duly authorized; or (4) because not properly transmitted to the Clerk; or (5) because taken after the taker's time for taking proof had expired; or (6) because retaken to the same matters without an order; or (7) for any other cause going to the admissibility of the deposition, and not to the competency of the witness, or his evidence, must be made and disposed of before the commencement of the hearing, or trial, otherwise they will be considered as waived.<sup>22</sup> No such objection can be raised when the deposition is read, or offered to be read, at the hearing.

The following objections to the evidence must, however, be made when the evidence is offered at the hearing:

<sup>15</sup> Code, § 4431.

<sup>16</sup> Rather *v.* Williams, 10 Pick., 543, citing § 463, (now § 465,) of this book.

<sup>17</sup> In Chancery, causes are not always heard in public. When there are valid objections to a public hearing, the cause may be heard privately in the Chancellor's room in the Court House, when both parties consent thereto. This has been the uniform practice of the Court in case of family disputes, and other matters of a delicate nature, unfit for publication. A private hearing may be given even against the consent of one of the parties. 2 Dan. Ch. Pr., 984; 1 Barb. Ch. Pr., 319. In Tennessee, the Chancellor would not grant a private hearing except by consent of parties. And not then in a case of public importance. In divorce suits, a private hearing is often allowed on application of either party, the other not objecting.

<sup>18</sup> In reading pleadings and depositions, omit all formal parts, such as captions, certificates, and affidavits, also the boundaries of lands, fiats, and dates of filing, unless special reasons exist for calling the

<sup>19</sup> In reading the evidence, begin, ordinarily, with your client's own deposition if he gives a full history of the case; if not, read first that deposition which covers most of the facts of the case.

<sup>20</sup> The right to open and close the argument does not, however, always belong to the complainant. It belongs to the defendant when the entire burden of proof rests upon the latter. The right to open and close the argument belongs to the party who (1) pleads affirmative matter in abatement; or (2) who moves to dismiss; or (3) who demurs; or (4) who pleads affirmative matter in bar; or (5) who excepts to an answer, deposition, or Master's report; or (6) who objects to a witness, or to his evidence; or (7) who maintains the affirmative of any given question; or (8) who has the entire burden of proof to bear. See, Best, Pr. Ev., § 637.

<sup>21</sup> See, *post*, § 544.

<sup>22</sup> Ch. Rule, II, § 5; *post*, § 1191, sub-sec. 5; see, *ante*, § 501.

1. **Objections to the Competency of the Witness**, because (1) he is an infant, idiot, or lunatic, without sufficient understanding to apprehend the obligations of an oath, and give correct answers to questions put; or (2) because the witness was intoxicated while testifying; or (3) because the witness is deaf and dumb, or unable to speak, or write, in the English language, and the interpreter was not sworn; or (4) because the witness is infamous by the judgment of a Court, and disqualified to testify; or (5) because the witness is a husband, or wife, of the party objecting, or of the opposite party, and the evidence is as to a matter that occurred between them, by virtue, or in consequence, of the marital relation; or (6) because the witness is an executor, administrator, or guardian, and his evidence is as to transactions with, or statements by, the testator, intestate, or ward; or (7) because the witness is a party, and his evidence is as to a transaction or conversation with, or a statement by, the opposite party, who is of unsound mind.<sup>23</sup>

2. **Objections to the Competency of the Evidence**, because (1) not relevant to the issues involved, or immaterial; or (2) because not the best evidence, being hearsay, or a copy, or parol evidence of the contents of a writing; or (3) because a privileged communication; or (4) because a transcript not duly certified; or (5) because a deed not registered; or (6) because only a part of a record, or writing.<sup>24</sup>

3. **Objections to the Form of the Evidence**, because (1) the questions of the adverse party to his own witness were leading; (2) because the answer of the witness was not responsive to the objector's question.<sup>25</sup>

4. **Objections to Evidence Must be Specific**, or the Court is not required to notice them. General exceptions to a deposition, witness, paper, question or answer need not be noticed by the Chancellor, and will not be noticed in the Supreme Court. If a party thinks he has ground of exception to any evidence or witness he must specify it, and not require the Court to guess it. A general exception is no exception.<sup>26</sup>

§ 536. **Hearing on a Matter Appealed from the County Court.**—The Code provides that any person interested in the estate may except to the account taken and stated by the County Court Clerk with an administrator or executor; and that when such an account has been finally settled by the County Court, either party may appeal from the judgment of the Court to the Chancery or Circuit Court; and the appeal shall be brought before the Chancellor or Circuit Judge at his first session in such county or district, and it shall be sufficient to take up on said appeal only so much of the record as will suffice to present the matter complained of in the decision below.<sup>26a</sup>

The matters in dispute, in such a case, would ordinarily be heard upon the exceptions taken to the account in the Court below. But, if the case is of such a nature that justice cannot well be done on the County Court record, the Chancellor would, probably, have the power to refer the matters in dispute to the Master, under proper instructions; or he might remand the case with proper instructions to the County Court.<sup>26b</sup>

§ 537. **The Argument of Counsel.**—The one purpose of argument is to aid the Court (1) in reaching a correct conclusion from the evidence as to the truth of the facts alleged in the pleadings; and (2) to aid the Court in applying the right law to the facts as found. Counsel for the complainant, therefore, should endeavor to show (1) how the evidence sustains his bill, and (2) how it disproves the defences set up; and counsel for the defendant should endeavor to show how the evidence contradicts the bill and supports the answer. Counsel

<sup>23</sup> M. & V.'s Code, §§ 4563-4565.

<sup>24</sup> Objections to the admissibility of evidence, made before the Commissioner, must be renewed and ruled on in Court when the deposition is read, or they will be deemed to be waived. *Sahlien v. Bank*, 6 Pick., 221.

<sup>25</sup> But in such case, the objections will go for naught, unless they are made in writing at the very

time the leading question is put, or the irresponsive answer is made. See, *ante*, § 496.

<sup>26</sup> *Powers v. McKenzie*, 6 Pick., 167.

<sup>26a</sup> Code, §§ 2302-2304.

<sup>26b</sup> Such power would be within the spirit of Code, §§ 3152 and 3170. On such a reference additional evidence might be heard and the account recast.



on both sides should point out the inconsistencies and incredibility of the evidence, or any part thereof, and why and wherein a witness is or is not to be credited.

If there be any disputed questions of law involved in the cause, counsel on each side should file a written brief of the authorities by them relied on, and should send the books to the Chancellor's room.<sup>27</sup>

In arguing any matter before the Chancellor, it should always be kept in mind that nothing so commends both counsel and his cause as a smooth, clear, unimpassioned, and candid, presentation of the law and facts of the case, wholly unmingled with ungenerous or unkind allusions to opposite counsel, or to his arguments; and that nothing so harms both counsel and cause, in the estimation of the Chancellor, as manifest misquotations of law or evidence, unjust criticism of parties<sup>28</sup> or witnesses, unwarranted deductions from the evidence, unfair statements of the arguments of the other side, or unnecessary exhibitions of temper.

**§ 538. How Exceptions to Evidence, and the Chancellor's Rulings Thereon, are Made a Part of the Record for Purposes of Review.**—Formerly, where exceptions to evidence were sustained by the Chancellor, or any matter of evidence was excluded by him, at the hearing, a bill of exceptions was necessary to give the Supreme Court jurisdiction of the evidence so ruled out; but now, where exceptions to evidence are either sustained or overruled, it is not necessary upon an appeal of the case, to embody the rulings of the Chancellor, the exception and the excluded evidence, in a bill of exceptions, if the rulings of the Chancellor, the exceptions and the excluded evidence are set out in the body of the deposition and properly authenticated by the Chancellor.<sup>29</sup>

So, where any document, deposition or exhibit to a deposition, or any other paper, is excluded, in part or as a whole, it is no longer necessary on appeal to embody the same, the exceptions thereto and the rulings of the Chancellor, in a separate bill of exceptions, where the action of the Court on the parts, or the whole documents, depositions, exhibits<sup>30</sup> thereto, or other papers, is duly noted thereon by the Chancellor, such action by the Chancellor constituting the same a part of the record, in lieu of a bill of exceptions.<sup>31</sup>

The statute declares that these rules shall not apply where the testimony is oral,<sup>32</sup> by which is meant that where witnesses are examined orally in open Court, at the hearing, as on a trial by jury, the exceptions to the testimony of the witnesses so examined, and the rulings of the Chancellor thereon must be perpetuated by a bill of exceptions as was the practice before the statute.

#### **ACTION OF CHANCELLOR ON EXCEPTIONS TO EVIDENCE IN DEPOSITIONS.**

[*This action to be written on the face of the deposition.*]

Above question [or answer] objected to by defendant, [or complainant,] because [here set out the ground of objection.]

Objection sustained, [or overruled,] and answer excluded [or admitted.]

April 3, 1906.

A. B., Chancellor.

<sup>27</sup> In arguing a cause, lawyers should keep in mind that a Justice of the Peace needs less argument than a juror, that a Circuit Judge needs less than a Justice of the Peace, that a Chancellor needs less than a Circuit Judge, and that a Supreme Judge needs less than a Chancellor. Nevertheless, they are all benefited by sound argument, and especially by the production of pertinent law. The best Judges, as a rule, desire to hear argument. In early times, the same cases were often argued again and again. The case of *Stowell v. Zouche*, in Plowden, was argued four times; *Manby & Richards v. Scott*, in Levinz, was argued four times; and there is a case in Wille's Reports which was argued five times, and at five different terms. These re-arguments were often before all the Judges of England, and by the ablest lawyers. 1 Kent's Com., 487. The case of *Moss v. Averill*, 10 New York, 449, was argued three times; *Holt v. Ward*, 2 Strange, 938, was argued four times; and *Tooke v. Hollingsworth*, 5

to say that justice and reason seldom suffer from thorough argumentation; whereas, injustice always dreads investigation, and abhors discussion. The value of thorough argumentation, as an aid in attaining justice, is illustrated in our own State by the following cases: *Nicholson v. Patterson*, 6 Hum., 394; *Sevier v. The Justices*, Peck, 362; *Fogg v. Williams*, 2 Head, 474; and *Senter v. Bowman*, 5 Heisk., 15. See *Lindsley v. Thompson*, 1 Tenn. Ch., 272, 275. See, *post*, § 1319, note 20.

<sup>28</sup> The motives of litigants are immaterial, and cannot be inquired into, and should not be commented on. *Macey v. Childers*, 2 Tenn. Ch., 442; *State, ex rel. v. Williams*, 2 Cates, 590.

<sup>29</sup> Act of 1905, ch. 49, sec. 1. A prudent Solicitor will, however, often prefer to set all these matters up in a bill of exceptions.

<sup>30</sup> The statute omits the word "exhibits," but this is evidently a typographical error.

<sup>31</sup> Act of 1905, ch. 49, sec. 2.

**ACTION OF CHANCELLOR ON EXCEPTIONS TO DEPOSITIONS.**

[*This action to be written at the foot of the deposition.*]

Foregoing deposition read, notwithstanding [or, ruled out because of] foregoing exceptions,<sup>33</sup> A. B., Chancellor.  
 April 3, 1906.

**ACTION OF CHANCELLOR ON EXCEPTIONS TO A DOCUMENT.**

[*This action to be endorsed on the document itself.*<sup>34</sup>]

This deed [or other document] objected to by complainant, [or defendant,] because [specifying the ground of objection.] Objection overruled, [or sustained,] and deed read [or excluded.] A. B., Chancellor.  
 April 3, 1906.

**ARTICLE II.**

**INCIDENTS OF THE HEARING.**

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| <p>§ 539. Amendment of Pleadings When Allowed at the Hearing.</p> <p>§ 540. What Defects in the Proof May be Remedied at the Hearing.</p> <p>§ 541. Remanding a Cause for Further Proof.</p> <p>§ 542. No Objection to Relief at the Hearing, When.</p> | <p>§ 543. Announcement of the Decree.</p> <p>§ 544. Taking a Case Under Advisement.</p> <p>§ 545. Drawing of Orders and Decrees.</p> <p>§ 546. Leaving the Record Unadjourned.</p> |
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§ 539. **Amendment of Pleadings when Allowed at the Hearing.**—Whenever, at the hearing, it appears impossible to the Court to do complete justice, or to determine the whole controversy, without an amendment of the bill or cross-bill, making new allegations, or new prayers, or new parties, the Court may, on its own motion, or on motion of a party, allow the cause to stand over, with leave to make the necessary amendments, or new parties, or both.<sup>1</sup> In all such cases, however, the party in default should be taxed with all, or a large part, of the costs of the cause.<sup>2</sup> If, after such amendments, either party desire to take further proof on the issues raised by the amendments, the cause should be remanded to the rules for that purpose, but not for proof generally.

**ORDER FOR A CAUSE TO STAND OVER TO MAKE NEW PARTIES.**

John Doe, }  
*vs.* }  
 Richard Roe. }

This cause coming on to be heard this day, and the record having been read [or the pleadings having been read,] and argument of counsel [in part] heard; and it appearing to the Court that Robert Roe, and his wife, Rachel Roe, are necessary parties defendant to this cause, on motion of the complainant, it is ordered that the cause do stand over, to the end that the complainant may so amend his bill as to make said Robert Roe and Rachel Roe parties defendant thereto. The complainant and David Doe, his prosecution surety, will pay all the costs accruing in the cause between now and the final decree, said costs to be hereafter taxed.

§ 540. **What Defects in the Proof may be Remedied at the Hearing.**—From the earliest times, Courts of Equity have relieved against mere errors of Commissioners, witnesses and Solicitors; and when there has been an accidental defect in evidence, have, before the hearing, at the hearing, and at the re-hearing of a cause, allowed the defect to be supplied.<sup>3</sup> Thus, leave has been given at

<sup>33</sup> That is, the exceptions to the deposition for want of notice or proper formalities. See, *ante*, §§ 497-501. These exceptions must of course, have been ruled on by the Master and, on appeal, acted on by the Chancellor.

<sup>34</sup> If no room on a document or deposition to endorse the exception, and action of the Chancellor, the endorsement may be made on a paper attached to the document or deposition, and exhibited thereto by letters or figures of identification.

<sup>1</sup> Sto. Eq. Pl., § 333, note. When it is manifest that justice cannot be done without amending the pleadings so as to make the necessary allegations or parties, the Chancellor should allow the cause to stand over for that purpose. The Supreme Court often remands causes on its own motion for such purposes. See, *post*, § 1318.

<sup>2</sup> See, *ante*, §§ 526-528.

<sup>3</sup> Gres. Eq. Ev., 196.

the hearing: (1) to prove the execution of a deed on file; (2) to stamp an instrument; (3) to prove the loss of a deed so as to let in a copy; (4) to prove the death of a witness to an instrument; (5) to prove that the defendant is a married woman; (6) to prove the death of a party; (7) to prove that the defendant is out of the jurisdiction of the Court; and (8) in any case of defects or omissions of proof, whether brought to light and become material in consequence of something which arises unexpectedly in the course of the hearing, or caused by accident or inadvertence.<sup>4</sup> And the Court will be specially lenient in such cases, when minors or persons of unsound mind would otherwise be injured. If necessary, the Court will remand the cause, or postpone the hearing, with liberty to supply the requisite proof. And so, if the Court see in any such case that the opposite party is liable to be prejudiced by its action, the cause will be remanded to enable him to rebut.

**ORDER FOR A CAUSE TO STAND OVER TO SUPPLY PROOF.**

John Doe,  
*vs.*  
 Richard Roe, *et al.* }

This cause coming on this day to be heard upon the pleadings and proofs, and the record having been read, and the argument in part heard, and it appearing to the Court that the complainant has inadvertently omitted to prove the execution of the title-bond by Henry Brown to the defendant, Richard Roe, [*or has inadvertently omitted to prove some other manifest link in his chain of evidence.*] it is ordered, on motion of the complainant, that this cause do stand over with leave to him to prove the execution of said bond; but for this leave he will pay one-fourth of all the accrued costs of the cause, for which an execution may issue.

§ 541. **Remanding a Cause for Further Proof.**—While the Chancellor is usually content to determine the cause upon such proofs as the parties may choose to read, he is under no compulsion to do so, as is a Judge of a Court of law. The Chancellor may not only postpone his decision, but, if he deems the evidence unsatisfactory, or defective, or if he is unable to solve the questions in issue upon the proofs read at the hearing, he may require further evidence.<sup>5</sup> This right of the Chancellor is inherent in his office and does not depend on any consent of the parties. Thus, after or during the hearing, the Chancellor may remand the cause for further evidence on particular points, or may remand it for further proof generally, or may refer it to the Master to report as to certain facts about which there are defects or failures in evidence, or he may order a trial by jury.<sup>6</sup>

Where in any case, the Court can see that a party has a clear right so that injustice will be done by dismissing his bill, but his suit fails from some oversight or neglect not culpable, it is the duty of the Court to remand the cause for further proof, that justice may be done.

The Supreme Court will remand a cause, on its own motion, to the end that further proof may be taken, when it appears probable that a decision upon the evidence then in the record will work injustice,<sup>7</sup> and, for a greater reason, the Chancery Court will remand under the same circumstances.

And so, if it should clearly appear that a defendant has a good defence in whole, or in part, which by some oversight not culpable he has failed to prove, the Court, applying the foregoing rules impartially, would, on his application, remand the cause with leave to make the proof.<sup>8</sup>

§ 542. **No Objections to Relief at the Hearing, When.**—No objections because of the non-joinder or mis-joinder of parties, complainant or defendant, or

<sup>4</sup> 1 Dan. Ch. Pr., 858, note.

<sup>5</sup> 3 Greenl. Ev., § 330-337; Gres. Eq. Ev., 489.

<sup>6</sup> *Ibid*; Moses v. Occoe Bank, 1 Lea, 415.

<sup>7</sup> See, *post*, § 1318.

<sup>8</sup> But remandments, whether for the benefit of one party or the other, should be only on the payment of all, or a large part, of the costs of the cause. See, *ante*, § 527. Hearst v. Proffitt, 7 Cates, 560;

It is the experience of the author, that it is impolitic to remand a cause for further proof on a point as to which the evidence is conflicting; for the reason that there is a strong temptation to introduce false testimony when the parties realize that the case will turn on the decision of a disputed point. Causes should be remanded, not for more proof on a disputed question, but for proof on some question

because of multifariousness, can be made at the hearing, but the Court in such case will decree upon the merits.<sup>9</sup> If the defendant, at the hearing, object for want of parties, not having previously taken the objection by plea, answer, or demurrer, the Court may render a decree saving the rights of the parties not before it, or grant leave to amend on terms not extending beyond the payment of costs.<sup>10</sup> The jurisdiction of the Court cannot be objected to at the hearing, if the defendant has answered,<sup>11</sup> unless, indeed, the case be one wholly unfit to be determined in a Court of Equity.<sup>12</sup>

§ 543. **Announcement of Decree.**—The evidence in the cause having been read, and the Solicitors of the parties having concluded their argument, the papers in the cause and the briefs of counsel, all properly assorted and arranged for convenient reference, are sent to the Chancellor's chambers for his further consideration. If any authorities have been relied on specially by counsel they, also, should be sent along with the papers in the cause.

The Chancellor, thereupon, proceeds to further consider the case, looking first to the pleadings to be sure of the issues involved, then to such pertinent evidence as his notes of the hearing indicate to be important, and lastly to the briefs of counsel and the authorities cited.<sup>13</sup>

After reaching a conclusion, the Chancellor prepares a memorandum of his findings of law and fact, if the case is of importance and complicated; and, if the case is of special importance or complication, he may write out his opinion in whole or in part. If the case is one of frequent occurrence he will, ordinarily, announce his conclusions orally.<sup>14</sup>

The Chancellor is not required to give his *reasons* for his decisions, and in many cases it is wisest not to do so.<sup>15</sup>

§ 544. **Taking a Case Under Advisement.**—If the Chancellor desires time to investigate a case after the hearing, or if he desires to consult authorities not accessible, or if unprepared for any other reason, to announce his decision, he may hold the case under advisement, or he may call on the parties for additional briefs, or for further argument on particular matters. If he wishes to hold the case under advisement he should so state on the minutes of the Court;<sup>16</sup> but in such case he must forward his decree to the Clerk and Master of the Court in thirty days, unless by consent of counsel, further time is allowed him.<sup>17</sup>

#### ENTRY IN CAUSE TAKEN UNDER ADVISEMENT.

John Doe,  
vs.  
Richard Roe, *et al.* }

This cause came on this July 24, 1905, for final hearing on the pleadings and proofs in the cause and argument of counsel, and the Chancellor desiring time for further consideration takes the case under advisement, [and by consent of counsel he is allowed sixty days in which to file his decree.]

<sup>9</sup> Code, §§ 4338; 4325. These objections must be made by motion to dismiss, or by demurrer; and if the mis-joinder, or non-joinder, of parties does not appear on the face of bill, the objection may be made by plea. Code, §§ 4325; 4386-4388.

<sup>10</sup> Code, § 4337.

<sup>11</sup> Code, §§ 4309; 4321; 4385. This has long been the law. Acts of 1801, ch. 6; *LeRoy v. Platt*, 4 Paige, (N. Y.), 77.

<sup>12</sup> The true meaning of this rule is, that after answer filed, no exception can be taken (1) to the local jurisdiction of the Court over the person, or over the subject-matter, and (2) that no objection can be taken to the general jurisdiction because of a perfect remedy at law. It does not mean that because an answer has been filed the Court is bound to pronounce a decree in a case unfit for Equity. See, *ante*, § 177, notes 17 and 30; and § 290.

<sup>13</sup> See, *post*, § 1141, sub-sec. 10.

<sup>14</sup> The Chancellor usually announces his decision on the day following the conclusion of the hearing, or on a day later, because he requires some time to consider the matters in issue, and besides, counsel are in a condition more dispassionately to hear his views. As a rule, it is unwise to decide any case that has been vigorously contested, as soon as the

argument is closed; the winning side is apt to be too jubilant, and the losing side too resentful.

<sup>15</sup> The *decision* is the thing he is required to give by the law. A sound decision based on no announced reasons is infinitely better than an unsound decision based on many reasons. Reasoning sometimes entangles the conscience and befogs the intellect. See *McGuire v. Gallagher*, 11 Pick., 349.

<sup>16</sup> Acts of 1905, ch. 427, sec. 2. In the old forms, the only entry in such a case was this: "*Curia advisare vult.*" [The Court wishes to deliberate]. The power to take a case under advisement is one that exists independently of the statute, the only effect of the statute being to limit the time the case may be so held, and to provide for the entry of the decree in vacation.

<sup>17</sup> This part of the Act is merely directory, and a decree withheld beyond the statutory time, or beyond the extension, would be valid and proof against any exception on that account.

When a case is thus taken under advisement the record of the Court should be left unadjourned, and the minutes unclosed, so that the decree and any prayer for, and grant of, an appeal may be entered thereon. See, *post*, § 546.

§ 545. **Drawing of Orders and Decrees.**—The Solicitor of the party in whose favor the decision is made, is expected by the Court to draw the order, or decree. Orders are often entered, after being read to and approved by the Chancellor, without being previously submitted to the opposite counsel; but the latter should always be given the opportunity to inspect and criticize the draft of the decree, before it is read to the Chancellor.<sup>18</sup> If the opposite counsel object to the decree, he should forthwith bring the matter of his objection before the Chancellor, in order that the decree may be settled at once.

In drawing decrees, care should be taken to have them follow the pleadings, and the specific prayer for relief, unless relief has been granted under the general prayer.

The Chancellor should never allow an order or decree to be entered on the minutes until after it has been expressly approved by him. This practice inflexibly adhered to will enable the Clerk to keep his minutes free from interlineations, erasures, and other alterations.

§ 546. **Leaving the Record Unadjourned.**—The Chancellor may leave the record of the term unadjourned until Court in course; in which case the minutes being open, orders and decrees made in vacation may be entered therein as in term time.<sup>19</sup> All entries made in the open minutes after the close of the term, should be compared with the originals by the Chancellor and approved by him, as soon after the entry is made as convenient, but in no event later than the next regular term of the Court.<sup>20</sup> All orders and decrees entered on the open minutes are as effective as those made and entered in term time.<sup>21</sup> While not necessary it may be well for the Chancellor to make an entry on the minutes showing the minutes are intentionally left open, thus:

**ENTRY SHOWING THE MINUTES LEFT OPEN.**

The business of the term ready for hearing being disposed of, but that decrees in cases held under advisement, and decrees and orders made at Chambers, may be the more conveniently entered of record, the record is left unadjourned and the minutes left open until the next regular term.

HAL H. HAYNES, Chancellor.

**ARTICLE III.**

**TRIAL BY JURY.**

- § 547. When a Trial by Jury May be Had.
- § 548. When a Trial by Jury is Appropriate.
- § 549. Frame of Issues of Fact.
- § 550. Form of the Issues, and of the Verdict.
- § 551. How the Trial is Conducted.

- § 552. Effect of a Verdict.
- § 553. Some Suggestions in Reference to Demanding a Jury.
- § 554. Term to be Extended When Trial Not Concluded.

§ 547. **When a Trial by Jury May be Had.**—Ordinarily in the Chancery Court, the Chancellor determines all issues whether of law, or of fact;<sup>1</sup> but either party to a suit is, upon application therefor in due season, entitled to a jury to try and determine any material issue of fact: all issues of fact in any case shall, however, be submitted to one jury.<sup>2</sup>

<sup>18</sup> 2 Dan. Ch. Pr., 1009; Crow v. Blythe, 3 Hay., 236; Whitney v. Belden, 4 Paige, (N. Y.), 140.

<sup>19</sup> Acts of 1905, ch. 427, sec. 2. See, *post*, §§ 771-775.

<sup>20</sup> *Ibid.* If the entries differ from the originals they must be made to conform to them. *Ibid.*, sec. 9.

<sup>21</sup> *Ibid.*

<sup>1</sup> Code, §§ 2953; 2955.

Chancery has always been insignificant. Cooper v. Stockard, 16 Lea, 145.

It is sometimes supposed that either party to a Chancery suit has a *Constitutional right* to a trial by jury. This supposition is based on a misapprehension. The Constitutional provision that "the right of trial by jury shall remain inviolate," (Art. I, § 6,) refers to trials at common law; Neely v. State, 4

The demand for a jury may be made in the pleadings, or at the bar after the cause is at issue. If the demand is made in the pleadings, the cause will stand for trial at the first term before a jury summoned *instanter*.<sup>3</sup> Either party may demand a jury at any time before the hearing is actually begun.<sup>4</sup> The Court may, however, make a rule requiring the demand for a jury to be made, in open Court, on some previous day of the trial term, in order to have time to obtain a jury, and to give the opposite side notice of the demand.<sup>5</sup>

The demand for a jury may be made in the bill, answer or plea, by inserting therein, ordinarily at its conclusion and just before the signature of the Solicitor, the following: "*And the complainant, [or defendant, as the case may be,] demands a jury to try all the issues of fact in this cause.*" The demand, if made below a pleading, must be dated and signed; and should be marked "filed" by the Clerk. If the demand is made after the pleading is filed, it must be made in open Court, or at Chambers, and entered on the minutes, thus:

**DEMAND FOR A JURY.**

John Doe, }  
*vs.*  
 Richard Roe. }

The complainant [or defendant,] demands a jury to try all the issues of fact in this cause.

§ 548. **When a Jury Trial is Appropriate.**—The following are the principal cases wherein a trial by jury is appropriate: 1, Where the evidence is so contradictory, or so nearly balanced, that an open and rigid cross-examination of the witnesses before a jury is necessary for the ascertainment of the truth; 2, Where the genuineness of a deed, will, note of hand, bill of sale, or other written instrument is in issue; 3, Where questions of sanity, duress, fraud, usury, and failure of consideration, are involved; 4, Where the defence of adverse possession is interposed in an ejection suit; 5, Where the question in issue is the dividing line between two tracts or lots of land; 6, Where unliquidated damages are to be assessed; 7, Where a deed, or bill of sale, is alleged to have been given as a mere mortgage; 8, Where the fact of marriage, or the legitimacy of children, is in issue;<sup>6</sup> and 9, Where, in a divorce suit, matters of fact are charged in the bill and denied in the answer.<sup>7</sup>

But in all the foregoing cases, the main reason for a trial by jury is the contradictory character of the evidence, or the importance of an open and rigid cross-examination of the witnesses in the presence of the Court and jury.<sup>8</sup>

The Chancellor may, on his own motion, submit any disputed question of fact to a jury, in order to have their verdict thereon for his own information; and this he will ordinarily do when the evidence is so conflicting that it is difficult to ascertain the truth.<sup>9</sup>

§ 549. **Frame of Issues of Fact.**—The issues of fact, to be determined by the jury, are made up by the parties under the direction of the Court; and they

State, 9 Hum., 53; *Goddard v. State*, 2 Yerg., 99; *Jackson v. Nimmo*, 3 Lea, 613; 3 A. & E. Ency. of Law, 719. Indeed, even in those cases in Chancery wherein a jury is demanded, the *suit*, strictly speaking, is not tried by the jury, inasmuch as they merely answer certain questions of fact submitted to them. *Cooper v. Stockard*, 16 Lea, 144. It would seem, however, that where the jurisdiction of the Chancery Court has been extended by statute so as to include actions formerly cognizable exclusively at common law, the Constitutional right of trial by jury would remain, at least when demanded by the defendant. *Trigally v. Memphis*, 6 Cold., 385.

<sup>3</sup> Code, § 4466. If not demanded in the pleadings it cannot be demanded until the other party has had time to take proof. *Harris v. Bogle*, 7 Cates, 701. Chancery Rule 2, § 4, as to the time for taking proof, does not apply when a jury is demanded in the pleadings. *Ibid.*

<sup>4</sup> *Allen v. Saulpaw*, 6 Lea, 477.  
<sup>5</sup> *Stadler v. Hertz*, 13 Lea, 315. In this case the Supreme Court sustained a rule which required the demand for a jury to be made on or before

Tuesday of the trial term. *Cheatham v. Pearce*, 5 Pick., 668. If a jury trial be not demanded at the first trial term it may be demanded at any subsequent trial term. *Harris v. Bogle*, 7 Cates, 701. A waiver of a jury at one term does not preclude a party from demanding a jury at a succeeding term. *Worthington v. Railroad*, 6 Cates, 182. But applying for and obtaining a reference to the Master is a waiver of a demand for a jury. *Harris v. Bogle*, 7 Cates, 701.

The statutes prescribing when and how juries shall be demanded, (Acts of 1875, ch. 4, and Acts of 1889, ch. 220,) do not apply to the Chancery Court. *Cooper v. Stockard*, 16 Lea, 140; *Cheatham v. Pearce*, 5 Pick., 668.  
<sup>6</sup> 2 Dan. Ch. Pr., 1073, note.  
<sup>7</sup> Code, § 2458.

<sup>8</sup> *Townsend v. Graves*, 3 Paige Ch., (N. Y.), 453; *Hammond v. Fuller*, 1 Paige Ch., 197, *Desty's notes*; *Vanderheyden v. Reid*, 1 Hopk. Ch., (N. Y.), 408. *Munson v. Reed*, *Clarke's Ch.*, (N. Y.), 580; *Allen v. Saulpaw*, 6 Lea, 482.  
<sup>9</sup> *State v. Allen*, 2 Tenn. Ch., 46.

should set forth, briefly and clearly, the true questions of fact to be tried.<sup>10</sup> The Chancellor has the power and it is his duty to so shape the issues submitted by the parties as to present the material and determinative questions of fact made by the pleadings, briefly and clearly.<sup>11</sup> These issues must, of course, be responsive to the pleadings,<sup>12</sup> and must be so comprehensive of the questions of fact put in issue by the pleadings that, when determined by the jury, the Court will be able, upon the findings of the jury, and the balance of the record, to pronounce a full and complete final decree on all the material matters involved in the controversy.<sup>13</sup> The issues should be responsive to the pleadings, and should raise no questions of fact not raised by the pleadings.<sup>14</sup>

The party applying for a jury trial must submit material issues; and if he fails so to do the verdict will be immaterial, and the Court may, thereupon, determine the case as though no jury trial had taken place, if the record is in a condition to justify that course.<sup>15</sup> But where the issues are material, on the verdict being set aside, whether by the Chancery or the Supreme Court, neither Court can determine the facts and decide the cause thereon, but the cause must be re-tried by a jury.<sup>16</sup>

**§ 550. Form of Issues, and of the Verdict.**—The issues may be in the form of pleadings at law;<sup>17</sup> but the better practice, perhaps, is to resolve the issues made by the pleadings into the form of questions,<sup>18</sup> to be answered, “yes” or “no,” or by dates, amounts, quantities, or boundaries, as the case may be.

Thus, on an ejectment bill, to which is interposed the defence of adverse possession, and the statute of limitations, the following issues might be submitted to the jury:

#### ISSUES OF FACT.

John Doe, }  
vs. } No. 213.  
Richard Roe. }

The following issues of fact are made up by the parties, under the direction of the Court, to be submitted to the jury:

##### I.

Aside from any of the defences set up by the defendant's answer, does the complainant own in fee the tract of land he sues for in his bill?

##### II.

Or if he owns a portion only of said tract, state what portion, giving the metes and bounds.

<sup>10</sup> Codé, § 4468.

<sup>11</sup> *Burton v. Farmers' Association*, 20 Pick., 414.

<sup>12</sup> *James v. Brooks*, 6 Heisk., 150; *Ragsdale v. Gossett*, 2 Lea, 729.

<sup>13</sup> *Connor v. Frierson*, 14 Pick., 183.

<sup>14</sup> *Burton v. Farmers' Association*, 20 Pick., 414.

<sup>15</sup> *Gass v. Mason*, 4 Sneed, 509; *Ragsdale v. Gossett*, 2 Lea, 729; *First N. Bank v. Oldham*, 6 Lea, 729; *Mills v. Faris*, 12 Heisk., 452; *Nelson v. Claybrooke*, 4 Lea, 687.

If the issue tendered by a party be immaterial, the Chancellor may refuse to submit it, and proceed with the hearing without a jury, and make a decree as though no jury had been demanded. *Dan. Ch. Pr.*, 1079, note. If, however, he does submit an immaterial issue, it is his duty to disregard the finding of the jury thereon, and if all the proof be in writing, he should at once find the facts for himself, and pronounce a decree thereon. *Gass v. Mason*, 4 Sneed, 509; *Ragsdale v. Gossett*, 2 Lea, 730. A rule of Court requiring issues to be filed on or before a specified time, and that each should embrace only one question of fact, is proper and reasonable. *Cbeatham v. Pearce & Ryan*, 5 Pick., 668.

<sup>16</sup> *First N. Bank v. Oldham*, 6 Lea, 718.

<sup>17</sup> *James v. Brooks*, 6 Heisk., 150. In *Lancaster v. Ward*, 1 Tenn., (Overt.), 430, the issues were as follows:

“First, Whether the bill single for \$860, exhibited in the complainant's bill, was procured from John Lancaster, the deceased, by the defendant Ward, by fraud, misrepresentation, and undue influence, as stated in complainant's bill.

“Second, Whether the defendant Ward paid to the deceased any consideration for the said bill single, and if so, what consideration he paid.”

Lea, 144. In this case, Chief Justice Deaderick, in speaking of the questions to be tried by a jury in Chancery, said, “In practice, these questions are *literally* questions propounded to the jury, which, in their verdict, they are required to answer affirmatively, or negatively.”

Since the system of special pleading has been practically abandoned, and the general issue of law and fact substituted for it, juries in the Circuit Court have become, in effect, a bench of twelve Chancellors, who decide the case on ill-defined, and often ill-conceived notions of law and general Equity, these notions of the individual jurors often differing as much as their faces, clothing, and habits of thought. The Circuit Judge can advise these twelve Chancellors, in a general way, as to what the law is; and, if they find contrary to his judgment, all he can do is to refer the case to another bench of twelve Chancellors, to be tried anew in the same general way, and on the same general and incongruous notions; and if their verdict accords with the former verdict, the power of the Judge is, ordinarily, at an end; and the second verdict must, ordinarily, stand, however strongly the Judge may dissent, and however grossly the law may have been violated and justice outraged.

But, in the Chancery Court, if the issues are properly prepared, they accomplish in part the purpose of special pleading, by restricting the findings of the jury to pure questions of fact. The verdict in issues in Chancery is in the nature of a special verdict. The jury does not, ordinarily, pass on any question of law, and the Chancellor should see that the issues are so framed as to restrict them to pure questions of fact, thus confining the jury to their

III.

Had the defendant been in actual and adverse possession of any part of the tract sued for, openly, notoriously, and continuously, for a period of seven or more years next before the bill was filed?

IV.

If the defendant had had such possession, state what color of title he held under, if any.

V.

If the defendant's possession was not held under any color of title, state the metes and bounds of his possession held for seven or more years next before the bill was filed.

In *Ragsdale & Mabry v. Gossett*,<sup>19</sup> Judge Cooper held that the issues should have been as follows:

ISSUES OF FACT.

George H. Ragsdale, *et al.*, }  
*vs.* }  
 V. F. Gossett, *et al.* }

In this cause, the following issues of fact are tendered by the complainants to be submitted to the jury:

I.

Was the money borrowed from McIntosh and Johnson the separate estate of the wife?

II.

If so, was any part of it used in the purchase of the chattels in controversy, for her separate use?

III.

Was the sale of these chattels, and the purchase as made, intended as a fraudulent device to protect the husband's property from his creditors?

In *Hunter v. Wallace*,<sup>20</sup> the issues submitted to the jury were in the form of questions, and in substance as follows:

ISSUES OF FACT.

1st. Had Finley notice of the sale to the plaintiff at the time he paid the purchase-money, or procured his conveyance?

2d. What was the value of the improvements made by the plaintiff?

3d. Did Knox empower Wallace, either by letter or verbally, to make the contract with the plaintiff?

If the issues are in the form of questions propounded to the jury, (which is the better practice,) their verdict is an affirmative or negative answer. The jury do not, as a rule, return a verdict in favor of the complainant for the money or thing sued for, or in favor of the defendant generally, but they say such and such allegations, or propositions of fact, are true, or false. The jury do not try the suit, but try such questions only as are submitted to them. The Chancellor tries and decides the suit, aided by the finding of the jury.<sup>21</sup>

§ 551. **How the Trial is Conducted.**—A jury trial in the Chancery Court is conducted in the same manner as in the Circuit Court:<sup>22</sup> the parties summon their witnesses and enforce their attendance,<sup>23</sup> and the witnesses are sworn, put under the rule and examined, as in a Court of law.<sup>24</sup> Jurors are designated by the Court, and summoned by the Sheriff, and are tried, empanelled and sworn, as in the Circuit Court.<sup>25</sup> The Chancellor passes on all questions of evidence, and on the competency of witnesses, and after the proof is all in on both sides, the cause is argued to the jury by the respective counsel, and the jury is then charged by the Chancellor. The charge of the Chancellor may be required by either party to be reduced to writing before delivered. The jury should be directed to reduce their findings to writing; but this is not essential. The verdict of the jury may be set aside on any ground that would vitiate it if in the Circuit Court, and the Chancellor has the same power to grant new trials as is possessed by Courts of law. Indeed, the whole proceedings, from the time the demand for a jury is made until their verdict is approved, or set aside, by

19 2 Lea, 737.

20 Tenn., (Overt,) 239.

21 Cooper v. Stockard, 16 Lea, 144.

22 Code, § 4466.

23 Code, § 4470.

24 When a trial by jury is demanded in the Chancery Court it is not necessary to notify the adverse

party that *via voce* testimony will be introduced. *Johnson v. Warden*, 1 Shan. Cas., 670.

25 The Court shall designate good and lawful men to serve as jurors, and direct the Sheriff to summon them instantly. Code, §§ 3996; 3993. Jurors in the Chancery Court must have the same qualifications, are subject to the same rules, and receive the same pay, as regular jurors in the Circuit Court.



the Chancellor are, in all respects, the same as in jury trials in the Circuit Court,<sup>26</sup> and so is the manner of making out a bill of exceptions, and praying and prosecuting an appeal to the Supreme Court.

**DEMAND FOR A JURY, ISSUES, VERDICT, AND FINAL DECREE.**

John Doe, }  
*vs.* } No. 683.  
 Richard Roe. }

In this cause, the defendant demanded a jury to try the issues of fact involved in the pleadings, which demand was granted; and the following issues of fact were thereupon made up by the parties, under the direction of the Court, to be submitted to the jury:

1. Was the note sued on executed by the defendant?
2. If not, how much does the defendant owe the complainant on the account exhibited to the bill, if anything?
3. If the defendant is indebted on said account, should interest be added? If so, from what date?

And thereupon came the following jury, all good and lawful men, [*naming them,*] who were duly sworn well and truly to try said issues, and a true verdict to render thereon, according to the law and the evidence; and the evidence [*or, argument,*] not being concluded, the jury was respited until tomorrow, [*or, and the evidence, and argument, and the charge to the Court, having been heard, the said jurors, upon their oaths aforesaid, say:*

To the first question they answer, "Yes."

To all the other questions they answer, "No."

Whereupon, the defendant moved the Court to set the said findings of the jury aside, and grant him a new trial on said issues, which motion on due consideration thereof, was by the Court overruled.

And, thereupon, the cause coming on to be further and finally heard this day, upon the pleadings and the said findings of the jury, on consideration thereof, it is ordered, adjudged, and decreed by the Court that [*Here insert the adjudications of the Court and the award of final process. See, post, §§ 567-568.*]

§ 552. **Effect of a Verdict.**—When a Chancellor orders a jury on his own motion, his object is to get the opinion of the jury on a difficult question of fact, so that he may thereby be aided in reaching a conclusion satisfactory to his judgment; or, as the books express it, the object of the verdict is to inform and satisfy the conscience of the Chancellor. In all such cases, the verdict is merely advisory, and if it does not satisfy the conscience of the Chancellor, he may disregard it, and find the facts for himself.<sup>27</sup> He will, however, give the verdict due consideration, and will not set it aside unless clearly erroneous.

But when either party demands a jury, their verdict is conclusive upon the Chancellor, unless he grants a new trial, or unless the issue tendered be immaterial. The object of the statute, in allowing a party to demand a jury in the Chancery Court, is to give him all the benefits and rights resulting from such a trial in a Court of law.<sup>28</sup>

The jury having determined the issues submitted to them, the Chancellor, if he allows the verdict to stand, considers the facts found by the jury to be true, and determines the rights of the parties as he deems just and right in view of the facts found. In other words, the jury report their opinion upon the questions submitted to them, and the Chancellor tries and determines the suit between the parties upon the facts reported by the jury, and the other facts before him, and the law governing the case.<sup>29</sup> If, by agreement of parties, the Chancellor hears the case on oral testimony, his decision has all the force and effect of the verdict of a jury.<sup>30</sup>

§ 553. **Some Suggestions in Reference to Demanding a Jury.**—If, in any case after you have taken your proof, you feel that the real facts are with you, but that (1) by false swearing, or (2) by the refusal of obstinate witnesses to answer fully, or (3) by the collusion of witnesses, or (4) by the evasion of

<sup>26</sup> Code, §§ 4466-4470. The practice in jury trials is fully and admirably set forth in Caruthers's Law-suit. A bill of exceptions is prepared, signed and filed, and a record thereof made on the minutes, in the same manner as in the Circuit Court. For a form of a bill of exceptions, see, *post*, § 1214.

<sup>27</sup> James v. Brooks, 6 Heisk., 150; Morris v. Swaney, 7 Heisk., 591; Code, § 4469. The verdict will not be disturbed by the Supreme Court if there be any evidence to support it. Scruggs v. Heiskell, 11 Pick., 455; McElynn v. Hill, 21 Pick., 319.

<sup>29</sup> Cooper v. Stockard, 16 Lea, 144.

<sup>30</sup> Thomas v. Adams, 11 Pick., 373.

unwilling or hostile witnesses, you have been unable to get out the facts fully enough to risk a trial before the Chancellor on your depositions, then consider whether it would not be well to demand a jury, and have the witnesses subpoenaed and examined in open Court. A vigorous oral examination of a witness, in open Court before a jury, will often elicit truth impossible of extraction by means of a deposition. This is especially true of the direct examination of your own witnesses, when they are hostile; and of the cross-examination of your adversary's witnesses, when they are unwilling to tell the whole truth.

A Solicitor, however, should never demand a jury merely because his client believes (1) that there is a local prejudice in his favor, or (2) that the other party is a corporation laboring under local prejudice, or (3) that a jury will allow more damages than will the Chancellor, or (4) that there is a chance to defeat justice, or to do injustice, by means of local or other prejudice, or by any artifice. Any Solicitor who aids or abets his client in demanding a jury for any such purposes, lowers himself in the estimation of the Court, prostitutes the machinery of justice, and degrades at once the profession to which he belongs, and the Court in which he practices. "Law is neither a trade nor a solemn jugglery," but the science of justice; and a Court of Conscience is not the forum for any unconscientious practices.

§ 554. **Term to be Extended When Trial Not Concluded.**—Whenever a case is pending and on trial by the Court, or a jury, and undetermined at the time when the term at which it is pending expires, on account of [lapse of] time, and on account of the arrival of the succeeding term, the term shall be extended and continued into such succeeding term for all the purposes of trying, disposing of, and returning verdict and rendering judgment in, such case so pending and on trial, the same as if such new term had not arrived. And the jury trying such case shall not be discharged because of the expiration of the term.<sup>31</sup>

<sup>31</sup> Acts of 1899, ch. 40. Under this Act the Court may continue and extend a term for the purpose of disposing of motions for a new trial and granting appeals. *R. R. and Telephone Cos. v. Simmons*, 23 Pick., 392.

## PART V.

### PROCEEDINGS IN A SUIT IN CHANCERY FROM THE CONCLUSION OF THE HEARING TO THE ENFORCEMENT OF THE DECREE.

#### CHAPTER XXVIII.

##### DECREES ON THE MERITS.

ARTICLE I. Nature and Extent of the Relief Granted.

ARTICLE II. Decrees Generally Considered.

ARTICLE III. Kinds of Decrees.

ARTICLE IV. Practical Suggestions as to Decrees.

#### ARTICLE I.

##### NATURE AND EXTENT OF THE RELIEF GRANTED.

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| <p>§ 555. Grounds of a Decree.</p> <p>§ 556. Extent of the Relief Granted.</p> <p>§ 557. Relief Under the General Prayer.</p> <p>§ 558. When Relief May be Based on the Answer.</p> <p>§ 559. What Relief a Defendant May Have.</p> <p>§ 560. Relief When Granted Between Co-defendants.</p> | <p>§ 561. When Relief Against a Defendant is Defeated by a Co-defendant.</p> <p>§ 562. When Persons Not Parties May Take Benefits Under a Decree.</p> <p>§ 563. When Interest Will be Allowed in a Decree.</p> |
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§ 555. **Grounds of a Decree.**—The bill and decree in a cause are syllogistic in their nature, the law constituting the major premise of the syllogism, and hence seldom expressed, the bill constituting the minor premise, and the decree constituting the conclusion of the syllogism. For this reason, which is as sound in law as in logic, the decree must be a legitimate deduction from the bill<sup>1</sup> and the law, or it will be erroneous on its face.<sup>2</sup> And if the facts alleged in the bill are denied in the answer, and not proved, any decree based on such a bill will be erroneous in fact.<sup>3</sup> It follows from these premises, that a proper decree must be based either on the bill and the admissions in the answer, or on the bill and the proofs in the cause sustaining it, and that a decree not so based is necessarily erroneous. A decree must be founded on, and sustained by, both the material allegations and the pertinent proofs in the cause; it cannot be based on allegations without pertinent proofs, nor on proofs without corre-

<sup>1</sup> Occasionally decrees are based on the admissions contained in the answer. The complainant might amend his bill, and charge the facts thus admitted, in which case, the Court would decree on the admission; but as Courts of Equity look at the substance and not at ceremony, they deal with such an answer as though the facts admitted had been charged in an amended bill and then admitted by the defend-

deemed as based on allegations admitted. See, *post*, § 558.

<sup>2</sup> Such an erroneous decree may be reversed on appeal, or by writ of error, or by a bill of review for error apparent; and, if wholly outside of the pleadings, is void. See, *post*, §§ 565; 814, note 43.

<sup>3</sup> Such a decree may be reversed on appeal, or by writ of error.

sponding allegations, but must conform to the material allegations in the pleadings, as well as to the pertinent proofs in the cause.<sup>4</sup>

A Court of Chancery has no jurisdiction of any matter not submitted to it in a pleading for adjudication; nor can the defendant be called on to respond to anything not alleged against him. Neither can a Court consider any evidence which does not directly, or indirectly, tend to prove, or disprove, the averments contained in the pleadings. A decree can neither be based on allegations without corresponding proof, nor on proof without corresponding allegations;<sup>5</sup> but all decrees must be the concurring result of allegations justified by proof, and proof justified by allegations.<sup>6</sup> A decree based on pleadings, without proof, will be reversed on appeal or writ of error, but will be good against collateral attack; while a decree based on proof, without pleadings, will not only be reversed on appeal or writ of error, but will, also, yield to a collateral attack: for such a decree is *coram non judice*, and absolutely void.<sup>7</sup> The jurisdiction of the Court is circumscribed by the pleadings, and the pleadings are circumscribed by the law.<sup>8</sup>

§ 556. **Extent of Relief Granted.**—It is a fundamental rule of Courts of Equity to make as complete a decision, upon all the points embraced in a cause, as the nature of the case will admit; so as to preclude, not only all further litigation between the same parties, and the possibility of the same parties being, at any future period, disturbed or harassed by other parties claiming the same matter, but also to preclude any danger of injustice to persons who are not before the Court.<sup>9</sup> Acting upon this fundamental rule, Courts of Equity not only require the pleadings to so present all the matters in controversy, that they may be properly and fully adjudicated,<sup>10</sup> but they, also, require all persons having any interest in the subject-matter of the controversy to be made parties, to the end that they may either have their rights ascertained, or their duties declared, or their claims adjudged, or their titles bound.<sup>11</sup> And the extent of the relief the Court will grant is, therefore, commensurate with all the rights, all the duties, all the claims, and all the titles, of all the parties to the suit in and to the subject-matter of the controversy, so far as those rights, duties, claims and titles appear in the pleadings and in the pertinent proof. The pleadings must conform to the law, the proof must conform to the pleadings, and the decree must conform to them all: it must be within the law and the pleadings, and be sustained by the proof. If a decree is outside the pleadings, it is void: if inside the pleadings but outside the proof, it is voidable on appeal or writ of error, but is otherwise valid.

§ 557. **Relief Under the General Prayer.**—As a rule, no relief can be granted if none is prayed for;<sup>12</sup> and no relief will be granted inconsistent with that prayed for. The decree ordinarily follows the special relief sought by the bill, if the pleadings and proof will warrant it.<sup>13</sup>

If the complainant is not entitled to the specific relief he prays, he may, under the general prayer, have such other relief as, on the pleadings and proof,

<sup>4</sup> 2 Dan. Ch. Pr., 1003, note. A decree must be based upon both the pleadings and the proof, and must be logically responsive thereto. The complainant cannot recover on a case different from that alleged in his bill. Neither allegations without proof, nor proof without allegations, nor proof and allegations which do not substantially correspond, will entitle the complainant to relief. The proof must follow the bill, and the decree must follow both. 1 Dan. Ch. Pr.; 361; 861; 4 Bax., 296; 4 Heisk., 209; 609; 3 Bax., 302; 9 Lea, 63; 9 Heisk., 679; 746; 3 Tenn. Ch., 118; 4 Hum., 417; 12 Heisk., 700; 2 Tenn. Ch., 174; 4 Sneed, 625; 1 Pick., 87. A decree wholly outside of the issues raised by the pleadings is *coram non judice*, and void even when collaterally attacked. 1 Dan. Ch. Pr., 853, Mayo v. Harding. 3 Tenn. Ch., 237. See, also, King v. Rowan, 10 Heisk., 677; Wilcox v. Blackwell, 15 Pick., 352. <sup>5</sup> Gerrit v. Cusack, 22 Pick., 141; Bradshaw v. Van Valkenberg, 13 Pick., 316.

<sup>6</sup> And the Court is absolutely bound by the allega-

tions of the parties, and cannot go outside of them even to do substantial justice. The parties make the issues in their pleadings. Teague v. Teague, 2 Ch. Apps., 376. *Judicis est judicare secundum allegata et probata.* (It is the duty of a Judge to make his judgment in accordance with the allegations and the proofs).

<sup>7</sup> Unless made by consent of parties. See, *post*, § 565.

<sup>8</sup> See note 4, *supra*.

<sup>9</sup> 2 Dan. Ch. Pr., 990; see, *ante*, §§ 36; 38.

<sup>10</sup> See, *ante*, § 146.

<sup>11</sup> See, *ante*, §§ 90-95.

<sup>12</sup> But where a bill is filed under a statute prescribing the relief, it may be granted without a prayer, as in attachment cases where the attached property may be sold without a sale being prayed for. Eaton v. Breathe, 8 Hum., 536; Code, § 3536; Quint v. Leake, 1 Ten. Ch., 73.

<sup>13</sup> Pillow v. Pillow, 5 Yerg., 420.

he is fairly entitled to,<sup>14</sup> provided it is not of a character to take the defendant by surprise.<sup>15</sup> The relief under the general prayer must be such as follows, ordinarily and logically, from the pleadings and the proof. If the bill prays for general relief only, the complainant can orally pray, at the hearing, for the specific relief he is entitled to, on the case made out by the pleadings and proof.<sup>16</sup>

§ 558. **When Relief May be Based on the Answer.**—Where the answer denies the precise case alleged in the bill, and sets up a different case, if the complainant fail to prove the case he alleges, and he be entitled to any relief on the case set up in the answer, the Court will grant him such relief.<sup>17</sup> It would be more regular in such cases, however, for the complainant to amend his bill and charge the case made in the answer; but, as Courts of Chancery disregard form, a decree will be rendered as though such an amendment had been made.<sup>18</sup> But when relief is based upon an answer, the whole answer must be taken together, the matters of discharge as well as the matters of charge; and when so considered, must show that the complainant is entitled to relief, or none will be granted on the answer alone.<sup>19</sup> In case the answer sets up a discharge, also, if the complainant wishes to avail himself of the matters of charge and disprove the matters of discharge, he must amend his bill, and allege the former and deny the latter.<sup>20</sup>

§ 559. **What Relief a Defendant May Have.**—While, as a rule, a defendant to a suit is not entitled to any affirmative relief, unless he obtains it by means of a cross-bill, or an answer filed as a cross-bill, (and even then he obtains it as a complainant, and not as a defendant,) nevertheless, there are important exceptions to this rule; and when a defendant's equities are the same as the complainant's, the Court will grant the former the same relief as is granted the latter, if the bill so prays.<sup>21</sup>

And, as he who seeks Equity must, also, do Equity, the Court will give the defendant any relief he may be entitled to in good conscience, as against the complainant, as to any matter connected with the subject-matter of the litigation.<sup>22</sup> Thus, a defendant will (1) be allowed a set-off, or (2) will be allowed the value of his improvements made in good faith and without notice when complainant recovers the land, or (3) will be allowed the principal of his debt when complainant has an usurious or inequitable instrument cancelled, or (4) will be allowed the liens by him removed when a partition is sought.<sup>23</sup> On a bill for an account, a decree may be rendered in favor of the defendant for the balance found due him, and a cross-bill is not necessary to entitle the defendant to such a decree.<sup>24</sup> So, on a bill to enjoin a mortgage sale, and for an account to ascertain the true balance of the mortgage debt, a decree may be rendered in the defendant's favor for such balance, and the mortgaged land sold, without a cross-bill.<sup>25</sup>

§ 560. **Relief When Granted Between Co-defendants.**—As a general rule, the Court will not make a decree between co-defendants, but will content itself by granting the complainant the relief he may be entitled to, or by dismissing his bill. To this rule there are, however, frequent and important exceptions; and it is a settled doctrine of adjudication that whenever, in a Court of Equity,

<sup>14</sup> *Peterson v. Turney*, 2 Ch. Apps., 519; *Tennessee Ice Co. v. Paine*, 23 Pick., 151; *Dollman v. Collier*, 8 Pick., 660.

<sup>15</sup> *Allum v. Stockbridge*, 8 Bax., 356.

<sup>16</sup> *Dodd v. Benthall*, 4 Heisk., 609.

<sup>17</sup> 1 Dan. Ch. Pr., 361; *Rose v. Mynatt*, 7 Yerg.,

<sup>18</sup> *Mauzy v. Lewis*, 10 Yerg., 118; *Bailey v. Bailey*,

<sup>19</sup> 8 Hum., 230; *Shannon v. Erwin*, 11 Heisk., 340;

<sup>20</sup> *Cox v. Waggoner*, 5 Sneed, 543.

<sup>21</sup> Or the amendment may be made at the hearing,

<sup>22</sup> 1 Dan. Ch. Pr., 861. See, *ante*, § 553, note 1.

<sup>23</sup> *Neal v. Robinson*, 8 Hum., 435; *Mulloy v.*

<sup>24</sup> *Young*, 10 Hum., 298.

<sup>25</sup> *Jameson v. Shelby*, 2 Hum., 198.

<sup>22</sup> Under this maxim, an equitable right may be secured, or an equitable relief awarded, to the defendant, which he could not have obtained in a suit brought by him for that purpose. 1 Pom. Eq. Jur., §§ 385-387; 1 Sto. Eq. Jur., § 64 *e*; *ante*, § 39.

<sup>23</sup> See, *ante*, § 39; and *post*, § 560.

<sup>24</sup> 2 Dan. Ch. Pr., 992, note; *Fisher v. Stovall*, 1

Pick., 316; *Croft v. Johnson*, 8 Bax., 390; *Allen v.*

*Allen*, 11 Heisk., 387.

<sup>25</sup> *Polk v. Mitchell*, 1 Pick., 364. But a cross-bill

is necessary if the defendant wishes to enforce his

mortgage on a bill filed for an accounting. *Griffith*

*v. Security Association*, 16 Pick., 410. See, *Lewis v.*

*Glass*, 8 Pick., 147.

a case is made out between defendants, by evidence arising from the pleadings and proofs between the complainants and the defendants, the Court is not only entitled to make a decree between the defendants, but is bound to do so.<sup>26</sup> The tendency of the Court is in favor of the more frequent exercise of this jurisdiction; and to make decrees between co-defendants in all cases, as to all matters contained in the pleadings that if left undetermined would leave roots of future controversy; the object of the Court being to prevent a multiplicity of suits, and to bring litigation to an end.<sup>27</sup> And to effectually do this, the Court will so decree as (1) to settle all equities between the parties arising out of the pleadings, regardless of their attitudes as complainants or defendants, and (2) to make a final disposition of the entire subject-matter of the litigation.<sup>28</sup>

The cases in which a decree may be made in favor of one defendant against another are:

1. Where the decree, made in favor of the complainant against one or more of the defendants, operates to create a right, or equity, in favor of one defendant against another which can be adjusted or protected in the same suit; such right, or equity, however, must arise out of the decree itself, and not from a state of facts outside of the decree.<sup>29</sup>

2. Where the complainant and one or more defendants have rights of the same nature, and growing out of the same facts, against the other defendant or defendants, so that the same decree may declare and enforce the rights of the complainant and of the defendant, or defendants, whose interests are the same as his.<sup>30</sup>

3. Where the relief to which the complainant is entitled cannot be granted without first determining the rights and equities existing between the defendants, and growing out of facts charged in the bill.<sup>31</sup>

**§ 561. When Relief Against a Defendant is Defeated by a Co-defendant.** A Court of Chancery seeks to do Equity to and between all the parties to a suit as far as possible under the pleadings and proofs, regardless of their attitude as complainants or defendants; and allows no forms of pleading and no technicalities of practice to stay its hand in doing such complete justice to each party as good reason and good conscience require; and, when necessary for

<sup>26</sup> 2 Dan. Ch. Pr., 1371, note; *Henshaw v. Ward*, 9 Hum., 568; *Allen v. Baugus*, 1 Swan, 404; *Ingram v. Smith*, 1 Head, 428; *LaGrange v. M. & C. R. R. Co.*, 7 Cold., 420; *Davis v. Reeves*, 7 Lea, 585. See, also, Code, § 2974; and *Sto. Eq. Pl.*, §§ 392-394.

<sup>27</sup> *Barb. Ch. Pr.*, 339; 2 Dan. Ch. Pr., 1371; Code, § 2974. *Boni judicis est lites dirimere ne lis ex lite oriatur, et interest reipublica ut sint fines litium.*

<sup>28</sup> *Allen v. Baugus*, 1 Swan, 406; *Birdsong v. Birdsong*, 2 Head, 302; *LaGrange v. Rainey*; 7 Cold., 457. Such relief, however, must be confined to the matters arising out of, or connected with, the questions raised by the pleadings, or the determinations contained in the decree, and cannot be grounded on the proof alone. If the proof show the defendant to be entitled to relief against a co-defendant, or against the complainant as to matters not set up in the pleadings, the defendant seeking such relief must resort to a cross-bill, or to an original bill, according to the nature of the case. See *McKee v. Dail*, 1 Ch. Apps., 689, which cites the above section, (then § 544.)

<sup>29</sup> *L. & M. R. R. Co. v. Rainey*, 7 Cold., 457; *Keeling v. Heard*, 3 Head, 592.

<sup>30</sup> *Ingram v. Smith*, 1 Head, 411; *Gentry v. Gentry*, 1 Speed, 87; *Allen v. Baugus*, 1 Swan, 404; *Davis v. Reeves*, 7 Lea, 585. These cases show that where the complainant and one or more of the defendants have an interest in the same property, real or personal, against the other defendants, the Court will determine and enforce the rights of all the parties to such property, regardless of their attitude as complainants or defendants; and will so decree as though the bill had been filed on behalf of the defendants having concurrent rights with the complainant, or as though such defendants were really

co-complainants. Thus on a bill (1) to redeem land, or (2) to partition land, or (3) to sell land for partition, or (4) to set up title to specific real or personal property, or (5) to recover a trust fund, or (6) to compel an executor, administrator, guardian or other trustee to account, or (7) to sell land to pay debts, or (8) to wind up an insolvent estate, partnership or corporation, or (9) to have a general accounting, the Court will render a complete decree, and so mould it as to make a final and full disposition of the entire subject-matter, and of the rights of all the parties having an interest therein, regardless of their attitudes as complainants or defendants. In such cases, a defendant, whose right or interests are concurrent with those of the complainant, will be given the same sort of recovery, and his rights and interests will be protected and enforced in the same manner as though he were a co-complainant, and especially if he be an infant, or person of unsound mind.

<sup>31</sup> *Henshaw v. Wells*, 9 Hum., 568. *Blinded Justice*, with sword in one hand and scales in the other, condemning all in one scale and rewarding all in the other scale, is the divinity of the Courts of law. The divinity of the Courts of Chancery, on the other hand, is *open-eyed Equity*, having neither sword nor scales, wearing the breast-plates of good reason and good conscience, using both hands to remove all forms, cloaks, veils, technicalities and subtleties, that conceal or distort the real facts and circumstances of the case before her, separating the pure grains of truth from the straw and chaff of fraud and artifice, and apportioning to each party, whether complainant or defendant, what in good reason and good conscience is his just due.

this purpose, the Court will require pleadings to be amended, new parties to be made, and additional proof to be filed.

Under the operation of its rule of doing complete and not half justice,<sup>32</sup> when, from defences made by one party the non-liability of a non-defending party appears, the Court will not adjudge the latter to be liable, not even when a *pro confesso* has been entered against him.<sup>33</sup> Thus, where there is privity between defendants, a good defence by one of the privies will protect a co-defendant who is a co-heir, co-legatee, co-partner, co-principal, co-surety, tenant in common, co-trustee, co-director, co-guardian, co-executor, co-administrator, beneficiary or trustee, principal or agent, or vendor or vendee, from the consequences of a *pro confesso*.

When, on the pleadings alone, or on both pleadings and proof, it appears that the complainant is not entitled to any recovery, what justice is there in giving him a decree against an innocent man because as a defendant he has failed to make any defence? The Chancery Court declines to enforce forfeitures and relieves against penalties, and while it may punish such a defendant by taxing him with some of the costs it will not hold that he has forfeited all rights and incurred all penalties by failing to answer the bill when it appears of record in the cause that he is not liable, for that would be to crucify an innocent man on a technicality,<sup>34</sup> and aid a guilty man to perpetrate an iniquity by means of the forms of procedure.

Therefore, it has been adjudicated, (1,) that a defence by an heir or legatee will enure to the benefit of the executors of the estate;<sup>35</sup> (2,) that a defence by one partner will enure to the benefit of another partner;<sup>36</sup> (3,) that a defence by a trustee will protect the beneficiary;<sup>37</sup> (4,) that a defence by his vendor will save a vendee from a *pro confesso* against him;<sup>38</sup> and (5,) where one personal representative successfully defends he thereby relieves the representatives from the effects of a judgment by default in a Court of law;<sup>39</sup> so that the general rule stated in the second paragraph of this section may be considered a part of our jurisprudence.<sup>40</sup> But, on the contrary, where there is no privity, no joint liability, or no common interest between two defendants, the answer and defence of one will not enure to the benefit of the other who has been *pro confessoed*, and will not protect him from the liability alleged in the bill.<sup>41</sup>

§ 562. When Persons Not Parties May Take Benefits Under a Decree.—It often happens that persons who are not parties are entitled to take benefits under a decree: this happens when they are interested in the subject-matter of the suit, but have not been made parties because (1) too numerous, or (2) because their interests or names were not known; or (3) because the bill is filed for their benefit in part. The most ordinary cases of a right to come in under a decree are the following: 1, Where a decree directs a fund belonging to an estate, or to a trust, to be paid out to those entitled, in which case, legatees, distributees, and creditors may come in at any time before final distribution of the funds. 2, Where a female party marries pending the suit, and no notice thereof is taken by the Court, the husband may come in under the decree in the right of his wife; 3, Where the persons entitled are numerous, and the bill is filed for the benefit of all concerned: 4, Where the decree in a partition, or similar case, adjudges that certain unknown heirs have an interest, these heirs may set up that interest under the decree: 5, Where a person has acquired by purchase, descent or otherwise, the interest of a party in the decree; and 6, Where, in any case, a person not a party has an interest in the fund to be distributed, and the scope of the decree includes him and his interest.<sup>42</sup>

<sup>32</sup> See, *ante*, § 38.

<sup>33</sup> *McDaniel v. Goodall*, 2 *Cold.*, 395.

<sup>34</sup> A *pro confesso* is only a technical confession of liability.

<sup>35</sup> *Allen & Hill, exrs. v. Shanks*, 6 *Pick.*, 359.

<sup>36</sup> *Cheatham v. Pearce & Ryan*, 5 *Pick.*, 668. Even after a *pro confesso*. *Butler v. Kenzie*, 6 *Pick.*, 31.

<sup>38</sup> *Hennessee v. Ford*, 8 *Hum.*, 499.

<sup>39</sup> *Brien v. Patterson*, 3 *Head*, 499.

<sup>40</sup> See, *ante*, §§ 210; 369, for other illustrations of the operations of this rule.

<sup>41</sup> *Phillips v. Hollister*, 2 *Cold.*, 269.

<sup>42</sup> 1 *Barb. Ch. Pr.*, 335-336; 2 *Dan. Ch. Pr.*, 1209-1214.

In all such cases, the proper procedure to obtain the benefit of a decree is by a sworn petition, setting forth clearly the facts on which the claim is based, and praying to be made a party to the cause, and to be allowed to come in and prove the petitioner's claim under the decree. Such petition, however, cannot be used to attack the decree, nor to set up rights, claims, or interests in conflict therewith; this can be done by a bill only.

If such a decree is merely interlocutory, the rights and privileges of such third persons are greater, and they may have their rights expressly protected in the final decree, and may contest the claims of other claimants.

§ 563. **When Interest Will be Allowed in a Decree.**—Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money, the rate not to exceed six per centum: any excess over that rate is usury.<sup>43</sup> Interest was not allowed at common law,<sup>44</sup> but the Legislature and the Courts have made many instances where interest is legal. Thus, all bills single, bonds, notes, bills of exchange, and liquidated and settled accounts, signed by the debtor, bear interest from the time they become due, unless otherwise specified in the writing;<sup>45</sup> and all judgments and decrees draw interest from their date.<sup>46</sup> In all other cases, Chancellors and juries are given an equitable power to allow interest in the form of damages, if they think it just.<sup>47</sup> The general rule is to allow interest in all cases where the amount of the debt is certain, and not disputed on reasonable grounds. The Clerk and Master will allow interest in stating an account when so directed in the order of reference.<sup>48</sup> Interest may be allowed on the separate items of a debt from the periods at which they respectively fell due.<sup>49</sup> And where damages are allowed for a breach of contract to deliver specific articles on a given day at a certain price, interest may be allowed on such damages from the breach of the contract to the date of the decree.<sup>50</sup> Interest is allowable on a debt admitted, and agreed to be paid,<sup>51</sup> and on an account rendered and not disputed in a reasonable time.

Interest is not ordinarily allowable on unliquidated demands, unless there is some precise time fixed for payment, or an account has been rendered or a demand made, or some custom or usage warrant it;<sup>52</sup> but where the debt is for property sold or services rendered or money loaned to the defendant, or a just debt paid for him, and the transaction reasonable, and no equities or meritorious defences, interest is ordinarily allowable.

Interest is an incident of a debt after its maturity, because it is either given by positive law, or, in the absence of countervailing Equity, by the equitable verdict of the jury, or by the Court acting in place of the jury; but where the debt to be paid, or the duty to be performed, is uncertain, no interest ought to be allowed. When the Court has discretionary power to allow interest it may make the allowance from the maturity of the debt, or from date of demand made on defendant for payment, or from date of acknowledgment of debt by the defendant, or from the day the suit was commenced to collect it, which is deemed a demand.

In the Code form of declaration on the common counts, it is alleged that "the several sums of money, *with interest thereon*, are now due;"<sup>53</sup> which seems to imply that in suits for money due by account, open or stated, or due for money loaned, or for goods, wares and merchandise, or for specific articles of personal

<sup>43</sup> Code, §§ 1943-1944.

<sup>44</sup> *Cherry v. Mann, Cooke*, 268; *Caruthers v. Andrews*, 2 Cold., 381; *Overton v. Bolton*, 9 Heisk., 766. In this respect the Law of Moses was followed, where interest is termed usury. Lev. 25:36-37.

<sup>45</sup> Code, § 1945.

<sup>46</sup> Code, § 1948.

<sup>47</sup> *Cole v. Sands*, 1 Tenn., (Overt,) 106; *Williams v. Inman*, 5 Cold., 269; *Haralson v. McCawock*, 10 Lea, 726; *Cole Mfg. Co. v. Collier*, 7 Pick., 525.

<sup>48</sup> *Shepard v. Akers*, 2 Tenn. Ch., 627; or, in a proper case, he may charge interest when the decree

is silent on the subject. *Shepard v. Akers*, 2 Tenn. Ch., 627.

<sup>49</sup> *Thompson v. French*, 10 Yerg., 458.

<sup>50</sup> *Noe v. Hodges*, 5 Hum., 103.

<sup>51</sup> *Mills v. Mills*, 3 Head, 709.

<sup>52</sup> *Dan. Ch. Pr.*, 1258, note 4.

<sup>53</sup> Code, § 2939, Form, No. 8.

These forms allow interest in no other suits except those on written evidences of debt signed by the defendant, thus placing money due on a common count on the same footing as money due on a note of hand, or other evidence of debt signed by the defendant.



property, or for money paid for the defendant at his request, or for work and labor done for the defendant, interest is to be allowed on the recovery from the day it became due. Hence, it is safe to say, that in all such cases interest should be allowed from the day the complainant had the right to the money he sues for.

The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied to discharging the principal; and interest is to be computed on the balance as aforesaid.<sup>54</sup>

ARTICLE II.

DECREES GENERALLY CONSIDERED.

- § 564. Nature, Office, and Effect, of a Decree.
- § 565. Essentials of a Valid Decree.
- § 566. Frame of a Decree.
- § 567. Formal Parts of a Decree.
- § 568. Forms of Decrees.
- § 569. Dismissing Bills at the Hearing.
- § 570. When a Bill Will be Dismissed Without Prejudice.
- § 571. The Drawing, and Entering, of Orders and Decrees.
- § 572. When a Decree May be Changed.
- § 573. When and How Decrees May be Amended.
- § 574. The Revivor of Decrees.

§ 564. **Nature, Office, and Effect of a Decree.**<sup>1</sup>—A decree is the determination of the rights of the parties as to the matters in controversy before the Court, duly pronounced by the Chancellor, and entered on the minutes of the Court.<sup>2</sup> As the office of pleadings is to present to the Court the issues of law and fact the parties desire to have adjudicated, and as the office of proof is to sustain by facts the respective contentions of the parties, so the office of a decree is to close the controversy and adjudge the conclusions of law and fact reached by the Court as to the respective rights, duties, and liabilities of the parties. As a rule, decrees determine the rights of all the parties to the suit according to Equity and good conscience, and are pronounced only after hearing and understanding all the points in issue;<sup>3</sup> but a decree is none the less a decree, and none the less valid, although pronounced without such a hearing and understanding, and in violation of Equity and good conscience.<sup>4</sup> The force and effect of a decree, when unappealed from and unreversed, is not impaired by the fact that the decree is unjust, and might have been reversed on appeal, or by writ of error. So long as the parties aggrieved acquiesce in it, so long is

<sup>54</sup> This is the rule laid down by Chancellor Kent, in *Jackson v. Connecticut*, 1 Johns. Ch. R. 17, and approved by our Supreme Court. *Jones v. Ward*, 10 Yerg., 160; *Scanlan v. Houston*, 5 Yerg., 310; *Union Bank v. Williams*, 3 Cold., 582; *Thompson v. Childress*, 1 Tenn. Ch. 369; *Smith v. Thomas*, 8 Bax., 417; *Curd v. Davis*, 1 Heisk., 576.

The rule may, perhaps, be more briefly stated thus: 1. Where the payment equals or exceeds the accrued interest such payment is deducted from the aggregate of principal and accrued interest, and the balance becomes a new principal upon which subsequent interest will be computed. 2. Where the payment is less than the accrued interest such payment is not computed until it and subsequent payments equal or

deducted from the aggregate of principal and accrued interest, and the balance becomes a new principal upon which subsequent interest will be computed.

<sup>1</sup> *Decretum est sententia lata super legem.* (A decree is a decision based on law.)

<sup>2</sup> A decree is defined by our statutes to be "a determination of the rights of the parties in a suit in Equity." Code, § 2970. A decree properly so called, is ordinarily made upon a hearing of the cause, and is a determination of the principles or issues involved. Orders made upon motions or petitions, are not decrees, though in the nature of decrees; they are usually termed decretal orders. 1 Barh. Ch. Pr., 336.

<sup>3</sup> 2 Dan. Ch. Pr., 986.

it valid and binding, nor can it be incidentally or collaterally assailed. Until reversed by an appellate Court, or impeached by an original bill for fraud, or set aside upon a bill of review, a decree, however erroneous, is absolutely conclusive upon the parties to the suit and their privies, provided the Court had jurisdiction of the subject-matter.<sup>5</sup> In Tennessee, a decree in Equity is for all purposes as high in dignity, and as conclusive in effect, as a judgment at law, and as effectually terminates the litigation in which it is pronounced.

A decree is operative and binding upon all the parties to the suit, whether they be natural or artificial persons, and whether under disability or not.<sup>6</sup> Persons under disability have a longer period in which to sue out a writ of error, or to file a bill of review, or a bill to impeach a decree for fraud, but none the less is the original decree conclusive upon them until set aside, modified or annulled, by a proper procedure. Infants have no longer a day in Court, after attaining majority, to show cause why they should not be bound by a decree.<sup>7</sup>

A decree is not binding, however upon a person not made a party, nor upon a party not brought before the Court,<sup>8</sup> unless such a person was a member of a class whose interests and rights were duly and expressly presented for adjudication.<sup>9</sup>

§ 565. **Essentials of a Valid Decree.**—The Chancery Court is a Superior Court of general Equity jurisdiction,<sup>10</sup> and all of its decrees are presumed to be valid, and this presumption is conclusive against collateral attack,<sup>11</sup> unless it affirmatively appear, on the face of the record itself:<sup>12</sup>

1. That the Court had no general jurisdiction of the subject-matter of the litigation:<sup>13</sup> or

2. That the decree itself is wholly outside of the pleadings,<sup>14</sup> and no binding consent thereto is shown in the record;<sup>15</sup> or

3. That the Court had no jurisdiction of the party complaining, in person or by representation of interest: in which case it is void only as to such party, or his privies.<sup>16</sup>

<sup>5</sup> 2 Dan. Ch. Pr., 986, note. And, if all the persons in being who have an interest in the subject-matter of the suit are made parties, the decree will bind those subsequently born who have an interest. *Parker v. Peters*, 2 Shan. Cas., 636; *Ridley v. Halliday*, 22 Pick., 607.

<sup>6</sup> 1 Barh. Ch. Pr., 334; 2 Dan. Ch. Pr., 986. The decree is binding on those who claim under the parties to the suit. *Russell v. Houston*, 7 Cates, 536.

<sup>7</sup> *Winchester v. Winchester*, 1 Head, 460.

Infants were formerly allowed a day in Court, to show why they should not be compelled to make a deed; but now our Courts divest the title *proprio vigore* out of the infant, and no deed by him is necessary, and hence no day in Court is necessary. *Wilson v. Schaefer*, 23 Pick., 300.

<sup>8</sup> 2 Dan. Ch. Pr., 986, note; *Davis v. Reaves*, 7 Lea, 588.

<sup>9</sup> See note 5, *supra*.

<sup>10</sup> See, *ante*, §§ 16-19; 23.

<sup>11</sup> *Pope v. Harrison*, 16 Lea, 82; *Reinhardt v. Nealis*, 17 Pick., 169.

A Court of general jurisdiction is presumed to have acted correctly, and the burden of showing the contrary rests upon him who alleges it. Every intendment is in favor of its decrees. Irregularities in the proceedings, or erroneous deductions from the evidence, will not affect their validity, if the Court had jurisdiction of the subject-matter and of the person. If such jurisdiction be shown by the record, all irregularities go for naught; if such jurisdiction be not shown the proceedings are void, however regular in all other respects. Proceedings in suits may be very irregular and easily reversible in the Supreme Court, on appeal, or writ of error, and yet invulnerable to collateral attack. Courts hesitate long, and insist upon a clear case, before pronouncing a decree void. If the Court had jurisdiction of the subject and of the party, that is enough to make the decree proof against collateral attack, even in cases where the decree would have been easily reversed on an appeal, or on a writ of error. *Epperson v. Robertson*, 7 Pick., 407; *Campbell v. Bryant*, 2 Shan. Cas., 146; *Kindell v. Titus*, 9 Heisk., 727. *Interest reipub-*

*lica res judicata non rescindi.* (It is to the interest of the State that adjudications be not nullified). *Russell v. Houston*, 7 Cates, 536. See, 4 Yerg., 166; 7 Heisk., 246; 12 Heisk., 629; 4 Sneed, 379; 5 Hum., 319; 6 Hum., 445; 1 Head, 555; 2 Bax., 484; 6 Bax., 274; 6 Bax., 80; 152; 467; 1 Lea, 466; 9 Lea, 710; 16 Lea, 82; 1 Pick., 171; and many other cases cited in the Digests. See, *post*, § 1302; 649; *ante*, §§ 446.

<sup>12</sup> *Reinhardt v. Nealis*, 17 Pick., 169.

<sup>13</sup> Jurisdiction of the subject-matter cannot be given by consent, except where that jurisdiction depends on the venue. If the Court has no jurisdiction of the subject-matter, and no right to determine it, or pronounce a decree therein, all its orders and decrees are nullities, and may be so treated, on a collateral attack; and the fact that the defendant appeared and made no objection to the jurisdiction, or consented to the decree, will not validate the proceedings. *Agee v. Dement*, 1 Hum., 331; *White v. Buchanan*, 6 Cold., 32; *Noel v. Scoby*, 2 Heisk., 28; *Ferris v. Fort*, 2 Tenn. Ch., 150; *Board v. Bodkin Bros.*, 24 Pick., 700; *Baker v. Mitchell*, 21 Pick., 610. See, *ante*, § 177, notes 17 and 30; and § 290.

<sup>14</sup> A decree wholly foreign to the pleadings would be *coram non iudice*, and absolutely void. 1 Dan. Ch. Pr., 853; *Dillard v. Harris*, 2 Tenn. Ch., 193; *Mayo v. Harding*, 3 Tenn. Ch., 237; *Easley v. Farkington*, 5 Bax., 592. *Penniman v. Smith*, 5 Lea, 130; *Thompson v. Keck*, 23 Pick., 451; *Gilreath v. Gilliland*, 11 Pick., 383; *Teague v. Teague*, 2 Ch. Apps., 376. The appearance of the defendant, and that the decree is justified by the pleadings, will be presumed, however, after a considerable lapse of time, and when the record is imperfect. *Pope v. Harrison*, 16 Lea, 82. And consent of parties will validate such a decree. See next note. *Wilson v. Schaefer*, 23 Pick., 300; *Johnston v. Osment*, 24 Pick., 32; *Bigley v. Watson*, 14 Pick., 353.

<sup>15</sup> *Reinhardt v. Nealis*, 17 Pick., 169. A decree wholly outside the pleadings is validated by the consent of the parties appearing in the decree. *Ibid.*

<sup>16</sup> If a person is not duly made a party to a suit

A decree is absolutely void if it appear on the face of the record itself either (1.) that the Court had no general jurisdiction of the subject-matter, or (2.) that the decree is wholly outside of the pleadings, and no consent thereto appears; and a decree is void as to any person shown by the record itself not to have been before the Court in person, or by representation. All decrees, not thus appearing on their face to be void, are valid and binding, until either (1.) reversed in the Supreme Court, or in the Court of Chancery Appeals, on appeal or writ of error, or (2.) are reversed on a bill of review, or (3.) are set aside on a bill filed to impeach it.

All decrees not thus appearing on their face to be void are absolutely proof against collateral attack, and no parol proof is admissible on such an attack to show any defect in the proceedings, or in the decree.<sup>17</sup>

§ 566. **Frame of a Decree.**—Decrees commonly consist of five parts: 1st, The style of the cause in which it is pronounced; 2d, The commencement, which usually gives the date of the decree, and the name of the Chancellor by whom it is pronounced; 3d, The recitals, which state the facts on which the decree is based; 4th, The declaratory part, which sets forth the rights of the parties, and 5th, The ordering, or mandatory part, which specifies what shall be done, when, how, where, by whom, and to or for whom.<sup>18</sup> The first and fifth parts only are absolutely essential, as the fourth part may be largely incorporated into the fifth. These five parts will be considered more fully.

1. **The Title, Style of the Cause.** The decree should show, in its style, or elsewhere on its face, the names of all the parties to the cause, both complainant and defendant; and, also, the character or capacity in which any of the parties sues or is sued, when in other right than in his own,<sup>19</sup> as when he sues or is sued as executor, administrator, next friend, guardian, trustee, assignee, and the like. The better practice is to incorporate all of their names in the body of the decree, especially the names of the defendants, when more than one.<sup>20</sup>

2. **The Commencement of a Decree.** It is often important, and nearly always convenient, to know the date of the decree, and the name of the Chancellor pronouncing it. The date is sometimes essential, especially when a decree is entered *nunc pro tunc*, as the parties' rights sometimes depend on the date when a decree is pronounced. The following form of commencement, though brief, is adequate: "*This cause was heard on this May 20, 1890, before Chancellor John P. Smith, upon*"— Unless there be some special reason for having the decree bear the date when actually pronounced, it will be so dated as to conform to the date of the minutes in which it is entered; and if it bear a prior date, it should show on its face that it is entered *nunc pro tunc*.<sup>21</sup>

3. **The Recitals in a Decree.** Formerly, an abstract of the pleadings and proof followed the introductory part of a decree, and constituted the premises of the declaratory part; but now the recitals are confined to a plain and succinct state-

by service of subpoena, publication, or appearance, or is not duly in Court by representation of interest, or by a privy, he is not bound by any decree in such suit. But if the Court has jurisdiction of the person of the parties, all persons claiming under them are bound by the decree, if it is otherwise valid. A decree against a person not before the Court, is a nullity as to him and all claiming under him; but such a decree is none the less valid and binding as to other parties actually brought before the Court. 2 Dan. Ch. Pr., 986, note. As to representation of interest, see *Parker v. Peters*, 2 Shan. Cas., 636; *Ridley v. Halliday*, 22 Pick., 607. A decree on a bill filed in the wrong county in a local suit is void, even when the jurisdiction is not objected to. *Nashville v. Webb*, 6 Cates, 432; *Mills v. Haley*, M.S.S., Nashville, 1906.

<sup>17</sup> See, *ante*, § 446. A decree is collaterally attacked when objected to as evidence in another cause. *Pope v. Harrison*, 16 Lea, 90. On such an attack the justness of the decree, and whether it is free from error or sustained by the evidence, cannot be

questioned: these are matters to be inquired into only by the Supreme Court on appeal, or writ of error. See *Freem. on Judgments*, §§ 120; 124.

<sup>18</sup> 2 Dan. Ch. Pr., 1001-1004.

<sup>19</sup> 2 Dan. Ch. Pr., 1002.

<sup>20</sup> This is a matter of no little importance. Inasmuch as the pleadings are no longer enrolled, and frequently get lost or mislaid, and as the rule dockets are not always kept in due form, there may be nothing on record to show who the parties to a cause are, and in what character they sue or are sued, unless the decree should so show on its face. A careful Solicitor will not, in order to save a minute's time, jeopard his client's interests by failing to insert all the names of the parties in the style, or body, of a final decree. A decree which does not give, in its style or elsewhere on its face, the names and character of all the parties to the suit, is frequently absolutely unintelligible, and if the pleadings are lost, may be valueless without further litigation.

<sup>21</sup> 1 Barb. Ch. Pr., 337; 2 Dan. Ch. Pr., 1002, note.

ment of the facts without any abstract of the pleadings,<sup>22</sup> and may be dispensed with altogether, unless the Court otherwise direct.<sup>23</sup> Every final decree, however, should at least show that the cause was heard upon the bill, the answers of those answering, the order *pro confesso* as to those *pro confessoed*; the exhibits, if any, the other orders and reports, if any, and the proof, including any agreements.<sup>24</sup> It is of material importance that the decree should show what evidence was objected to at the hearing, and the ruling of the Court thereon;<sup>25</sup> and if any verbal agreements made at the bar are considered by the Court, these should be recited in the decree. Whenever a decree is made by consent, it should be so stated on its face.

4. **The Declaratory Part of a Decree.** After reciting that the cause was heard upon the pleadings, specifying them when necessary, the orders *pro confesso*, if any, and the other orders, if any; the reports of the Master, if any; the exhibits, if any, and the proof, including any verbal agreements made in open Court, the decree should declare what, after considering all these, and the arguments of counsel, the Court is of opinion the facts,<sup>26</sup> and the rights and duties of the respective parties, are. This part of the decree is a sort of premise<sup>27</sup> of the ordering, or mandatory, part of the decree, and makes the meaning of the latter clearer, and its equity more manifest.<sup>28</sup> The declaratory part of a decree should, as a rule, follow the premises, or essential allegations of the bill.

5. **The Ordering, or Mandatory Part, of a Decree.** This part and the title, or style of the cause, are the only absolutely essential parts of a decree. The mandates of a Court are its ultimate conclusions and final resolutions, all else in the decree, except the style of the cause, being merely preambles and inducements. The mandatory part of a decree is its vital and virile part, and contains the specific orders and directions of the Court, and points out with clearness and emphasis what shall be done, when, how, where, by whom, and to or for whom. The ordering part of the decree must conform to the pleadings, and be responsive to them, leaving no matter undetermined, and no roots for further litigation: it should be precise and definite, free from vagueness, and capable of being executed with certainty.<sup>29</sup>

The mandatory part of a decree is as follows:

"It is, therefore, ordered, adjudged, and decreed by the Court that" [*the* (1) *defendant pay the complainant the amount of money due, or* (2) *that the complainant recover the* (3) *land, or* (4) *sum of money, or* (5) *other right he sues for, or* (6) *that he is entitled to the* *ten, or right, or interest, he claims, or* (7) *that the contract be reformed, or rescinded, or specifically performed, or* (8) *that the defendant be perpetually enjoined from doing any of the acts complained of, or* (9) *that he be required to do the particular thing sought by the bill, or* (10) *that the cloud be removed, or* (11) *the title be divested and vested, or* (12) *that the complainant have such other relief as he prays for, and may be entitled to, and* (13) *that the costs be paid by such and such parties, and* (14) *that the proper final process issue.*]

There is a marked difference between a technical decree in Chancery and a judgment at law. A judgment gives the plaintiff a recovery without any other

<sup>22</sup> Since the discontinuance of the practice of enrolling the pleadings, it has become of more importance to recite in a decree the substantial facts on which the decree is based, because in this way the facts are perpetuated of record, in case the pleadings and proof should be lost or mislaid.

<sup>23</sup> Code, §§ 4476-4477; 1 Barb. Ch. Pr., 338.

<sup>24</sup> This recital is valuable as a perpetuation of the facts, for reasons stated in the preceding notes to this section.

<sup>25</sup> 2 Dan. Ch. Pr., 1003.

<sup>26</sup> Decrees need not recite the facts on which they are based, but only the conclusions to which the Court has come. The Code, however, does not prohibit a plain and succinct statement of the facts in a decree; Code, §§ 4476-4477; and such a statement is often important, and may be properly made in the declaratory part of a decree.

<sup>27</sup> The recitals of a decree are the premises of the declaratory part of a decree, the declaratory part is the premise of the mandatory part, and the mandatory part is the premise of the final process, including orders of sale, which are a sort of final process. The draftsman, who remembers this logical

sequence of the different parts of a decree, will have no difficulty in drawing a lucid and concise decree, such a decree being one of the highest evidences of genuine legal skill and ability. As he is a timid Chancellor who gives no reasons for his decrees, so he is a timid or unskilled Solicitor who omits the declaratory part in drawing a decree.

<sup>28</sup> The declaratory part of a decree is in the nature of a preamble to a resolution, giving the reasons and considerations moving the Chancellor to the mandatory conclusions he reaches.

<sup>29</sup> 2 Dan. Ch. Pr., 1004-1006. A decree should (1) specify the precise amount of money to be paid; (2) the precise tract of land to be sold, identifying it; (3) the precise persons by whom and to whom money should be paid; (4) the precise acts to be done, by whom, when, where, and for whom, and (5) should leave nothing to be determined by any other person, or to be ascertained by calculation, except when a reference to the Master is expressly made. 2 Dan. Ch. Pr., 1004, notes. The mandatory part of a decree, should, as a rule, conform to the special prayers of the bill.

reason than that the jury has found in his favor,<sup>29a</sup> whereas a technical decree in Chancery gives a summary of the pleadings and the findings of facts by the Chancellor and then commands the defendant to do the particular act, pay the money decreed to be due from him, execute the instrument required, specifically perform the contract named, deliver the real or personal property, or the deeds, papers or other instruments described, or enjoins and prohibits the defendant from doing the acts complained of.

In case of a money recovery, enforceable by execution, many Solicitors, in drawing decrees, pursue the forms of judgments at law in a similar case, and there is no good objection to this practice, and it has been often followed in this Treatise.

If the decree leaves any matter undisposed of, there should be added to it a special or general reservation of such matters, the general reservation order being, "*other matters are reserved.*"<sup>30</sup> If the decree is entered *nunc pro tunc*, it should so state. If further application to the Court for some order in the case be probable the decree should conclude as follows: "*And either party is to be at liberty to apply to the Court as occasion may require.*"<sup>31</sup>

§ 567. **Formal Parts of Decrees.**—To illustrate the preceding section, the formal parts of decrees are here set out. These parts will be often referred to in the forms of decrees given in this Treatise, they being omitted in many forms in order to economize space and avoid unnecessary repetition.

#### THE FORMAL PARTS OF A DECREE.

##### The Title, Style of the Cause.<sup>32</sup>

A B and C D,	} No. 1313
vs.	
E F, G H and I J.	

##### The Commencement.

This cause came on to be heard this August 25, 1890, before Chancellor John P. Smith [*or*, Judge William R. Hicks, sitting by interchange with Chancellor John P. Smith,] upon

##### The Recitals.

the bill [*or*, the original and amended bills], the answers of the defendants, E F and I J, the latter by K L, his general guardian [*or*, guardian *ad litem*,] and the judgment *pro confesso* heretofore taken and entered against the defendant G H,<sup>33</sup> [as to both the original and amended bills,] and upon the written agreement exhibited to the [original] bill, and the other proof in the cause, and argument of counsel.

##### The Declaratory Part.<sup>34</sup>

from all of which it appears to the Court that [*Here insert such of the essential allegations of the bill as are sustained by the proof, or admitted by the answers.*]

##### The Ordering, or Mandatory Part.

It is therefore ordered, adjudged and decreed by the Court:

1. That [*Here insert what the Court has decreed, following, as a rule, the specific prayers of the bill, unless the Court's decree is different.*]

<sup>29a</sup> A judgment at law is as follows, omitting the verdict of the jury: "It is therefore considered by the Court that the plaintiff recover of the defendant five hundred dollars [*or*, the premises specified in the declaration,] and the costs of the suit, for which an execution [and writ of possession] will issue."

<sup>30</sup> 2 Dan. Ch. Pr., 1366-1375. In *Shepard v. Akers*, 2 Tenn. Ch., 627, interest was allowed in a subsequent decree, without any reservation in the former decree. The former decree was, however, for an account between the parties.

<sup>31</sup> *State, ex rel., v. Williams*, 2 Cates, 597. This reservation of liberty to apply is a prudent precaution: 1st, When the decree is of such a character that, upon the death of a party, other parties may have rights under the decree requiring action by the Court; 2d, When parties by representation not *in esse* when the decree was pronounced may be born, and some action of the Court may be necessary for the protection of their rights; 3d, When parties are required by the decree to do some specific act, and further orders may become necessary for the enforcement of the decree; 4th, When, in any other case,

reservation of liberty to apply does not alter the final nature of the decree. Such a decree can be appealed from as a matter of right, and may be pleaded in bar to another suit, for the same matter. This liberty to apply is taken advantage of by motion or petition, but in either case all parties concerned should have notice, and an opportunity to be heard. 1 Barb. Ch. Pr., 333; 2 Dan. Ch. Pr., 996. See, *post*, § 579, on Supplemental Decrees.

<sup>32</sup> Give the correct style of the cause, ordinarily the style endorsed on back of the bill. See, *ante*, § 178. Technically, every decree has a caption identical with that of the first day's minutes; but the practice is to consider the caption of the first day's minutes as the caption of every order and decree made during the term. See, *ante*, § 532.

<sup>33</sup> Give the names of all the defendants, and show which ones answered and which were *pro confesso*.

<sup>34</sup> This part of the decree is important, but not essential; and may be omitted. Code, § 4476. In such case the following form is often used after the recital: On consideration whereof it is ordered, adjudged and decreed by the Court:

2. That [*Here order the sale of any property sought to be sold described in the bill, or levied on by attachment.*]
3. That [*Here make the injunction, if any, perpetual, if desired and proper.*]
4. That the costs of the cause be paid by the defendants E F and G H, and I J, for which an execution will issue. [*Or, adjudge the costs otherwise, if the Court so determines.*]
5. That all other matters are reserved, [*if any are reserved.*] This decree was made on the 20th instant, and is entered now for then. [*Insert this, if a fact, and especially if necessary to obtain priority of lien or of satisfaction.*]

§ 568. **Forms of Decrees.**—The frame of decrees as set forth in the preceding section will be more fully illustrated by the following forms:

**GENERAL FORM OF A DECREE.**

The Title, or Style, of the Cause.

A B,                    }  
*vs.*                    }  
 C D, *et al.*        } No. 618.

**The Commencement.**

This cause was heard on this 24th day of June, 1891, before Chancellor M N, [*or, before Hon. K L, Judge of the 5th Circuit, sitting by interchange with Chancellor M N.*]

**The Recitals.**

Upon the original and amended bills, the answers of the defendant, C D, and of the minor defendant, E D, by O P, his guardian *ad litem*, to both of said bills, the judgment *pro confesso* heretofore entered against the defendant, D D, as to both of said bills, the exhibits to the original and amended bills, the stipulation between the complainant and the defendant, C D, and the other proof in the cause, [*showing in detail the various bills, answers, exhibits, and stipulations filed, and pro confessos taken. Or the recital may be general, thus: upon the pleadings and proof in the cause, and the pro confesso against the defendant, D D.*]

**The Declaratory Part.**

From all which it appears to the Court that [*giving the general facts alleged in the bill, and sustained by the proof.*]

**The Mandatory Part.**

It is, therefore, ordered, adjudged, and decreed by the Court that the complainant have and recover of the defendants, C D and E F, the sum of one thousand dollars, and all the costs of the cause; [*or, the property described in the bill; or, that complainant's rights are so and so; or, that the defendants be required to do so and so; or, that they be perpetually enjoined from doing so and so;—following, as a rule, in this part of the decree, the prayer in the bill for specific relief.*] The costs of the cause will be paid by the defendant, C D, for which an execution will issue against him; [*or, the costs of the cause will be paid out of the fund in the cause, or out of the proceeds of said sale; or, will be paid one-half by the complainant and the other half by the defendant, or as otherwise decreed.*] A writ of possession will issue to put A B in possession of said tract of land. [*If a report is ordered, specify the matters to be reported, then add: said report will be made to the present [or, next,] term of the Court, until which time all other matters are reserved.*]

**FORM OF AN INTERLOCUTORY DECREE.**

The Title, or Style, of the Cause.

John Smith and Henry Smith,        }  
*vs.*                                        }  
 David Smith, Mary Smith,            }  
 Daniel Smith and George Jones.      } No. 226.

**The Commencement.**

This cause was heard this May 20, 1890, before Hon. John P. Smith, Chancellor, [*or, before Judge William R. Hicks, sitting by interchange with Chancellor John P. Smith.*] upon

**The Recitals.**

the original and amended bills, and the answers of David Smith and Mary Smith in person, and of Daniel Smith, a minor, by G. Mc. Henderson, his guardian *ad litem*, and the *pro confesso* heretofore taken and entered against the defendant George Jones, the two deeds exhibited to the bill, and the other proof in the cause, from all which

**The Declaratory Part.**

it appears that the complainants John Smith and Henry Smith, and the defendants David Smith, Mary Smith, and Daniel Smith, as children and heirs at law of William Smith, deceased, are tenants in common, and equal owners, share and share alike, of the tract of land described in the bill, situated in the 4th civil district of Grainger county, and bounded as follows: Beginning on a large poplar. [*giving description by metes and bounds.*] And it

further appearing that Susan Jones, born Smith, formerly the wife of the defendant, George Jones, died in the lifetime of her father, the said William Smith, leaving no children.

**The Ordering, or Mandatory, Part.**

It is therefore ordered, adjudged and decreed by the Court:

1. That said John Smith, Henry Smith, David Smith, Mary Smith, and Daniel Smith are each entitled, as equal tenants in common, to an undivided one-fifth of said tract of land, and as such are entitled to have said tract partitioned, or sold.

2. That George Jones has no title or interest in said land, or in any part thereof, either in his own right, or in the right of his deceased wife.

3. That the Master hear proof and report to the present term, if practicable, and if not, to the next term:

(1) Whether said tract of land is so situated that advantageous partition thereof can be made; or

(2) Whether it would be manifestly for the advantage of the parties that the tract should be sold instead of partitioned.

4. The adjudication of costs, and counsel fees, and all other matters, are reserved.

5. This decree was made on May 10, 1890, and is entered now for then.

The mandatory part of every decree should be divided into paragraphs, and each paragraph consecutively numbered. These numbers may be placed at the beginning of the paragraphs, as shown above, or they may be put in the center of a separate line above the paragraphs.

The form of a final decree is substantially the same as that of an interlocutory decree, except no matter is reserved, and there is no reference to the Master as to any matter.

**FORM OF A FINAL DECREE.**

**The Title, or Style, of the Cause.**

John Jones,	}	No. 953.
<i>vs.</i>		
Henry Thomas and George Stokes.		

**The Commencement.**

This cause came on to be heard this August 25, 1890, before Chancellor John P. Smith, [or, Judge William R. Hicks, sitting by interchange with Chancellor John P. Smith,] upon

**The Recitals.**

the original and amended bills, the answers of the defendant Henry Thomas to both bills, and the judgment *pro confesso* heretofore entered against the defendant George Stokes as to both bills, and the written agreement exhibited to the amended bill, and the other proof in the cause,<sup>36</sup> from all of which

**The Declaratory Part.**

it appears<sup>36</sup> that the defendants, Henry Thomas and George Stokes, did, on December 12, 1888, execute said written agreement, giving the complainant a lien on the saw-mill, engine, boiler and fixtures described in the bill, and situated on the farm of William Cook, in the 2d civil district of Grainger county, to secure the payment of six hundred dollars, on or before April 25, 1890; and that the defendant George Stokes, did in and by said agreement guarantee to pay complainant any balance due on said written agreement in case the proceeds of said property do not satisfy the same; and it further appearing that there is now due on said agreement principal and interest the sum of six hundred and forty-eight dollars; and that all of said property has been attached to secure the payment of the same;

**The Ordering, or Mandatory, Part.**

It is therefore ordered, adjudged and decreed by the Court:<sup>37</sup>

1. That complainant have and recover of the defendants, Henry Thomas and George Stokes, said sum of six hundred and forty-eight dollars, and all the costs of this cause.

2. That if said sum and costs are not paid within sixty days, the Sheriff [or Master] will, after giving legal notice, sell said saw-mill, engine, boiler and fixtures for cash in hand, to the highest and best bidder; and an order of sale will issue accordingly. If the proceeds of said sale be insufficient to satisfy this decree,

3. An execution will issue against both defendants for the balance remaining unpaid.

4. The costs of the cause will be paid in the first instance out of the proceeds of said sale.

§ 569. **Dismissing Bills at the Hearing.**—If, at the hearing, it appear that the complainant is not entitled to any relief, either under his special prayers, or under his general prayer, his bill will be dismissed; if, however, he is entitled

<sup>36</sup> When the various pleadings and important proofs are recited, there is less danger of confusion arising, especially on appeal, from papers getting lost or mixed.

<sup>36</sup> The declaratory part should follow, as a rule, the essential allegations of the bill.

<sup>37</sup> The ordering part of a decree should, as a rule, follow the special prayers of the bill.

to relief as to some matters, or as to some of the parties, he will be granted appropriate relief as to such matters, or as to such parties; and as to all other matters and all other parties, the bill will be dismissed. If the complainant is entitled to relief on the case set up in the answer, he will be granted such relief, even though entitled to none on his own bill.<sup>38</sup> These matters have been fully treated in the previous sections of this Chapter.<sup>39</sup> The following is the form of a

**DECREE DISMISSING A BILL.**

D. C. & J. W. Hubbard, }  
*vs.* } No. 842.  
 J. W. Fravell, *et al.* }

This cause coming on to be heard, this June 25, 1882, before Chancellor W. G. Croley, upon the bill, the answers of the defendants, and the proof, from consideration of all which it appears to the Court that the equities [*or*, causes of action,] alleged in the bill are fully met and denied by the answers, and are not sustained by the proof. It is, therefore, ordered, adjudged, and decreed by the Court, that the bill be dismissed, and that the complainants, and John Smith, their prosecution surety, pay all the costs of the cause, for which let an execution issue.<sup>40</sup>

§ 570. **When a Bill Will be Dismissed Without Prejudice.**—When a bill is dismissed (1) because of some slip or mistake in the pleadings or proof, or (2) because of failure to give some required bond, or (3) for want of any of the prerequisites of the writ, or (4) for want of necessary parties, or (5) for any other reason not involving the merits of the controversy, it should generally be dismissed without prejudice to complainant's rights to file another bill. And even when there is an adjudication upon the merits, and it appears probable from the pleadings, or proof, that in a new suit better adapted to the equities sought to be set up, relief may be had; or that, in a subsequent suit, evidence not now attainable may be produced, the Court will, on application, incline to dismiss the bill without prejudice, if the complainant is guilty of no negligence or bad faith.<sup>41</sup>

Where, however, the defendant has taken his proof on the merits, and the complainant has either taken no proof, or is unwilling to have the cause heard on the proof on file, he should not be allowed to dismiss his bill without prejudice; and thus be given full leave to again relitigate the same matters with the same parties. In such case the complainant may, subject to the rules heretofore laid down in this Chapter, dismiss his bill, but such dismissal must be subject to all the consequences incident to a dismissal with prejudice.<sup>42</sup>

§ 571. **The Drawing and Entering of Orders and Decrees.**—After the Chancellor has delivered his opinion, the duty of drawing the consequent order or decree generally devolves on the Solicitors of the winning party. The Chancellor frequently furnishes the draftsman with a memorandum of the chief points of his adjudication. In drawing the decree, the draftsman should, not only in the declaratory part, carefully and conscientiously follow the Chancellor's opinion, but should, in the mandatory part, earnestly endeavor to have his draft fully and fairly express the Chancellor's conclusions.

If the Chancellor has inadvertently failed to adjudicate any question raised by the pleadings, either the draftsman, or the opposite party, may call his attention to it, after notice thereof to the other side, and have it determined, to the end that it may be incorporated into the draft of the decree.

After the decree has been fully drawn, it should be submitted to the Solicitor of the other party for his inspection and criticism; if he raises no objection to

<sup>38</sup> See, *ante*, §§ 406, note; 555; 558.

<sup>39</sup> See, *ante*, §§ 555-563.

<sup>40</sup> This decree is based on *Hubbard v. Fravell*, 12 Lea, 315.

<sup>41</sup> 2 Dan. Ch. Pr., 994; 1 Barb. Ch. Pr., 331. No suit should ever be dismissed because of any slip, mistake, or omission, that can be remedied, corrected or supplied in the Court where the bill is pending. The better practice is to allow the complainant to amend his bill, or to file a supplemental bill, or to

remand the cause for further proof, as the exigency may require. In such case, however, the complainants should be taxed with all the costs of the cause; for, otherwise, the complainant will obtain an advantage from his own want of diligence. The interlocutory taxation of costs is the best spur to diligence, and the best preventive of delay.

<sup>42</sup> See *Parkes v. Clift*, 9 Lea, 524; and cases there cited; 2 Sto. Eq. Jur., § 1523.



it, or if his objections are acquiesced in, or removed, the draft is then read to the Chancellor in open Court, or at Chambers, and if approved by him, is delivered to the Clerk for entry upon the minutes.<sup>43</sup> If the respective Solicitors cannot agree upon the draft of the decree, they must submit their differences to the Chancellor in open Court, or at Chambers, and he will determine them, and settle the decree.<sup>44</sup>

The decree must be written upon not less than half a sheet of paper, and in ink.<sup>45</sup>

Until a decree has been settled and entered on the minutes, it is considered as only inchoate, and neither party can have any benefit from the decision.<sup>46</sup> A decree, however, is considered as entered from the time it is left with the Clerk for that purpose, although, from a press of business, it may not be actually copied into the minute-book for some days afterward. If the Chancellor should die, or resign, before a decree has been entered on the minutes, such a decree would be a nullity, and the cause would remain on the docket for trial, as though it had not been heard.<sup>47</sup>

§ 572. **When a Decree May be Changed.**—A decree is inchoate, and has no force whatever, until it has been entered on the minutes;<sup>48</sup> and even after it has been entered on the minutes, and the minutes signed, it is completely within the power of the Chancellor until the end of the term, unless the term continues longer than thirty days after the entry of the decree, and then until the end of thirty days.<sup>49</sup> During this period, the Chancellor may modify, amend, add to, subtract from, or make any other change in, the decree he may deem proper, and may even absolutely vacate it, and restore the cause to the docket; or he may vacate the decree and have one entered in favor of the other party.<sup>50</sup> These changes, or reversals, of the decree may be on the Chancellor's own motion, or on reargument or reconsideration, or on a formal rehearing on a petition filed for that purpose.<sup>51</sup>

#### ORDER VACATING A DECREE.

John Doe, }  
vs. } Order vacating decree.  
Richard Roe, et al. }

On motion of the defendants, supported by the affidavit of George Slow, their Solicitor, [or, for satisfactory reasons appearing to the Court, or, by consent of parties,] the decree pronounced in this cause on the.....day of....., 19.... [giving the date,] in favor of the complainant [or the defendants,] is hereby recalled, vacated and annulled, and the cause is reinstated on the trial docket, to be further proceeded in as though said decree had never been made.

The most usual matters in which decrees are amended before adjournment, are the following: (1) where there are miscalculations of amounts, or of interest; (2) where the costs have not been adjudged, or have been misjudged; (3) where there are errors, or omissions, in reference to the Master's report; (4) where there are errors, or omissions, in the recitals of the decree; (5) where

<sup>43</sup> The law does not recognize any order or decree made by the Chancellor, until it has been entered upon the minutes of the Court. The minutes are not invalidated by the failure of the Chancellor to sign them, because of death, sickness, or other reason. Moore v. State, 3 Heisk., 493; Jackson v. Jackson, 3 Shan. Cas., 18; Pickett v. State, MSS., Knoxville, 1906.

<sup>44</sup> The Chancellor may require the Solicitor objecting to the draft to make a draft of his own, or he may himself correct the decree, or draw the decree *de novo*.

<sup>45</sup> Ch. Rule, III, § 1; *post*, § 1192. A sheet of legal cap contains four pages, and a half sheet contains two pages. Many careless or penurious Solicitors write decrees on a part of a half sheet. This should not be allowed; it results in interlining, in crowding the margins, and in much illegibility for want of due space. Decrees written with a lead pencil should be deemed nullities, and the Master should be directed to return them. A Solicitor who does not deem the decree worthy of his care should dismiss his bill.

<sup>47</sup> Fraker v. Brazleton, 12 Lea, 278.

<sup>48</sup> 1 Barb. Ch. Pr., 341.

<sup>49</sup> Acts of 1885, ch. 65; Railroad v. Johnson, 16 Lea, 387.

<sup>50</sup> 2 Dan. Ch. Pr., 1018-1028. During the period stated in the text, the record of the Court, even though entered on the minutes, is said to be "in the breast of the Judge," and is absolutely under his control. State v. Disney, 5 Sneed, 598; Hall v. Bewley, 11 Hum., 105; Davis v. Jones, 3 Head, 604; Timmons v. Garrison, 4 Hum., 148; Abbott v. Faggs, 1 Heisk., 749; State v. Dalton, 1 Cates, 544.

<sup>51</sup> It may be (1) that the decree was pronounced without argument; or (2) under a misapprehension, by the Chancellor, of some admission or statement by counsel; or (3) that some allegation, or pleading, or proof, was overlooked or misunderstood; or (4) that the Chancellor was, in some way, misled; or (5) that for any other reason, injustice has been inadvertently done. While Chancellors should be far removed from instability of judgment; nevertheless, no sentiment of pride should stay their action, when justice requires that a decree be changed or

there are errors, or omissions, in the metes and bounds of a tract of land mentioned in the decree; (6) where there are blanks in the decree, to be filled by dates, names, amounts, or otherwise; (7) where the prayer for an appeal was not entered, or was misentered; and (8) where the decree was ordered to be entered *nunc pro tunc*, and it does not contain the order.

But after the lapse of the thirty days after its entry, or after the close of the term, the Chancellor's power to make any revision of a decree settling rights is forever ended,<sup>52</sup> except on a bill of review, or on a bill to impeach the decree for fraud, no matter how manifest and gross the error, nor how certain he may be of its existence.<sup>53</sup> The decrees of Fate are not more beyond his power of change. His right thereafter to rectify a decree, as shown in the next section, is rather clerical in its nature than judicial, such rectification not requiring any exercise of discretion, and not embracing any redetermination of any matter.<sup>54</sup>

An order or decree made by consent cannot be modified or varied, in an essential part, without the assent of all the consenting parties.<sup>55</sup> The Court may, however, upon the application of either party, give such further directions as shall become necessary for the purpose of carrying such order or decree into effect, according to its spirit and intent.<sup>56</sup>

An interlocutory order or decree that settles a principle, adjudges a right, or determines an issue, especially if made upon a hearing of the cause, is, after the lapse of thirty days, or after the adjournment of the term, as much beyond the power of the Court to change it as is a final decree;<sup>57</sup> but an interlocutory order or decree settling no rights, but merely ordering an injunction, or making a reference to the Master, or appointing a receiver, or giving directions to a receiver, or to the Master, or ordering a sale of property, or providing for the safe-keeping or other disposition of property in the custody of the Court, or ruling on motions in reference to proof, or other matters preparatory to a trial, may be set aside, overruled, or disregarded, at a subsequent term, provided such action does not take any party by surprise, or deprive any party of a vested right.<sup>58</sup>

§ 573. **When and How Decrees May be Amended.**—As already stated, decrees are entirely within the power of the Chancellor for thirty days, or during the term if it continue less than thirty days; and he may, during this period, make any changes in them he may deem necessary to the furtherance of justice.

After the expiration of said period, however, a decree cannot be in any way changed, except in the manner and to the extent provided by the statute. The

<sup>52</sup> And he has no more authority than any third person to make alterations and additions. *Kennedy v. Kennedy*, 13 Lea, 25. The instant he affixes his signature to the entry adjourning his Court to the next term that instant his power to make any changes in the record is forever gone.

<sup>53</sup> *Allen v. Barksdale*, 1 Head, 240. *Meek v. Mathis*, 1 Heisk., 536. *Berdanatti v. Sexton*, 2 Tenn. Ch., 702. The only remedies in case of such errors are: (1) an appeal, taken within the Chancellor's power to grant it; (2) a writ of error *coram nobis*; (3) a bill of review; (4) a writ of error; and (5) a bill to impeach the decree for fraud; the last four are filed after the lapse of said limit. When a decree is made it speaks for itself, and cannot be enlarged, restricted, or modified by parol proof. *Bank v. Memphis*, 23 Pick., 66.

<sup>54</sup> *Post*, § 573. And see *Elliot v. Cochran*, 1 Cold., 389; *State v. Bank*, 12 Pick., 591.

<sup>55</sup> In *Anderson v. Thompson*, 7 Lea, 259, a majority of the Supreme Court held that a final judgment of the Circuit Court could not be set aside at a subsequent term, and the pleadings amended by consent; but the dissenting opinions of Judges Freeman and Turney greatly weaken the force of the decision. *Consensus facit legem atque tollit errorem*.

<sup>56</sup> 1 Barb. Ch. Pr., 351; 2 Dan. Ch. Pr., 1030, note.

<sup>57</sup> *Grimstead v. Huggins*, 13 Lea, 728; *Allen v. Shanks*, 6 Pick., 359; *Vaccaro v. Cicalla*, 5 Pick., 163.

<sup>58</sup> There is some confusion in our Reports, and

some conflict between them and the text books, in regard to the power of a Court to change an interlocutory decree at a subsequent term. The general rule is, that a decretal or interlocutory order may, on final hearing, be altered, modified, or vacated. 2 Dan. Ch. Pr., 1371, note. Our Supreme Court, however, has frequently held exactly the reverse. *Johnson v. Hannah*, 2 Lea, 10; *Meek v. Mathis*, 1 Heisk., 536. There are, also, decisions in accordance with the general rule. *Morris v. Richardson*, 11 Hum., 389. See, also, *Franklin v. Franklin*, 2 Swan, 525; *Shaw v. Patterson*, 2 Tenn. Ch., 174; *Bank v. Bilbrey*, 3 Bax., 10. This confusion has grown out of the fact that, by various gradations, interlocutory decrees approach final decrees, until the line of distinction becomes imperceptible. 2 Dan. Ch. Pr., 986, note. Our cases may all be reconciled with themselves and with the text books by observing the distinction made in the text between the two kinds of interlocutory decrees; the kind that adjudicates no question raised by the pleadings and settles no rights, being subject to alteration or vacation at a subsequent term, or at the final hearing; and all other interlocutory orders and decrees being final in their nature and not subject to be changed at a subsequent term, thus conforming to the maxim of Bacon: *Sententia interlocutoria revocari potest, definitiva non potest*. But after all, if the Chancellor's final decree be right it will be affirmed by the Supreme Court, regardless of his errors in overruling interlocutory decrees. *Bank v. Bilbrey*, 3 Bax., 11; *Allen v. Shanks*, 6 Pick., 359.

Chancellor may, at any time within twelve months after final decree, and while the cause is still in his Court, amend any clerical error, mistake in the calculation of interest, or other mistake or omission in the decree, where there is sufficient matter apparent on the record, the papers in the cause, or entries by the presiding Chancellor, to amend by.<sup>59</sup> Every mistake, apparent on the face of the record, may be corrected by the Court at any time after final judgment, at the discretion of the Court.<sup>60</sup>

The party seeking to have a decree amended, after the cause has been finally disposed of, must give the opposite party ten days' notice of his intention to move the Court for a correction of the supposed mistake;<sup>61</sup> and, on the day specified in such notice, the motion should be entered on the minutes of the Court. If, at the hearing of the motion, the mistake complained of is apparent on the face of the record, the correction will be made as a matter of course;<sup>62</sup> if, however, the mistake is not apparent on the record, the party making the motion must be able to show the mistake by the papers in the cause, or by the entries of the Chancellor on his docket. The proof of the mistake must appear of record, or by some matter in the nature of a record, and parol evidence is absolutely inadmissible, no matter how strong, or how clear; and even when the evidence conforms to the requirements of the statute, it should be so conclusive as to leave no reasonable doubt,<sup>63</sup> (1) that the mistake or omission alleged in the notice actually exists, and (2) as to what correction should in fact be made.

§ 574. **The Revivor of Decrees.**—A decree continues in full force from the day it is made, until it is satisfied, or is barred by the statute of limitations; or until it is modified, vacated, reversed, or annulled, on proper proceedings for that purpose; and an execution, or other proper process, may issue on it at any time, as long as it is in force.<sup>64</sup> If the complainant die, it must be revived in the name of the person entitled to its benefits. If the defendant die, it must be revived against his successor in liability. If there are more defendants than one, and any of them die, leaving the co-defendant or co-defendants surviving, this will not debar the complainant from enforcing his decree by execution, or otherwise, against the survivor or survivors,<sup>65</sup> to the extent of their liability; or, he may, in such case, revive by *scire facias*, or by a bill of revivor, against those standing in the decedent's shoes.<sup>66</sup>

Decrees are revived by and against the same parties by and against whom the suit would have been revived had the decedent died before the decree was pronounced; and what has elsewhere been said about the revival of suits in case of death, applies in all respects to the revival of decrees in case of death; the rules as to the proper parties to revive or revive against being the same in both cases.

On a proceeding to revive a decree, whether by a bill of revivor, or by a *scire facias*, the defendant may plead and prove any fact that has transpired since the rendition of the decree that would bar the decree, or make it inequitable to revive it: he may plead the bar of the statute of limitations, a release, a payment, or any other matter that is a discharge, or satisfaction, of the decree.<sup>67</sup>

<sup>59</sup> Code, § 2877. What is here meant by the cause being still in Court, is that it has not been removed to the Supreme Court of the State by appeal, or writ of error, or to a U. S. Court in pursuance of some Federal statute. Dictating decrees to typewriters and stenographers causes many errors. See § 502.

<sup>60</sup> Code, § 2878. See 1 Barb. Ch. Pr., 349-352; 2 Dan. Ch. Pr., 1013; 1029-1032.

<sup>61</sup> Code, § 2879.

<sup>62</sup> It would seem that the proper way to make this amendment, or correction, would be, (1) to enter the proper order or decree on the minutes of the term at which the motion for the amendment or correction is made, and (2) to note on the margin of the decree amended or corrected, the fact and date of the amendment or correction, the Chancellor to

decree amended [corrected, or rectified,] August 25, 1890. See Minute Book O, page 246. A B, Chancellor." 1 Barb. Ch. Pr., 352; 2 Dan. Ch. Pr., 1031.

<sup>63</sup> The record is of such dignity and verity that nothing but the clearest statutory proof should be allowed to prevail against it—proof cogent enough to remove all doubt of the truth of the amendment sought to be made.

<sup>64</sup> Code, § 2987. Execution issued after the lapse of ten years will be quashed. *Cannon v. Laman*, 7 Lea, 513.

<sup>65</sup> Code, § 2988. For proceedings to revive, see Chapter on Abatement and Revivor.

<sup>66</sup> Bank v. Marr, 13 Lea, 108.

<sup>67</sup> A decree cannot be revived by *scire facias* after the lapse of ten years. *Rogers v. Hollings*.

ARTICLE III.

KINDS OF DECREES.

- § 575. Interlocutory Decrees.
- § 576. Final Decrees.
- § 577. Consent Decrees.

- § 578. *Nunc pro Tunc* Decrees.
- § 579. Supplemental Decrees.

§ 575. **Interlocutory Decrees.**—An interlocutory decree is one which expressly, or by necessary implication, reserves some particular matter or matters for further consideration, or reserves the further consideration of the cause generally until a future hearing.<sup>1</sup> All decrees which precede the final decree are interlocutory; a final decree being one which terminates the litigation, and from which an appeal will lie as a matter of right.<sup>2</sup> Any order or decree preparatory to a final decision of the cause is interlocutory.<sup>3</sup>

All decrees overruling motions to dismiss the bill, and overruling demurrers and pleas; all decrees referring matters to the Master for his action and report; all decrees remanding causes to the rules for further proof; all decrees determining exceptions to depositions and to reports; all decrees determining applications to amend, or file additional pleadings; all decrees ordering sales of land, or other property; all decrees allowing or disallowing motions of all kinds whatsoever; all decrees on preliminary matters, or matters preparatory for a hearing on the main issues; and all other decrees that expressly reserve matters for future consideration, are interlocutory decrees.<sup>4</sup>

§ 576. **Final Decrees.**—A final decree is one that (1) decides and disposes of the whole merits of the cause; and (2) reserves on its face no further questions, or directions, for the future judgment of the Court.<sup>5</sup> A final decree, as the term necessarily implies, puts an end to the litigation, leaving none of the issues open for further consideration, or action; and this it may do, (1) by dismissing the bill, or (2) by granting the relief prayed, in whole or in part, and, (3) in either case, adjudging the costs, and awarding final process. A decree may be final without being complete. A complete final decree determines every question properly raised by the pleadings, and leaves no roots of the subject-matter of the litigation, out of which other controversies can arise: it finally and forever closes and bars the doors against any reopening of the matters in dispute, and concludes and ends the controversy. A decree which, though not complete, is final in its nature, reserves nothing for the further action of the Court, adjudges costs, and awards final process, is nevertheless a final decree. When only a part of the relief prayed is granted, or only a part of the issues are determined, and the decree, though final, is silent as to the residue, the effect is the same as though the bill had been expressly dismissed as to the residue of the relief sought, and as though the issues undecided had been expressly adjudged against the party maintaining the affirmative thereof. But a decree is not final which leaves matters undisposed of as to one or more of the defendants.<sup>6</sup>

<sup>1</sup> 2 Dan. Ch. Pr., 986, note. Whether a decree is final, or interlocutory, is to be determined by its subject-matter and substantial purport. Code, § 2971.

<sup>2</sup> See, *post*, § 576. The reader of this book must always keep in mind the fact that the purpose of the author is to give the practice in Tennessee, and not the general practice elsewhere.

<sup>3</sup> Delap v. Hunter, 1 Sneed, 101; 1 Barb. Ch. Pr., 326.

<sup>4</sup> 2 Dan. Ch. Pr., 986. In strictness, all final decrees are interlocutory until the term ends, or thirty days elapse; for until then they may be

changed, or set aside. Gilb. For. Rom., 183; 2 Dan. Ch. Pr., 1019.

<sup>5</sup> Pond v. Trigg, 5 Heisk., 539; 2 Dan. Ch. Pr., 993, note. A decree is final even when (1) it fails to adjudge the costs; Brown v. Wright, 1 Ch. Apps., 160; or (2) fails to award an execution in a case of money recovery. Hyder v. Butler, 19 Pick., 289. The law adjudges the costs in the former case against the losing party, and in the latter case awards an execution. *Ibid*.

<sup>6</sup> Lang v. Ingalls Zinc Co., 15 Pick., 476; Bank v. Matson, 11 Pick., 632.

In our practice, a decree which determines the principles involved in the controversy, and (1) orders an account, or (2) a sale, or (3) a partition, is not a final decree;<sup>7</sup> and cannot, therefore, be appealed from without leave of the Court; and cannot be reviewed at all on a writ of error.<sup>8</sup>

A decree dismissing a bill upon its merits is final and conclusive until reversed, and may be pleaded in bar to a second bill for the same relief on the same subject-matter, between the same parties, unless the decree of dismissal shows on its face that the dismissal is without prejudice to complainant's right to file another bill.<sup>9</sup>

A decree may be final as to one party, and not final as to the other: thus, a decree determining the controversy as to one of the defendants, whose interests are not connected with the others, and adjudging the costs as to him, is a final decree;<sup>10</sup> and from such a decree, the Chancellor may, in his discretion, allow an appeal.<sup>11</sup>

A final decree may, however, be changed, or overruled and vacated, by the Chancellor, even after it has been entered and the minutes of the day signed, provided such change, or vacation, is made within thirty days from the decree, if the term holds so long, otherwise, before the adjournment of the term. After the lapse of said period of thirty days, or after the adjournment of the term, the decree becomes strictly final, and passes beyond the control of the Court,<sup>12</sup> and can only be changed, or overruled, (1) by the Chancellor, upon a bill of review, or a bill to impeach the decree for fraud, or (2) by the Supreme Court, on appeal or writ of error. Decrees in our Chancery Courts are not enrolled in the English sense, but with us a decree is deemed to be enrolled as soon as the Chancellor's right to change it has terminated.

§ 577. **Consent Decrees.**—A decree is frequently made by consent of parties. In such a case, the Court does not inquire into the merits or equities of the decree, nor whether it is sustained by the pleadings.<sup>13</sup> The only questions for the Court to determine are: (1) Are the parties capable of binding themselves by consent; and (2) whether they have consented, or do now consent, to the proposed decree. These two facts appearing, the Court orders the decree to be entered, provided that it shows upon its face that it is a consent decree. If it does not so show upon its face, it is not a consent decree, even though in fact it was consented to; but it is a decree of the Court *in invitum*, and subject to all the remedies for its correction allowable in case of contested decrees.

A decree by consent is in the nature of a solemn contract; and is, in effect, an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. As a result, such a decree is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended, or in any way varied, without a like consent, nor can it be reheard, appealed from, or reviewed upon a writ of error.<sup>14</sup> The one only way in which it can be attacked, or impeached, is by an original bill alleging fraud in securing the consent.<sup>15</sup>

Where, however, a decree is based upon a writing authorizing a particular decree to be made, or otherwise adjusting the controversy, if the decree is not justified by such writing, to that extent it is erroneous, and may, therefore, be reheard, appealed from, or otherwise reviewed, as in case of a contested decree: or the Court may, on motion, amend or rectify the decree.<sup>16</sup>

<sup>7</sup> Code, § 3157. This statute changed the former rule of the Court as to what constitutes a final decree; and the decisions of our Courts prior to the Code are apt to mislead. Abbott v. Fagg, 1 Heisk., 742.

<sup>8</sup> Gibson v. Widener, 1 Pick., 16; Barton v. Turley, 11 Lea, 600; Terrell v. Ingersoll, 10 Lea, 77.

<sup>9</sup> 2 Dan. Ch. Pr., 994. As to when a bill will be dismissed without prejudice, see, *ante*, § 570.

<sup>10</sup> 1 Barb. Ch. Pr., 331.

<sup>11</sup> Code, § 3157.

<sup>12</sup> Acts of 1885, ch. 65: Railroad v. Johnson. 16

Osment, 24 Pick., 32; Bigley v. Watson, 14 Pick., 353.

<sup>14</sup> Williams v. Neil, 4 Heisk., 279; Jones v. Williamson, 5 Cold., 371; Boyce v. Stanton, 15 Lea, 346.

<sup>15</sup> 1 Barb. Ch. Pr., 373; 2 Dan. Ch. Pr., 974; 1460, notes. In case of consent decrees the following maxims apply: (1) *Conventio vincit legem*; (2) *Volenti non fit injuria*; (3) *Consensus tollit errorem*. Musgrove v. Lusk, 3 Tenn. Ch., 580. The statute provides for an appeal only when a party is "dissatisfied with a decree;" and a party cannot be dissatisfied with a decree that he consents to, if *sub iudice*. Code

The Court will not, ordinarily, make a decree by consent where infants are concerned, without referring it to the Master to inquire whether it be for their benefit; yet, if such a decree is made, the infants will be bound by it.<sup>17</sup> The consent of counsel to a decree is to be given upon their own conception of their authority; and if their client is injured by such consent, his remedy is against his counsel, unless his counsel's consent was procured by fraud.<sup>18</sup>

A decree for an absolute or limited divorce cannot be entered by consent; but a decree for alimony may be.

A mere *pro forma* decree should not be allowed to be entered, and if entered will be dismissed in the Supreme Court, regardless of its merits.<sup>19</sup>

§ 578. **Nunc Pro Tunc Decrees.**—Ordinarily, there is nothing to be gained by having a decree dated on the very day the cause was heard, or the Chancellor's opinion delivered; and for this reason, decrees usually bear even date with the minutes of the Court in which they are entered. But parties have the right to have the decree entered as of the date of the hearing, and when the delay of the Chancellor in deciding the cause after the hearing, or the delay of counsel, or the Clerk, in drawing or entering the decree after the decision, works an injury to any party, and especially to the winning party, the Court will, on application by the party interested, order the decree to bear even date with the hearing, or with the decision, as the party in interest may elect. Such a decree is said to be entered *nunc pro tunc*.<sup>20</sup>

Decrees *nunc pro tunc* are often entered in the following cases: 1, Where either party died after the hearing, and before the decree is entered;<sup>21</sup> 2, Where, after decision made, and before decree entered, the defendant made a conveyance of his realty; 3, Where a report, or a sale, has been made by a Master or a Special Commissioner, or a partition has been made by Commissioners, and the decree ordering the same has not been entered: in such a case, an entry *nunc pro tunc* will relate back to the time the decree was made, and will make valid the intermediate proceedings authorized by the decree; and 4, Where, in any case, the act of the Chancellor after the hearing, or the conduct of opposite counsel, or the neglect of the Clerk, has resulted in delaying the entry of a decree, and the delay may injuriously affect any of the parties, it is the duty of the Court, on application of such party, to have such decree entered as of its proper date;<sup>22</sup> and it is no ground for refusing such application, that the rights of third parties will be injuriously affected thereby.<sup>23</sup> The usual formula in case of *nunc pro tunc* decrees is: "*This decree was made on the* (naming the day the cause was heard), *and is entered now for then, by order of the Court.*"

A *nunc pro tunc* order or decree ought not to be entered except upon the clearest evidence, such as (1) the distinct recollection of the presiding Chancellor: or, (2) some memorandum by him, or by the Clerk and Master; or, (3) the agreement of counsel.<sup>24</sup> To justify a *nunc pro tunc* order or entry, at a subsequent term, there must be some matter in the nature of a record to base it upon, such as (1) a decree actually drawn at the time, but, by mistake, not entered; or, (2) an entry on the Chancellor's docket; or (3) a memorandum, or opinion in writing, by the Chancellor.<sup>25</sup>

Courts can make their records speak the truth as to things done; and should do so by entries *nunc pro tunc*, even after an appeal has been prayed and granted.<sup>26</sup> But after the jurisdiction of the Court over the cause is lost, no

<sup>17</sup> 1 Barb. Ch. Pr., 373; 2 Dan. Ch. Pr., 975; *Musgrove v. Lusk*, 2 Tenn. Ch., 576; *Milly v. Harrison*, 7 Cold., 199. The Court should look closely into such decrees, and see that they do not prejudice the infant. *Ibid.*

<sup>18</sup> 1 Barb. Ch. Pr., 374; 2 Dan. Ch. Pr., 575.

<sup>19</sup> *Ward v. Alsip*, 16 Pick., 738.

<sup>20</sup> *Freem. on Judgts.*, §§ 56-58; *Sto. E. Pl.*, § 363, note.

<sup>21</sup> *McLean v. State*, 8 Heisk., 288; *Mayfield v. Stephenson*, 6 Bax., 403.

<sup>22</sup> *Freem. on Judgts.*, §§ 56-58; *Davis v. Jones*, 3 Head, 603. *Actus Curie neminem gravabit.*

<sup>23</sup> 2 Dan. Ch. Pr., 1017, note.

<sup>24</sup> *Shea v. Mabry*, 1 Lea, 319; *Carter v. McBroom*, 1 Pick., 377. See *Kearney v. Jackson*, 1 Yerg., 295.

<sup>25</sup> *McGavock v. Puryear*, 6 Cold., 34; *Farris v. Kilpatrick*, 1 Hum., 379; *Newland v. Gaines*, 1 Heisk., 720; *M. & O. R. v. Dowd*, 9 Heisk., 179.

<sup>26</sup> *Davis v. Jones*, 3 Head, 603; *Pond v. Trigg*, 5 Heisk., 536; *Newland v. Gaines*, 1 Heisk., 720.

*nunc pro tunc* order can be made,<sup>27</sup> without a petition, and notice to parties adversely interested. Such a petition may be filed by a third party interested in the decree.<sup>28</sup>

§ 579. **Supplemental Decrees.**—It frequently happens that, after all the issues raised by the pleadings have been determined, or after a final decree on the merits of the controversy, either dismissing the bill or granting relief, some further order or decree is necessary in order to completely adjust all the matters incidental to the litigation. Thus, 1, The defendant may be entitled to a reference and decree on the question of damages, when an attachment or injunction bill is dismissed; or 2, It may be necessary to take judgment on purchase-money notes, executed to the Master or Special Commissioner, or to resell the land in enforcement of the lien for purchase-money; or 3, It may be necessary to make orders and decrees relative to settlements with receivers, and to take judgment on their bonds; or 4, It may be necessary to make orders in reference to calling in loaned money, or in reference to loaning out money; or 5, Questions may arise as to the proper distribution of funds in the hands of the Master; or 6, An order of sale may be necessary in consequence of a levy on land too late to make a sale;<sup>29</sup> or 7, It may be necessary to revive a decree; or 8, To set aside the satisfaction of a decree;<sup>30</sup> or, 9, To substitute a surety, or a purchaser, to the rights of a complainant under a decree;<sup>31</sup> or 10, It may be necessary to attach a party for violation of a perpetual injunction; or 11, To make some other order in enforcement or execution of a final decree, or in adjustment of the consequential rights or duties of parties, or officers of the Court, thereunder. Inasmuch as the foregoing orders and decrees are supplemental in their nature and office, they are denominated supplemental orders and decrees.<sup>32</sup>

#### ARTICLE IV.

##### PRACTICAL SUGGESTIONS AS TO DECREES.

§ 580. Suggestions as to the Substance of Decrees. | § 581. Suggestions as to the Writing and Entry of Decrees.

§ 580. **Suggestions as to the Substance of Decrees.**—In the first place, be sure that your decree is supported by the pleadings, and that it is both a logical and a legal deduction from the pleadings. In drawing your decree, keep in mind the following particulars:

1. If there are defendants under disability of infancy or mental unsoundness, recite in your decree the fact that the cause was heard on the pleadings, including their answers by regular guardian, or guardian *ad litem*.

2. If any defendant has been *pro confessoed* at rules, recite that fact in the decree.

3. If any oral agreements were made at the hearing, incorporate them in the decree; otherwise, you will lose their benefit if the case should go to the Supreme Court.

4. If you excepted to any evidence at the hearing, show those exceptions in the decree, or in writing, authenticated by the Chancellor, or in a bill of exceptions, or you will lose the benefit of them in the Supreme Court.<sup>1</sup>

<sup>27</sup> *Staggs v. State*, 3 Hum., 372; *Hill v. Bowers*, 4 Heisk., 272.

<sup>28</sup> *Rush v. Rush*, 13 Pick., 279. In this case a *nunc pro tunc* divorce decree was entered at a subsequent term on petition of a stranger injured by the non-entry of the decree, the party divorced having died. The Judge's docket contained these words:

<sup>29</sup> *Pond v. Trieg*, 5 Heisk., 532.

<sup>30</sup> Code, § 2990, amended by the Acts of 1875, ch. 33.

<sup>31</sup> Code, §§ 2994-2996.

<sup>32</sup> See, *ante*, § 566, note 31, on "leave to apply."

<sup>1</sup> See, *ante*, § 538.

5. If you excepted to any ruling, or order, of the Court made at the hearing, incorporate that fact in the decree, and file a bill of exceptions, if necessary, to show all the facts.

6. If your client has obtained a money recovery, state the amount thereof in words; and do not, in your haste, express the amount in figures only. Figures are too easily changed, and too liable to be misunderstood. You may use both words and figures.

7. If the decree directs a sale of land, or removes a cloud, or transfers the possession or title of land, or adjudicates the title, describe the land by metes and bounds in the decree. This will then be a permanent record of title, whereas the file may get lost.

8. If the decree affects the title to land, or affects other important matters, give the names of all the defendants in the body of the decree. The pleadings may get lost.

9. Always see that proper final process is awarded. If your client is adjudged the possession of any property, do not fail to have a writ of possession awarded. If you are entitled to a perpetual injunction, have it so decreed. See that your decree awards an execution for the costs.

10. If the decree is not satisfactory, pray an appeal, even in cases where an appeal will not lie as a matter of right. Such a prayer, when disallowed, may improve your standing when the case finally gets into the Supreme Court: it will be evidence that you did not willingly submit to the decree.

11. If you are allowed an appeal, and are unable to get your bill of exceptions, if any, made out, signed and filed, be sure to get an extension of time, and then be sure to file it within such extension.

12. Do not fail to dispose of any fund in Court, or in the hands of a Receiver; or to make an injunction, if any, perpetual, in a proper case; or to order attached property to be sold as such, if any.

13. If the decree be final and in your favor have the costs adjudged, final process awarded, and a lien declared in your favor on the recovery.

§ 581. **Suggestions as to the Writing and Entry of Decrees.**—In drawing decrees, the following matters are worthy of consideration:

1. Write your decrees in ink, on legal cap paper, never using less than half a sheet (two full pages) of paper.

2. Divide your decree into paragraphs, as elsewhere shown, and number your paragraphs. If the decree directs a reference to the Master, paragraph and number the matters referred.

3. Take pains and due deliberation in drawing your decree; avoid interlineations, erasures and other alterations. Consult and follow the forms given in the books; and do not rely on your own skill until you have become an expert draftsman.

4. Present your decrees in open Court, in due season, first showing them to adverse counsel, if practicable.

5. Never allow the minutes of a term to be closed without being sure that your orders and decrees have all been duly entered.



## CHAPTER XXIX.

## DECREES AS TO COSTS.

## ARTICLE I. Costs Generally Considered.

## ARTICLE II. The Adjudication of Costs.

## ARTICLE I.

## COSTS GENERALLY CONSIDERED.

§ 582. What are Costs.

§ 583. General Rules as to the Taxation of Costs.

§ 584. Statutory Requirements as to Costs.

§ 585. Taxation, and Retaxation, of Costs.

§ 582. **What are Costs.**—Costs are the expenses incident to a suit; and consist (1) of the fees and postage<sup>1</sup> allowed by the statute to the officers of the Court for various specified acts and services connected with a procedure in Court; (2) of the fees, mileage and ferriage allowed witnesses in the cause; (3) of necessary fees paid by the successful party for copies of deeds, bonds, wills, or other records, filed as part of the testimony;<sup>2</sup> (4) of the expenses necessarily incurred, and allowed by the Court, in the progress of a cause, such as expenses for protecting or preserving property, for making surveys and plats, and for advertising property; (5) of the expenses incident to a receivership, or to a sequestration; and (6) of counsel and guardian *ad litem* fees.

§ 583. **General Rules as to Taxation of Costs.**—Costs in Chancery, except as hereinafter shown, are taxed against such party, or parties, as the Court, in its discretion, may deem equitably liable therefor, in view of all the circumstances of the suit.<sup>3</sup> The discretion exercised by the Court in adjudging costs is not an arbitrary, capricious, blind discretion, but an equitable discretion, resulting from a consideration of the entire case, and all its circumstances, and the situation and conduct of the parties, in connection with the principles and practice in reference to the taxation of costs that have been acted on in analogous cases.<sup>4</sup>

The discretion of the Court in adjudging costs is subject to review in the Supreme Court;<sup>5</sup> but will not be reversed except in case of clear abuse.<sup>6</sup>

As a rule, costs follow the result of the suit;<sup>7</sup> but this is because, as a rule, it is equitable that they should. This rule is seldom departed from, except when it would be inequitable to follow it. Parties, though unsuccessful, are sometimes exonerated from costs, because of their good conduct, or some Equity; and on the other hand, successful parties are sometimes taxed with costs, because of their bad conduct.<sup>8</sup> A complainant may be entitled to the relief he prays, and yet be guilty of some conduct connected with the suit, or the

<sup>1</sup> Code, § 3207.

<sup>2</sup> Code, § 3206.

<sup>3</sup> Code, § 4493; 2 Dan. Ch. Pr., 1376. And the prosecution surety may be held liable, even though his principal is successful. *Allison v. Stephens*, 2 Head, 251; *Ogg v. Leinart*, 1 Heisk., 40.

<sup>4</sup> *Clark v. Clark*, 4 Hay., 36. *Perkins v. McGavock*, 3 Hay., 255. 2 Barb. Ch. Pr., 322. Discretion here does not mean an arbitrary discretion, but a sound and reasonable discretion, *secundum arbitrium boni judicis*. 1 Sto. Eq. Jur., § 693. Whoever hath power to act at discretion is bound by the rule of

*per legem quid sit justum.* (Discretion is to discern by aid of the law what is just.)

<sup>5</sup> *Snapp v. Purcell*, 13 Lea, 693.

<sup>6</sup> *State v. Lewis*, 10 Lea, 168; *Grosvenor v. Bethel*, 9 Pick., 577; *Tyler v. Walker*, 17 Pick., 306.

<sup>7</sup> *Raht v. Mining Co.*, 5 Lea, 79. *Ubi damna dantur victis victori in expensis condemnari debet.* Civil Law. And if a final decree fail to adjudge the costs the law adjudges them against the losing party. *Brown v. Wright*, 1 Ch. Appa., 160.

<sup>8</sup> 2 Dan. Ch. Pr., 1397; *Hunter v. Gardenhire*, 13 Lea, 658; *Durant v. Davis*, 10 Heisk., 524.

subject-matter, that offends the conscience of the Court; and so, a defendant may lose a suit, and yet commend himself to the favor of a conscientious Chancellor; in such cases, the Court will adjudge the costs so as to meet the requirements of Equity, and conform to the practice of the Court in such matters.<sup>9</sup>

§ 584. **Statutory Requirements as to Costs.**—The following are statutory exceptions to the rule that the taxation of costs is discretionary with the Court:

1. When a complainant amends his bill after copy issued, he must pay all the costs occasioned thereby.

2. When a defendant's answer is excepted to for insufficiency, and he files a sufficient answer within a month on a rule so requiring, he will not be liable to costs; but if he fail so to do, no further answer shall be received except upon costs.

3. The unsuccessful party must pay the other three dollars when a plea, or demurrer, or an exception to an answer, is overruled or allowed.<sup>10</sup>

4. The complainant must pay the costs when his bill is dismissed for want of prosecution.<sup>11</sup>

5. The applicant in a suit to have dower assigned must pay the costs.<sup>12</sup>

6. The complainant, who fails to set aside a conveyance alleged to be fraudulent, must pay all the costs except those incident to the taking of judgment on his claim, if he obtain such judgment.<sup>13</sup>

7. A female in whose favor a divorce decree is made cannot be taxed with the costs.<sup>14</sup>

8. The Chancery Courts will follow the law of the Circuit Courts in the taxation of costs in analogous cases. Thus, (1) in case of the abatement of a suit by the death of the complainant, the defendant will be considered the successful party;<sup>15</sup> and (2) when a defendant fails on a pleading to the merits previously filed, but succeeds on a pleading in the nature of a plea since the last continuance, he will, ordinarily, be taxed with the costs which accrued previous to the filing of his last pleading, whether such pleading be a supplemental answer, or a cross bill.<sup>16</sup>

§ 585. **Taxation, and Retaxation, of Costs.**—The Clerk and Master makes out the bill of costs, after they have been adjudged by the Court. The defendants against whom judgment has been recovered, are entitled, as between themselves, to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the defendants, and inured exclusively to his benefit.<sup>17</sup>

Costs omitted in taxing the bill of costs may be retaxed, at any time, upon application to the Court; but if the judgment for costs has been paid, the party against whom the retaxation is asked, shall have five days' notice of the application. If the taxation of costs be excessive, by charging the costs of witnesses who were not examined, or by charging costs to an improper party, or taxing costs contrary to law, or the taxation is otherwise erroneous, the party aggrieved may move the Court for a retaxation, setting forth the particulars in which the Clerk has erred.<sup>18</sup>

Not more than two witnesses called to prove the same fact shall be taxed in any bill of costs against the losing party, except in case of witnesses called to attack or sustain the character of a witness or party. If more than the number of witnesses allowed are examined in proof of any particular fact, a motion

<sup>9</sup> See next Article for a fuller treatment of this subject, §§ 587-593.

<sup>10</sup> Code, §§ 4492; 4405; 4397.

<sup>11</sup> Code, § 4494.

<sup>12</sup> Code, § 2418.

<sup>13</sup> Code, § 4292.

<sup>14</sup> Code, § 2477.

<sup>15</sup> Code, § 3201.

<sup>16</sup> Code, § 3208.

<sup>17</sup> Code, § 3210. The decree is for costs, generally, their taxation in detail being left to the Clerk. If the Clerk mistax the costs, the Court, on proper

application, will retax them. *State, ex rel., v. Alexander*, 7 Cates, 156.

<sup>18</sup> Code, § 3211-3212. A motion to retax costs is in the nature of a bill to surcharge and falsify, and should put its finger on every error of commission, and specify every omission.

If the fact that costs have been mistaxed against a party comes to his knowledge after the Court has adjourned he may have the execution stayed as to the errors complained of, on presenting a petition to the Chancellor at Chambers, and have an adjudication thereon at the next term.

should be made at the term at which the cause is tried, and the Court will instruct the Clerk as to the taxation of costs: such motion can not be made afterwards, without good cause shown.<sup>19</sup>

The losing party may move the Court at the trial term, to direct the Clerk as to how disputed costs should be taxed; or how costs should be taxed as between parties, when several of them are made variously liable for the costs.

## ARTICLE II.

### THE ADJUDICATION OF COSTS.

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| <p>§ 586. The Adjudication of Costs Generally Considered.</p> <p>§ 587. When a Successful Complainant May be Taxed With Costs.</p> <p>§ 588. When a Successful Defendant Will be Taxed With Costs.</p> <p>§ 589. When Each Party Must Pay His Own Costs.</p> | <p>§ 590. When the Costs Will be Apportioned.</p> <p>§ 591. When Administrators, Guardians, and Other Trustees, Will be Taxed With Costs.</p> <p>§ 592. Costs on Interlocutory Proceedings.</p> <p>§ 593. When Costs Will be Paid Out of the Fund.</p> |
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§ 586. **The Adjudication of Costs Generally Considered.**—By both the civil and the common law the unsuccessful party was taxed with the costs of the litigation;<sup>1</sup> and by our Code, the successful party in a civil suit at law is entitled to full costs unless otherwise directed by law;<sup>2</sup> but in the Chancery Court, both by usage<sup>3</sup> and by statute,<sup>4</sup> costs are adjudged according to the discretion of the Court, as hereinafter shown. Nevertheless, even in Chancery, as a rule the unsuccessful party pays the costs;<sup>5</sup> and, if a decree otherwise final fails to adjudge the costs, the law adjudges them against the losing party,<sup>6</sup> and awards an execution therefor if there be a money recovery.<sup>7</sup>

§ 587. **When a Successful Complainant May be Taxed With Costs.**—It is not enough that a complainant obtains a decree: he must, also, be without fault, if he would escape costs. And so a complainant may be successful and without fault, and yet the defendant may, also, be wholly without fault, in which case it would be manifestly inequitable to burden the latter with all the costs of a suit instituted for the complainant's benefit.

The following are cases where the complainant, though successful, may be charged with the costs, if the defendant be free from wrong: 1, In a suit by complainant to quiet his title, defendants claiming nothing;<sup>8</sup> 2, Where the defendant is a mere stake-holder; 3, Where the complainant seeks to redeem after mortgage forfeited; 4, Where a full tender was made before suit; 5, Where the defendant is administrator or executor without assets, and the complainant knew that fact;<sup>9</sup> 6, Where the defendants are heirs, claiming nothing, and especially if they are minors;<sup>8</sup> 7, Where an infant on attaining majority sues to have his deed set aside, the defendant being guilty of no fraud;<sup>10</sup> 8, Where a married woman takes advantage of her coverture and recovers, the defendant having done nothing inequitable;<sup>11</sup> 9, Where a vendor compels a specific performance, but had not shown a good title before suit;<sup>12</sup> 10, Where a widow seeks an assignment of dower;<sup>13</sup> 11, Where complainant was greatly in fault, but the strict law was in his favor; 12, Where complainant has obtained a bar-

<sup>19</sup> Code, §§ 3213-3214.

<sup>1</sup> 2 Dan. Ch. Pr., 1376; 1381.

<sup>2</sup> Code, § 3197.

<sup>3</sup> 2 Dan. Ch. Pr., 1376.

<sup>4</sup> Code, § 4493.

<sup>5</sup> Raht v. Mining Co., 5 Lea, 79.

<sup>8</sup> *Armstrong v. Douglass*, 5 Pick., 230; *Patton v. Dixon*, 21 Pick., 97.

<sup>9</sup> 2 Dan. Ch. Pr., 1381-1400.

<sup>10</sup> *Barker v. Wilson*, 4 Heisk., 271.

<sup>11</sup> *Durant v. Davis*, 10 Heisk., 524.

<sup>12</sup> *Adams Eq.*, 389.

gain oppressive to the defendant; 13, Where the complainant recovers, but claimed greatly too much;<sup>14</sup> 14, Where the defendant offered a reasonable settlement before suit;<sup>15</sup> and 15, Where a complainant has been guilty of *laches*,<sup>16</sup> or his mistake caused the suit;<sup>17</sup> 16, Where he filed an original bill when he could have obtained the same relief by cross bill in a pending suit;<sup>18</sup> 17, Where he brought an unnecessary foreclosure suit;<sup>19</sup> 18, Where his own misconduct necessitated the suit;<sup>20</sup> and 19, Where his recovery is less than fifty dollars.<sup>21</sup>

In almost all cases where the complainant obtains relief and the defendant is insolvent, the Court will require the complainant to pay the costs due the officers of the Court, and his own witnesses, in the first instance; and give him a judgment over against the defendant for such costs.

§ 588. **When a Successful Defendant Will be Taxed With Costs.**—A defendant not unfrequently is guilty of such unconscientious conduct in connection with the litigation, that, though successful, it would be inequitable to burden the complainant with the costs.

The following are cases where the defendant, though successful, should be charged with the costs: 1, Where as administrator, executor, guardian, or trustee, he failed to file proper inventories, or make the settlements required by law, in consequence whereof suit was brought for an account;<sup>22</sup> 2, Where the suit was caused by the defendant falsely claiming to be heir, executor, partner, or the like;<sup>23</sup> 3, Where, in a divorce case, his conduct was very improper;<sup>24</sup> 4, Where a suit for specific performance was dismissed, because the defendant had no title;<sup>25</sup> 5, Where his vacillating conduct caused, or prolonged, the litigation, he obtaining benefits once informally renounced;<sup>26</sup> 6, Where his negligence, or mistake of law, caused the litigation;<sup>27</sup> 7, Where he succeeds on the plea of bankruptcy;<sup>28</sup> or 8, on the defence of former adjudication set up in his answer, but without merits;<sup>29</sup> or 9, Where his defence was technical, and without merits;<sup>40</sup> 10, Where he introduced an unnecessary amount of testimony;<sup>31</sup> 11, Where he succeeded on a cross bill, but his negligence caused the litigation;<sup>32</sup> or 12, Where, as agent, his misconduct caused the suit.<sup>33</sup>

§ 589. **When Each Party Must Pay His Own Costs.**—There are cases where the Court will make each party pay his own costs, most of them being cases where both parties are equally at fault, or equally without fault, or where the defendant succeeds, but without merits. In the following cases each party should pay his own costs: 1, Where the suit is adjusted out of Court, the defendant obtaining set-offs or reductions, and the costs not being disposed of;<sup>34</sup> 2, Where complainant failed because of his misunderstanding of the contract, but without fault on his part;<sup>35</sup> 3, Where, in a doubtful case, the complainant, though successful, refused a fair offer of adjustment; 4, Where both parties are at fault;<sup>36</sup> or 5, are equally innocent;<sup>37</sup> 6, Where the suit is caused by the misconduct of a third person, both parties being without fault;<sup>38</sup> 7, Where the defendant succeeds, but without merits of his own;<sup>39</sup> 8, Where, in consequence of the peculiar hardship of the case, the unsuccessful party should

<sup>14</sup> 2 Dan. Ch. Pr., 1398-1399.

<sup>15</sup> 2 Dan. Ch. Pr., 1394-1396; Coal Creek, M. & M. Co. v. Moses, 15 Lea 311; Perkins v. McGavock, 3 Hay., 257.

<sup>16</sup> 2 Dan. Ch. Pr., 1398; Bracken v. Martin, 3 Yerg., 55.

<sup>17</sup> Helm v. Wright, 2 Hum., 72.

<sup>18</sup> Parker v. Britt., 4 Heisk., 243.

<sup>19</sup> Clark v. Jones, 9 Pick., 639.

<sup>20</sup> Huffman v. Huffman, 1 Lea, 497.

<sup>21</sup> Smets v. Williams, 4 Paige, (N. Y.) 364.

<sup>22</sup> 2 Dan. Ch. Pr., 1416-1417.

<sup>23</sup> Adams Eq., 389; 2 Dan. Ch. Pr., 1405; Pigue v. Young, 1 Pick., 263.

<sup>24</sup> Shell v. Shell, 2 Sneed, 729.

<sup>25</sup> Adams Eq., 389.

<sup>26</sup> Gentry v. Gentry, 1 Sneed, 87.

<sup>27</sup> Fraker v. Brazleton, 12 Lea, 281; Wray v. Williams, 2 Yerg., 302.

<sup>28</sup> Payne v. Beech, 2 Tenn. Ch., 711.

<sup>29</sup> Arnold v. Kyle, 8 Bax., 319.

<sup>30</sup> McKoin v. Cooley, 3 Hum., 561.

<sup>31</sup> Lassater v. Garrett, 4 Bax., 375.

<sup>32</sup> Crank v. Flowers, 4 Heisk., 638.

<sup>33</sup> Ray v. Haag, 1 Ch. Apps., 249.

<sup>34</sup> Eastburn v. Kirk, 2 John. Ch., 317; 1 Dan. Ch. Pr., 795; 2 *Ibid.*, 1382.

<sup>35</sup> 2 Dan. Ch. Pr., 1398.

<sup>36</sup> Knuckolls v. Lea, 10 Hum., 577.

<sup>37</sup> 2 Dan. Ch. Pr., 1400-1402; Hicks v. Porter, 6 Pick., 1.

<sup>38</sup> Penuleton v. Eaton, 3 John. Ch., 69.

<sup>39</sup> Peck v. Peck, 9 Yerg., 305; Nicoll v. Trustees, 1 John. Ch., 166; Finley v. Gant, 8 Bax., 115.

be relieved from part of the costs;<sup>40</sup> 9, Where the defendant succeeds on the ground that the complainant participated in the inequitable conduct he complains of;<sup>41</sup> 10, Where proof is very conflicting, but no satisfactory preponderance in favor of the complainant;<sup>42</sup> and 11, Where a cause is remanded by the Supreme Court for proof of complainant's corporate character.<sup>43</sup>

§ 590. **When the Costs Will be Apportioned.**—There are cases where it would be hardly equitable to onerate either party with all the costs, and yet where it would not be equitable to onerate one of the parties with all of his own costs. In such cases the Court apportions the costs. The following are cases where costs are ordinarily apportioned: 1, Where there are several issues, or claims, and the complainant fails on some, and succeeds on others;<sup>44</sup> 2, Where the complainant fails to maintain some alleged equities; 3, Where the suit was brought for an account and sustained;<sup>45</sup> 4, Where the complainant fails to prove an alleged fraudulent conveyance, but establishes his debt;<sup>46</sup> 5, Where the defendant answered when he might have ended the suit by demurrer, or plea, and thereby saved costs and delay;<sup>47</sup> 6, Where the complainant fails, but was deceived by the defendant's conduct;<sup>48</sup> 7, Where the complainant obtains a decree, but made unfounded charges of fraud;<sup>49</sup> 8, Where the bill is dismissed because both parties are guilty of iniquity;<sup>49a</sup> 9, Where the complainant succeeds, but was negligent of matters affecting the interests of the defendant, who was an innocent sufferer in the transaction;<sup>50</sup> 10, Where a complainant succeeds but could have obtained the same relief by cross bill in another cause;<sup>51</sup> 11, Where none of the parties have merits;<sup>52</sup> and 12, Where they are apportioned among the parties in proportion to their respective interests.<sup>53</sup>

§ 591. **When Administrators, Executors, Guardians and Other Trustees, and Officers, Will be Taxed With Costs.**—It is manifestly inequitable that an innocent person should suffer because of the negligence, fraud or other misconduct of another, especially if the latter is charged with the duty of caring for the interests of the former. For this reason, Courts charge executors, administrators, guardians and other trustees, personally with the costs of improper proceedings instituted by them, and of proper proceedings instituted against them.<sup>54</sup> The following will serve as illustrations of this general rule; 1, Where an administrator's bill to sell land to pay debts is dismissed, because not sustained by proper proofs;<sup>55</sup> 2, Where an administrator failed to plead the statute of limitations, although on the hearing no assets were found in his hands;<sup>56</sup> 3, Where a trustee is seeking to enforce an improper compromise;<sup>57</sup> 4, Where administrators, executors, guardians or trustees are held personally liable for failing to discharge a duty; 5, Where an administrator sued to recover land, the title to which was in his intestate's heirs;<sup>58</sup> and 6, a Judge acting *coram non judice* may be taxed with the costs of a successful mandamus suit against him.<sup>59</sup>

§ 592. **Costs on Interlocutory Proceedings.**—The Chancellor frequently adjudges costs in an interlocutory order granting leave to amend pleadings, or setting aside a *pro confesso*, or extending the time for taking proof, or overruling a plea or demurrer, or granting a continuance, or allowing the rehearing of a

<sup>40</sup> 2 Dan. Ch. Pr., 1404.

<sup>41</sup> 2 Dan. Ch. Pr., 1397.

<sup>42</sup> *Humphreys v. McCloud*, 3 Head, 235.

<sup>43</sup> *Bank v. Jefferson*, 8 Pick., 537.

<sup>44</sup> 2 Dan. Ch. Pr., 1407; *Adams Eq.*, 389; *Raht v. Mining Co.*, 2 Lea, 80.

<sup>45</sup> 2 Dan. Ch. Pr., 1407-1408.

<sup>46</sup> Code, § 4292. In such a case, complainant must pay all the costs down to the decree adjudging that the conveyance is not fraudulent. This provision of the statute often operates in favor of dishonest debtors, and should be repealed. See *Bump on Fraud. Con.*, 572-573.

<sup>47</sup> 2 Dan. Ch. Pr., 1394; *Reed v. Noe*, 9 Yerg., 283; Code, § 4320.

<sup>49a</sup> *Carrick v. Armstrong*, 2 Cold., 268. In this case, the bill was dismissed, and each party taxed with half the costs.

<sup>50</sup> *Irwin v. Burnett*, 6 Hum., 344.

<sup>51</sup> *Parker v. Britt*, 4 Heisk., 249.

<sup>52</sup> *Peck v. Peck*, 9 Yerg., 301.

<sup>53</sup> *Traughber v. Smelser*, 24 Pick., 347.

<sup>54</sup> 2 Dan. Ch. Pr., 1416-1419; *Wade v. Fisher*, 10 Heisk., 490.

<sup>55</sup> *Wade v. Fisher*, 10 Heisk., 490; *Porterfield v. Taliaferro*, 9 Lea, 242.

<sup>56</sup> *Apperson v. Harris*, 7 Lea, 323; *Wray v. Williams*, 2 Yerg., 302.

<sup>57</sup> *De Graffenreid v. Green*, 1 Cold., 110.

<sup>58</sup> *Cotham v. Britt*, 10 Heisk., 469.

cause, or granting a new trial by jury. In all such cases, the controlling considerations should be: 1, Has the applicant manifested good faith and due diligence? and 2, Will the allowance of the application result in an increase of the costs, or in any way operate to the disadvantage of the opposite party?<sup>60</sup>

The following general rules will serve as a guide in taxing costs on interlocutory proceedings:

1. **A Pro Confesso should be Set Aside** only upon the payment of the costs of the cause, except in cases heretofore specified.<sup>60a</sup>

2. **An Amendment to a Pleading** that causes a continuance should not be allowed, except upon the payment of the same costs as would be imposed on a continuance.

3. **An Extension of the Time for Taking Proof** should not be allowed, except upon the payment of the costs of all depositions, or other proofs, thereafter taken or filed by either party.

4. **A Continuance** should not be granted, after the expiration of the statutory time for taking proof, except on payment of all the unadjudged costs of the cause.

5. **A Rehearing, or a New Trial** should not be granted in order to let in new evidence, except on payment of all the adjudged costs of the cause.

6. **Affidavits Showing Good Cause**<sup>60b</sup> for granting the application should be imperatively required in each of the foregoing cases, and oral statements, as on affidavit, should not be heard, even by consent.

7. **No Costs should be Taxed** in any of the foregoing cases when the application is the result of the act of an officer of the Court, or of the fraud of the opposite side, or of accident or mistake, unmixed with negligence on the part of the applicant, his Solicitor or agent.

8. **On Overruling a Demurrer, or Plea**, deemed frivolous, the defendant should be taxed with all the costs of the cause, if such demurrer or plea was filed more than two months before the first day of the term.<sup>61</sup>

§ 593. **When Costs will be Paid Out of the Fund.**—The Chancery Court is frequently called on to administer a fund, or an estate; or to aid executors, administrators, guardians or other trustees, in the administration of their trusts; or to wind up estates, corporations and partnerships that are insolvent. In such cases, where no party has been guilty of inequitable conduct, or has caused unnecessary costs, the Court ordinarily orders the costs to be paid out of the fund being administered. The following are cases of this character: 1, Where an estate, or fund, is being administered by the Court: but the costs of unnecessary proceedings will be paid by the party causing them.<sup>62</sup> 2, Where executors, administrators, guardians, receivers, trustees, and agents, fairly account and pay over, and act in good faith, and the suit is not caused by their misconduct;<sup>63</sup> 3, Where an executor properly seeks the aid of the Court, in construing, executing or sustaining a will;<sup>64</sup> 4, Where the suit is necessary to the execution of a trust;<sup>65</sup> 5, Where the suit is brought by one or more creditors for the benefit of all; 6, Where the suit is to administer a charity, if the parties

<sup>60</sup> The rules that impose interlocutory costs are generally based on the principle of compensation. The law has no favorites as between equals, except in so far as it favors those who are diligent; and a Court has no right to grant a favor to one party at the expense of another party. Favors should be paid for in costs; otherwise the party in default is rewarded, and the party who has done his duty is punished. As he who seeks Equity must do Equity, so he who seeks a favor of the Court should accompany his application with an offer to pay such costs as the Court may impose. No rule so greatly encourages diligence and prevents negligence, as the uniform taxation of costs against parties seeking favors.

The subject of the taxation of costs in cases of amendments and continuances has been already fully considered. *Ante*, §§ 429; 526-529.

<sup>60a</sup> See, *ante*, § 207.

<sup>60b</sup> See, *ante*, § 62, sub-sec. 8.

<sup>61</sup> Code, §§ 2938; 3203. Code, § 2934, is construed as applicable to the Chancery Courts; *Kirkman v. Snodgrass*, 3 Head, 370; then why not § 2938, in the same Article? The three dollars adjudged against the unsuccessful party on the argument of demurrers and pleas, Code, §§ 4397; 4405; 4492, are in the nature of a forfeit, or penalty, and are not costs in the ordinary sense. There is no necessary conflict between the various sections of the Code on this subject; and Equity should follow the law in uprooting frivolous pleadings filed for mere delay.

<sup>62</sup> 2 Dan. Ch. Pr., 1377; 1411.

<sup>63</sup> 2 Dan. Ch. Pr., 1411-1418.

<sup>64</sup> *Bennett v. Bradford*, 1 Cold., 472; *Rogers v. Ross*, 4 John. Ch., 608; 2 Dan. Ch. Pr., 1427; *Franklin v. Armfield*, 1 Cold., 638.

<sup>65</sup> *Adams Eq.*, 389, *De Graffenreid v. Green*, 1 Cold., 110.

have been guilty of no inequitable conduct; 7, Where a mortgagee, or beneficiary under a trust deed, with powers of sale, seeks the aid of the Court to enforce his security;<sup>66</sup> 8, Where, in cases of constructive fraud, a fund comes into Court;<sup>67</sup> and 9, Where real estate is partitioned, or sold for partition, in which case counsel fees may, also, be taxed as part of the costs.<sup>68</sup>

<sup>66</sup> Adams Eq., 389. The Court will almost invariably order the costs paid out of the fund arising from Court sales where they could not, probably, otherwise be made.

<sup>67</sup> Bump on Fraud. Con., 572.

<sup>68</sup> Acts of 1887, ch., 183.

## CHAPTER XXX.

## REFERENCES TO THE MASTER, AND PROCEEDINGS THEREON.

- ARTICLE I. When References are Necessary, or Proper.  
 ARTICLE II. Proceedings upon a Reference.  
 ARTICLE III. The Master's Report.  
 ARTICLE IV. Proceedings upon a Master's Report.

## ARTICLE I.

## WHEN REFERENCES ARE NECESSARY, OR PROPER.

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| § 594. Object of a Reference to the Master.             | § 598. When References to the Master are Proper. |
| § 595. What Matters May be Referred to the Master.      | § 599. How and When References are Made.         |
| § 596. Matters Not Proper to be Referred to the Master. | § 600. Form of a Reference.                      |
| § 597. When References to the Master are Necessary.     | § 601. Form of a Reference.                      |
|   | § 602. Reference on Further Directions.          |

§ 594. **Object of a Reference to the Master**—There are often (1) inquiries to be made during the pendency of a suit, or (2) accounts to be taken, or (3) calculations to be made, or (4) settlements to be investigated, or (5) particulars to be ascertained, or (6) special ministerial acts to be performed, or (7) other matters to be attended to, which require the skill of a bookkeeper, accountant, or a man of business, rather than the judgment of a Chancellor; and if the Chancellor was obliged to attend to all of these matters of inquiry and detail, the sessions of the Court would be greatly prolonged, and the number of Chancellors would have to be greatly increased. To remedy this difficulty, and enable the Chancellor to devote his time to the finding and adjudication of the more important matters in litigation, and to the determination of the principles governing the controversy, Equity Courts have an officer, called a Master in Chancery, specially fitted to aid the Chancellor, by taking off his shoulders the burden of many details, the making of many inquiries, and the ascertainment of many facts. The character, powers, and duties of this officer are shown elsewhere.<sup>1</sup>

The findings of the Master are analagous to a special verdict in a Court of law, and it may be stated generally, that what a jury is to the Circuit Court, the Master is to the Chancery Court, with these advantages in favor of the Chancery practice: (1) the Master's reports are far more definite, precise, and thorough than the verdicts of a jury; (2) the Master's reports, as a rule, are more correct and otherwise more satisfactory than verdicts; (3) the Master's errors are more manifest, and more easily corrected than the errors of a jury;<sup>2</sup> and (4) there are matters of account, of details of calculation, of tabulation, and of classification, with which juries are wholly unfitted to deal.<sup>3</sup>

Hence, it may be stated that the objects of a reference to the Master are: 1, To relieve the Chancellor of the details and minor matters involved in a litiga-

<sup>1</sup> See Chapter on the Clerk and Master, *post*, §§ 1153-1172.

<sup>2</sup> The Master's report gives items and details specifically, whereas the verdict of a jury is in gross, and it cannot often be known whether any particular item was allowed or not.

<sup>3</sup> How could a jury by means of oral explanations pass on the many items of cross accounts contained in various books or memoranda, and running through many years?



tion, to the end that the Chancellor may have more time to devote to the consideration of the larger matters;<sup>4</sup> and 2, To present the details, or minor matters in such a form as to enable the parties to scrutinize them, and point out all supposed errors.

§ 595. **What Matters may be Referred to the Master.**—The matters referred to the Master are almost as numerous as the matters subject to the jurisdiction of the Chancery Court; and include the following: 1, Whether it is to the interest of the owners to sell a tract of land for partition; 2, Whether it is to the manifest interest of minors, or married women, to sell their property; 3, Whether it is necessary to sell a decedent's lands to pay his debts; 4, Whether the title to land sold, or about to be sold, or purchased, is good; 5, Whether there are any tax liens, mortgages, trust deeds, life estates, or other liens on land sold, or about to be purchased, by order of the Court; 6, What are the assets and liabilities of a decedent, a partnership, corporation, or other person, whose assets are in the custody of the Court; 7, What are the relative rights and priorities of various creditors, or claimants, of the same fund; 8, What is the state of the account between a guardian, personal representative, receiver or other trustee, and the beneficiaries; or between persons having mutual dealings; 9, The validity and amount of any particular liability; 10, The compensation of guardians, personal representatives, receivers, trustees, guardians *ad litem*, Solicitors, and others; 11, The proper allowance for the maintenance of a married woman, infant or person of unsound mind, or for the education of an infant; 12, The investment of money belonging to persons under disability, or belonging to persons who fail to draw the same out of Court; 13, The ascertainment of heirs, or legatees, or distributees, whose estates are in Court; and their residences, when their names and abodes are unknown; 14, The assessment of damages in any case where properly allowable; 15, The ascertainment of the value of any property, real or personal, or of any betterment or permanent improvement; and 16, whether in any pleading, petition or deposition, there is any, and what, scandalous, impertinent or unnecessary matter. Indeed, it may be stated that, in general, there is no question of unknown or disputed fact which may not be referred to the Master, to the end that the Chancellor and the parties may have the benefit of his investigations and findings.<sup>5</sup>

Where a question arises incidentally (1) as to the title to property about to be purchased, or sold, under the orders of the Court, or (2) as to who owns certain property involved in the litigation, or (3) as to what interests the parties, or others not parties, have in such property, or (4) as to what encumbrances rest upon property about to be purchased or sold under the orders of the Court, in any and all such cases it is proper to refer such matters to the Master;<sup>6</sup> but where the suit is brought expressly to recover property on the strength of complainant's title, the Court must then determine the title; and the truth of complainant's allegations of ownership in such a case is not a proper matter to be referred to the Master.<sup>7</sup>

§ 596. **Matters not Proper to be Referred to the Master.**—The line of division, between matters proper to be referred to the Master, and matters not proper to be referred, is not well defined; but it may be stated, generally, that the main issues of the controversy,<sup>8</sup> and the principles on which these issues are to be adjudicated, must be determined by the Chancellor,<sup>9</sup> while collateral, subordinate, and incidental issues, and the ascertainment of facts ancillary to the determination of the main issues, or to the execution of the decree, may be referred to the Master. It is not proper to refer a question of law, or the deter-

<sup>4</sup> See note 12, *infra*.

<sup>5</sup> 1 Smith's Ch. Pr., 9-11.

<sup>6</sup> 2 Dan. Ch. Pr., 1215; 1283; 1 Barb. Ch. Pr., 519;

Code, § 3310. *Moredock v. Williams*, 1 Tenn., (Over.,) 325; *Buchanan v. Alwell*, 8 Hum., 516.

<sup>7</sup> *Woodson v. Smith*, 1 Head. 277. This case is

Master to determine a question of title can be made in no case. It does not so decide. The decision is entirely in accord with the general doctrine laid down in the text. See *Buchanan v. Alwell*, 8 Hum., 516, Judge McKinney writing both opinions.

<sup>8</sup> 2 Dan. Ch. Pr., 1168. note.

mination of a question of law, to the Master, but a mixed question of law and fact may be referred.<sup>10</sup> References in old cases as to old matters, and as to what has been done in the case, or what its present condition is, ought not to be granted: this is the work of counsel.<sup>11</sup>

**§ 597. When References to the Master are Necessary.**—References to the Master are necessary in the following cases: 1, When in any case it is necessary to take and state an account between the parties, covering numerous items; 2, When the assets of a decedent, a partnership, a corporation, or other person, are being administered in Court, and it becomes necessary to ascertain the kind, items and amount of such assets, and the names, priorities and equities, of the creditors, and the amount due each; 3, When it becomes necessary to show a deficiency of personal assets, in order to justify the sale of a decedent's lands to pay his debts; 4, When an insolvent estate is being wound up in Chancery, and it becomes necessary to ascertain the character and amount of the assets, and the names, priorities and equities, of the various creditors and claimants, and the amounts due each; 5, When it becomes necessary to ascertain whether any, and what, tax liens, mortgages, trust deeds, life estates, and other encumbrances, exist on land sold, about to be sold, or about to be purchased by the Court; 6, When the duty devolves on the Court of investing money belonging to persons under disability, and it becomes necessary to find a bargainer, or a borrower; 7, When it becomes necessary to make inquiry for heirs, distributees, legatees, or persons entitled to a fund in Court.

References are necessary in the 1st, 2d, 3d, and 4th of the foregoing cases: 1, Because they necessitate long, minute and tedious arithmetical calculations; 2, Because the duties connected with them are clerical rather than judicial; 3, Because the accounts are often so long and so complicated that errors and omissions are almost unavoidable; 4, Because all parties in interest should have an opportunity to scan the account when taken, to the end that they may point out any and all errors, or omissions, therein; and 5, Because by bringing the case on for hearing on the Master's report, and the exceptions thereto, all clerical matters are eliminated, or greatly reduced, and the controversy is narrowed down to the real points in issue, and to those matters only in the case that require judicial determination.<sup>12</sup>

References are necessary in the 5th, 6th, and 7th of the foregoing cases: 1, Because the duties imposed in such cases on the Master are incompatible with the office of Judge; 2, Because the duty of a Chancellor is not to hunt for facts outside of the record, but to declare the rights of the parties on the record as presented by them; and 3, Because the duties imposed by the reference require so much time that they could not well be attended to while Court is in session.

**§ 588. When References to the Master are Proper.**—There are matters as to which references to the Master are proper to be made, but are not imperative; matters which the Chancellor may refer to the Master for a report, or which he may determine without a reference. In these cases, the Chancellor exercises his discretion, and directs a reference, or adjudicates without a reference, as the exigency may require. In exercising his discretion in such matters, the Chancellor will consider: 1, Whether the Master's duties on a reference will be appropriate to his office; 2, Whether more proof will be required, or is desired; 3, Whether a report by the Master will narrow, simplify, or more clearly define,

<sup>10</sup> 2 Dan. Ch. Pr., 1203; 1 Barb. Ch. Pr., 516.

<sup>11</sup> *Eubank v. Wright*, 2 Tenn. Ch., 538.

<sup>12</sup> *White v. Cox*, 4 Hay., 214. Besides, while a Chancellor might be willing himself to perform the drudgery of taking and stating an account after a hearing, he has no right to operate the Judges of the Supreme Court with such drudgery as would necessarily result from the practice of deciding such suits without a reference and a report. A Chancellor who would undertake to decide a complicated account, without a reference and a report, would find himself overwhelmed by such a confusion of details

that the argument of counsel would only "darken by its elucidations, and puzzle by its explanations;" his decree, when rendered, would be but little, if any, better than a Master's report; and, on appeal to the Supreme Court, the assignment of errors would be merely exceptions to the Chancellor's report. The Supreme Court should not tolerate such a practice. But in *Gray v. State* it was held that the trial Judge in the Circuit Court might state an account without referring it to the Clerk. 11 Pick., 317.

the matters in controversy; and 4, Whether a report will enable either or both parties to present their cases more satisfactorily to the Court. If these questions are answered in the affirmative, the Chancellor will generally order a reference; if, however, the probabilities are that the Master's report will settle nothing, but that on exceptions thereto the whole controversy will come on for redetermination before the Court, in such a case a reference will not be made. The inclination of the Chancellor is to order a reference when either party desires it, unless the desire is based on a disposition to delay the final determination of the suit.<sup>13</sup>

Subject to these general rules, references are proper when the question is: 1, whether a tract of land should be sold for partition; or, 2, whether it is manifestly to the interest of minors, or married women, to sell their property for reinvestment, or for their maintenance or education; or, 3, whether a particular claim is valid, and its amount; or, 4, what is a reasonable compensation for a guardian, personal representative, receiver, trustee, guardian *ad litem*, Solicitor,<sup>14</sup> or any other person entitled to compensation; or, 5, what is a proper allowance for the maintenance of a married woman, infant, or person of unsound mind, or for the education of an infant; or, 6, what amount of damages is properly allowable in a given case; or, 7, what is the reasonable value of any property, real or personal, or of any betterments or permanent improvements; or, 8, what is the present cash value of a homestead, dower, or other life estate; or, 9, whether a party has a title to property in controversy;<sup>15</sup> or, 10, whether any pleading, petition, or deposition contains any, and what, scandalous, impertinent, or unnecessary matter.

§ 599. **How and When References are Made.**—As a reference is a step in the progress of a suit, it is generally made on motion of the complainant: sometimes, however, it is made on motion of the defendant; and sometimes the Chancellor makes a reference on his own motion, for his own guidance or information. A reference is usually made after a preliminary hearing on the main questions in controversy, and after a decree settling those questions; the reference in such cases being mainly in furtherance of the decree, and being based on the adjudication made, and the principles declared.<sup>16</sup> Sometimes, however, the pleadings themselves show that a report will be necessary; and when, in such a case, a reference can be made, plainly pointing out to the Master what he must report on, and by what rules he must be guided, a reference will be ordered without waiting for any hearing on the proof, leaving the parties to introduce their proof before the Master, and to contest any matter in dispute by exceptions to the Master's report.

Other references are made on petition of third parties, or are made as incidental to the main litigation, or as elucidatory of some side issue, or as necessary to a complete decree, or as a means of avoiding further litigation connected with the subject-matter of the suit.

A reference may be had at any time between the filing of an answer and the final disposition of the cause, even after a decree and the return of an execution satisfied, or after a sale made and confirmed. In short, a reference will be ordered whenever necessary to enable the Court to do justice in any matter connected with the litigation, or connected with the enforcement of the decree,

<sup>13</sup> The devices of counsel to secure desired delays are multitudinous; the forms in which these delays are sought are Protean; the reasons by which their applications for delay are supported are plausible and seductive; and their protestations that they desire the speediest possible trial consistent with justice are vehement and perplexing.

<sup>14</sup> The Chancellor should always determine the compensation of a guardian *ad litem* and Solicitor, where all the services by them were rendered in the given case, and are evidenced by the record, or judicially known to the Court. A reference to the Master in such a case is unnecessary, and a waste

<sup>15</sup> A reference is frequently made to the Master to inquire into the title of a party to property in question in a cause. References of this nature are principally made in suits for the specific performance of contracts for the sale, or purchase, of real estate; but such references are not confined to such cases. A purchaser may have a reference before the sale is confirmed to him; or even after confirmation and before he pays the purchase-money. 2 Dan. Ch. Pr., 1215-1220.

<sup>16</sup> The order of reference must be founded on the pleadings and proofs, and cannot be more extensive than the allegations of the parties. 2 Dan. Ch. Pr.,

or the distribution of the proceeds of a decree. A reference, however, should never be made as to matters of account, unless the Court is able, either from the admissions of the answer, or from the proof, to so specify the principles and rules on which the account is to be taken as to limit the range of inquiry, and reduce the matters to be reported on, to those points essential to the determination of the litigation. General and indefinite references for an account, without determining any principles, or giving any special directions for the guidance of the Master, should never be made, as they generally result in unnecessary proof, and an inconclusive and unprofitable report, productive only of costs, confusion, disappointment and delay.<sup>17</sup>

In decreeing an account, the Court should settle and specify the principles on which the account is to be taken; and, when practicable, should define the powers and duties of the Master, and indicate, in a general way, what he is required to do in each particular matter referred to him.<sup>18</sup> The object of such rulings and directions is to narrow the range of inquiry, to point out to the Master the paths for him to pursue in his investigations, and thereby prevent the unnecessary accumulation of costs. The Court should, also, rule on disputed matters of evidence, and specify what books of account, or other evidences of account, what settlements, and what other proofs, the Master may consider, and what weight he should give them, and what rights of surcharge and falsification, or what other liberties the various parties may exercise. If the Chancellor, at the hearing, has reached a definite conclusion as to any large items of the account, he should so find, and direct the Master to take such items as *prima facie*, or absolutely correct, or to totally reject them, as the case may be.<sup>19</sup> If there be agreements to be construed, or instruments to be passed on, the decree of reference should settle the construction and effect of such agreements, and determine the validity and meaning of such instruments, so that the Master may be neither entangled nor embarrassed by such questions.<sup>20</sup> References, however, may be made by consent, without any preliminary determination of principles.<sup>21</sup>

**§ 600. The Frame of a Reference.**—If the order of reference is to elucidate some matter in controversy, it must necessarily conform to the issues raised by the pleadings; if the reference is not for the purpose of aiding in the determination of the matters in controversy, it must, nevertheless, relate to some matter pertinent to the pleadings, or to the decrees, or to the subject-matter, or to the funds or property in the custody of the Court.

The order of reference should clearly indicate the matter to be reported on, and if any rules or directions are necessary for the guidance of the Master, they should be specified. The order should not only contain all the specific directions necessary to enable the Master to understand what he is expected to do, but should lay down with particularity the principles on which he is to act, to the end that the inquiry may be made as narrow as possible, and all impertinent and unnecessary matters may be excluded.<sup>22</sup> If any book of account, or settlement between the parties is deemed *prima facie* correct by the Court, the order of reference should so state, and leave be given the attacking party to surcharge and falsify such book of account, or settlement;<sup>23</sup> but if such settlement is wholly set aside, and an account *de novo* ordered, the decree should so state.

<sup>17</sup> *Carey v. Williams*, 1 Lea, 51; *Patton v. Cone*, 1 Lea, 14; *Terrell v. Ingersoll*, 10 Lea, 77.

<sup>18</sup> 2 Dan. Ch. Pr., 1221, note; *Cobb v. Jameson*, 1 Tenn. Ch., 604; *Jones v. Douglass*, 1 Tenn. Ch., 357.

<sup>19</sup> The decree of reference should specify what accounts and settlements, if any, should be taken as *prima facie* correct. 2 Dan. Ch. Pr., 1232, note.

<sup>20</sup> 2 Dan. Ch. Pr., 1233, notes. In short, the decree of reference should, as far as possible, blaze out the Master's road, and mile-mark it, and put up finger-boards at the forks, and indicate the paths to be avoided and the short cuts that may be taken with safety.

<sup>21</sup> 1 Dan. Ch. Pr., 857, note; 2 *Ibid.*, 992; *Wessells v. Wessells*, 1 Tenn. Ch., 58; *Trimble v. Dodd*, 2 Tenn. Ch., 500. Where the adult parties consent to an account before a hearing, the Chancellor may, in a proper case, consent for the parties under disability. 1 Dan. Ch. Pr., 857. But in such cases, the reference should be expressly without prejudice to any question in the case affecting those under disability.

<sup>22</sup> *Cobb v. Jameson*, 1 Tenn. Ch., 604; 2 Dan. Ch. Pr., 1221, note.

<sup>23</sup> 2 Dan. Ch. Pr., 1232, note.

In case of a reference for an account, or for a reference as to more matters than one, the order should be divided into parts, each part contained in a separate paragraph, and covering a subdivision of the account, or a single matter; and each paragraph should be given in its proper logical order, or legal sequence, and be consecutively numbered. The paragraphing and consecutive numbering of an order of reference is necessary to an orderly and intelligible report.<sup>24</sup>

The order of reference may specify when a report shall be made, and when filed, and may state what notices of the taking of the account shall be given, and on whom served.<sup>25</sup> The order should, also, state whether any and what evidence on file may be considered in taking the account, and whether any and what new evidence may be filed by the parties, and may state what evidence shall not be considered. The Court may, also, make all necessary orders as to the production of documents, books, vouchers, or other evidence in possession of the parties.

Each party should be required, before the taking of proof on a reference begins, to file with the Master a statement of all his items of charge against the other party, and no item not contained in such statement should be considered.<sup>26</sup>

Many forms of references will be given in subsequent pages of this treatise which can readily be found by the Index.

§ 601. **Form of a Reference.**—The following general form is given, to aid in drawing a reference. Before drawing the reference it would be well to consider the preceding section :

#### ORDER OF REFERENCE.

John Doe,  
vs.  
Richard Roe, et al. } No. 619

This cause came on to be heard this December 1st, 1906, before Chancellor Hugh G. Kyle, upon the bill, the answers of all the defendants thereto, the cross-bill of the defendant Sarah Roe and the answer thereto, and the proof in the cause, [including the agreement signed by all the parties, except Sarah Roe, which is filed and marked A;] and argument of counsel having been heard, the Chancellor is of opinion that this is a proper case for a reference to the Master. [*Or, in a proper case, the decree may declare the rights and liabilities of the parties, and lay down the rules and principles to govern the Master in stating the account, or making the report. See, post, § 1040.*]

The Master is, therefore, directed to hear proof, including that on file, and report to the next term of the Court:

1st, What [*&c., setting out the matters to be reported on, putting each head in a separate paragraph, if possible, and numbering the paragraphs consecutively. See, post, §§ 975; 1040.*]

2d, Whether [*&c., See Index, for various orders of reference.*]

The Master will [*&c., Here set out any special rules for the guidance of the Master as to evidence, or the force and effect of documents, settlements, previous reports, or agreements between the parties, or as to requiring the parties to file their respective charges or discharges. See, post, § 958.*]

All other matters are reserved until the incoming of the Master's report.

§ 602. **Reference on Further Directions.**—On the incoming of the Master's report the Chancellor may confirm it, in whole or in part, or he may recommit it in whole or in part, or he may recommit it with further directions. It is not necessary in the original order of reference to reserve the right to give further directions.<sup>27</sup> The Chancellor is not bound by any directions contained in an order of reference. References are made to obtain facts, and the Chancellor may make such changes in his references, and such additions thereto, as he may deem proper to obtain the facts necessary for a complete adjudication of all the matters in controversy.

<sup>24</sup> The deficiencies, disorders and general confusion sometimes found in Master's reports, are as much the fault of the Solicitor who drew the order of reference as of the Master who made the report. Confused, illogical, and chaotic references, neither paragraphed nor numbered, often result in similar

wonderful how much order and lucidity a skillful and diligent Master will deduce from a chaos of unmethodical orders and heterogeneous evidence.

<sup>25</sup> Ch. Rule, IV, § 1; *post*, § 1193.

<sup>26</sup> Of course, such statements would be amendable like any other pleading. *See, post*, § 958.

REFERENCE ON FURTHER DIRECTIONS.

John Den, }  
*vs.* } No. 723  
 Richard Fen, }

[Follow the decree on exceptions to a report, in § 616, *post*, down to the words, "all other matters," and add:

The Master is further directed to report whether any trees were cut and removed from said land by the defendant, and if so, when cut and the value thereof; and he may hear additional proof on this point.

ARTICLE II.

PROCEEDINGS UPON A REFERENCE.

- |   |  |
|---|--|
| § 603. When and Where a Reference is to be Executed.      | § 606. Opening the Account.                            |
| § 604. Notice of the Time and Place of Taking an Account. | § 607. Examination of the Witnesses.                   |
| § 605. Meeting of the Parties, and Adjournments.          | § 608. The Production of Documents.                    |
|   | § 609. Character of the Evidence.                      |
|   | § 610. Filing Claims Before the Master Under a Decree. |

§ 603. **When and Where a Reference is to be Executed.**—The Court may fix the time when an account shall be taken and the report be made; but when the time is not so fixed, the Master fixes the time and place. If the reference is not for an account, but for a report as to some other matter, the Court usually leaves it to the Master to determine when he will make his report. But in all cases where any of the parties is required or expected to furnish proof to be used in making the report, a time should be fixed by the Master for making his report, and the parties interested duly notified thereof, to the end that they may have their witnesses present, or their proof on file in due season. When the decree does not fix the time in which the report shall be made, the Code requires the Master to proceed with the least practicable delay to comply with the terms of the reference;<sup>1</sup> and any neglect of duty in this respect is punishable by a fine of fifty dollars, and the Master is also guilty of a misdemeanor, and subject to removal from office.<sup>2</sup>

The ordinary place for taking an account is the office of the Master; but he would be authorized to take it at another place, if more convenient to the parties, or if any other good reason justified such action.<sup>3</sup>

§ 604. **Notice of the Time and Place of Taking an Account.**—The time and place for taking the account having been fixed, either by the Court, or the Master, the next step to be taken is to give the notice thereof. This notice is given not only to the parties interested in the account, and to be affected by it, but, also, to their respective Solicitors, if both the party and Solicitors reside in the county; if both do not reside in the county, then notice shall be given to the one that does reside in the county, whether he be the party, or his Solicitor. In all cases in which a party is a non-resident, the notice must be served on his Solicitor. If the parties are numerous, the notice must be served upon such of them as the decree, or Master, may designate. The notice shall be executed five days before the day assigned for taking the account, and the notice should, on

<sup>1</sup> Code, § 4474.

<sup>2</sup> Code, §§ 4472-4473; Ch. Rule, VII, § 9, *post*, § 1196, sub-sec., 9. These severe penalties indicate that Masters have, in the past, been very remiss in complying with orders of reference. Such remissness greatly retards the final determination of a suit, and tends to bring the Court into disrepute. The Chancellor, who requires diligence on the part of all litigants, should countenance no negligence on

the part of his chief officer. The Code says the Chancellor "shall punish such neglect," not may punish. Masters should begin taking proof for their reports within thirty days after the order is made, and should have the last one of their reports on file at least five days before the next term. Ch. Rule, IV, § 8, *post*, § 1193.

<sup>3</sup> Ch. Rule, IV, § 2; *post*, § 1193.

its face, warn the person notified that if he fail to attend, the account will be proceeded with *ex parte*.<sup>4</sup>

The rule that all parties interested in the result of an account are entitled to attend before the Master at the taking, applies not only to those who are parties, but also to those who are *quasi* parties,<sup>5</sup> such as (1) creditors who seek either to prove a claim of their own, or to disprove the claim of another; (2) claimants of any fund or property involved in the litigation, or in the custody of the Court; and (3) purchasers of property sold by order of the Court, when their rights therein or thereto are in question.

The following will serve as a form of

**NOTICE OF THE TAKING OF AN ACCOUNT.**

John Doe,

*vs.*

Richard Roe, *et al.*

In Chancery, at Dandridge.

Take notice, that, on the 2d of June next, at 10 a. m., at my office in Dandridge, I will begin the taking of the account ordered in said cause at the last [*or, present,*] term, when and where you will attend with your proof, or the account will be proceeded with *ex parte*.<sup>3</sup> You will produce at said time and place the following books, or, papers: (*describing them,*) to be used as evidence in the taking of said account.]

May 10, 1891.

DAN H. MEEK, C. & M.

To Mr. Richard Roe.

§ 605. **Meeting of the Parties, and Adjournments.**—If, on the day designated in the notice, the parties, or any of them, attend, the Master will proceed with the taking of the account, unless, upon affidavit of either party showing sufficient cause, he adjourn the matter from day to day, or to another day prior to the time he is required to file his report, at which time, unless he again adjourn the same, he will proceed to take the account, and make the report. If there is no adjournment, the Master will proceed forthwith to examine the witnesses and other proof introduced; and when he has concluded his examination, the account shall be closed, notwithstanding a party may fail to attend.<sup>7</sup>

§ 606. **Opening the Account.**—If either fail to attend, the account shall be closed, and no other evidence shall be introduced or heard,<sup>8</sup> unless the party offering it shall, within ten days by special affidavit,<sup>9</sup> show that he has material evidence, which was not before the Master at the time fixed for taking the account, and which he could not by proper diligence have produced at the time set for taking the account; in which case the Master may open the account for the reception of further evidence by both parties upon the same notice prescribed for the original account.<sup>10</sup> The Court, also, may at any time before confirmation, open the account for additional evidence.<sup>11</sup>

§ 607. **Examination of the Witnesses.**—When the hour arrives for the taking of the account, the Master will begin the examination of the witnesses of

<sup>4</sup> Ch. Rule, IV, §§ 2-5, § 1193. The notice should be served by leaving a copy with the person to be notified, and returning the original, with a return thereon, to the Master. If the parties are numerous, the Master should, by an entry on his rule docket, designate those to be notified. If the report states that due notice was given of the time and place of taking the account, that is sufficient evidence of the fact, in the absence of any evidence to the contrary. 2 Dan. Ch. Pr., 1171, note.

<sup>5</sup> 2 Dan. Ch. Pr., 1174; 1 Barb. Ch. Pr., 477.

<sup>6</sup> Ch. Rule, IV, § 3. If the order of reference requires any party to produce books, deeds, writings, or other documents, the notice to him should so state.

<sup>7</sup> Ch. Rule, IV, §§ 4-9; § 1193.

<sup>8</sup> The meaning of this part of Chancery Rule, IV, § 9, though somewhat obscure, evidently is: (1) that if neither party attends, the Master will close the account, using such proof as may then be in the record; (2) if only one party attends, the Master will not wait for the other party, but after taking the proof of the attending party, will close the account, without waiting for the other party; and, (3) that when an account has once been closed, whether

heard, except upon special affidavit showing sufficient cause.

<sup>9</sup> The special affidavit, like a special affidavit for a continuance, should (1) give the names of the witnesses, or the character of the documents; should (2) specify what the witnesses or documents will prove, and should (3) show that there was no want of due diligence on affiant's part, and no negligence in not producing this evidence before the Master at the proper time, and (4) that he can and will have this evidence before the Master if the account is opened. If the evidence specified in the affidavit is material, and proper diligence be shown, the Master may, in his discretion, open the account for additional evidence. Ch. Rule, IV, § 9; § 1193.

<sup>10</sup> Ch. Rule, IV, § 9; *Stull v. Goode*, 10 Heisk., 58. When the account is opened, it should be opened not only for the introduction of the evidence specified in the affidavit, but for such rebutting evidence as the other party may bring forward. The Master should not open the account generally, as a rule, but should open it only for the particular evidence referred to in the affidavit, and for evidence in rebuttal thereof.

<sup>11</sup> Ch. Rule, IV, § 9, *post*, § 1193; *Stull v. Goode*,

the party on whom rests the burden of the proof; and, after they have been all examined, he will hear the evidence offered by the other party; after which he will allow rebutting proof. The Master may, however, by consent of parties, or for good cause, vary this order for the examination of witnesses: In the examination of a witness, all due formalities should be observed,<sup>12</sup> as in case of taking depositions.

A witness whose deposition was taken in chief before the hearing, as to any matter, cannot upon a reference be examined as to the same matter, by either the Master or the party whose witness he is, without an order of the Court, or of the Master, upon affidavit showing cause therefor; but he may be examined touching any other matter. A witness who was not examined before the hearing, but who was first examined by the Master at the taking of the account, may be re-examined by the Master at his discretion.<sup>13</sup> So, also, a witness who has been examined on behalf of one party, may be examined by the other party without an order.<sup>14</sup>

A witness who fails to appear before the Master when duly summoned may be attached; and a witness who appears and refuses to answer legal interrogatories shall be committed by the Master to the county jail until he consents to give his testimony.<sup>15</sup> The Master has, also, all the powers of a commissioner in taking depositions.<sup>16</sup>

**§ 608. The Production of Documents.**—The order of reference frequently requires some or all of the parties to produce before the Master, all deeds, books, papers and writings, in their custody or under their control, relating to the matters of reference, to the end that they may be used in the taking of the account, or in making the report ordered. In such cases, the Master will notify the parties to produce such documents, at the same time he notifies them of the time and place of taking the account.<sup>17</sup> If the order of reference does not require the production of documents by the parties, or if other persons have books, documents, or other writings under their control, the production of such books, documents, or other writings, may be enforced by a subpoena *duces tecum*.<sup>18</sup> Documents, when introduced, may be inspected by any party interested in the reference.

**§ 609. Character of the Evidence.**—In taking an account, the order of reference shows what matters the Master is called on to consider; and the pleadings cannot be looked to except as an explanation of the true meaning of the order of reference. No evidence should be heard by the Master, unless it will legitimately aid him in reaching a conclusion on the matters covered by the reference. On the taking of an account, neither party should be allowed to introduce proof as to matters not referred to the Master, even when such matters are put in issue by the pleading; because the Master is not trying the cause, or preparing it for trial, on the issues raised by the pleadings,<sup>19</sup> but exclusively on the issues raised by the order of reference.<sup>20</sup> If one party is allowed to travel outside of the order of reference, the other party will want to follow him, and the result will be that the costs will be greatly increased, the time

<sup>12</sup> The Master will find it necessary, to the prompt and orderly conduct of accounts, to insist on the enforcement of the regular rules of procedure in taking proof, requiring each party to introduce his proof in the same order as on a trial before the Chancellor, and requiring each witness to be examined in the same manner.

<sup>13</sup> Ch. Rule, IV, §§ 10-11; § 1193, *post*. The Master must keep in mind that his duty is to reach the inner truth of the controversy, and where a witness is intelligent, truthful, and familiar with the facts, these characteristics should be considered when his re-examination is requested. On the other hand, an unreliable witness should never be re-examined, where other evidence as to the same matter is accessible. Light does not come from smoke, and pure water cannot flow from an impure fountain.

<sup>14</sup> 2 Dan. Ch. Pr., 1191. The reasons which require a special order to authorize the re-examination

of a witness are, (1) the danger of perjury by the witness when he knows where the cause pinches, and how his testimony bore upon it; and (2) the anxiety of the Court, or Master, to prevent improper tampering with the witness to induce him to retract, or contradict, or explain away, what he swore in his former examination. 2 Dan. Ch. Pr., 1192.

<sup>15</sup> Ch. Rule, VII, §§ 6-7. See, *post*, § 1196.

<sup>16</sup> See, *ante*, §§ 492-496.

<sup>17</sup> 2 Dan. Ch. Pr., 1176.

<sup>18</sup> Code, § 3814. A failure to produce documents, when required by the Court, or by a subpoena *duces tecum*, is a contempt, and punishable as such. 2 Dan. Ch. Pr., 1179. For a form of a subpoena *duces tecum*, see, *ante*, § 492.

<sup>19</sup> 2 Dan. Ch. Pr., 1187; 1269, notes.

<sup>20</sup> *Maury v. Lewis*, 10 Verg., 115; *Markham v. Townsend*, 2 Tenn. Ch., 718.



for taking proof greatly prolonged, and the Master greatly perplexed, and perhaps overwhelmed, by a mass of immaterial, irrelevant and impertinent testimony. The rules of evidence in taking the account are, in no particular, different from the rules of evidence in preparing the case for hearing before the Chancellor. When incompetent evidence is offered it must be then and there objected to, or at least objected to before the evidence is closed by the opposite party, or the objector will be deemed to have waived any objections. Such objections should be in writing and brought to the attention of the Master, and the party offering the evidence.

1. **What Evidence may be Considered.** The parties have the liberty, in any reference to the Master, to make use of all the pleadings, depositions and documentary evidence, on file in the cause when the order of reference was made.<sup>21</sup> The Master must consider, also, all depositions and documentary evidence taken and filed by any of the parties before he begins to make up his report. And when the reference is for an account, the parties may, in addition to all the foregoing evidence, introduce witnesses to be examined by the Master in person, or by his deputy.

2. **Agreements by the Parties.** Before the Master begins the examination of the witnesses, he should call on the parties to know what matters referred to him are wholly or in part agreed on, what are admitted, and what denied.<sup>22</sup> In this way, the range of investigation may often be greatly narrowed, and the matters really controverted specifically defined, thus greatly lessening both the labor and the expense of taking the proof, and making the report. All such agreements should be reduced to writing, signed and filed.<sup>23</sup>

§ 610. **Filing Claims Before the Master, Under a Decree.**—Whenever there are assets or funds in Court to be administered or distributed, and the Master, by order of the Court, is directed to report the parties having interest therein, or claims thereto, as creditors, legatees, distributees, beneficiaries or otherwise, any such person, even when not a party to the suit, is authorized, under such an order, to set up his claim to such assets or funds.

To do this in proper form, he must present his petition, either in open Court, or before the Master, praying to be allowed to come in under the decree, and file and prove his claim.<sup>24</sup> This petition should detail the particulars of the claim, and the circumstances under which it arises; and should be accompanied by any written evidence of the claim or claims specified.<sup>25</sup> The petition should be sworn to as an evidence of the good faith of the petitioner.<sup>26</sup> On the filing of such a petition, the petitioner is entitled to all the rights of any other party, so far as is necessary to prove or defend his claim or debt, and is entitled to the production of all documents in the possession or power of any of the parties to the suit relating to his claim; and, conversely, the other parties are entitled to the like production of documents in his power or possession.<sup>27</sup>

Where publication is made requiring persons to present and prove their debts or claims within a certain time, or be forever barred, such a publication will not preclude a person from proving his debt or claim at any time while the fund is in Court. Such person must, however, present a sworn petition showing merits, and explaining satisfactorily his delay.<sup>28</sup>

Ordinarily, a creditor or claimant, when a competent witness, may prove his claim by his own deposition, when it is not contested. It must be remembered,

<sup>21</sup> 2 Dan. Ch. Pr., 1188.

<sup>22</sup> 2 Dan. Ch. Pr., 1222, note. See, *post*, § 958.

<sup>23</sup> Counsel should always endeavor to lessen the costs and labor of taking the accounts, by agreeing to such matters as cannot be contested. A short stipulation as to deeds, contents of records, hooks, or other documents will often save great costs; as will agreements in reference to dates, names of heirs, and ages of parties.

<sup>24</sup> The answer of the complainant under oath to

<sup>25</sup> *Miller v. Taylor*, 2 Shan. Cas., 462. See, *post*, § 1003.

<sup>26</sup> The sworn petition will not, however, be an evidence of the justness of the claim; the claim must be otherwise proved. 2 Dan. Ch. Pr., 1209.

<sup>27</sup> 2 Dan. Ch. Pr., 1209, note. If the Master disallows his claim, he may except. *Ibid*, 1212.

<sup>28</sup> 2 Dan. Ch. Pr., 1204-1205. Such a creditor will, ordinarily, be required to pay any costs occasioned by the filing of his petition. *Ibid*.

however, that the party representing the estate against which the claim is made, has a right to the benefit of any defence which he could have made to the claim, had a bill been filed against him by the claimant to establish such claim; he may plead the statute of limitations, failure of consideration, set-off, payment or any other defence. So may one creditor or claimant contest the validity of the claim of any other creditor or claimant.<sup>29</sup>

## ARTICLE III.

## THE MASTER'S REPORT.

- |  |                                     |
|--|-------------------------------------|
| § 611. The Master's Report, and What it<br>Should Contain. | § 613. Form of a Master's Report.   |
| § 612. Frame of a Master's Report.                         | § 614. When a Report Must be Filed. |

§ 611. **The Master's Report, and What it Should Contain.**—A report is ordinarily either (1) a formal statement by the Master showing how the facts or matters referred to him are; or (2) a formal statement of how he has discharged some duty imposed upon him by the Court.<sup>1</sup> It is, therefore, essential to a complete report that the Master shall fully and definitely respond to every matter referred to him, to the end that his report may supply the Court with all the facts called for, or inquired about; and in all respects show that the Master has fully and properly discharged every duty imposed on him by the order of reference.

A perfect report must not only contain everything called for, and show that every duty imposed has been performed, but it must also contain no recital of facts not called for, and no statement of acts not required to be done. In making his report, the Master must confine himself to the matters referred to him: those matters circumscribe his authority and limit his jurisdiction. All other matters contained in his report are mere surplusage and impertinence; and the Court will pay no attention to them, unless to order them to be stricken out.<sup>2</sup>

The report must not only respond to all the requirements of the order of reference, but it must be positive, definite, and correct; not inferential, hypothetical, or in the alternative as to any matter. The Chancellor wants the Master's findings as to the facts, and his positive and affirmative conclusions as to matters of judgment, or opinion. A report, giving alternative states of facts, or alternative conclusions, is no report at all, and will be set aside on motion. The facts called for must be set forth in the report with such precision and particularity, and the duty imposed by the reference must be performed with such fullness and completeness, that the Court will have no difficulty in basing on the report an adjudication as to all and every matter specified in the order of reference.

The Court will not allow anything in an account under the name of general expenses: the party must specify the particulars.<sup>3</sup> Sums in gross will not be allowed in any case; for the party charged therewith has the right to know the items; and lumping charges are generally not only excessive, but are sometimes cloaks for frauds.<sup>4</sup> A report, for these reasons, should contain no lumping charges, and no lumping credits, but should specify every item of charge or credit.

<sup>29</sup> 2 Dan. Ch. Pr., 1211, note.  
<sup>1</sup> 2 Dan. Ch. Pr., 1294. Inasmuch as the taking of an account involves the exercise of judgment and discretion, the Master can not delegate this duty to another, nor can he adopt an account stated by another, either in the same or in another suit. 2 Dan.

Ch. Pr., 1295, note. Of course, his regular deputy may make and sign a report.  
<sup>2</sup> 2 Dan. Ch. Pr., 1296-1297.  
<sup>3</sup> 2 Dan. Ch. Pr., 1232.  
<sup>4</sup> *Dolus versatur in generalibus.*

§ 612. **Frame of a Master's Report.**—The frame of a report is as important as its contents; for a report may contain everything called for by the order of reference, and yet its statements may be so unmethodical, and its arrangement so unsystematical, and its construction so irregular and chaotic, that no decree can be predicated upon it without rearranging and restating its contents. As every order of reference should not only specify, in a separate paragraph, each particular matter to be reported on, but should also give each item of the reference in its proper logical order, or legal sequence, and consecutively numbered; so a report should, not only respond fully and directly to each of the particular matters of reference, but should also respond to them in the order in which they appear in the reference, and should never have under one head what properly belongs to another head of reference.

The report should not contain any more of the decree or order of reference than is necessary to show what matters have been referred; nor should the evidence be either recited, or summarized. Preambles, explanations, and arguments, are wholly out of place in a report, as are also all other matters that unnecessarily tend to swell its size. What the Chancellor calls for are facts, conclusions and acts,—in a word, *results*, and not the processes by which the results were reached.<sup>5</sup> The report should not be hypothetical, or in the alternative, unless so required; and the facts found should be stated with such positiveness and particularity that an issue as to their correctness may be readily raised by an exception thereto. The report of the Master is in the nature of a special verdict; and his findings should not only be clearly and fully responsive to the order of reference, but each finding must be clear, direct, emphatic and brief. And where sums and amounts are reported on, he should give each item allowed, and not the gross sum or amount, for otherwise neither party could intelligently except, not knowing what items had been allowed and what disallowed.<sup>6</sup>

The report must be written in ink,<sup>7</sup> and properly paged; and should refer, by page, to the particular pages of the record upon which each item is based.<sup>8</sup> A reference to a deposition, or to a transcript, is too indefinite, as they may contain many pages. The number of the question and answer in a deposition may be referred to, as well as the page.

§ 613. **Form of a Master's Report.**—The form of a Master's report can be readily understood from the foregoing sections, and from the following form.<sup>9</sup>

#### MASTER'S REPORT.

John Doe,  
vs.  
Richard Roe, et al. } No. 619.—Master's Report to Nov. Term, 1890.

The undersigned respectfully reports that, in obedience to a decree in this cause, pronounced at the last term, directing the Master to hear proof and report:

1. What amount was originally due from the defendant, Richard Roe, to the complainant, for the construction of the dwelling-house referred to in the bill, after deducting payments made to complainant, before the assignment by complainant to the defendant, Stokes.

<sup>5</sup> 2 Dan. Ch. Pr., 1298-1300, notes; Evans v. Evans, 2 Cold., 143. While the report of the Master should not, on the one hand, copy the proof on which it is based, it should not, upon the other hand, be a mere skeleton, presenting nothing but an array of figures. Each item should be numbered, and when these items rest upon accounts, receipts, or other vouchers, they should be numbered correspondingly; and where they are supported by depositions, the pages of the depositions should be referred to. The Master should state the grounds of his action in a concise and intelligible manner, referring to the pages of the depositions and of documentary evidence, on which he relies. Green v. Lanier, 5 Heisk., 662; Stull v. Goode, 10 Heisk., 58.

<sup>6</sup> The Master's report should not contain any lumping charge or credit, composed of several items, unless accompanied by a schedule of such items; because, where a lumping charge or credit is made, neither party can with any certainty or definiteness,

except thereto. Every item allowed or disallowed by the Master, should be set out either in the report, or in a schedule thereto; and the Master should under each item give the precise place in the record where he obtained the proof in reference thereto, giving the document and page, and if a deposition, the name of the witness, the page and number of the answer. A general reference to a document, pleading or deposition, is but little better than no reference at all. 2 Dan. Ch. Pr., 1301, notes.

<sup>7</sup> The ink should be black, and the paper should be legal cap. Fancy inks and fancy paper are abominations in Court proceedings; and a sure sign of some infirmity on the part of the officer or Solicitor voluntarily using them.

<sup>8</sup> Ch. Rule, IV, §§ 6-7; *post*, 1193.

<sup>9</sup> For other forms of Reports, see, *post*, §§ 916; 994; 976. The above form is intended to conform to the requirements given by Judge Nelson, in Greene v. Lanier, 5 Heisk., 671.

2. How much of the debt due from the complainant to the defendant, Charles Stokes, did the defendant, Richard Roe, pay, and under what contract; and what payments defendant, Richard Roe, made to said Stokes thereunder.

3. Was said dwelling-house constructed according to contract; and if not, what deduction should reasonably be made from the contract price.

4. What amount does the defendant, Richard Roe, owe complainant for building the out-houses and fences on the lot containing said dwelling-house, after deducting all payments made, and all other credits.

5. What balance is due from the defendant, Richard Roe, and what part of said balance belongs to complainant, and what part to the defendant, Charles Stokes.

I.

As to the 1st head to be reported on, I report that the defendant, Richard Roe, originally owed the complainant the full contract price for the building of said dwelling house, to-wit: \$2,100.00

(Written contract, p. 3.)

Less the following payments:

- (1) Paid January 2, 1890, . . . . . \$400.00  
(Exhibit No. 1, to the dep. of Richard Roe; and dep. of John Doe, p. 41.)
- (2) Paid January 18, 1890, . . . . . 600.00 1,000.00  
(Exhibit No. 2, to dep. of Richard Roe; and dep. of John Doe, p. 42.)

Balance originally due the complainant for the building of said house... \$1,100.00

I find that the payment of \$300.00 set up in the answer was not in fact made, for the reason that the check by which it was sought to be made, was never cashed, and could not have been, because the defendant, Roe, had no money in the bank subject to such check. (See dep. of the Cashier, John Jones, pp. 1-2; and dep. of John Doe, p. 8; and the said check, exhibit 3, to John Doe's dep.)

II.

As to the 2d head to be reported on, I report that the complainant owed defendant, Charles Stokes, \$2,300.00; and that he, on January 20, 1890, gave said Stokes an order in writing on the defendant, Richard Roe, for all the balance due complainant for constructing said house. (See dep. of John Doe, p. 8; and dep. of Richard Roe, p. 5.) This order was accepted by the defendant, Roe, and on it he has made the following payments:

- Paid Charles Stokes, Jan. 21, 1890, . . . . . \$400.00  
(Dep. of Stokes, p. 3; dep. of Roe, p. 6.)
- Paid Charles Stokes, Feb. 25, 1890, . . . . . 300.00  
(Dep. of Stokes, p. 4; dep. of Roe, p. 7.)
- Total amount paid by the defendant, Roe, to Stokes, on said order, . . . . . \$700.00

III.

As to the 3d head of reference, I report that while the house was not constructed strictly according to the original contract, yet the defendant, Roe, agreed to accept it, and did accept it, as though it had been so constructed; and that such acceptance was based on a sufficient consideration, consisting of additional work done and materials furnished by complainant, and of delays caused by Richard Roe, himself.

(Deps. of John Doe, p. 12; and James Johnson, p. 4.)

IV.

As to the 4th head of reference, I report that the defendant, Roe, owes complainant for building the said out-houses and a fence a balance of \$218.00

As follows:

- Total cost of materials and labor, . . . . . \$480.00  
(Dep. of John Doe, p. 18; and exhibit 5 to his dep.)
- Paid Charles Stokes on said order, . . . . . 262.00  
(Deps. Stokes, p. 3, and Roe, p. 12.)

The defendant, Roe, claims a deduction of \$20.00 because the fence is not straight. This claim I disallow: 1st, because it was straight when built and accepted, (Dep. of Doe, p. 18;) and 2d, the crooks in it were caused by defendant, Roe's, clothes' lines being tied to the fence in wet weather (Dep. of Sarah Cook, pp. 2-3.)

Defendant Stokes agrees that the said balance of \$218.00 belongs to complainant, and that complainant owes him nothing after he gets the sum of \$286.13, as shown under head v. (Dep. of Stokes, p. 6.)

V.

As to the 5th head of reference, I report that the defendant, Richard Roe, owes:

- 1. On the dwelling house, principal, . . . . . \$300.00
- Interest, from Jan'y. 1, 1890, . . . . . 47.00  
(Dep. of John Doe, p. 14.)
- \$347.00

This balance of \$347.00, I find to belong as follows:

To defendant, Charles Stokes, . . . . .	\$286.13
(See <i>deps. of Charles Stokes, p. 8, and John Doe, p. 14.</i> )	
To complainant, John Doe, . . . . .	60.87
(See <i>same deps. and pages as next above.</i> )	
	<hr/> \$347.00

By agreement between defendant, Stokes, and complainant, the said balance was to be used to pay whatever sum complainant yet owed him, Stokes, and they agree that said sum is \$286.13, and the remainder of said \$347.00 is the property of complainant. (*Dep. of Charles Stokes, p. 3.*)

2. Balance owing by defendant, Richard Roe, on the out-houses and fence . . . . .	\$218.00
( <i>Dep. of Stokes, p. 6.</i> )	
Total Balance due from defendant, Richard Roe, . . . . .	\$565.00
Of which there is due defendant, Stokes, . . . . .	\$286.13
And due complainant, Doe, . . . . .	278.87
	<hr/> 565.00

All of which is respectfully submitted, this Oct. 13, 1890.  
W. L. TRENT, C. & M.

§ 614. **When a Report must be Filed.**—If the order or decree prescribes a time when a report shall be filed, the report must be filed within such time, or a satisfactory excuse given in writing to the Chancellor, by the same time, in lieu of such report;<sup>10</sup> and a failure so to do makes the Master liable to severe penalties.<sup>11</sup> If the time for filing the report is not prescribed by the order of reference, the report must be filed five days before the first day of the term succeeding the order of reference.<sup>12</sup> The object of having the report filed before the first day of the term is to enable the Solicitors of the parties to examine it, and file such exceptions to it as they may desire: these exceptions must be filed on or before the second day of the term, or sooner if the cause is sooner reached on the docket;<sup>13</sup> and hence the necessity of having the Master's report on file at as early a day as possible.<sup>14</sup> If the Master fails to file his report within the time required, he must file, in lieu, a valid excuse in writing, duly verified by his oath.<sup>15</sup> The Master must note upon the hearing docket, and also upon the Chancellor's docket, opposite the cause, the fact that his report has been filed.<sup>16</sup>

ARTICLE IV.

PROCEEDINGS UPON A MASTER'S REPORT.

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|---|--|
| § 615. Exceptions to a Master's Report.                             | § 618. When and How to Correct Errors Not Reached by Exceptions. |
| § 616. Form of Exceptions to a Master's Report, and Decree Thereon. | § 619. Effect of a Master's Report.                              |
| § 617. When and How Exceptions are Disposed of.                     | § 620. Effect of Confirmation of a Master's Report.              |

§ 615. **Exceptions to a Master's Report.**—After a report has been filed, the fact should be noted at once on the dockets of the bar and the Chancellor, opposite the cause,<sup>1</sup> so that the parties interested may have notice of the filing, and thus be enabled to examine the report. If any party is dissatisfied with a report on the ground that he has material evidence not before the Master, and which he could not by proper diligence have produced, he may, within ten days

10 Code, § 4471.  
11 *Ante*, § 603.  
12 Ch. Rule, IV, § 8; *post*, § 1193.  
13 Ch. Rule, IV, § 12; *post*, § 1193.  
14 Notwithstanding the imperative language of the statute, and its peremptory repetitions, notwithstanding the severe penalties imposed, cumulative in their character; and notwithstanding the exhortations of the Chancellor and of counsel, there are some Masters who will persist in so delaying to comply with an order of reference, that the term

Such laggardness so interferes with the administration of justice that it should be stimulated into statutory activity by the rigid application of the statutory penalties. Masters must understand that it is not only a gross neglect of duty, but, also, a contempt of Court, and a violation of law, to fail to file a complete report, or a sworn excuse, within the time required. Code, §§ 4471-4474; Ch. Rule, VII, § 9.  
15 Code, § 4472; Ch. Rule, VII, § 9; *post*, § 1196.  
16 Ch. Rule, IV, § 8; *post*, § 1193.

after closing the account, file a special affidavit showing these facts, and move the Master to open the account.<sup>2</sup> If, however, a party has no additional evidence, or if ten days have elapsed, he must except to the report if dissatisfied with it.

Exceptions to a Master's report are proper only in those cases which he has come to a wrong conclusion upon the matters referred to him. Where he proceeds irregularly,<sup>3</sup> or neglects to report upon all the matters referred to him, or failed to give notice, or heard improper proof, improperly refused to reopen the account, or to grant a continuance, or otherwise denied a party his just rights, the proper course for the aggrieved party is to apply to the Court to set aside the report, and refer it back to the Master, with proper directions,<sup>4</sup> supporting his application by affidavit of the facts, when they do not otherwise sufficiently appear. Exceptions are in the nature of special demurrers to the report, and must be based upon the report, and not on matters outside of the report;<sup>5</sup> and must clearly and distinctly specify the matter, or item, excepted to,<sup>6</sup> and why excepted to. The exceptions must be numbered, and refer to the page or pages of the report which show the item or matter excepted to; and, also, refer to the page or pages of the depositions, or other parts of the record, by which the Master's report is sought to be impeached.<sup>7</sup>

Exceptions should not be prolix, or argumentative, but should state concisely the fault imputed to the report;<sup>8</sup> and should show what the report should have been, on the matter excepted to. And when a party excepts to a report which contains a number of items, he must specify the particular items of which he complains. He cannot by a general exception impose upon the Court the burden of examining every item in the report in order to ascertain the error.<sup>9</sup>

A general exception to a Master's report will not be noticed; neither will a specific exception unless proper reference is made to the page or pages of the deposition, or other evidence, by which the exception is sought to be sustained; for the exceptant cannot, either by general exceptions, or by general references to the proof, impose on the Court the burden of hunting for errors, or for proof to sustain exceptions.<sup>10</sup> The report is presumed to be correct, and the party who disputes that correctness, must clearly and specifically designate the precise errors he complains of, and the precise proof in the record showing such errors: in short, he must put his finger both on the error and the proof of the error.<sup>11</sup>

A party cannot, by means of exceptions to a report, reopen any matter adjudicated prior to the report. The Master, in making his report, is bound by the decree ordering the report, and by the former decrees, if any; and so are the parties. A party cannot, therefore, have the benefit of a rehearing, or of a bill of review, or of an appeal, or of a writ of error, or of an original bill, by filing exceptions to a report.<sup>12</sup> The former proceedings are conclusive as to the matters of reference. Exceptions to a report must be confined to the report itself, and to the evidence on which it is based. If the Master has obeyed the order of reference, and his report is sustained by the facts in the record, exceptions are of no avail.<sup>13</sup> The office of exceptions is to show that the Master has not followed the order of reference, or has not made proper deductions from the evidence in the case.

<sup>2</sup> Ch. Rule, IV, § 9. Creditors, claimants, and other quasi parties, may have an account opened, or may file exceptions, in the same manner, and on the same terms, as parties to the record; but if their claims are disallowed, and not referred to in the report, they should first obtain leave of the Court to file exceptions. 2 Dan. Ch. Pr., 1311.

<sup>3</sup> The fact that the Master employed a party as an amanuensis in making his report is no ground of exception, no improper conduct being shown. *Longmire v. Fain*, 5 Pick., 393.

<sup>4</sup> 2 Dan. Ch. Pr., 1309, note. See, *post*, § 618.

<sup>5</sup> *Musgrove v. Lusk*, 2 Tenn. Ch., 576.

<sup>6</sup> *Ridley v. Ridley*, 1 Cold., 323; *Goddard v. Cox*, 1 Lea. 112; *Musgrove v. Lusk*, 2 Tenn. Ch., 576.

<sup>7</sup> Ch. Rule, IV, § 13; *post*, 1193; *Green v. Lanier*, 5 Heisk., 670.

<sup>8</sup> 2 Dan. Ch. Pr., 1309, note.

<sup>9</sup> 2 Dan. Ch. Pr., 1315, note. See, also, *White v. Cox*, 4 Hay., 213.

<sup>10</sup> 2 Dan. Ch. Pr., 1315, note. A reference to a deposition is too indefinite. The reference must give the page of the deposition, or the number of the question and answer.

<sup>11</sup> The Court will not notice any exceptions to a Masters' report, except those that point to the particular item or matter excepted to. 2 Dan. Ch. Pr., 1815, note.

<sup>12</sup> *Maury v. Lewis*, 10 Yerg., 119.

<sup>13</sup> *Musgrove v. Lusk*, 2 Tenn. Ch., 576.

Any person who is a party, or a quasi party, to the suit, may take exceptions to a report. Creditors and claimants, whose debts and claims have been allowed, or disallowed, may except either as to matters connected with their own claims, or as to allowances made to other creditors or claimants. If there be nothing in the report, or in the proof, that will support an exception by a creditor or claimant whose claim has been unjustly disallowed, he should file an affidavit, or present a sworn petition, showing the facts, and have the report recommitted as to his claim, with proper directions.<sup>14</sup>

No one can except unless he has been aggrieved; he cannot except because another party, even an infant, has been aggrieved.<sup>15</sup>

§ 616. Form of Exceptions to a Master's Report, and Decree Thereon.—In drawing exceptions to a Master's report, no technical set form is indispensable: the essential matter is that the exceptions should clearly and distinctly state the matter or item excepted to, and also refer to the page or pages of the evidence sustaining the exception and impeaching the report.<sup>16</sup> The following is the usual form of

EXCEPTIONS TO A MASTER'S REPORT.

John Doe, }  
vs. } No. 619  
Richard Roe, et al. }

Exceptions of the defendant, Richard Roe, to the report of the Master filed in this cause on Oct. 13, 1890:

1st. The Master has, under the 1st head of his report, (page 4,) charged this defendant with \$2,100.00, as the contract price of the dwelling-house, whereas the weight of the proof is that complainant subsequently agreed to do all the work, and furnish all the materials, for \$2,000.00. (*Deps. of Richard Roe, p. 8; Sarah Roe, p. 6; and Wm. George, p. 3.*)

2d. The Master under the 3d head of his report, (page 6,) reports that this defendant agreed to accept the house as though it had been constructed according to contract, and fails to allow any deduction for defective work and materials, and for work not done; whereas he should have reported the following deductions:

- (1) Defective chimneys, . . . . . \$40.00  
(*Dep. of Wm. George, p. 5, q. 13.*)
- (2) Defective stair-case, . . . . . 18.00  
(*Dep. of Jas. Neal, p. 3, q. 7.*)
- (3) Defective doors, . . . . . 14.00  
(*Dep. Jas. Neal, p. 4, q. 9.*)
- (4) Defective plastering, . . . . . 25.00  
(*Dep. of Richard Roe, p. 9; and Jas. Neal, p. 5, q. 12.*)

3d. The Master fails to allow under the 4th head, (p. 8,) any deduction for defects in the fence, whereas he should have allowed \$20.00, the cost of straightening it. (*Deps. of John Dike, p. 3; and Richard Roe, p. 12, q. 18.*)

4th. The Master reports under the 5th head of his report, (p. 10,) a total balance due from this defendant of \$565.00; whereas said balance is only \$348.00, being \$217.00 less than the report. [*This amount of \$217.00 is composed of the additional credits claimed in the preceding exceptions.*]

Wherefore, this defendant excepts to said report, and appeals therefrom to the Court.

HENRY H. INGERSOLL, Solicitor.

The following is the form of a decree disposing of the foregoing exceptions to the Master's report, showing the various rulings of the Court on the various exceptions:

DECREE ON EXCEPTIONS TO A REPORT.

John Doe, }  
vs. } No. 619  
Richard Roe, et al. }

This cause coming on this day to be heard before Hon. T. S. Logan, Judge, sitting by interchange, upon the whole record in the cause, but especially upon the Report of the Master, filed Oct. 13, 1890, and the exceptions of the defendant, Richard Roe, to said report; and argument of counsel having been heard, and the premises understood by the Court, the Court overrules and disallows the first of said exceptions, and sustains and allows the third of said exceptions; and as to the second and fourth exceptions, the report is recommitted, and both

<sup>14</sup> 2 Dan. Ch. Pr., 1311.  
<sup>15</sup> *Musgrove v. Lusk*, 2 Tenn. Ch., 576. When a mand for a report on correct principles. *Hardwick v. Can. Co.*, 5 Cates, 657.

parties are allowed ten days to file additional proof as to the matters referred to in said second exception. At the end of said ten days the Master will make and file his report in reference to said matters, and will show the balance due from the exceptant, Richard Roe.

All other matters are reserved until the incoming of said report.

The foregoing forms illustrate most of the features usually found in exceptions to reports, and in decrees ruling on such exceptions; but the following form will serve as a further illustration of such exceptions and decrees:

**EXCEPTIONS TO A REPORT.**

John Den, }  
*vs.* } No. 723.  
 Richard Fen. }

Exceptions taken by the said defendant to the report of the Master made in this cause to the present term of the Court:

*1st Exception.* For that the Master has in and by his said report, (Item I, page 2,) stated that the said complainant paid said defendant, on the 5th of December, 1887, \$5,000, and charges this defendant with the same, and interest thereon, whereas the proof does not show that such payment was, in fact, ever made.

*2nd Exception.* For that the Master has in his said report, (Item V, page 10,) stated that the value of the rents and profits of the tract of land in controversy in this suit, while occupied by the complainant, at only \$50.00 a year, whereas the proof shows them to have been of the yearly value of \$100.00. (*See dep. of Frank Fen, page 12, q. 21.*)

*3rd Exception.* For that the Master has in his said report, (Item VII, page 12,) stated that the value of the permanent improvements erected by the complainant on said tract of land at \$1,000, whereas, according to the weight of the evidence, they are not worth more than \$600.00. (*See dep. of Geo. Bird, pp. 9 to 12; and dep. of Thos. Cate, p. 8, q. 10.*)

*4th Exception.* For that the Master should, in his said report, have allowed the defendant \$200.00, the amount of the check referred to in the answer. The report wholly ignores said check. (*See dep. of Richard Fen; and the affidavits of John Carr and James Crow, herewith filed, and marked respectively exhibit A, and exhibit B, to these exceptions.*)

In all of which particulars, the defendant excepts to said report, and appeals therefrom to the judgment of the Court.

T. S. WEBB, Solicitor.

**DECREE ON EXCEPTIONS TO A REPORT.**

John Den, }  
*vs.* } No. 723.  
 Richard Fen. }

On this 10th day of June, 1891, before the Hon. B. M. Estes, Chancellor, came on for argument, the exceptions taken by the defendant to the report of the Master, made in this cause to the present term of the Court; and the Court having heard read the report, the proof referred to therein, and the exceptions, and being of the opinion that the first exception taken as aforesaid, being for that the Master, in and by his said report, has stated that the complainant paid said defendant, on the 5th day of December, 1887, the sum of five thousand dollars, and charges the defendant with the same, and interest thereon, is well taken, the same is sustained. And the Court being of opinion that the second exception taken as aforesaid, being for that the Master in and by said report, stated the value of the permanent improvements erected by the complainant on the tract of land in controversy, in his suit at one thousand dollars, the Court orders that eight hundred dollars, and no more, be allowed for said improvements, that appearing to the Court to be their reasonable value, and said third exception is, to that extent, sustained and allowed. The matters contained in the defendant's fourth exception, relative to the bank check, referred to in the answer, and in the defendant's affidavits in support of his said fourth exception, not being sufficiently clear to the Court, the report is recommitted as to said matters, and the Master will report thereon at the end of ten days herefrom, hearing the proof on file, and any additional proof filed by the parties, or either of them. All other matters are reserved until the incoming of this report.

§ 617. **When and How Exceptions are Disposed Of.**—All exceptions to a Master's report must be filed on or before the second day of the term to which the report is made returnable, unless the cause is sooner reached on the docket, in which event the exceptions must be filed at the calling of the cause; in either case, the exceptions shall be immediately set down for argument, and shall be heard and disposed of like a motion, provided they are disposed of by the Court before or when the cause is reached for trial.<sup>17</sup>

On the argument of exceptions, the exceptant has the right to open and conclude.<sup>18</sup> The better practice is to hear argument on both sides as to one excep-

<sup>17</sup> Ch. Rule, IV, §§ 12; 15; *post*, § 1193. Exceptions not taken in the Chancery Court cannot be

made in the Supreme Court. 2 Dan. Ch. Pr., 1302, note.

<sup>18</sup> Upon the hearing of exceptions, the exceptant



tion before taking up the next exception. Before argument the proof should be read, or, at least, so much of it as refers to the matters contained in the exceptions; or the Chancellor can allow counsel for the exceptant to read during his argument such parts of the evidence as sustain his exceptions, and can allow opposite counsel, during his argument, to read so much of the evidence as sustains the report, confining the exceptant's counsel, however, to the pages of evidence specified in his exceptions.

Upon the argument of exceptions, the Court may sustain some and overrule others, or may sustain in part and overrule in part. Upon sustaining one or more exceptions, the Court may either recommit the report of the Master with directions to review it as to the exceptions sustained; or the Chancellor may himself correct the error specified in the exception, without recommitting the report, and thereupon confirm the report as by him corrected, or modified.<sup>19</sup> The Chancellor will not, however, during the argument of exceptions, consider any general exceptions, or any matter in a report not excepted to.<sup>20</sup> Matters not excepted to are deemed correct.

Exceptions cannot be taken to a Master's report after it has been confirmed: confirmation makes it a part of the decree. If, therefore, a party desires to except to a report that has been confirmed, he must first have the decree of confirmation set aside. If the party show grounds of exception, and, also, show that he was prevented from excepting by fraud, surprise, or mistake, the Court, if it has not lost control of the decree of confirmation, will set it aside, and allow the report to be excepted to. In general, however, the Court is very cautious in admitting applications to review a Master's report after it has been confirmed; and it is only in cases of fraud, surprise, or mistake, that it will be permitted.<sup>21</sup>

#### FINAL DECREE ON A REPORT.

John Den. }  
     *vs.* } No. 723.—Final Decree.  
 Richard Fen. }

This cause coming on to be further and finally heard, this July 20, 1891, before Hon. B. M. Estes, Chancellor, upon the whole record in the cause, and especially on the report of the Master, filed June 20, 1891, and the exception of defendant thereto, and upon argument of counsel, on consideration of all which, it is ordered, adjudged and decreed, that said exception be overruled and disallowed, and said report confirmed; and that the defendant is justly indebted to the complainant by reason of the premises, in the sum of thirteen hundred dollars. [*If the complainant has no lien on any property to secure his debt, the decree will then proceed as follows:*] for all of which and the costs of the cause, which are adjudged against the defendant, an execution will issue. [*If the debt is a lien on real estate, conclude the decree after the words "thirteen hundred dollars," as follows:*]

And it further appearing that complainant is entitled to have said sum declared a lien on the tract [or lot] of land described in the bill, it is so ordered, adjudged and decreed.

And if said sum of thirteen hundred dollars and all the costs of the cause are not paid into the office of the Clerk and Master of the Court in satisfaction of this decree within sixty days, the Clerk and Master will, in the manner required by law, sell said tract [or lot] of land to the highest and best bidder, on a credit of six, twelve, eighteen and twenty-four months [*&c.* See balance of decree in § 626, *post.*]

**§ 618. When and How to Correct Errors not Reached by Exceptions.**—Exceptions will not reach any error not apparent in the report, or in the accompanying proofs. If, therefore, the Master (1) takes an account without notice, or (2) rules out material and admissible evidence, so that it does not appear in the record, or (3) if the Master refuses to examine a material and competent witness, or (4) if the Master admits illegal evidence, or rejects legal evidence, or

must confine himself to the exceptions, and will not be allowed to raise other objections to the report, nor to go behind the decree. The exceptions and the argument must be founded on the facts stated in the report, or in the accompanying proofs; and evidence which was not before the Master cannot be read. If a party has new evidence, he should not except, but move the Court to open the account and recommit the report. 2 Dan. Ch. Pr., 1317, notes; *See also* 2 Dan. Ch. Pr., 1318, notes.

It is sometimes advisable to take up and dispose of an important exception before taking up the next, first hearing the part of the report excepted to, then the exception to such part, and lastly argument for and against the exception, each side in his argument referring to the evidence he relies on.

<sup>19</sup> 2 Dan. Ch. Pr., 1318-1319, notes.

<sup>20</sup> 2 Dan. Ch. Pr., 1315, note.

<sup>21</sup> *Ibid.*, 1314, note; 1321.

improperly refuses to open the account on application made to him, or (5) if the Master commits any other error in taking an account which cannot be adequately presented to the Court by exceptions to the report, the party injured may bring the matter before the Chancellor at Chambers, or in open Court, and obtain any order necessary to correct the error, and give the injured party the relief he is entitled to, supporting his motion by affidavit if the facts do not otherwise appear. In such cases, if the report has not been filed, the Chancellor may, at Chambers,<sup>22</sup> or in Court direct the Master to receive the rejected evidence, or reject the received evidence, or hear the rejected witness, or open the account; and if the report has been filed, it may be recommitted, with proper instructions to the Master. In cases of this sort, exceptions will not enable the party injured to obtain the relief he is entitled to.<sup>23</sup>

If the Master was prejudiced against a party, or had expressed an opinion, or was nearly related to one of the parties, or was interested in the litigation, on such fact being made known to the Chancellor, either in vacation, or in term time, he may appoint a commissioner to take the account,<sup>24</sup> the application for such appointment being made in due season, and the applicant not having waived the Master's incompetency.

The party injured by any act of the Master specified in this section should bring the matter before the Chancellor at the first opportunity. Acts of acquiescence, after knowledge, will be deemed a waiver of any error, or disability, of the Master.

If a party, or *quasi* party, desires to introduce new evidence, he must file a special affidavit, detailing such evidence, showing clearly its materiality, and cogency, explaining satisfactorily why it was not introduced before the Master, and why application to open the account was not made to the Master; on such an affidavit the Court may recommit the report to the Master, on such terms and with such directions as will effectuate the ends of justice.<sup>25</sup>

**§ 619. Effect of a Master's Report.**—A Master's report is in the nature of a special verdict, and exceptions to it are in the nature of a motion for a new trial; and the Court will not overrule it unless the evidence clearly preponderates against it. The burden is on the party excepting, to establish the mistake, or misconduct, or disability, alleged. Where a matter of fact, depending on conflicting testimony, and the credibility of witnesses, has been referred to the Master, his decision will not be interfered with, unless it is a plain case of error, or mistake, especially when the witnesses were examined before him.<sup>26</sup> The result is, the Court will not allow an exception to the Master's report, unless the exception is clearly sustained by the weight of the evidence, or otherwise affirmatively appears to be well taken.

The effect of confirming a report is the same as though the facts contained in the report had been ascertained by the Court, upon argument and due consideration of the record in the cause. Indeed, if a report is confirmed without exceptions filed, the facts found by the Master will, on appeal to the Supreme Court, be conclusive; whereas, if the Chancellor had upon argument found the same facts, his finding would be inconclusive, and subject to modification, or reversal, on appeal or writ of error.

**§ 620. Effect of Confirmation of a Master's Report.**—A Master's report when unexcepted to is confessed to be true and correct, in so far as said report is responsive to the order of reference; and a decree confirming it is conclusive upon all parties, including minors properly represented, after the term is passed.<sup>27</sup> Neither can such a report when so confirmed be set aside in the Supreme Court, even when the report is erroneous on the proof;<sup>28</sup> but may be

<sup>22</sup> Code, §§ 4410; 4416.

<sup>23</sup> 2 Dan. Ch. Pr., 1309; 1317-1319, notes.

<sup>24</sup> Code, § 4414.

<sup>25</sup> Ch. Rule, IV, § 9.

<sup>26</sup> 2 Dan. Ch. Pr., 1298; 1321, notes. When the Master sees and hears the witnesses, he is a better

judge of their credibility than is the Chancellor. See *Brown v. Dailey*, 1 Pick., 218; and *Turley v. Turley*, 1 Pick., 251.

<sup>27</sup> *Allen & Hill, exrs., v. Shanks*, 6 Pick., 359; *Grimstead v. Huggins*, 13 Lea, 728.

<sup>28</sup> *Ibid.*

set aside on an original bill surcharging and falsifying the report and decree for fraud.<sup>29</sup>

When a Master's report is confirmed by the Chancellor on exceptions as to facts, such concurrence has the force and effect of a verdict of a jury and judgment thereon, and is conclusive on the Supreme Court.<sup>30</sup> But a concurrent finding of law,<sup>31</sup> or of a mixed question of law and fact, or of fact based on mere opinions or estimates,<sup>32</sup> is not conclusive but subject to review and redetermination in the Supreme Court, and this is so even when the Court of Chancery Appeals also concurs on a question of law.<sup>33</sup>

<sup>29</sup> *Vaccaro v. Cicalla*, 5 Pick., 63, 76.

<sup>30</sup> *Hicks v. Porter*, 6 Pick., 1; *Fitzsimmons v. Johnson*, 6 Pick., 416; *Dollman v. Collier*, 8 Pick., 660. See, *post*, § 1302.

<sup>31</sup> *Railroad v. Knoxville*, 14 Pick., 1.

<sup>32</sup> *Pearson v. Gillenwaters*, 15 Pick., 446. Such

as estimates as to fees of Solicitors, or compensation of guardians, administrators and other trustees.

<sup>33</sup> *Hascall v. Hafford*, 23 Pick., 355. A mixed question of law and fact should not be referred to the Master. *Ibid.*

CHAPTER XXXI.

DECREES OF SALE, AND PROCEEDINGS THEREON.

- ARTICLE I. Sales Generally Considered.
- ARTICLE II. Report of Sale, and Proceedings Thereon.
- ARTICLE III. The Opening of Biddings.
- ARTICLE IV. Purchasers' Duties, Rights, and Liabilities.
- ARTICLE V. Payment of Money Under a Decree to Parties Entitled.

ARTICLE I.

SALES GENERALLY CONSIDERED.

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| § 621. When a Sale Will be Decreed.                             | § 625. When Private Sales Will be Made by the Court. |
| § 622. What Should Appear of Record When Land is Sold for Debt. | § 626. Form of a Decree of Sale.                     |
| § 623. Sale of Land in Bar of Redemption.                       | § 627. Duties of the Master in Reference to Sales.   |
| § 624. Duties of the Court in Making Sales.                     |  |

§ 621. When a Sale will be Decreed.—The Chancery Court will, by decree, order the Clerk and Master, or a special commissioner, or a receiver appointed for that purpose, to sell property, real or personal, in the following cases:

1. Where the property is described in the bill; and its sale is prayed for, and is necessary, to enforce some lien or trust, created by the contract of the parties, or by operation of law, or by the decree of the Court.

2. Where the bill is filed to sell the property therein described: (1) for partition among tenants in common; (2) for reinvestment in case of persons under disability; (3) for the maintenance or education of persons under disability; (4) to pay the debts of a decedent; (5) to wind up an insolvent or dissolved corporation; or (6) to pay the debts of a fraudulent vendor.

3. Where property described in the bill has been attached, or otherwise impounded, during the progress of the cause.

4. Where, in any other case, the sale of the property described in the bill is necessary, or proper, for the due enforcement of the rights of any of the parties to the suit.

5. Where property has been levied on by attachment or execution, and for some reason has not been sold by the officer levying the writ.

§ 622. What Should Appear of Record when Land is Sold for Debt.—Before land can be properly sold for debt the following facts should appear of record, or in the decree for sale:

- 1. The owner of the land must be before the Court.
- 2. A debt necessitating such sale must be established by sufficient proof.<sup>1</sup>
- 3. The precise amount of this debt must be ascertained and stated in the decree.<sup>2</sup>
- 4. The land to be sold must be described in the decree, or by reference to the bill, or to the attachment or execution levy, or to some other part of the record, so as to identify it;<sup>3</sup> and such land must not be different from that sought to be reached by the bill, if any be so sought.<sup>4</sup>

<sup>1</sup> Miller v. Taylor, 2 Shan. Cas., 461.  
<sup>2</sup> Pryor v. Coleman, 2 Shan. Cas., 257; Lewis v. Baker, 1 Head., 388; Codwise v. Taylor, 4 Sneed, 351; Denny v. Steakley, 2 Heisk., 156.  
<sup>3</sup> And when the lands of parties under disability are sold the acreage should be known, and sales in gross not allowed. Horn v. Denton, 2 Sneed, 125.  
<sup>4</sup> A decree is *coram non iudice* and void that sells a different tract from that described in the bill. Bank v. Carpenter, 13 Pick., 437.

5. The homestead and dower should be carved out when either or both encumber the land.

6. The right of redemption should be preserved, unless good reasons exist for a sale in bar of redemption.

7. Opportunity should be given to the debtor to pay the debt before the sale.<sup>5</sup>

8. The sale should be duly advertised.<sup>6</sup>

9. If there be more tracts than one, each tract should be sold separately, unless, for sufficient reasons appearing in the record, the Court should order two or more adjoining tracts to be consolidated and sold as one.<sup>7</sup>

§ 623. **Sale of Land in Bar of Redemption.**—Man naturally loves the land he owns, and in all ages among all civilized nations, the law has regarded a man's home as sacred, and has declared that when sold it should be subject to redemption.

1. **When the Right to Redeem Exists, and When it May be Barred.**—Ordinarily, under our law, real estate sold for debt under any judicial procedure is sold subject to redemption at any time within two years after such sale.<sup>8</sup> But where, upon a foreclosure of a mortgage, or deed of trust, or in any case the specific land to be sold is mentioned in the decree, the Court, upon application of the complainant, may order:

1. That the property be sold on a credit of not less than six months, nor more than two years.

2. That when the sale is made and reported, and confirmed, no right of redemption or repurchase shall exist in the debtor or his creditors, but that the purchaser's title shall be absolute.<sup>9</sup>

Under these provisions of the Code three things must be done to make a decree destroy the right of redemption: 1st, the complainant must pray in his bill that the land specified in the bill be sold on a credit, and in bar of the equity of redemption; 2d, this specified land must be mentioned in the decree of sale; and 3d, the decree must order that the sale be on a credit, specifying the time, which must be not less than six months, nor more than two years, and that when made no right of redemption shall exist.<sup>10</sup> The statute evidently contemplated that no part of the purchase price should, on such a sale, be required to be paid in cash, but the Supreme Court has decided that if, on facts appearing in the record, when the decree is made, a cash payment will not interfere with the obtaining of a full and fair price, the Court may require a portion of the purchase money to be paid in cash.<sup>11</sup> But, if such justifying facts do not so appear in the record, a sale requiring any portion of the purchase money to be paid in cash will vitiate the sale; and, on appeal or writ of error, the Supreme Court will set the sale aside and order a resale, and allow the right of redemption from the day of such resale.<sup>12</sup> It is not imperative on the Chancellor to order a sale on credit, barring the equity of redemption, merely because the

<sup>5</sup> Lewis v. Baker, 1 Head, 388; Codwise v. Taylor, 4 Sneed, 351.

<sup>6</sup> See, *post*, § 627.

<sup>7</sup> Pryor v. Coleman, 2 Shan. Cas., 257; Cooke v. Walters, 2 Lea, 116.

<sup>8</sup> Code, § 2124.

<sup>9</sup> Code, § 4489.

<sup>10</sup> McBee v. McBee, 1 Heisk., 558; Thruston v. Belote, 12 Heisk., 250; Glass v. Porter, 7 Bax., 114; Turner v. Argo, 5 Pick., 443.

<sup>11</sup> Hodges v. Copely, 11 Heisk., 335; McBee v. McBee, 1 Heisk., 558. The Master may be required to report whether a cash payment will prevent the land being sold for a full and fair price.

No cash should ever be required, unless: 1, The sale is made in the enforcement of a contract expressly providing for a sale for cash, and then it is the duty of the Court to sell for cash. Knox v. McCain, 13 Lea, 197; or 2, Some cash is imperatively required to discharge taxes, or other pressing encumbrances; or 3, The interests of the owners of

The parties are all *sui juris*, and consent to sale for cash, in whole or in part.

As a rule, the prepayment of any cash lessens the price bid for the land somewhat in proportion to the percentage of cash required; that is to say, if ten per cent. cash is required, the land will, ordinarily, bring ten per cent. less, and this percentage holds good until about the limit of 25 per cent. And of what benefit is it to any one, except the Clerks, to have ten per cent. of the purchase money paid in cash?

Neither should a tract of land be sold first in lots, and then as a whole, adopting the sale bringing the larger sum in the aggregate. In such a case, shrewd and scheming bidders will combine, and not bid when the lots are sold separately, but wait until the property is sold as a whole, and then bid a nominal advance, and, on confirmation of the sale, partition the property between them. To defeat such a device, let the property be sold as a whole first, and then sell it in lots: this method puts poor and honest men on

complainant asks for such relief in his bill. It is a matter of sound legal discretion to be exercised in view of the facts of the case.<sup>13</sup>

2. When the Right to Redeem Does Not Exist. In construing the various sections of the Code relative to the equity of redemption,<sup>14</sup> it is apparent that it is intended to exist in cases only where the land is sold for debt of the owner of the land, and it therefore does not exist in the following cases:

1. Where land is resold by the Court for the purchase money due from the purchaser at the original Court sale, he failing to pay the full amount of his bid. In such a case, the resale may be made for cash, without the equity of redemption.<sup>15</sup>

2. Where land is sold in an administration cause for the payment of the debts of the decedent.<sup>16</sup>

3. Where land is sold for partition of proceeds among tenants in common.<sup>17</sup>

4. Where the lands of married women, infants,<sup>18</sup> idiots, lunatics, or persons of unsound mind<sup>19</sup> are sold for support, education, reinvestment or division.

When land is sold in any of the foregoing cases it is not necessary for the decree to bar the equity of redemption.

§ 624. **Duties of the Court in Making Sales.**—It is an exercise of great power on the part of a Court to sell a man's property, and especially his land, against his will; and, in making a judicial sale, the Court should diligently see: 1, That the proper parties are before the Court to give a good title to the purchaser; 2, That the pleadings and proofs justify the sale;<sup>20</sup> 3, That there is a proper decree of sale;<sup>21</sup> 4, That the sale is made by the Master in strict compliance with the decree; 5, That the best price possible is obtained for the property sold, and 6, That the report of sale by the Master, and the confirmation thereof, are in regular form. The Court acts as a sort of judicial agent for the parties in making a sale.<sup>22</sup>

In making sales of property, real or personal, the Court has two great duties to discharge; a duty to the owner of the property, and a duty to the buyer of the property. The duty to the owner of the property is discharged when the highest possible price has been obtained for it;<sup>23</sup> and the duty to the purchaser is discharged by giving him a good title to what he buys, or, at least, such a title as he has the right in reason to expect.<sup>24</sup> It savors of judicial tyranny and oppression, and is certainly judicial injustice, either to sacrifice the owner, and selling his property for a grossly inadequate price, or to sacrifice the buyer, by taking his money and giving him no title or other consideration in return.

§ 625. **When Private Sales will be Made by the Court.**—While sales by the Master are generally made publicly, and on due advertisement of the time, place and terms,<sup>25</sup> nevertheless, inasmuch as a Court of Chancery is bound by no forms, but looks to the substance of things, and strives to best promote the interests of all concerned, cases often arise when the Chancellor deems it expedient for the welfare of the parties to order the Master to sell at private sale; or the Chancellor may accept an offer made directly to the Court, or may ratify a sale already made, and that, too, even when persons under disability have an interest in the land. The question for the consideration of the Court in case of persons under disability is not *how* the land has been sold, but the ne-

<sup>13</sup> *Hoyal v. Bryson*, 6 Heisk., 142. See, *post*, § 1141; sub-sec., 6.

<sup>14</sup> Code, §§ 2124; 4489.

<sup>15</sup> *Mosby v. Hunt*, 9 Heisk., 676; *Holman v.*

*Green*, 4 Bax., 135.

<sup>16</sup> *Love v. Williams*, 2 Lea, 227.

<sup>17</sup> Code, § 3300.

<sup>18</sup> Code, §§ 3323-3336.

<sup>19</sup> Code, §§ 3716-3719.

<sup>20</sup> There are three things the law is anxious about: 1, That judgments should be effectual; 2, That sales should be valid; and 3, That decisions should be uniform. These golden words are by Judge Haywood, in *Porter v. Cocke*, Peck, 49.

<sup>21</sup> The exact amount of the debt should be fixed in the decree. *Lewis v. Baker*, 1 Head., 388; if any

of the parties are under disability the number of acres in the tract should be ascertained before sale is made. *Horn v. Denton*, 2 Sneed, 125; and reasonable time, say sixty days, given the defendant to pay the debt before sale. *Lewis v. Baker*, 1 Head, 388; *Codwise v. Taylor*, 4 Sneed, 351. See preceding section.

<sup>22</sup> *Glenn v. Glenn*, 7 Heisk., 367.

<sup>23</sup> *Childress v. Hurt*, 2 Swan, 487; *Glenn v. Glenn*, 7 Heisk., 367; *Owen v. Owen*, 5 Hum., 352; *Lucas v. Moore*, 2 Lea, 7; *Atkins v. Murfree*, 1 Tenn. Ch., 56; *Click v. Burris*, 6 Heisk., 544.

<sup>24</sup> See, *Porter v. Cocke*, Peck, 49; *Jones v. Douglass*, 1 Tenn. Ch., 357.

<sup>25</sup> Code, §§ 2145a-2149; 2 Dan. Ch. Pr., 1292.

cessity or inexpediency of the sale, and the propriety of ratifying it, considering the price offered; in short, the question is, will the welfare of the person under disability be promoted by the sale? In all such cases, the Court acts as guardian for those not able to act for themselves; and endeavors to do for them what they themselves would almost certainly do, if able freely and intelligently to act for themselves. Irregularities in a sale of an infant's land will be disregarded, where such sale is manifestly advantageous to the infant.<sup>26</sup> Thus, the Court will ratify a sale made by a next friend of infants during the progress of a suit instituted by him to sell their land, the Court being satisfied that such sale was an advantageous one for the infants,<sup>27</sup> the advisability of the sale having been first duly referred to the Master for investigation and report.<sup>23</sup>

§ 626. **Form of a Decree of Sale.**—A decree of sale should (1) be preceded by some adjudication warranting a sale; (2) it should specifically describe the land ordered to be sold, and not refer to pleadings, deeds or other papers, for the description; (3) it should expressly declare by whom the sale shall be made; and (4) it should specify when, where, and on what terms, the sale shall be made. The following form will serve as a guide in drawing a decree of sale, omitting the antecedent adjudication:

#### FORM OF A DECREE OF SALE.

It is, therefore, ordered and decreed by the Court that [unless this decree is satisfied within sixty days from this day,] said tract of land be sold by the Clerk and Master of this Court, [or, by Jonathan S. Lindsay, as special commissioner of this Court,] to the highest and best bidder, on a credit of six and twelve months, taking from the purchaser notes for the purchase-money drawing interest from the date of sale, with one or more solvent sureties thereto, and retaining a lien on the land as further security for the purchase-money. Said sale will be made in front of the Court House door in Knoxville [or, on the premises,] and on the notice prescribed by law. [If the tract of land has not been already described in the decree, then add:] Said tract of land is described as follows: [Here insert the description given in the title papers, or in the surveyor's report.] [If the sale is in bar of redemption, then say:] And on the special application of the complainant, both in his bill and at the bar, that said land be sold on a credit and in bar of all right of redemption, said sale will be made on the credit aforesaid, and when made and confirmed by the Court, no right of redemption or repurchase shall exist in the defendants, or in any of their creditors, but the title of the purchaser shall be absolute.<sup>29</sup>

The Master [or, special commissioner,] will report his action in the premises to the next regular term of the Court, until which time all other matters are reserved.

§ 627. **Duties of the Master in Reference to Sales.**—The Master is required in making sales to exercise the utmost diligence, impartiality and good faith. It is a gross breach of his duty for him to do any act that will either directly or indirectly favor a purchaser to the detriment of the parties entitled to the proceeds; but he should earnestly endeavor to realize the highest possible price for the property he has been commissioned to sell. His principal duties in reference to sales are the following:

1. **He Must Duly Advertise the Property.** If the decree of sale specifies any particular method of advertising the property, this method should be strictly

<sup>26</sup> Elliot v. Blair, 5 Cold., 185; Swan v. Newman, 3 Head, 289.

<sup>27</sup> Kirkman et al., ex parte, 3 Head, 518. In this case, the Court said in substance, that it was the Court that made the sale and not the next friend; that the next friend was only the medium through which the offer to purchase was made known to the Court; that the offer, being a very advantageous one, the Chancery Court could, and did, in the interest of the infants, properly accept it; and that the purchaser acquired a good title. This case lays down the true doctrine for all cases of Chancery sales: the Court makes the sale; the Master merely reports, for the information of the Court and the parties, the best bid he can get for the property ordered to be sold; and on such report it is for the Court to say whether such bid will be accepted and the sale made. In the language of Judge Caruthers, in the above case, "It is the sanction of the Court that makes the sale." Wood v. Morgan, 4 Hum., 371. See Hurl v. Long, 6 Pick., 445.

<sup>28</sup> Inasmuch as Chancery sales are, generally, in

bar of redemption, the Court should use every means to realize the highest price. This cannot always be done by a public sale, and it is often deemed more advantageous to the parties to sell by private contract. In such cases, the Court may, in its discretion, order the sale to be so made. Or, if a would-be purchaser has already been obtained who offers what is considered a high price, and the parties in interest desire the property to be sold to him, the Court may authorize such a sale: if persons under disability are interested, the Court will not, however, accept such a bid without a reference to the Master to inquire and report whether any better bid can be obtained, or whether it is to the manifest interest of all parties to accept the bid offered: if the Master reports in favor of the bid, the Court will, ordinarily, accept it.

<sup>29</sup> When the bill prays for a sale on a credit and in bar of redemption, the complainant is, ordinarily, entitled to have it so sold. Smith v. Taylor, 11 Lea, 738; Gibbs v. Patten, 2 Lea, 180; Hoyal v. Bryson, 6 Heisk., 139.

followed. The Master has no discretion to vary or disregard such method, but must implicitly obey the directions contained in the decree. In his advertisement he should give the names of the complainant and defendant, or parties interested, should briefly describe the land, and mention the time, place, and terms of sale.<sup>30</sup>

If the decree does not give any special directions in reference to the method of advertising and selling the property, it must be advertised and sold in the manner prescribed by the statute.<sup>31</sup> If the Master fail to sell according to the decree, or to the statute, he is guilty of a misdemeanor, and liable in damages; but the sale will not necessarily be either void or voidable.<sup>32</sup> If the decree specify when the property shall be sold, the Master must strictly comply with such direction; if there be no such direction, the land should be advertised in time to sell it within three months after the decree of sale.<sup>33</sup>

The advertisement for the sale may be in the following form:

**CHANCERY SALE OF LAND.**

In obedience to a decree of the Chancery Court at Knoxville, made in the case of John Doe *vs.* Richard Roe, *et al.*, I will, on Saturday, June 27, 1891, at noon, in front of the Court House door in Knoxville, [*or, on the premises,*] sell to the highest and best bidder, the tract of land, [*or, town lot,*] in said decree described, being the farm on which Richard Roe now resides, in the 10th civil district of Knox county, containing 100 acres, more or less.<sup>34</sup>

Said sale will be [*for cash in hand, or,*] on a credit of six and twelve months, [*following the terms specified in the decree,*] and in bar of the equity of redemption. Notes, drawing interest from the day of sale, with good personal security, will be required of the purchaser; and a lien will be retained on the property sold, as further security.

June 1, 1891.

W. L. TRENT, C. & M.

**2. He should Announce the Terms of the Sale.** Before he begins to cry the property, the Master should distinctly and fully announce the terms of the sale; and state what amount, or per cent., of cash will be required, if any; on what time the sale is to be made, if on a credit, and when each installment of the purchase-money is to be paid; what security is required to the purchase-money notes, and when interest will begin to run on such notes.

**3. He should Describe the Property to be Sold.** If the land is described in the decree by metes and bounds, this description should be given on the day of the sale; or, if the decree refers to some other paper for a description, such paper must be followed in describing the land. The Master may, also, state, at the time and place of sale, in a general way, the character of the property to be sold; but he must carefully avoid making any statements, either in his advertisement or in his verbal proclamation, which will unduly enhance the value of the property, or mislead the purchaser. A Court of Equity will not allow any deception whatever to be practiced upon bidders.<sup>35</sup>

**4. He should Require the Purchaser to Comply with the Terms of Sale.** When the property has been knocked down to the highest bidder, the Master should at once require him to comply with the terms of the sale, by paying the requisite amount of cash, if any cash is required, and by giving notes, with

<sup>30</sup> Code, § 2149. A description by metes and bounds is not only wholly unnecessary, but is downright oppressive when the costs of publication are thereby much increased. Chancellors should scan the costs of publications made by the Master, and see that no unnecessary costs are incurred.

<sup>31</sup> See Code, §§ 2145-2155; Act of 1859-1860, ch. 60.

<sup>32</sup> Code, §§ 2152-2153.

<sup>33</sup> A sale is in the nature of an execution, and the advertisement should be begun within the time prescribed by law for the issuance of executions. Code, § 3005, as amended by Act of 1869, ch. 47; and Act of 1871, ch. 62. See, also, Act of 1885, ch. 65.

Some Masters delay their sales until the month before the term following the decree of sale. This should never be done, unless the party entitled to the proceeds of the sale so orders, in writing. If a sale is promptly made, it better enables the parties inter-

ested to obtain an advanced bidder, and thus prevent the property being sacrificed. The Master who makes such a delay is not only violating his duty, but, as a rule, is, also, injuring the parties interested in having the land bring its full price. Code, § 4474.

<sup>34</sup> The land should not be described in the advertisement by metes and bounds, unless the decree expressly so orders. A brief general description, sufficient to identify the tract, or lot, is sufficient. Code, § 2149. Many advertisements of land sales are entirely too long. Some have too much head, others too much body, and still others too much ending; and, as a consequence, the printer's fees are illegally and inequitably increased. Clerks should run their offices in the interest of litigants, and not in the interest of newspapers; and Chancellors should tax them with all unnecessary advertising costs.

<sup>35</sup> *Veeder v. Fond*, 3 Paige, (N. Y.), 94.



approved security,<sup>36</sup> for the deferred payments, such notes to draw interest from date of sale.

If the purchaser of property sold at the Master's sale fails to make payment, or comply with the terms of the sale, the Master may again expose the property to sale, on the same day; or, he may re-advertise it and re-sell it, according to the directions contained in the decree.<sup>37</sup> If the Master is satisfied with the good faith and ability of the highest bidder, he may allow him a reasonable opportunity to comply with the terms of his bid.<sup>38</sup> If, however, the Master has reason to doubt the good faith or ability of the bidder, he may demand an immediate compliance with the terms of the sale.<sup>39</sup> The following is a

#### FORM OF A NOTE FOR PURCHASE-MONEY.

\$500.00

Knoxville, Tenn.

Six months after date, we, or either of us, promise to pay S. P. Evans, Clerk and Master of the Chancery Court at Knoxville, Tennessee, or his successor in office, the sum of five hundred dollars, with interest from date hereof. This note is given for, and is a lien on, the property purchased by the undersigned William Jones at a sale made by said Clerk and Master, under a decree pronounced by said Court, at the May term, 1881, in the case of John Doe vs. Richard Roe, *et al.*, No. 618, on the Rule Docket of said Court.

Witness our hands this 20th day of June, 1881.

WILLIAM JONES,  
GEORGE JONES, (surety),  
HENRY JONES, (surety.)

**5. He should Make Due Report of the Sale to the Court.** As soon as the property has been sold, the Master must make out and submit to the Court a report,<sup>40</sup> showing the property sold, the person to whom sold, when sold, the amount of the sale, the principal and interest collected on the sale, if any; the number and amount of the notes, if any, and the names of the sureties thereon, and any other matter connected with the sale proper to be stated. This report should describe the land by metes and bounds, or other accurate description, unless such a description is contained in the decree of sale.<sup>41</sup> The report should be filed before the first day of the term.

**6. His Duty when the Purchaser Fails to Comply with the Terms of Sale.** Courts of Chancery will not tolerate any trifling with its process, or with officers acting under its orders; and when the Master is selling property under a decree, whoever bids is conclusively presumed to bid in good faith, and the Court will, by attachment, compel a bidder to comply with his bid. If, therefore, a solvent

<sup>36</sup> If the Master negligently takes insufficient security, he will be held liable, and will, also, forfeit all fees and commissions due him in the cause. *Dean v. Hale*, 7 Lea, 613.

<sup>37</sup> Ch. Rule, XIV, § 1; *post*, 1203.

<sup>38</sup> This reasonable opportunity might be a day, or a week; but it should not be so extended as not to leave time for the Master to re-advertise the property. As to the powers of the Court over a bidder failing to comply with his bid, see, *post*, § 642.

<sup>39</sup> *Irby v. Irby*, 11 Lea, 165. In this case, the Master required Hubbard, the highest bidder, to comply with the terms of sale in one hour. Hubbard announced that he would not be able to comply with the terms of the sale until the following Monday; and thereupon, the Master at once resold the property, with the understanding that, if Hubbard complied with the terms of the sale according to his promise, the sale would be confirmed to him. The Master then resold the property to other parties for a much less sum, and reported the facts to the Court. Hubbard failing to comply with the terms of the sale, the Court confirmed the sale to the next highest bidder. On appeal, the Supreme Court held that the Master's action was entirely correct, and affirmed the Chancellor's decree. This case is an illustration of the fact that the highest bid is not always the best bid. The best bid is the highest bid that is in compliance with the terms of the sale.

<sup>40</sup> Code, § 4045. This section states that the Master shall, also, report the aggregate fund on hand, the disbursements made, to whom and when, specifying the fees allowed to the Master and other officers of the Court. These matters cannot be included in a

report of sale; and, as a consequence, they are sold, if ever reported, unless specially called for by a separate order of the Court, which will be made, of course, on motion.

<sup>41</sup> There has, in the past, been too much negligence in describing lands sold, or ordered to be sold. In some cases, no description outside of a general and indefinite reference is contained either in the pleadings, decree of sale, or Master's report of sale; and in some cases, the Master has been ordered to make a deed to the purchaser, on the latter furnishing metes and bounds for such deed! Such practice should not be tolerated. 1, It results in property bringing a less price because of the uncertainty of description; 2, It sometimes requires subsequent litigation to settle the boundaries; and 3, False boundaries are sometimes given to the Master to be included in his deed to the purchaser. The Court should never sell lands except by metes and bounds, and should always require the description to be contained in the decree of sale, or in the report of sale. The Master then knows what he is selling, the purchaser knows what he is buying, and if the files in the cause are ever lost, the minutes of the Court will perpetuate the description. In aid of our land titles, the Courts should set a good example of carefulness and accuracy. In *Sims v. Cross*, 10 Yerg., 460, it was decided that a decree was not void for uncertainty in the description of the land sold, inasmuch as the Master's report of the sale referred to a mortgage deed, which was on file, for a description. Nevertheless, the better and safer practice, is to incorporate the description in the decree, or in the report of sale.

bidder refuses to comply with the terms of his bid, and there is not sufficient time to resell on the same day, or to re-advertise and resell before the day the report of the sale must be filed; or, if the Master think it improbable that so good a bid can be had on a resale, in either event he may report to the Court the fact that the land was sold to such a bidder, and that he failed, or refused, to comply with the terms of sale. In such a case, the Court will deal with such bidder as in case of contempt. Even if the Master makes a resale in such a case, he should nevertheless report the fact of the failure, or refusal, of such bidder at the first sale to comply with the terms of his bid, and upon such report, upon motion and petition, the Court would attach such bidder, and hold him responsible for the extra costs occasioned by his conduct, and may, also, impose a fine and imprisonment for his contempt.<sup>42</sup> If the highest bidder fail to make payment, or comply with the terms of the sale, the Master may again expose the property to sale on the same day, or may re-advertise and resell according to the decree, as though the first sale had never taken place.<sup>43</sup>

ARTICLE II.

REPORT OF SALE, AND PROCEEDINGS THEREON.

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| <p>§ 628. The Master's Report of Sale.</p> <p>§ 629. Confirmation of Sale, and Divestiture of Title.</p> <p>§ 630. Form of a Decree Confirming a Sale.</p> | <p>§ 631. When a Party May Have a Sale Set Aside.</p> <p>§ 632. When a Purchaser May Have a Sale Set Aside.</p> <p>§ 633. Procedure in Setting Aside Sales.</p> |
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§ 628. **The Master's Report of Sale.**—The property having been knocked down to the highest bidder, complying with the terms of sale, and he having duly executed and delivered his notes, or paid the money, or otherwise complied with the terms of sale, the Master will then make out his report of the sale, showing therein in what manner he has complied with the decree of sale, to whom he sold the property, when, and on what terms. In general, it is not necessary for the Master to show in his report all the details of advertising and giving notice, but a general statement that he did advertise, or did give the notice, required by law or the decree, is sufficient. The report may be in the third person, or in the first person; but a report in the first person carries with it a larger measure of personal responsibility. The following is a

FORM OF A MASTER'S REPORT OF SALE.

<p>John Doe, vs. Richard Roe, et al.</p>	<p>} No. 618.—Master's Report of Sale.</p>
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I respectfully report that, in obedience to a decree in this cause made at the last term, commanding me to sell the property therein mentioned, I advertised [and gave the notice] as required by the decree, and, on the 20th day of June, 1881, in front of the Court House door in Knoxville, [or, on the premises,] sold said property, at public sale, in bar of the equity of redemption, to William Jones, he being the highest and best bidder, at the price of one thousand dollars, for which he gave his two promissory notes, each for the sum of five hundred dollars, dated June 20th, 1881, [the day of sale,] due respectively, six and twelve months after date, and bearing interest from date, with George Jones and Henry Jones, as his sureties thereon. Said property so sold is that certain tract or lot of land in the 7th civil district of Knox county, Tenn., adjoining the lands of George Jones, Henry Jones and others, bounded as follows: Beginning on a black oak, Henry Jones' corner, [and giving the description in full by metes and bounds to beginning,] containing one hundred acres, more or less.

<sup>42</sup> In such a case, a petition should be filed specifying the contempt, and due proceedings had thereon. See Chapter on Contempts, *post*, § 921.  
<sup>43</sup> Ch. Rule, XIV, § 1; § 1203, *post*. The Master

should notify the first purchaser that the resale would be at his cost and risk, and he should, also, make report of these facts to the Court.

Said notes show on their face that they were given for, and are a lien on, said land, and are hereto exhibited.

And in obedience to said decree, and on due notice, I, also, sold, on the same day, the following personal property to the highest and best bidders:

1 Red cow to John Jones, for.....	\$ 25.00
1 Threshing machine to Henry Brown, for.....	93.00
1 Stock of goods, (See Exhibit A.) <sup>1</sup> .....	327.00

\$445.00

I sold all of said personal property for cash, except the threshing machine, which I sold on a credit of six months, taking a note therefor with surety and retaining a lien on the machine. Said money and note are in my possession, subject to the order of the Court.

Respectfully submitted, this June 20, 1881.

S. P. EVANS, C. & M.

#### EXHIBIT "A" TO REPORT.

I sold the stock of goods as follows:

1 box of soap to John Brown, for .....	\$1.00
1 plow to Henry Jones, for .....	6.00
1 bolt of domestic to Kate Clark, for .....	3.00

[*And so on to the end.*]

June 20, 1881.

S. P. EVANS, C. & M.

§ 629. **Confirmation of Sale, and Divestiture of Title.**—When the Master makes a sale of personalty, and reports the sale for the action of the Court, showing that the purchaser has complied with the terms of the sale, upon confirmation of such sale by the Court, the sale becomes complete, and the title to the personalty so sold becomes vested in him, without any formal decree divesting and vesting title, subject, however, to any lien that may be retained to secure the purchase-money, or for any other purpose.<sup>2</sup> In sales of realty, however, the mere confirmation of the report of sale does not of itself divest and vest the legal title: it only completes the sale. The legal title must be passed by decree, or by deed in pursuance of a decree, for that purpose.<sup>3</sup>

When land is sold on a credit, the better practice, where the solvency of the purchaser and his sureties is doubtful, is merely to confirm the sale, thus reserving the legal title until the entire consideration money has been paid.<sup>4</sup> The more usual practice, however, is to confirm the sale in all cases, and divest and vest title by the decree of confirmation, reserving in the decree an express lien on the land to secure the payment of the unpaid purchase-money, and directing the Master to make the purchaser a deed, or give him a certified copy of the decree, upon the purchase-money being all paid.

Under certain circumstances, hereinafter shown, the Chancellor may confirm a sale of land at Chambers.<sup>4a</sup>

§ 630. **Form of a Decree Confirming a Sale.**—It is a prudent precaution to specify in the body of a decree of confirmation the names of all the parties who have any title to, or interest in, the land, as the papers in the cause may some day get lost, or mislaid, and the title thereby become clouded. The following is the form of such a decree, omitting the caption:

#### DECREE CONFIRMING A SALE.

This cause came on to be heard this day before Hon. William B. Staley, upon the whole record in the cause, including the decree of sale and the Master's report made in obedience thereto, which report is as follows:

[*Here copy the report, in full.*<sup>5</sup>]

<sup>1</sup> When the items are numerous they should be put in a schedule, and not entered in the body of the report.

<sup>2</sup> *Graves v. Keaton*, 3 Cold., 13; *Young v. Thompson*, 2 Cold., 596. These were cases wherein slaves had been sold under statutory authority. Where the Master is ordered to sell goods, wares, and merchandise, or other personalty, as a receiver, unless the decree otherwise direct, his sale would be final without any confirmation by the Court. In *Moore v. Watson*, 4 Cold., 64, where a steamboat and her appendages were sold by the Master, the biddings were opened, and the sale confirmed to the original purchasers, at an advanced bid; and after this, but at the same term, this second sale was set aside, the

biddings reopened, and an advanced bid received. This sale was made under an agreement, the terms of which do not appear. To prevent confusion, the decree ordering the Master to sell personalty should specify on its face whether the sale would require confirmation by the Court, or not.

<sup>3</sup> *Webster v. Hill*, 3 Sneed, 333; *Bryant v. McCallum*, 4 Heisk., 517; *Wayne v. Fouts*, 24 Pick., 145.

<sup>4</sup> *Webster v. Hill*, 3 Sneed, 333; *Bryant v. McCallum*, 4 Heisk., 517.

<sup>4a</sup> See, *post*, § 772.

<sup>5</sup> The statute requires this report to "be embodied in a decree to be entered on the minutes of the Court." Code, § 4047.

And said report, being unexcepted to, is by the Court, on motion of the complainant [or defendant, or purchaser,] in all things confirmed.

It is, therefore, ordered, adjudged, and decreed, by the Court that all the right, title and interest, of the defendants Richard Roe, Roland Roe, Robert Roe and Romeo Roe, and of all the other parties to this suit,<sup>6</sup> in and to said tract of land, [in both law and Equity,] be divested out of them and each of them, and be vested in the said purchaser, William Jones, as an indefeasible inheritance in fee simple forever [or, for and during the natural life of the defendants, or as the case may be;] [subject to the lien aforesaid for the unpaid purchase-money.] And when said purchase-money shall have been fully paid, the Clerk and Master will make, acknowledge for registration, and deliver to said William Jones, a deed conveying said tract of land to him, as aforesaid, or will give him a duly certified copy of this decree, as a muniment of title, at his election, he paying the legal fees therefor. On application of the purchaser a writ of possession will be issued to put him into the possession of said tract of land.

[Then ordinarily follow some directions relating to the distribution of the proceeds, or some other matters.]

**§ 631. When a Party May Have a Sale Set Aside.**—A party may have a sale set aside whenever the property has not sold for a fair price, and there has been: (1) some failure of the Master to advertise the land properly; or (2) to sell at the right time, or at the right place; or (3) the Master has been guilty of some other misconduct, or irregularity, injurious to the sale; or (4) the purchaser has been guilty of some misconduct tending to diminish the price, or discourage bidding; or (5) others have been guilty of combinations, or other acts injuriously affecting the sale; or (6) the weather was so exceedingly inclement, or the waters so high, or in some other way bidders were prevented, or deterred, from attending the sale; or (7) for some other reason, not the fault of the party complaining, a fair sale was not had. Mere inadequacy of price, however, without more, will not justify a Court in setting aside a sale, unless an advance bid be tendered. The only test a Court can have of the value of property sold at a forced sale, is the price it will bring on due notice, at a public sale fairly conducted.<sup>7</sup>

If the property has sold for so good a price that a resale would probably avail nothing, the Court may disregard all irregularities in the sale, especially where persons under disability are concerned.<sup>8</sup> The fullness of the price in such cases, however, should be made affirmatively to appear, by reference to the Master, or otherwise.

**§ 632. When a Purchaser May Have the Sale Set Aside.**—A purchaser may have the sale set aside at any time before the title is vested in him and the term passed, if (1) the parties have no title to the property, or (2) if their title is seriously clouded,<sup>9</sup> or (3) if the property is not such in quality, size,<sup>10</sup> situation, character or value, as it was described to be, or (4) if from some want of necessary parties, or other fatal defect in the proceedings, or in the jurisdiction of the Court, the sale would be void,<sup>11</sup> or (5) if, for any other reason the purchaser would not get such a title, or property of such quality, situation, dimensions or value, as he had a right to expect, or as was authoritatively represented at, or before, the sale,<sup>12</sup> or (6) if, after the sale and before confirmation, the property should be destroyed or otherwise be materially injured, or greatly impaired in value.<sup>13</sup>

But a purchaser will not be relieved unless he apply in due season, and is

<sup>6</sup> It is a prudent precaution to include all the parties, when some are specified.

<sup>7</sup> *Atkisson v. Murfree*, 3 TENN. CH., 728; *Irby v. Irby*, 11 LEA, 165. *Tantum bona valent quantum vendi possunt.*

<sup>8</sup> *Bryant v. McCallum*, 4 HEISK., 511; *Swan v. Newman*, 3 HEAD, 289. But a void sale will not be confirmed, if the sale be attacked. *Andrews v. Andrews*, 7 HEISK., 234.

<sup>9</sup> *Read v. Fite*, 8 HUM., 328; *Deaderick v. Smith*, 6 HUM., 138.

<sup>10</sup> If the sale is by the acre, the purchaser is entitled to an abatement for the deficiency. *Myers v. Lindsay*, 5 LEA, 331. But where the land is sold in gross, not by the acre, and without any stipulation

as to quantity, and the boundaries are correctly given, the purchaser takes the risk as to quantity, unless there be fraud, or so great a deficiency as to create the presumption of fraud. *Moses v. Wallace*, 7 LEA, 413. As a correlative of this rule, if a purchaser by the acre, by mistake obtains a substantial surplus, over what he supposes he is buying, and the other party supposes he is selling, such purchaser will be compelled to pay for, or return, such surplus. *State v. Kellar*, 11 LEA, 399.

<sup>11</sup> *Crabtree v. Niblett*, 11 HUM., 488; *Kindell v. Titus*, 9 HEISK., 737.

<sup>12</sup> *Pearson v. Johnson*, 2 SNEED, 580.

<sup>13</sup> *Eakin v. Herbert*, 4 COLD., 119; *Childress v. Hurt*, 2 SWAN, 487; *Graves v. Keaton*, 3 COLD., 8.

unaffected by negligence or other inequitable conduct. If he buys, or allows the sale to be confirmed to him, with knowledge of the facts set out in his petition for relief, he will not be released.<sup>14</sup>

There is one prevailing rule running through all our Reports, and that is, that the Court will not set aside, for irregularities merely, the sale of an infant's estate, where it is advantageous to the infant,<sup>15</sup> provided the purchaser will get a good title.<sup>16</sup>

The rights and liabilities of purchasers will be considered in subsequent sections.<sup>17</sup>

§ 633. Procedure in Setting Aside Sales.—When the Master reports that he has sold the land in pursuance of the decree, or has advertised the sale as required by law, or by the decree, the Court will presume that his report is true; and the truth of the report cannot be put in issue by an exception to the effect that the Master did not advertise as required,<sup>18</sup> or did not do any other thing as reported, unless there be some evidence in the report itself, or exhibited thereto, or elsewhere on file in the cause, contradicting the report.<sup>19</sup> Inasmuch as such contradicting evidence seldom appears of record, an exception to a report of sale will seldom lie; and, as a consequence, a report of sale must usually be assailed by a sworn petition setting out in detail the grounds on which the sale is attacked.<sup>20</sup> On such a petition being filed, the Court may order proof to be taken summarily, or may refer the matter to the Master, or if the Master's conduct is called in question, may appoint a special commissioner to report on the truth of the petition.

When a purchaser seeks an abatement of the purchase-money, or to have an encumbrance removed, or to be relieved from his purchase entirely, or to have his rights under his purchase enforced, he should proceed by petition, if the cause is still in Court.<sup>21</sup> Being already a *quasi* party to the suit, and entitled to be heard in any matter growing out of his purchase, an original bill is not only unnecessary, but improper, if the cause be pending.

A purchaser may file his petition to be relieved from a sale, in whole or in part, at any time before a conveyance is executed,<sup>22</sup> but after the sale has been confirmed, and the term of the Court at which confirmation was had is passed, a sale can only be set aside for fraud, accident, mistake, or other sufficient ground.<sup>23</sup>

A petition attacking a Chancery sale must be positive in its averments. Information alone is insufficient to set the machinery of the Court in motion. A party who assails a judicial proceeding must ascertain the real facts before filing his petition, and must be able to allege those facts with definiteness and positiveness.<sup>24</sup>

<sup>14</sup> Spence v. Armour, 9 Heisk., 167.

<sup>15</sup> Elliott v. Blair, 5 Cold., 185.

<sup>16</sup> Swan v. Newman, 3 Head, 289; Rucker v. Moore, 1 Heisk., 726; Andrews v. Andrews, 7 Heisk., 234.

<sup>17</sup> See, *post*, §§ 640-643.

<sup>18</sup> Childress v. Harrison, 1 Bax., 410.

<sup>19</sup> An exception to a Master's report must be based on matter appearing in the record. *Ante*, § 618.

<sup>20</sup> Childress v. Harrison, 1 Bax., 414.

<sup>21</sup> Read v. Fite, 8 Hum., 330; Blackmore v. Barker, 2 Swan, 342; Leake v. Cannon, 2 Hum., 169; Majors v. McNeilly, 7 Heisk., 294.

<sup>22</sup> Foster v. Bradford, 1 Tenn. Ch., 400; Deaderick v. Smith, 6 Hum., 138; Read v. Fite, 8 Hum., 328.

<sup>23</sup> Spence v. Armour, 9 Heisk., 167. There is some conflict in our Reports as to the right of a

purchaser to come in for relief by petition in the original cause, after the confirmation of the sale. Foster v. Bradford, 1 Tenn. Ch., 402. The true rule would seem to be this: If the cause is still in Court, the purchaser, being a *quasi* party, has the right to relief by petition, even though such petition be not filed until after confirmation; but if the cause be out of Court, the purchaser must obtain relief by original bill. Foster v. Bradford, 1 Tenn. Ch., 402; Spence v. Armour, 9 Heisk., 167. If a petition contained sufficient merits, prayed for process, and brought all necessary parties before the Court, it would no doubt be entertained, as in the nature of an original bill. It would seem from Spence v. Armour, 9 Heisk., 167, that a cause is out of Court, as to the purchaser, after the sale has been confirmed, and the term of the Court, at which the confirmation is had, has passed.

<sup>24</sup> Foster v. Bradford, 1 Tenn. Ch., 400.

## ARTICLE III.

## OPENING OF BIDDINGS.

§ 634. When Biddings Will be Opened.

§ 635. When the Master May Open the Biddings.

§ 636. How Biddings are Opened by the Court.

§ 637. Forms Incident to the Opening of Biddings.

§ 638. Proceedings When Biddings are Opened.

§ 639. When and How Biddings Will be Reopened.

§ 634. When Biddings will be Opened.—Inasmuch as a sale<sup>1</sup> of land by the Master is conditioned upon its confirmation by the Court, and inasmuch as the chief aim of the Court is to obtain as great a price for the property as possible, it is the regular practice of the Court to “open the biddings;” that is, to allow a person to offer a larger price than the estate was originally sold for by the Master, and upon such offer being made, and the terms of the original sale complied with, to direct a re-sale of the property.<sup>2</sup> Biddings will be opened at any time before a confirmation of the Master’s report of sale, upon proper application being made, and a tender of an advance of at least ten per cent.<sup>3</sup> The Court will exercise more liberality in opening biddings when persons under disability are interested in the property sold, than when all the parties are adults and *sui juris*.<sup>4</sup> But, inasmuch as the sale is made for the benefit of the parties to the suit, and is under their control, the Court will not, when they are all *sui juris* and content with a sale, open the biddings at the instance of a third party who has no interest in the land, or in its proceeds, but merely wants to purchase the property.<sup>5</sup> Where, however, there are parties under disability

1 Although usually termed a sale, the proceedings before the Master are really not a sale, or at the very uttermost only a conditional sale. In *Wood v. Morgan*, 4 Hum., 371, Judge Green says, “There is no sale until the offer made to the Master is sanctioned by the Court and confirmed.” How can that be a sale which is not obligatory upon the parties? It is a bid, an offer by the purchaser, and if the Court is satisfied with it, it is obligatory upon the parties making it, and being confirmed by the Court, vests in the purchaser a right to the property.” So, *Kirkman, ex parte*, 3 Head, 518; *Armstrong v. McClure*, 4 Heisk., 80. See, *ante*, §§ 629-633.

2 The implied contract of sale by the Master is, that the sale is to be confirmed unless, (1) the Court has good reason to be dissatisfied with it; or (2) the purchaser has good reason to be dissatisfied with it; and the purchaser has no more right to complain of the Court for accepting a higher bid, than has the Court the right to complain of the purchaser for wanting to be relieved of his purchase, when he fails to get a title, or has other sufficient ground. And as to the policy of opening biddings, the author has long been profoundly convinced of its justice and wisdom. Nearly all of the complaints are made by Masters and purchasers: the Masters complain because of the increased trouble of a second sale without a corresponding increase of compensation, and the purchasers complain because of their disappointment in not getting the property at their bid, after complying with the terms of the sale. It is, also urged that the fact that the biddings are liable to be opened often deters bidding at a Master’s sale. There is truth in all these objections, but the question is not whether the practice is free from objections, or whether it does not occasionally work unjustly or injuriously, but whether it is not, in the main, preferable to the practice of making Master’s sales absolute. If the latter practice prevailed, it would soon result in a statute making all Chancery sales subject to redemption, because such sales would so often be mere ruthless sacrifices of property, and would so often make the debtor the victim of a

merciless creditor, or of combinations among bidders, that the cry of the people against such outrage, injustice and oppression would penetrate to the halls of legislation. It is safe to say, that the practice of opening biddings has these most beneficial results: 1st, it enables the owner of the land to secure the highest possible bidder; 2d, it prevents, or greatly thwarts, combinations among bidders; 3d, it enables the Court more effectually to remedy irregularities at the Master’s sale; 4th, it greatly increases the power of the Court to do justice both to the bidder and the owner, and 5th, in a great many cases, prevents property from being sold at grossly inadequate prices. If biddings were not opened, and redemption not allowed, Courts would often become mere destroyers of the estates of debtors. On this general subject, see *Atkisson v. Murfree*, 1 Tenn. Ch., 51. Besides, a bidder has no right to complain: 1st, because the opening of the biddings is a part of the implied contract under which he bids; 2d, he runs no risk until the sale is confirmed, and if the property is destroyed it is not his loss; and 3d, he has until confirmation to investigate the title he will get, and to ascertain whether the property is what it was represented to be. *Atkisson v. Murfree*, 1 Tenn. Ch., 53.

3 *Cluck v. Burriss*, 4 Heisk., 539; *Atkisson v. Murfree*, 1 Tenn. Ch., 51; 2 Dan. Ch. Pr., 1286. Where, however, the amount of the bid is large, say over \$10,000, the Court may open the biddings in order to obtain an advance as low as five per cent. 2 Dan. Ch. Pr., 1287. And when the amount of the bid is small, say under \$10, the Court may refuse to open the biddings even on an offer of ten per cent.

4 *Glenn v. Glenn*, 7 Heisk., 367.

5 *Bright v. Bright*, 12 Lea, 630; *Mayo v. Harding*, 3 Tenn. Ch., 237; 2 Dan. Ch. Pr., 1288. The Court will, however, allow a creditor to file a petition to have biddings opened even when all the parties to the suit are content with the sale, the creditor having a judgment against the owner of the land sold, and execution on his judgment having been returned *nulla bona*. *Childress v. Hurt*, 2 Swan, 488.

interested in the proceeds of the land, the Court will allow a stranger to petition for an order opening the biddings, when the interest of such parties will be promoted thereby. It is not necessary for a party to make an advanced bid; any one has the right to do so,<sup>6</sup> and any person interested in the proceeds of the sale, although not a party, may file a petition to have the biddings opened.<sup>7</sup>

The proper time for opening biddings is before the Master's report of sale has been confirmed absolutely: after that, increase of price alone, however large, is not sufficient to induce the Court to grant the application, although it is a strong auxiliary argument when there are other grounds. After confirmation and the close of the term, the purchaser is to be regarded as the owner of the estate according to his purchase, and his title will not be disturbed by opening the biddings, except in case of fraud, accident, mistake, or the existence of a relation of trust;<sup>8</sup> and then only on an original bill, setting forth the equities relied on, and making the proper parties and the proper prayers, so that issues of law and fact may be regularly made and determined.<sup>9</sup>

On applications to open biddings, the Court should so rule as to secure the highest possible price for the land it sells, provided that such ruling does not (1) unduly delay the progress of the suit, (2) does not encourage or reward negligence, on the part of those interested in bidding, or procuring bidders, and (3) does not tend to generally discourage bidding at the time and place of the original sale by the Master.<sup>10</sup> The policy of the law is to make the original sale by the Master a finality, and not an experiment; and the reservation of the right to set aside such a sale, and to open the biddings, is a mere safeguard and a precaution against circumstances and irregularities tending to lessen or prevent due competition; and an offer to advance the reported bid ten per cent. is deemed by the Court presumptive evidence of some such circumstance or irregularity.

§ 635. **When the Master May Open the Biddings.**—Where an advance bid of as much as ten per cent. of the original bid is made in vacation, the Clerk and Master, without any order or decree authorizing him, may accept such advance bid, and reopen the biddings on such sale, and receive additional bids, and hold the biddings open for other advance bids to some day by him designated. He must give the purchaser at the original sale and the parties or their Solicitors of record, notice of his reopening of the biddings, and report his action to the Court for confirmation. But this action and authority of the Clerk and Master in no way abridge the right and jurisdiction of the Chancellor to reopen the biddings on such terms as he may deem right.<sup>10a</sup> The proceedings in the Master's office under this section should conform substantially to those set out in the following section.

§ 636. **How Biddings are Opened by the Court.**—The procedure in Court in opening biddings is as follows: 1, A written offer must be made to advance the bid reported by the Master at least ten per cent., and to comply with all the terms of the sale. 2, If the sale is for cash, wholly or partly, the proposed bidder must deposit with the Master the whole amount of cash required by his bid, including the additional per cent. 3, If the sale is on time, in whole, or in part, and secured notes are required, he must execute the notes and secure them in strict compliance with the terms of the decree of sale,<sup>11</sup> dating the

<sup>6</sup> *Wilson v. Shields*, 3 Bax., 65.

<sup>7</sup> *Childress v. Hurt*, 2 Swan, 488.

<sup>8</sup> *Houston v. Aycock*, 5 Sneed, 406; *Spence v. Armour*, 9 Heisk., 169. But if an application to open the biddings before confirmation was prevented by surprise, accident or mistake, or by the fraud of the purchaser, the Court will set aside the confirmation, and allow the application, if regular in all other respects.

<sup>9</sup> *McMinn v. Phipps*, 3 Sneed, 196; *Spence v. Armour*, 9 Heisk., 167.

<sup>10</sup> *Morton v. Sloan*, 11 Hum., 278. Applications to open biddings should be favorably considered, and every due effort made to realize the best price. *Lucas v. Moore*, 2 Lea, 7.

<sup>10a</sup> Act of 1899, ch. 37.

<sup>11</sup> *Glenn v. Glenn*, 7 Heisk., 367. If secured notes be not given, the Court might lose a good purchaser while trying to get a better one, and thus, by grasping at a probability, lose a reality. *Mound City M. L. Ins. Co. v. Hamilton*, 3 Tean. Ch., 230; *Childress v. Harrison*, 1 Bax., 415.

notes back to the day of the Master's sale.<sup>12</sup> 4, The Master's certification of the sufficiency of the security tendered must be written under the notes; or the sureties may sign the written offer to advance the bid, and join in the offer to comply with the terms of sale, and the Master may certify their sufficiency beneath their signatures. 5, A petition must then be presented to the Court, by some person interested<sup>13</sup> in the proceeds of the sale, reciting the foregoing facts, and exhibiting the foregoing papers, and praying the Court to open the biddings, and keep them open until some set day and hour. 6, Reasonable notice of the time, when such petition will be presented, and the motion to open the biddings made, must be given to the purchaser at the Master's sale.<sup>14</sup> 7, On all the preceding steps being duly taken,<sup>15</sup> the Court will make an order opening the biddings, and directing them to stand open until a day and hour named, when they will be closed,<sup>16</sup> and directing the Master to start the bidding with the advanced bid specified in the petition.

If, however, the purchaser at the original sale consent, and all of the parties consent, the biddings may be opened without the filing of any petition, or the execution of any notes, the order showing on its face such consent. The Court, should, however, when any of the parties are under disability, be careful not to open biddings, by consent of the purchaser, until the proposed advance bidder has secured his bid by adequate security in a binding form, otherwise a good sale may be lost through the insolvency of the advance bidder.

When no objection is made; and none appears to the Court, the Court may allow the biddings to be opened, informally, without any petition, motion, or order, all parties in interest, including the purchaser, consenting; and the Master, in such case, may surrender to the original purchaser his notes, or money, and substitute for his name, in his original report of sale, the name of the new purchaser, acting throughout as though such new purchaser had been the purchaser at the original sale. When proper caution is exercised, and all parties consent, no objection can be seen to this practice; it facilitates the dispatch of business, saves costs, and works injury to no one.

§ 637. **Forms Incident to the Opening of Biddings.**—The following forms may be of benefit to the young Solicitor, and to the Master, when urgency prevents due deliberation in drawing the required paper:

**PETITION TO OPEN BIDDINGS.**

John Doe, }  
*vs.* } In Chancery at Knoxville, Tenn.  
Richard Roe, *et al.* }

To the Hon. William B. Staley, Chancellor:

Your petitioner, Richard Roe, respectfully shows to your Honor that John Gibbs, a responsible man, offers, in writing, to give eleven hundred dollars for the tract of land sold by the Master to William Jones for one thousand dollars, under the interlocutory decree rendered in this cause at the May term, 1881. Said Gibbs tenders sufficient sureties, and offers to fully comply with the terms of sale set out in said decree. His said offer, marked Exhibit A, is herewith filed, and prayed to be taken as a part of this petition. The said William Jones has notice of the said offer, and of this petition.

Your petitioner prays that said sale to said William Jones be set aside, and that the biddings for said property be opened.

GEORGE ANDREWS, Solicitor.

State of Tennessee, }  
County of Knox. }

<sup>12</sup> The reason of this is, that in contemplation of law, the sale is a mere continuation of the Master's sale, and relates to it. Besides, the rights of creditors, or other parties entitled to the proceeds of the sale would be injuriously affected if the notes were dated on the day of re-sale. *Atkisson v. Murfree*, 1 Tenn. Ch., 57.

<sup>13</sup> Where any party is under disability, the Court will allow a stranger, or the proposed bidder himself, to present the petition, regarding him as a *quasi* next friend.

<sup>14</sup> As the purchaser is a *quasi* party as to all matters connected with his bid, he is not so entitled to actual notice that it would be error to open biddings without such notice, if the service of notice would

be difficult, or cause injurious delay. Nevertheless, the Court should always require actual notice to be given the purchaser, not only to enable him the more effectually to protect his rights, but also to enable him to bid for the property at the opened sale.

<sup>15</sup> Applications to open biddings, made in good faith, should be favorably received and liberally acted upon, the object of the Court always being to realize the best possible price for the property. An applicant should not be repelled merely because his application is not in due form, but the Court should give such directions as will enable him to conform to its practice, and secure the right. *Lucas v. Moore*, 2 Lea, 7.

<sup>16</sup> *Atkisson v. Murfree*, 1 Tenn. Ch., 57.



Richard Roe makes oath that the statements in his foregoing petition are true.

RICHARD ROE.

Sworn to and subscribed before }  
me, this July 6, 1881.

W. A. GALBRAITH, D. C. & M. }

This petition must be filed by a person having an interest in the land, or in the proceeds thereof. If the parties to the suit are satisfied with the sale, and those interested in its proceeds are content, a mere stranger has no right to have the biddings opened, merely because he, or some one else desires to own the property. Any one, however, may make an offer to raise the biddings.<sup>17</sup>

**EXHIBIT "A" TO THE PETITION OF RICHARD ROE.**

John Doe,  
vs.  
Richard Roe, *et al.* } In the Chancery Court, at Knoxville.

To the Chancellor:

The undersigned, John Gibbs, hereby offers to give eleven hundred dollars for the tract of land sold in this cause, on June 20, 1881, to William Jones, for one thousand dollars; and, also, offers to fully comply with all the terms of sale specified in the decree of sale; and he tenders the sureties named below that he will fully perform this offer, if accepted by the Court.

July 6, 1881.

JOHN GIBBS.

If the above offer of John Gibbs is accepted, we hereby bind ourselves to sign the purchase-money notes as his sureties; and we hereby guarantee that he will fully comply with his foregoing offer, if it is accepted by the Court.

July 6, 1881.

FRANK BROWN,  
ROBERT ROE.

I hereby certify that the above named Frank Brown and Robert Roe are good and sufficient sureties for the performance of said offer.

July 6, 1881.

S. P. EVANS, C. & M.

If good sureties were not required, the Court might release a bidder whose bid was well secured, and accept a bidder in lieu who would be unable to comply with the terms of the sale, and thus lose the substance in grasping after a shadow.

The decree opening the biddings may be in the following form:

**DECREE OPENING BIDDINGS.**

John Doe,  
vs.  
Richard Roe, *et al.* } No. 618.

The defendant, Richard Roe, this day presented his petition, and the exhibit thereto, praying that the sale of land reported by the Master to have been made to William Jones for one thousand dollars be set aside, and that the biddings on said land be opened;

And it duly appearing from said petition, and exhibit, that John Gibbs has filed a written offer to bid eleven hundred dollars for said tract of land, and that he has tendered good and sufficient security for his said bid; and it also duly appearing that said William Jones has been duly notified that said petition would this day be presented to the Court for action thereon;

On consideration of the premises, it is ordered by the Court, that the said sale to William Jones be set aside, and that the biddings on said tract of land be opened, and kept open by the Master at his office until noon, on July 26, 1891, until which time he will receive bids for said tract of land on the terms prescribed in the decree of sale, beginning with the said bid of John Gibbs, exhibited to said petition. The Master will close the biddings at the hour herein specified unless there be more than one person then bidding, in which case he will cry the sale until the highest, last and best bid shall be obtained. He will report the person making such bid as the purchaser, on his complying with the terms of sale: said report will be made to the present [*or next*] term of this Court.

It must be kept steadily in view, that the opening of the biddings is a mere continuation of the former sale,<sup>18</sup> and that, as a consequence, the notes executed, and the rights of the bidder, bear date even with the date of the original sale, and relate thereto, even when it will result in a note being overdue when executed.

<sup>17</sup> See, *ante*, §§ 634-636.

<sup>18</sup> A re-sale takes place when the original sale is, | for any reason, entirely set aside. On a re-sale, the

proceedings are *de novo*.

§ 638. **Proceedings when Biddings are Opened.**—When the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid a deposit, or any part of the purchase-money, into Court, he will be entitled to have it paid back to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of these lots, the purchaser will be allowed to have the biddings opened, and to be discharged from his purchase, as to all the lots which he has purchased, it being considered but reasonable, that if he became the purchaser of a subsequent lot, in consequence of his having been declared the best bidder upon the prior lot, he should, if he is deprived of the purchase of the first lot, have the option of retaining or surrendering the subsequent lot. The purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot.<sup>19</sup>

On the biddings being opened, the Master will receive bids as required by the opening order, and will continue to receive them until the hour fixed for closing them. It is a safe and convenient practice to require each bidder to put his bid in writing, thus:

John Doe, }  
*vs.* } Opened Biddings.  
 Richard Roe, *et al.* }

The undersigned bid the amounts opposite our respective names for the property ordered to be sold in this cause:

NAMES OF BIDDERS.	AMOUNT OF BIDS. <sup>20</sup>
Jonathan Williams .....	\$650.00
George Anderson .....	675.00
Jonathan Williams .....	700.00

At the time and place specified for the closing of the biddings in the order opening the biddings, the Master will close the biddings by accepting and reporting the highest bidder complying with the terms of sale. If, at the hour of closing the sale, there be more than one bidder, the Master should cry the property until the highest bid has been obtained. When the sale has been made, the purchaser will, thereupon, pay the amount of his bid, or execute notes therefor, with the required security, or otherwise in all things comply with the requirements of the decree of sale. The Master will then report the sale.

**THE MASTER'S REPORT OF SALE ON OPENED BIDDINGS.**

John Doe, }  
*vs.* } Master's Report of Sale on Opened Biddings.  
 Richard Roe, *et al.* }

I respectfully report that, in obedience to an order made in this cause opening the biddings upon the property sold herein, on June 20, 1881, to William Jones, I kept said biddings open until July 26, 1881, at noon, when I sold said property, in bar of the equity of redemption, to John Gibbs, he being the highest and best bidder, at the price of twelve hundred dollars, for which he gave his two promissory notes, each for the sum of six hundred dollars, dated June 20, 1881, [*the date of the original sale,*] due respectively six and twelve months after date, bearing interest from date, with Frank Brown and Richard Roe as his sureties thereon. Said property so sold, is that certain tract [*or, lot,*] of land in the 7th civil district of Knox county, Tenn., [*describing it as in the original report.*]

Said notes show on their face that they were given for, and are a lien on, said land, and are hereto exhibited.

Respectfully submitted, July 26, 1881.

S. P. EVANS, C. & M.

§ 639. **When and How Biddings will be Re-opened.**—After the biddings have once been opened and closed, and the sale confirmed, it is no easy matter to have the biddings re-opened.<sup>21</sup> Nevertheless, during the term, the record

<sup>19</sup> 2 Dan. Ch. Pr., 1288.

<sup>20</sup> When the bids exceed \$100.00, no bid less than \$1.00 should be received; when the bids exceed \$500.00, no bid less than \$5.00 should be received; when the bids exceed \$1,000.00, no bid less than \$10.00 should be received. Much time is frittered away by taking bids of 5, 10, and 20 cents, and sim-

ilar insignificant amounts, when the bids are already in the hundreds, and sometimes in the thousands of dollars. Such insignificant bids fall under the maxim *de minimis non curat lex*, and should not be tolerated either by the Master, or the Court.

<sup>21</sup> Click v. Burris, 6 Heisk., 545.

is under the control of the Court, and if good cause be shown for a re-opening of the biddings, the Court will do so, especially where parties under disability would otherwise suffer.<sup>22</sup> The Court will not, however, re-open biddings merely because ten per cent. more is offered. After confirmation, there must be equitable circumstances, as well as an advanced bid, to justify the Court in re-opening the biddings.<sup>23</sup> If the report of the second sale has not been confirmed, the biddings will be re-opened on slighter grounds than after confirmation.<sup>24</sup> The Court will also relax the rules when the interests of persons under disability will be promoted by re-opening biddings.<sup>25</sup> After the biddings have once been re-opened, and a public re-sale had, the Court may, upon another offer of an advanced bid of ten per cent., confirm the sale to the reported bidder, with his consent, at the new advance.<sup>26</sup>

The course of procedure to re-open biddings is the same as on a proceeding to open biddings, except that more particularity and a stricter compliance with the rules of practice in such cases should be required.

## ARTICLE IV.

### PURCHASERS' DUTIES, RIGHTS, AND LIABILITIES.

§ 640. The Duties of a Purchaser.

§ 641. The Rights of a Purchaser.

§ 642. The Liabilities of a Purchaser.

§ 643. Judgment on Purchase-Money Notes.

§ 640. **The Duties of a Purchaser.**—While Chancery sales are conclusive upon all the parties to the suit, and, as a result, almost universally confer a good title upon the purchaser, nevertheless there is no warranty of title,<sup>1</sup> except in sales for partition; and it is consequently incumbent on a purchaser to ascertain (1) that the Court has jurisdiction under the pleadings to make the sale, (2) that the parties to the suit have a good title to the property, and (3) that all of the persons having an interest in the property, legal or equitable, are duly in Court. If these three requisites exist, the purchaser will acquire a good title, even though there be error in the decree,<sup>2</sup> or though the decree be reversed on a writ of error.<sup>3</sup>

A purchaser is just as much bound, in law and in morals, to investigate the title of property about to be sold by a Court, and the regularity and validity of the proceedings under which it is to be sold, as he is bound, in case an agent offers property for sale, to inquire into the title of his principal, and the regularity, validity and extent of his authority to bind his principal.<sup>4</sup>

§ 641. **The Rights of a Purchaser.**—The purchaser at a Chancery sale becomes a party by virtue of the Master's report of sale, and may make any

<sup>22</sup> *Mayo v. Harding*, 3 Tenn. Ch., 237. In *Moore v. Watson*, 3 Cold., 64, the sale of a steamboat and appendages was set aside a second time, and the biddings re-opened.

<sup>23</sup> *Bradford v. Hamilton*, 3 Tenn. Ch., 344. In this case, the Court refused to re-open the biddings at the instance of the owner, who was present at the resale, upon a mere offer of an advance of ten per cent. The case was affirmed by the Supreme Court.

<sup>24</sup> *Vaughn v. Smith*, 3 Tenn. Ch., 368.

<sup>25</sup> *Ante*, § 636.

<sup>26</sup> *Irby v. Irby*, 11 Lea, 165.

<sup>1</sup> When land is sold at a forced sale, the maxim *caveat emptor* applies; and the Court has no power to guarantee a good title to the purchaser. *Irby v. Irby*, 11 Lea, 165; and cases there cited.

<sup>2</sup> 2 Dan. Ch. Pr., 1276, note.

<sup>3</sup> If, however, a decree confirming a sale be appealed from and reversed, such reversal will nullify the sale, and entitle the purchaser to the purchase-money by him paid.

<sup>4</sup> There is no hardship in requiring a purchaser to inquire (1) into the jurisdiction of the Court over

the subject-matter, (2) into the jurisdiction of the Court over the parties, and (3) into the title of the parties to the land. Whoever buys land, at a private sale from a private person, is bound to see to it that the title is good; and this investigation he makes, or has made, at his own expense. Why then should not a purchaser at a Chancery sale investigate the title to the land he has bought, before the sale is confirmed to him? or at least before he pays the purchase-money? Hence, it is a settled rule in Chancery, that a person purchasing under a decree of the Court, must not only see that the parties to the suit have a good title to the land sold, but that the sale is made according to the decree. 2 Dan. Ch. Pr., 1275; 2 Barb. Ch. Pr., 529. But the purchaser is not charged with the burden of investigating the merits of the controversy; if the Court has jurisdiction to sell, and the parties to the sale have title, the purchaser need inquire no further. *McCavock v. Bell*, 3 Cold., 512. If the defendant, as whose property the land was sold, had no title, the purchaser will get no title. *Thompson v. Speck*, 2 Ch. Apps., 759.

motion, or file any petition, necessary to protect his rights, or relieve himself from liabilities growing out of the sale.<sup>5</sup>

The purchaser is entitled to have all tax liens, mortgage liens, trust-deed liens, vendors' liens, life estates, or other encumbrances on the property, removed, or else discharged out of the purchase-money paid by him into Court,<sup>6</sup> and he has the right to have a reference to the Master to ascertain whether a good and clear title can be made to him; and if it appears that such title cannot be made, he will not be compelled to complete the purchase.<sup>7</sup>

The purchaser is entitled to rents only from the confirmation of the sale by the Court;<sup>8</sup> and he is not entitled to the possession of the property purchased until confirmation. If he take possession before confirmation, and the sale be set aside, he will be deemed a trespasser, and held liable for mesne profits.<sup>9</sup> He is not liable for any loss or injury by fire, or otherwise, which may happen to the property before the sale to him is confirmed.<sup>10</sup>

If a purchaser desires to substitute another person in his stead, the Court will, on motion, make an order to that effect, or may allow the Master to make the change in his report.<sup>11</sup> No such substitution should, however, be made where the substitute has paid anything for the privilege, and the Court may, and ordinarily should, require an affidavit that there was no under bargain, and no consideration paid by the new purchaser, to stand in the other's shoes.<sup>12</sup> If any such consideration appears, the Court may either require the new purchaser to take the property at the additional price, or may order a re-sale.<sup>13</sup>

A purchaser may, on petition, be relieved from his purchase before confirmation, if he shows that he will not get a good title, or that there is a material deficiency in quantity, or that material misrepresentations were made in the advertisement, or at the sale, as to the value or character of the property, or that, for any other reason, it would be inequitable to compel him to complete the purchase by payment of the amount of his bid.<sup>14</sup> He will not, however, be relieved after confirmation, because of an encumbrance of which he had knowledge at the time of his bid, and which he then supposed the estate would be able to pay.<sup>15</sup> But when he has been prevented from applying for relief, before confirmation, by misrepresentation, surprise, accident, mistake, or the fraud of persons interested in the sale, he will be discharged from his purchase, even after the sale has been confirmed,<sup>16</sup> provided the purchase-money has not been paid and disbursed.<sup>17</sup>

A purchaser has the right to appeal from any judgment rendered against him, and has also the right to a writ of error.<sup>18</sup>

§ 642. **The Liabilities of a Purchaser.**—A sale of real estate by the Master is, whether so stated or not, conditional upon its confirmation; and, until such confirmation, may be set aside, either because of fraud, accident or mistake, or some irregularity in the proceedings, or because a higher bid has been obtained. Hence, no sale becomes absolute until confirmation and the adjournment of the Court, or the lapse of thirty days after confirmation in case the

<sup>5</sup> Blackmore v. Barker, 2 Swan, 340; Majors v. McNeilly, 7 Heisk., 294.

<sup>6</sup> 2 Dan. Ch. Pr., 1278; Childress v. Vance, 1 Bax., 406.

<sup>7</sup> 2 Dan. Ch. Pr., 1283. As a rule, the Chancery Court in no case undertakes to sell more than the title of the parties to the suit; and after confirmation the rule of *caveat emptor* applies; Housley v. Lindsay, 10 Heisk., 651; Staunton v. Harris, 9 Heisk., 579; Foster v. Bradford, 1 Tenn. Ch., 400; except in case of sales for partition, Deaderick v. Smith, 6 Hum., 147.

<sup>8</sup> Armstrong v. McClure, 4 Heisk., 80. And if the suit is appealed to the Supreme Court, the purchaser gets rents only from the final confirmation of the sale by that Court. Pearson v. Gillenwaters, 15 Pick., 446; and is not entitled to a receiver pending the appeal. *Ibid.* It would be more equitable to give the purchaser the rents from the day of sale,

when his purchase notes draw interest from the day of sale. 2 Dan. Ch. Pr., 1277, notes. But as he purchases under the terms of the sale, he has no right to complain.

<sup>9</sup> 2 Dan. Ch. Pr., 1278, note.

<sup>10</sup> Childress v. Hurt, 2 Swan, 487.

<sup>11</sup> Newland v. Gaines, 1 Heisk., 722; Fitzpatrick v. Thomas, 16 Lea, 216.

<sup>12</sup> Blake's Ch. Pr., 276; 1 Barb. Ch. Pr., 536.

<sup>13</sup> 2 Dan. Ch. Pr., 1285.

<sup>14</sup> 2 Dan. Ch. Pr., 1284; Childress v. Hurt, 2 Swan, 487; Pearson v. Johnson, 2 Sneed, 580; Eakin v. Herbert, 4 Cold., 119. As to when a purchaser may have a sale set aside, see, *ante*, § 632.

<sup>15</sup> Mountcastle v. Moore, 11 Heisk., 481.

<sup>16</sup> 2 Dan. Ch. Pr., 1288-1292.

<sup>17</sup> 3 Dan. Ch. Pr., 1277, notes.

<sup>18</sup> Eagan v. Phister, 5 Sneed, 298; Majors v. McNeilly, 7 Heisk., 294.

term lasts longer.<sup>19</sup> A bidder bids with this understanding, express or implied, and has no just right to complain, if, for sufficient reason, the sale to him by the Master is set aside by the Court.

When a person bids at a Chancery sale, he thereby submits himself to the jurisdiction of the Court as to all matters connected with such bid; and if his bid is accepted by the Master before it is withdrawn, and is reported and confirmed, the Court may by attachment compel the purchaser to complete his purchase, by paying the purchase-money;<sup>20</sup> or may order a re-sale of the property and issue an execution against him and his sureties, if any, for any loss caused by the re-sale:<sup>21</sup> in such case, however, the order of re-sale should only be made after notice to him that the re-sale will be at his risk.<sup>22</sup> A person who makes an advance bid may, also, be held liable in the same way, and to the same extent.<sup>23</sup>

If the purchaser fail to make payment or comply with the terms of sale, the Master may again expose the property to sale on the same day, or on a subsequent day, and after giving due notice of the time and place according to the directions contained in the decree;<sup>24</sup> or the Master may report the facts to the Court, which last would be the proper course, if the purchaser is a solvent person, and his bid higher than could probably be obtained on a re-sale.

Where two or more persons purchase one lot, they must purchase and pay as tenants in common, and will not be allowed to pay their proportions separately, because of the confusion which might ensue.<sup>25</sup>

**§ 643. Judgment on Purchase Money Notes.**—Where a purchaser at a Chancery sale fails to pay all the purchase-money, the Court may, on motion, and without notice to the purchaser or his sureties, order the land to be resold for cash, and in bar of the equity of redemption; and if any balance remains due after the confirmation of such sale, the Court may award an execution against the purchaser and his sureties for such balance.<sup>26</sup>

The following is the form of a judgment on a purchase-money note, omitting the caption:

#### JUDGMENT ON A PURCHASE-MONEY NOTE.

In this cause, on this 6th day of July, 1891, before the Hon. S. A. Rodgers, sitting by interchange with the Chancellor, came A. T. Marshall, the Clerk and Master of this Court, and produced, in open Court, the following note:

*[Here set it out in full.]*

And moved the Court for judgment thereon, in his name for the use of those entitled to the proceeds thereof, and for the enforcement of the lien specified on the face of said note, and in the decrees in this cause.

And it appearing to the Court from an inspection of said note [and the credits thereon,] that the sum of eight hundred and sixty-four dollars and twenty cents, principal and interest, is due on said note, it is ordered and decreed by the Court that said A. T. Marshall, as Clerk and Master of this Court, for the use of those entitled, recover of said Richard Roe and his surety, Robert Roe, said sum of eight hundred and sixty-four dollars and twenty cents, and the costs of this motion.

And it further appearing from an inspection of said note and of the record in this cause, that said note was given for the purchase-money of a tract of land sold in this cause, and that a lien was retained on said land to secure the payment of said note and said purchase-money, said land being described as follows: A tract of one hundred and sixty acres, more or less, lying in the 8th civil district of Sevier county, on the East Fork of Pigeon River,

<sup>19</sup> The confirmation only completes the contract of sale, and does not pass the legal title: this must be done by a decree divesting and vesting title, or by the Master's deed, made by order of the Court. *Webster v. Hill*, 3 Sneed, 339; Code, §§ 4103-4105; 4485.

<sup>20</sup> *Blackmore v. Barker*, 2 Swan, 340; *Deaderick v. Smith*, 6 Hum., 138; *Mosby v. Hunt*, 9 Heisk., 675; *Van Bibber v. Sawyer*, 10 Hum., 82.

<sup>21</sup> *Allen v. East*, 4 Heisk., 308.

<sup>22</sup> *Sharp v. Hess*, 1 Tenn. Leg. Rep., 23. It is a contempt of Court for a bidder to trifle with the Master, or for any other person to interfere with a Master's sale, in any way. A bidder will not, however, be attached for contempt until the sale has been confirmed to him, and he has failed, or refused,

to pay the purchase-money. Payment cannot be resisted on the ground of irregularity in the sale, after the sale has been confirmed by the Court, and the time for the parties to appeal has expired. 2 Dan. Ch. Pr., 1281-1284.

<sup>23</sup> *Allen v. East*, 4 Bax., 308.

<sup>24</sup> Ch. Rule, XIV; § 1203, *post*.

<sup>25</sup> 2 Dan. Ch. Pr., 1278.

<sup>26</sup> *Munson v. Payne*, 9 Heisk., 672; *Mosby v. Hunt*, 9 Heisk., 675. An execution is frequently ordered to issue before the confirmation of the sale, but such a practice is irregular, and may prove oppressive in case the bid on the land is raised high enough to satisfy the decree. In such a case, a surety may be greatly injured by the unnecessary sale of his property under the execution.

hounded as follows: [*Giving the description in the decree ordering or confirming the original sale.*] It is, therefore, ordered, adjudged, and decreed that said land be subjected to the satisfaction of this decree; and, that unless this decree is satisfied within three months from this date, the Master, after advertising according to law, will proceed to sell said tract of land at public sale, at the Court House door in Sevierville, to the highest bidder, for cash in hand. He will report his action in the premises to the next term of the Court, until which time all other matters are reserved.

It is further decreed that in the event that the proceeds arising from the sale of said tract of land, after confirmation of said sale, shall prove insufficient to satisfy this decree, execution may issue, after such confirmation, for such balance as may remain unsatisfied.

## ARTICLE V.

### PAYMENT OF MONEY UNDER A DECREE, TO PARTIES ENTITLED.

§ 644. Payment by the Clerk and Master of Money and Property in His Hands. | § 645. Payment of the Proceeds of Property Sold in Administering Assets.

§ 644. **Payment by the Clerk and Master of Money and Property in his Hands.**—All the money and other property in the hands of the Clerk and Master received by virtue of his office are Court funds, except his own fees and commissions; and he holds them in trust, under his bond and oath of office, for those thereunto entitled; and it is his duty to have such money and other property always on hand ready to be paid over or delivered to the party entitled, his agent or attorney, or to his Solicitor, upon application,<sup>1</sup> according to the directions and decrees of the Court.<sup>2</sup> When the Clerk and Master has doubts about the propriety of paying over money in any given case, and the parties or their Solicitors disagree in reference thereto, he should bring the matter to the attention of the Court.

Money in the hands of the Clerk of a Court is *in custodia legis*, and subject to the orders and decrees of the Court; and cannot be lawfully paid to any one except by order of the Court.<sup>3</sup> It can be reached by attachment or garnishment only by suit against the party entitled to it.<sup>4</sup>

In subsequent sections of this Book will be given full directions to the Clerk and Master in reference to the payment of money in his hands belonging to married women,<sup>5</sup> infants,<sup>6</sup> and lunatics.<sup>7</sup>

§ 645. **Payment of the Proceeds of Property Sold in Administering Assets.** When the Chancery Court takes jurisdiction to sell property, and especially land, for the purpose of dividing the proceeds among creditors, it stamps upon such proceeds the nature of a trust; and, as a consequence, takes especial care that they reach the hands of the beneficiaries. Accordingly the Court makes full and specific directions to the Clerk and Master in reference to paying out such proceeds, and sees to it that they go directly from the hand of the Court to the hand of the beneficiary, his agent, attorney or Solicitor. The Court will

<sup>1</sup> Code, § 4043.

<sup>2</sup> Code, § 4475.

<sup>3</sup> *Craig v. Governor*, 3 Cold., 247; *Yowell and Wife, ex parte*, 7 Heisk., 563; *Somerville v. Somerville*, 5 Heisk., 166; *Massey v. Gleaves*, 1 Tenn. Ch., 149.

<sup>4</sup> *Railroad v. Todd*, 11 Heisk., 556; 8 Am. & Eng.

Ency. of Law, 1116-1128. See *Drane v. McGavock*, 7 Hum., 132; *Bank v. Dibbrell*, 3 Sneed, 388; *Mayor v. Potomac Co.*, 2 Bax., 302.

<sup>5</sup> *Post*, § 1167.

<sup>6</sup> *Post*, § 1168.

<sup>7</sup> *Post*, § 1168.

not turn over the proceeds of the sale of land to pay the debts of a decedent, to the administrator in the case to be by him disbursed to the creditors,<sup>8</sup> for the administrator's bond does not cover such proceeds;<sup>9</sup> and, besides, the creditors are either parties or *quasi* parties to the suit.<sup>10</sup>

The cases in which property is sold in the interest of creditors in order to pro rate the proceeds are, among others:

1. Sales of lands of insolvent decedents.
2. Sales of land under a deed of trust for the benefit of creditors.
3. Sales of lands under a bill to wind up a corporation that has made an assignment.
4. Sales of land under a bill in behalf of creditors to set aside fraudulent conveyances.
5. Sales of land on a general creditors' bill.

<sup>8</sup> *Moses v. Moses*, 1 Shan. Cas., 414.

<sup>9</sup> *Gambill v. Campbell*, 12 Heisk., 739.

| <sup>10</sup> *Post*, §§ 792-794; 1003.

## CHAPTER XXXII.

## HOW DECREES ARE ENFORCED.

- ARTICLE I. Final Process Generally Considered.  
 ARTICLE II. Transfer of Title by Decree, or Deed.  
 ARTICLE III. Final Process Against the Person.  
 ARTICLE IV. Final Process Against Property.  
 ARTICLE V. Sequestrations to Enforce Decrees.  
 ARTICLE VI. Proceedings in Enforcement of Decrees on Remandment.

## ARTICLE I.

## FINAL PROCESS GENERALLY CONSIDERED.

§ 646. Powers of the Chancery Court in En-  
 forcing its Decrees.

§ 647. Kinds of Final Process.  
 § 648. Essentials of Final Process.

§ 646. Powers of the Chancery Court in Enforcing its Decrees.—Courts of Chancery have, inherently, all power necessary effectually to enforce their orders and decrees; and can exercise such power against either the person or property of the party in default.<sup>1</sup> Formerly a decree in the Chancery Court, unless it was for land, operated only *in personam*; and the only mode of enforcing it was by what is termed process of contempt against the party disobeying it, by keeping him in prison until he fully complied with all the requirements of the decree. And when a disobedient party, either could not be arrested on process of contempt, or having been arrested remained in prison without obeying the decree, the party entitled to the benefit of the decree might have a writ of sequestration to seize the defendant's personal property, and the rents and profits of his real estate, and apply the proceeds to the satisfaction of the decree.<sup>2</sup> These processes, though still authorized by law,<sup>3</sup> are now seldom resorted to, the Legislature having authorized the Chancery Courts to divest and vest title to property; and to issue all writs for the collection of money, or to obtain possession of real or personal property, in use in the common law Courts.<sup>4</sup>

The Chancery Court has thus, in its armory, every process and writ known either to Law or Equity, to enable it to enforce its decrees;<sup>5</sup> and, while the common law writs and the statutory powers of divesting title, are generally used instead of the process of attachment and writs of sequestration, nevertheless, the latter are sometimes indispensable to enable the Court effectually to enforce its decrees, and to do full justice in the cause. It is a general rule that Courts of Chancery have the power to issue any process that may be necessary to carry their decrees into effectual execution.<sup>6</sup>

<sup>1</sup> 2 Dan. Ch. Pr., 1042; 1 Barb. Ch. Pr., 440; Code, §§ 4478-4488.

<sup>2</sup> 2 Dan. Ch. Pr., 1032.

<sup>3</sup> Code, §§ 4478-4481; 4487; 3104.

<sup>4</sup> Code, §§ 4484-4486; 4488; 2997-3000.

In the war of legal altercation, the bill is the proclamation of war, the answer is the defiance of the adversary, the witnesses are the soldiers, the authorities are the artillery, the hearing is the battle, the decree is the victory, and the results of the final process are the spoils of war.

<sup>5</sup> Code, § 4488.

*Executio est finis et fructus legis.* (Execution is the end and fruit of the law.) 2 Sto. Eq. Jur., § 874.

<sup>6</sup> 2 Dan. Ch. Pr., 1042-1070; 1 Barb. Ch. Pr., 440; Code, §§ 4478-1488; 2997. An examination of the Reports of the various States of the Union will

show that, even in those States where there are no separate Chancery Courts, the authority of the Courts vested with Equity jurisdiction to issue all the writs and processes necessary to effectuate that jurisdiction, is constantly and vigorously maintained, and unhesitatingly exercised whenever the exigency requires. Indeed, it may be stated in brief, that the Chancery Courts of Tennessee are clothed with full power to employ any and all process necessary to completely carry out any order or decree they may lawfully make; and the extraordinary rarity of unusual process is an evidence, not of the want of authority on the part of the Court, but of the effectiveness of the usual processes, and of the honorable obedience of the people to the mandates of their own laws, as administered by their own Courts. *Ante*, § 32. See *Russell v. Stinson*, 3 Hay., 12.



§ 647. **Kinds of Final Process.**—The Chancery Court is equipped with every variety of writ, necessary to enforce its decrees, or to enable it to do justice. It can use its own peculiar processes against the person or property of the party in default, or can use the processes employed in the common law Courts, or may use the processes and powers conferred upon it by the Legislature. The usual methods of enforcing decrees in Chancery, generally speaking, are (1) by process against the person of the party in default; (2) by process against the property of such person, (3) by writs of possession, and (4) by writs of restitution.

I. The Ordinary Chancery processes to enforce decrees are the following:

1. **Injunctions to Perform Decrees**, accompanied by a copy of the decree. This is commonly called a writ of execution of a decree.<sup>2</sup>

2. **Attachments for Contempt**, against the person of the party in default, under which he may be arrested and committed to jail, there to remain until he performs the decree.<sup>3</sup>

3. **Writs of Distringas**, against the property of corporations,<sup>4</sup> to compel them to perform a decree, or to enforce a money recovery, or to transfer the possession of personal property.

4. **Writs of Sequestration**, against the estate of a delinquent to compel obedience to a decree.<sup>5</sup>

5. **Writs of Assistance**, to put the party entitled into possession of the property decreed to him.<sup>6</sup> This writ is substantially the same as a writ of possession, and is now generally called by that name.

II. The common law final processes used by our Chancery Courts<sup>7</sup> are:

1. **Executions**, or, as they are more correctly called, writs of *feri facias*, being the ordinary writs for the enforcement of decrees for money.

2. **Writs of Possession**, which are used to put a party into possession of property decreed to him.

3. **Writs of Restitution**, whose office is to restore a party to the possession of property of which he had been dispossessed by the Court, or its officer.

All of the foregoing writs are, technically speaking, "executions," execution being the general name of any and every process or writ whereby the judgments and decrees of Courts are enforced.<sup>8</sup>

III. The statutory processes and powers conferred upon the Court to enable it to enforce its decrees are the following:

1. **Divestiture of Title** to property out of one or more parties, and vesting it in those entitled, by decree.<sup>9</sup>

2. **Appointment of Commissioners to Make Sales**, and to execute conveyances, releases and acquittances, binding upon the parties in interest.<sup>10</sup>

3. **Decrees Becoming Effective** without a conveyance, release or acquittance, when the party required to execute the same fails so to do.<sup>11</sup>

<sup>2</sup> Barton's *Snit in Equity*, 161.

<sup>3</sup> Code, §§ 4478-4481.

<sup>4</sup> Code, § 3000. A *distringas* is used at common law, also; but it is, nevertheless, accounted a Chancery writ.

<sup>5</sup> Code, § 4487. A sequestration can be effectively used against a non-resident or absconding defendant, who has property in the State, and who is required to convey land situated in another State, or to execute a release or acquittance of a judgment, or a lien or mortgage of record in another State. 1 Barb. Ch. Pr., 444. If the land to be conveyed, or the mortgage, lien, or judgment to be discharged, are in this State, the Court can, by virtue of its own decree, transfer the title, or discharge the obligation, and perpetually enjoin its enforcements; but as the decree of the Court cannot operate extra-territorially, sequestration is the only available alternative, unless the person of the defendant can be seized on process of attachment for contempt. See Chapter on Attachment for Contempt; *post*, §§ 845-848; 918-923.

<sup>6</sup> 1 Barb. Ch. Pr., 441; 2 Dan. Ch. Pr., 1062.

to the judgment of the Court.) See "Execution" in *Bouv. Law Dic.*; *Blake's Ch. Pr.*, 163-164; 469-475; 1 Barb. Ch. Pr., 440-445; 2 *Ibid.*, 475-480; Code, title of Chapter, 13, preceding § 2997.

Blackstone enumerates the different kinds of executions issued on judgments in civil cases, as follows: 1, writ of possession; 2, writ of abatement (of a nuisance); 3, writ of restitution (in replevin, when the defendant wins the suit); 4, writ of *distringas* (in detinue, when the plaintiff wins the suit), and in case of money recoveries; 5, *capias ad satisfaciendum*, (ca. sa., to arrest and detain the defendant until he paid the debt); 6, *feri facias*, (fi. fa., to seize and sell the defendant's goods and chattels); 7, *levari facias*, (to sell the rents and profits of the defendant's lands and tenements); 8, *elegit*, (to sell his lands); and 9, *extendi facias* (extent, under which the body, goods and chattels, lands and tenements, of the defendant were all seized at once to satisfy the judgment.) 3 Blacks. Com., 412-421.

<sup>9</sup> Code, § 4484.

<sup>10</sup> Code, § 4485.

<sup>11</sup> Code, § 4486. A decree directing the Clerk and

§ 648. **Essentials of Final Process.**—If no appeal is taken from a final decree, the next, and ordinarily the last, step in the progress of a suit, is the enforcement of the decree. And as the decree itself awards final process, and is authority for its issuance, it is a fundamental rule that this final process must conform to the decree in all essentials. The essentials of final processes are as follows:

1. The process issued, in enforcement of a decree, must be the kind of process awarded by the decree itself, or by the law.<sup>12</sup>

2. The process must run in the name of the State of Tennessee; it must be addressed to the proper executive officer; it must show what is to be done, by whom, and when; it must be tested, and be signed by the Clerk and Master, or his deputy.

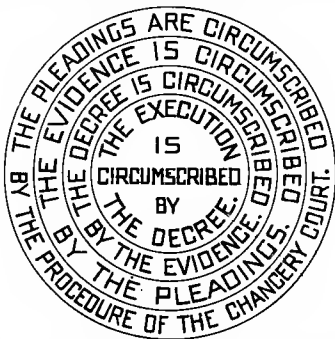
3. The process must sufficiently identify the suit in which, and the Court from which, it is issued, by giving the names of the parties or the style of the cause, and the style of the Court pronouncing the decree.<sup>13</sup>

4. The process must pursue the decree,<sup>14</sup> not only in its nature, but as to the amount of money to be paid or made, and as to description of property to be put in possession of the party recovering it, and as to other acts to be done.

<sup>12</sup> The law awards an execution on a decree for a money recovery. *Hyder v. Butler*, 19 Pick., 289; and no reason occurs why it does not award a writ of possession when land is recovered. Code, §§ 2997-2998; 3003. See, *post*, § 655.

<sup>13</sup> *Trotter v. Nelson*, 1 Swan, 7.

<sup>14</sup> The execution, to be absolutely valid, must not only be within the decree, but the decree must be within the evidence, the evidence must be within the pleadings, and the pleadings must be within the procedure and jurisdiction of the Chancery Court. This may be illustrated by a diagram, thus:



1. The inmost circle represents the *decree* circumscribing the execution, or final process. If the execution is not warranted by the decree, it may be superseded and quashed.

2. The next circle represents the *evidence*, circumscribing both the decree and the execution. If a decree is not justified by the evidence, it may be reversed by appeal, or writ of error, and may be reversed even after execution has issued by a writ of error, and on a *supersedeas* the execution may be stayed and annulled.

3. The circle next to the outmost represents the *pleadings*, circumscribing the evidence, the decree and the execution. If the evidence is not pertinent to the pleadings, or does not substantiate the pleading, on appeal or writ of error the decree will be reversed, and if an execution has issued it will be superseded and annulled.

4. The outside circle represents the *procedure and jurisdiction* of the Chancery Court circumscribing the pleadings, evidence, decree and execution; and if the pleadings or evidence do not justify the decree on appeal or writ of error the decree will be reversed, and if an execution has issued it will be superseded and annulled.

But a decree so erroneous as to be reversible on appeal or writ of error is, unless so reversed, valid enough to support an execution and justify all that may be done under it. A decree, however, that is absolutely void on its face, will not support an execution; and whoever undertakes to enforce such an execution is a trespasser, and his levy, sale or other act of execution is void in law. As to void and voidable decrees, see, *ante*, §§ 446; 565; and *post*, § 814, note 43.

## ARTICLE II.

## TRANSFER OF TITLE BY DECREE, OR DEED.

§ 649. Vesting Title, and Executing Instruments, by Decree.

§ 650. Deed by the Master, or Commissioner.

§ 649. **Vesting Title, and Executing Instruments, by Decree.**—Originally, the Chancery Court compelled parties to execute conveyances, by process of contempt and of sequestration;<sup>1</sup> but now, by statute, the Court may, by decree, divest the title to property, real or personal, out of any of the parties and vest it in others; and such a decree has all the force and effect of a conveyance by such parties executed in due form of law. The Court may, also, appoint a Commissioner to execute all necessary conveyances, releases, and acquittances, either in his name, or in the name of a party, as the Court may think proper; and the instrument so executed will be as valid as if executed by the party. Or the Court may direct a party to execute a conveyance, release, or acquittance; and if he fail or refuse so to do, in the time specified in the decree, or in a reasonable time, if no time is thus specified, the decree operates in all respects as if the conveyance, release, or acquittance was in fact made by such party as directed.<sup>2</sup>

Under these provisions of the statute, the Court generally divests and vests titles to property by decree, or directs the Clerk and Master, as commissioner, to make the proper party a deed conveying the property to him.<sup>3</sup> The decree is often in the alternative. The following is a form of a

**DECREE VESTING TITLE, AND ORDERING A DEED.**

And said report of sale, being unexcepted to, is in all things confirmed. It is therefore, ordered and decreed by the Court, that all the right, title, and interest of all parties to this suit<sup>4</sup> [or, of C D and E F] in and to said tract of land [or other property] be and the same are hereby divested out of them, and each of them, and vested in said G H, [the purchaser, complainant, or other person;] as an indefeasible inheritance in fee simple, forever; and the Clerk and Master of this Court, as commissioner, will in his own name, [or, in the name of the parties,] execute and deliver to said G H a deed conveying to him, the said G H, all the right, title, and interest, of all the parties to this suit, [or, of C. D. and E F,] in and to said tract of land,<sup>5</sup> [or other property;] or will give him a certified copy of this decree for registration, if said G. H. prefer the same. The costs of said deed, or certified decree, will be paid by said G H; and on his application a writ of possession will issue to put him in possession of said tract of land.

<sup>1</sup> Claiborne v. Crockett, Meigs, 607; 2 Dan. Ch. Pr., 1032.

<sup>2</sup> Code, §§ 4484-4486; 4103-4104.

<sup>3</sup> The Code, §§ 4485; 4105, declares that the decree of the Court divesting and vesting title, or the deed of the Clerk, shall have the same force and effect, and will be as valid, as if executed by the party in person. These are all-comprehensive words; and in Lowry v. McDurmott, 5 Yerg., 225, interlocutory and final decrees, ordering and confirming a sale of land, were allowed to be read as evidence, without producing the bill or answer upon which they were made; and on the strength of such decrees the plaintiff recovered in ejectment, the defendant objecting to the decree on the ground that the bill and answer were not produced. But in Whitmore v. Johnson, 10 Hum., 610, it was held that the decree is not admissible, without a supporting record, unless it embody all the facts necessary to show the right of the complainant to relief, and the jurisdiction of the Court to grant the relief. This holding emasculates the statute, and withers its efficacy, and should be confined to the special case decided, the Court evidently being influenced by the fact that the decree in that case was by a Circuit Court, in a case over which the jurisdiction of that Court was "new, special, and limited." When the decision was made, the

practice was to recite in decrees enough to show the jurisdiction of the Court, and the rightfulness of the conclusion reached. Now, however, the Code declares that decrees need not recite the facts upon which they are based, but only the conclusions to which the Court has come. Code, § 4476.

Since the publication of the original edition of this work containing the foregoing note, the Supreme Court in Russell v. Houston, 7 Cates, 536, has decided that a final decree in an ejectment suit in Chancery and the entries on the rule docket are admissible in evidence without producing the balance of the record when the file of papers containing the pleadings cannot be found. See, note 14 to § 446, ante.

<sup>4</sup> The decree should, in case of a sale, ordinarily bind all of the parties to the suit, by divesting the title out of all of them, and vesting it in the purchaser. Russell v. Stinson, 3 Hay., 13. In other cases, the title will be divested out of the defendants, or some of them, and vested in the complainant, or in the complainant and some of the defendants, according to the nature of the decree.

<sup>5</sup> The description of the tract, or other property, should fully appear either in the decree ordering, or the decree confirming, the sale. See, ante, §§ 172; 627, note; 580.

A decree directing the Clerk and Master to make a deed to the purchaser operates *proprio vigore* as a deed from its date.<sup>6</sup> The decree, or deed of the Clerk, as the case may be, has the same force and effect as a conveyance by the party, and must be registered.<sup>7</sup>

Where the sale is made at the voluntary instance of the parties, the decree, or deed of the Clerk, implies a covenant of seizin and warranty of title by the parties whose interest is sold, their heirs and representatives, unless otherwise provided in the face of the decree.<sup>8</sup>

§ 650. **Deed by the Master, or Commissioner.**—It is a common practice to authorize the Master, or special commissioner, to make a deed to the purchaser of land, sold by him under the decree of the Court. The following is a form of a

**MASTER'S, OR COMMISSIONER'S, DEED.**

This deed<sup>9</sup> by William L. Trent, Clerk and Master [or Commissioner] to G H, [the purchaser,] both of Knox county, Tennessee, witnesseth:

That, whereas, a bill was filed in the Chancery Court at Knoxville, Tennessee, on January 5, 1889, by A B against C D and E F, [giving the names of all the parties out of whom title is to be divested,] to recover a debt due him from said defendants, [or, to enforce a vendor's lien, or, as the case may be.]

And, whereas, a decree was duly rendered in said cause by said Court, at its November term, 1889, commanding me, [or, my predecessor] to sell the following tract [or, lot] of land [or other property,] situated in the 10th civil district of Knox county, adjoining the lands of I J and K L: Beginning on a large poplar K L's corner [describing the land, or other property conveyed, according to the decree ordering or confirming the sale.] And whereas, said tract [or, lot] of land [or other property,] was by me [or, said other person,] sold accordingly, and said G H became the purchaser, and said sale was duly confirmed by the Court, at its May term, 1890, [and all the right, title, and interest of all the parties to the suit (or, of all the defendants, or, of E F, or, as the case may be,) divested out of them and vested in said G H, (if such was the decree.)]

And, whereas, I was by said decree authorized and directed to execute and deliver a deed, conveying to said G H all the right, title, and interest, of all the parties to this suit, [or, of all the defendants, or, of E F, or, as the case may be,] in and to said tract [or, lot,] of land [or other property.]

Now, therefore, in consideration of the premises, and of the sum of one thousand dollars [specifying the amount of the purchaser's bid and not including any interest he may have paid,] to me paid by the said G H, I, William L. Trent, Clerk and Master [or Commissioner] of said Court, by virtue of the power and authority conferred upon me by said decree, do, by this deed, grant, convey, and confirm, unto said G H, his heirs and assigns forever, all the right, title, and interest, of all the parties to said suit, [or, of all said defendants, or, of E F, or, as the case may be,] in and to the said tract [or, lot,] of land, [or other property,] and every part and parcel thereof, with the appurtenances, as an indefeasible inheritance in fee simple, forever, [or, for and during the natural life of said E F, or, as the case may be.]

As witness my hand, and the Seal of said Court, this August 28, 1890.

Witnesses:

O P,  
Q, R.



WILLIAM L. TRENT,  
Clerk and Master [or Commissioner.]

State of Tennessee, }  
County of Knox. }

Personally appeared before me, John W. Conner, Clerk of the County Court of said county, William L. Trent, Clerk and Master [or Commissioner] as aforesaid, with whom and whose

<sup>6</sup> Behrn v. White, 24 Pick., 392.

<sup>7</sup> Code, § 4104.

<sup>8</sup> Code, § 4105.

<sup>9</sup> As a decree divesting and vesting title need not recite the facts on which it is based, it may well be contended that a Master's, or Commissioner's, deed, need not recite such facts. The above deed was drawn in conformity to the case of Whitmore v. Johnson, 10 Ham., 610, referred to in a preceding note to this section. It is believed, however, that the following shorter form would be valid:

**SHORT FORM OF A MASTER'S DEED.**

KNOW ALL MEN BY THESE PRESENTS,

That, whereas, in the Chancery Court at Knox-

ville, Tennessee, a decree was made on the 17th day of June, 1890, in the case of A B vs. C D and E F, authorizing and commanding me, William L. Trent, Clerk and Master of said Court, to make to G H, a deed for a certain tract of land sold to him by said Court, in said cause, as the property of said C D and E F, upon the purchase-money therefor being paid; and whereas, said purchase-money, to-wit, the sum of one thousand dollars, has been fully paid.

Now, therefore, in consideration of the premises, and of said sum of one thousand dollars to me paid, I, William L. Trent [&c., as in the longer form above given, describing the land by location, metes and bounds.]

official position I am personally acquainted, and acknowledged the execution of the foregoing [or, within,] deed, on the day it bears date, and for the purposes therein expressed.

As witness my hand, and the seal<sup>10</sup> of my Court, this August 28, 1890.

L. S.

JOHN W. CONNER, Clerk.

A probate in the ordinary statutory form would be sufficient, but the above additions have, perhaps, some value.

### ARTICLE III.

#### FINAL PROCESS AGAINST THE PERSON.

§ 651. Injunctions to Perform Decrees. | § 652. Attachments to Enforce Decrees.

§ 651. **Injunctions to Perform Decrees.**—Before issuing any attachment or sequestration, the Court may award a mandatory injunction<sup>1</sup> requiring a party to do a particular thing, or to refrain from doing a particular thing, specified in the decree and in the writ.<sup>2</sup> The following is the form of<sup>3</sup>

#### AN INJUNCTION TO PERFORM A DECREE.

The State of Tennessee,

To the Sheriff of Hamilton county:

Whereas, on the 10th day of July, 1890, a decree was made in our Chancery Court at Chattanooga, in the case of John Doe *vs.* Richard Roe, therein pending, commanding the said Richard Roe to sign, acknowledge, and deliver to the said John Doe, a deed<sup>4</sup> conveying to said Doe, in fee with covenants of warranty and seizin, lot No. 6 in the town of Decatur, Alabama, on the north-east corner of River and Second Streets; and also commanding him to execute and deliver to said Doe a release and acquittance of the lien retained by him on the lot by him sold to said Roe, in said town of Decatur, being lot No. 7, adjoining said lot No. 6 on the north, as by said decree doth more fully appear, a copy of which is herein enclosed to be delivered by you to said Richard Roe.

You are, therefore, hereby commanded to serve said copy of said decree<sup>5</sup> upon said Richard Roe, and make known to him that he is strictly enjoined and commanded to do, perform and fulfill and do all and every the matters and things in said decree specified and contained, in so far as the same relates to him, according to the true meaning and import of said decree, and in ten days from the service of said copy; and that he hereof fail not at his peril. Herein fail not, and make return of this writ, and how you have executed the same, on the 1st Monday of August next, at my office.

Witness, J. B. Ragon, Clerk and Master of our said Court, at office in Chattanooga, this July 10, 1890. J. B. RAGON, C. & M.

The Sheriff should show in his return that he read the writ to the defendant, and handed him the copy of the decree; and the date of such service.

It is not necessary, however, that a writ of injunction should issue with the decree,<sup>6</sup> the service of a copy of the decree alone is sufficient to bind the defendant; and if he fails or refuses to comply with the terms of the decree, in ten days after the service of a copy thereof, an attachment may issue by order of the Court upon the officer's return or affidavit of service of such copy.<sup>7</sup>

If the defendant in execution keeps out of the way, or absconds, so that a

<sup>10</sup> The seal of the Chancery Court is not needed to the deed, nor is the seal of the County Court needed to the probate, but they add to the solemnity and dignity of both deed and probate.

<sup>1</sup> See Chapter on Injunctions, *post*, § 824.

<sup>2</sup> 1 Barb. Ch. Pr., 441; 2 Dan. Ch. Pr., 1043; Smith's Ch. Pr., 429.

<sup>3</sup> Barton's Suit in Eq., 161. Formerly such writs were addressed to the defendant himself, but now

make a conveyance, the deed may be subject to the approval of the Clerk and Master of the Court. *Kennedy v. Woodfolk*, 3 Hay., 195; 200.

<sup>5</sup> Code, §§ 4479-4480.

<sup>6</sup> As a matter of practice, the writ is seldom issued, service of a copy of the decree being absolutely sufficient. Nevertheless, it may be nothing but fair to a defendant, who has no Solicitor to advise him, to issue the writ to the end that he may

copy of the decree cannot be served upon him, or if he evades receiving the decree, affidavit of the fact, and that a copy of the decree was tendered him, or left at his last place of abode, will authorize the issuance of an attachment without actual service of the copy of the decree.<sup>8</sup> If it appear to the Court by affidavit that service of a copy of the decree cannot be had, or is likely to be evaded, the Court may award a writ of sequestration in the first instance.<sup>9</sup>

§ 652. **Attachments to Enforce Decrees.**—Courts of Equity ordinarily act upon the person of the defendant, and enforce their decrees by process of attachment against his person,<sup>10</sup> when necessary; but such is the obedience of parties to the Court's mandates, and such the efficiency of the common law and statutory processes for enforcing the orders and decrees of our Chancery Court, that it is seldom necessary for the Court to bring into requisition its own peculiar process, to compel the payment of a sum decreed, or the surrender or transfer of property, or the execution of conveyances, releases and acquittances. These common law and statutory processes are, however, a mere lengthening and strengthening of the arm of the Court.<sup>11</sup> Its own peculiar powers and process for enforcing its rules, orders and decrees, still exist, and their efficacy is, in no way, impaired because held in reserve for extraordinary exigencies; and the Court may, in the first instance, if deemed expedient, compel a party to perform its decree by process against his person, or by a writ of sequestration against his estate.<sup>12</sup> But such is the regard of the Court for the liberty of the citizen and his rights of property, that it withholds these processes for cases where they are imperatively required to prevent a failure of justice. Thus, where land lies in Tennessee, the Court may, under the statute,<sup>13</sup> divest and vest the title by decree, or may appoint a Commissioner to make the deed, or direct the Master to make it, but if the land is situated in another State, these common law and statutory methods are absolutely ineffectual: in such a case the Court will, when the defendant resides within the territorial jurisdiction of the Court,<sup>14</sup> and has been served with subpœna, compel him to execute a conveyance within a specified time, and on his failure so to do will commit him to jail, there to remain until he makes the deed.<sup>15</sup>

The Court will not only compel a defendant to execute a deed in such a case, but, where any property to be conveyed, or a judgment to be satisfied, or a mortgage, trust deed, or other lien to be discharged, or a debt or obligation to be acquitted, is in another State, or of such a character, or so situated, that a decree divesting title or directing a conveyance, release, or acquittance would be ineffectual, or not fully operative *proprio vigore*; the Court is bound to require the party to make the necessary conveyance, release, or acquittance, and to enforce this requirement by process of attachment, and by sequestration, if necessary.

The Court will, by attachment, compel a defendant to perform any specified act, when other process would be ineffectual. Thus, the Court will, by attachment, enforce the payment of a trust fund into Court,<sup>16</sup> or the surrender of a deed or other document, or choses in action, or other personal property, especially property stamped with a trust, or having some extrinsic value not to be compensated in damages, or will enforce the payment of the widow's year's

<sup>8</sup> Code, § 4480.

<sup>9</sup> Code, § 4487.

<sup>10</sup> See, *ante*, § 32.

<sup>11</sup> Code, §§ 2997-3000; 3104; 4484-4488.

<sup>12</sup> Code, §§ 4305; 4478-4481; 4487-4488.

<sup>13</sup> Code, §§ 4484-4486.

<sup>14</sup> *Wicks v. Caruthers*, 13 Lea, 353.

<sup>15</sup> *Miller v. Birdsong*, 7 Bax., 531; 2 Dan. Ch. Pr., 1032, note; 1627; 1 Sto. Eq. Jur., §§ 743-744; 3 Pom. Eq. Jur., § 1318; 1 Barb. Ch. Pr., 44; Code, § 4481. Nevertheless, a Court of Equity will not make a decree that must be enforced *in personam*. When full and complete relief cannot be enforced except by the exercise of authority over property which lies in another State. *W. U. Telegraph Co.*

*v. W. & A. Railroad*, 8 Bax., 54; *Johnson v. Kimbro*, 3 Head, 557. In cases of fraud, trust and contract, the jurisdiction of the Chancery Court is sustainable if the Court has jurisdiction of the person of the defendant, although the land to be affected by the decree lies beyond the State. *King v. Pillow*, 6 Pick., 287; *Paper Co. v. Shyer*, 24 Pick., 444.

<sup>16</sup> *Seidenbach v. Denklepsel*, 11 Lea, 297. In this case, the surety of a receiver was required by an order *in personam* to pay into Court a sum of money belonging to the receivership, and deposited with him by the receiver, to indemnify him against loss as surety on the receiver's bond.

support by the administrator,<sup>17</sup> or the deposit of funds in the State treasury in a suit by the State.<sup>18</sup>

The decree should, in all such cases, not only require the defendant to do the specific act, but should fix the precise time within which it must be done;<sup>19</sup> and the Chancellor has power, on motion, as well in vacation as in term time, to make further orders, and to issue such writs and processes as may be necessary to carry into effect such decree or order, reasonable notice of such motion being given the adverse party, or his counsel.<sup>20</sup>

An attachment issues by order of the Chancellor, upon the officer's return, or affidavit, of the service of a copy of the decree ten days beforehand, and that the party has failed or refused to comply with the terms thereof. If the defendant in execution keeps out of the way, or absconds, so that a copy of the decree cannot be served upon him, or if he evades receiving the decree, affidavit of the fact, and that a copy of the decree was tendered him, or left at his last place of abode, will authorize the issuance of an attachment, without actual service of the copy.<sup>21</sup> If the Court see proper in the first instance, or, if upon issuance of the attachment, the delinquent cannot be found, a writ of sequestration may issue against the estate of such delinquent to compel obedience to the decree.<sup>22</sup>

All attachments for the non-performance of a decree are in the nature of an execution, on service of which no bail shall be taken, but the party shall be committed to jail, there to remain until he performs the decree;<sup>23</sup> or until, upon a *habeas corpus*, he has purged his contempt, and been discharged by the Chancellor upon such conditions in respect to his compliance with the decree as the Chancellor may think proper.<sup>24</sup> He cannot be discharged, however, until he has cleared his contempt,<sup>25</sup> and the adverse party, his agent, or attorney, is entitled to reasonable notice of the hearing upon the writ of *habeas corpus*, if in the State, and may interrogate the party in contempt upon his oath, and controvert the truth of his statements by other proof.<sup>26</sup>

The following is the form of an

#### ORDER FOR AN ATTACHMENT FOR NON-PERFORMANCE OF A DECREE.

John Doe, }  
*vs.* } Order for an Attachment.  
 Richard Roe. }

In this case it duly appearing that the defendant, Richard Roe, has not performed the decree against him as he was enjoined and commanded to do, and is in contempt, on motion of complainant, an attachment is awarded against him, and it is ordered that he be committed to the common jail of Knox county, there to remain until he shall fully comply with and perform said decree.

On such an order being made an attachment will issue, *instantly*, upon which the defendant will be arrested and committed to jail. The attachment may be as follows:

#### WRIT OF ATTACHMENT FOR CONTEMPT.

State of Tennessee, }  
 Knox County. }

To the Sheriff of Knox county:

You are hereby commanded to attach the body of Richard Roe, and him safely and closely keep in your custody in the common jail of Knox county, there to remain until he shall have fully complied with and performed the decree rendered against him in and by our Chancery

<sup>17</sup> *Rocco v. Cicalla*, 12 Heisk., 508.

<sup>18</sup> Acts of 1873, ch. 78.

<sup>19</sup> 2 Dan. Ch. Pr., 1043. The time may be limited thus: "On or before the — day of —," or, "Within — days after service of a copy of this decree." *Ibid.* If no time be fixed, the Code gives the party ten days after service of a copy of the decree. Code, § 4479.

<sup>20</sup> Code, §§ 4411-4412.

<sup>21</sup> Code, §§ 4479-4480. When the defendant cannot be found the Chancellor may, on an *ex parte*

<sup>22</sup> Code, § 4487; 2 Dan. Ch. Pr., 1047. Under the former English practice, a writ of sequestration might issue while the disobedient defendant was in jail, but our Code seems to imply that process against the *person*, and process against his *property*, will not *both* be allowed at the same time. Code, § 4478, gives alternative process against the *person* or against his *property*; and section 4487, also, gives alternative and not double process.

<sup>23</sup> Code, § 4481; 2 Dan. Ch. Pr., 1046-1048.

<sup>24</sup> Code, § 4482.

Court at Knoxville, in favor of John Doe, or until our said Court of Chancery shall make an order to the contrary.

And you will make return to the next term of our said Chancery court, at Knoxville, on the 4th Monday of November next, how you have executed this writ, by proper endorsement thereon.

This May 30, 1895.

On the service of this writ no bond will be taken.

W. L. TRENT, C. & M.

W. L. TRENT, C. & M.

For the proceedings and practice in case of attachments of the person, see the Article on Attachment to Compel an Answer,<sup>27</sup> and the Chapter on Contempts.<sup>28</sup>

ARTICLE IV.

FINAL PROCESS AGAINST PROPERTY.

- § 653. Executions, or *Fieri Facias*, to Enforce Decrees
- § 654. Orders of Sale.
- § 655. Writs of Possession, or Assistance.

- § 656. Writs of *Distringas*.
- § 657. Writs of Restitution, When Issued, and How Obtained.

§ 653. **Executions, or Fieri Facias, to Enforce Decrees.**—When a decree is pronounced the law awards an appropriate writ for its enforcement, and this writ, whatever its form and effect, is termed an execution,<sup>1</sup> When the decree awards a money recovery, the appropriate writ is a *fieri facias*, now generally called an *execution*, because it is the execution most frequently used. When the decree awards the possession of property to a party the appropriate writ is a writ of assistance, called, in Courts of law, a writ of possession; and when the Court awards the restoration of property, the appropriate writ is a writ of restitution. An execution, or *fieri facias*, against the goods and chattels, lands and tenements, of the defendant, is now the ordinary process for enforcing the collection of money on a decree.<sup>2</sup> When, however, the decree is against a corporation, the complainant may sue out a *distringas*; or may, at his election, sue out a *fieri facias* to be levied as well on the choses in action as on the goods, chattels, lands and tenements of the corporation; and in case of levy on choses in action, the Court may appoint a receiver to collect the same.<sup>3</sup> The following is the ordinary form of

AN EXECUTION, OR FIERI FACIAS.

State of Tennessee,

To the Sheriff of Shelby county:

You are hereby commanded that, of the goods and chattels, lands and tenements,<sup>4</sup> of Richard Roe and Robert Roe, you cause to be made the sum of four hundred and forty dollars, and the costs hereon endorsed, to satisfy a decree that John Doe, recovered against them in the Chancery Court at Memphis, on July 5, 1890; and to have said money and this writ, with your return thereon, at the next term of said Court, to be held at the Court House in Memphis, on the 4th Monday of December next.

Witness, E. B. McHenry, Clerk and Master of said Court, the 4th Monday of June, 1890.  
E. B. McHENRY, C. & M.

<sup>27</sup> *Ante*, §§ 201-204.

<sup>28</sup> *Post*, §§ 918-922.

<sup>1</sup> See, *ante*, § 647.

<sup>2</sup> Code, §§ 2998-2999. Formerly, all decrees, except for land, were enforced in Chancery by process of attachment. 2 Dan. Ch. Pr., 1032. *Deaderick v. Smith*, 6 Hum., 146. The decree then required the defendant to pay the complainant, but now the decree usually is that the complainant recover of the defendant, the amount decreed.

An award of an execution is not necessary in a decree for a money recovery: the law awards an execution. *Hyler v. Butler*, 19 Pick., 289.

<sup>3</sup> Code, § 3000. This section does not mean that the *distringas* is to be levied, etc.: it is the *fieri facias* that is to be levied, as well on the choses in action as etc.; thus making the latter writ more ef-

fective as against corporations whose assets may consist, in whole or in part, of choses in action. Under a *distringas* the property is seized and delivered, or held, according to the demand of the writ, and the order of the Court.

<sup>4</sup> If the execution is against a corporation it should read "that of the choses in action, goods and chattels, lands and tenements of," etc. Code, § 3000.

<sup>5</sup> The execution is tested of the first day of the term next before the date of issuance. Code, § 3001. The teste is important from the fact that the execution is a lien on the debtor's personal property from its teste. An execution may be levied upon the personality of a judgment debtor alive on the day of its teste but dead on the day of its issuance. *Trust Company v. Weaver*, 18 Pick., 60.



If the execution be against an executor, or administrator, in his representative capacity, the command should be

"that of the goods and chattels, rights and credits of I J, deceased, in the hands of K L, his executor [or, administrator,] to be administered, you cause to be made the sum [ &c., as in the above form.]

If the execution be against a corporation, the command to the Sheriff should read:

"You are hereby commanded that, of the choses in action, goods and chattels, lands and tenements,<sup>6</sup> of [the corporation, naming it,] you cause to be made the sum [ &c., as above.]

The provisions of the Code,<sup>7</sup> and Caruther's History of a Lawsuit, cover so fully the law and practice relative to executions, (their form and general requisites, their issuance and proceedings thereon, what is liable to levy, how levies and garnishments are made, delivery bonds and proceedings thereon, sales by execution and conveyances of realty sold,) that it would be an unnecessary consumption of space to consider further any of those matters, the practice in reference thereto being the same in the Chancery as in the Circuit Court.

§ 654. **Orders of Sale.**—If the execution has been levied on land and returned without a sale, an order of sale will be awarded on motion. So, if there be any property, real or personal, in the custody of the Court, whether by attachment, levy of execution, or otherwise, the Court will, on motion, award an order of sale to the Sheriff to sell such property, whenever proper in enforcement of a decree. Such an order may be as follows:

#### ORDER TO SELL PROPERTY LEVIED ON.

B. M. Pond,  
vs.  
Martha L. Trigg. } No. 3214.—Order to Sell.

In this cause, on motion of complainant's Solicitor, and it appearing from the Sheriff's return that an execution was levied upon the following lot: [describe it,] but that no sale thereof was made for want of time, it is ordered and decreed by the Court that the Sheriff proceed to sell said lot as required by law, and that an order of sale issue to him accordingly.

If the property has been attached, or has come into the custody of the Court otherwise than by the levy of an execution upon it, the Clerk and Master may be ordered to sell it. The following is the form of an order of sale, where an execution has been levied on land and returned for want of time to sell:<sup>8</sup>

#### ORDER OF SALE.

The State of Tennessee,

To the Sheriff of Shelby County:

Whereas, an execution issued, on March 22, 1871, from the Chancery Court of Shelby county, to the Sheriff of said county, upon a decree in said Court in favor of B. M. Pond against Martha L. Trigg, for the sum of five thousand dollars and the costs of the cause, which execution was returned as follows: "No personal property of the defendant to be found in my county upon which to levy this writ, and I therefore levied it on one lot in the city of Memphis, Tennessee, being lot No. 74, north-west of Adams street and Front row, fronting twenty feet on Front row and running back between parallel lines sixty-nine feet, parallel with Adams street east to an alley, as the property of the defendant, Martha L. Trigg, March 24, 1871, And this levy being too late to advertise and sell according to law, I return this writ unsatisfied, and ask an order of sale. MARCUS J. WRIGHT, Sheriff."

And whereas, at the April, 1871, term of said Chancery Court, an order was by it made that the Sheriff of Shelby county proceed and sell said lot so levied on as aforesaid, and that an order of sale issue to him;

You are, therefore, hereby commanded to proceed and sell said lot, as the law directs, to satisfy said decree and the costs; and have the proceeds of said sale, together with this writ, at the next term of said Court, to be held at the Court House in Memphis on the first Monday in October next.

Witness [ &c., as in an execution; see, ante, § 653.]

An order of sale in an attachment suit, and in any other case where the property ordered to be sold is in the custody of the Court, is so similar to the foregoing that it can easily be drawn, the draftsman being careful (1) to so

<sup>6</sup> Code, § 3000. An execution can be levied upon only a legal title. *Evans v. Land Co.* 8 Pick. 348. | admirable digest of our decisions relative to executions.

describe the property as to identify it, (2) to show that the property is in the custody of the Court by attachment, or in the hands of a receiver, or of some other officer of the Court, and (3) that the Court has ordered the property to be sold, specifying the manner and terms of sale, if any; and (4) to command the Sheriff, or other proper officer, to sell the property as required by the decree, and, if no requirements, then to sell it according to law.

§ 655. **Writs of Possession, or Assistance.**—If the decree be that the complainant recover, or be put in possession of, specific property, real or personal, the Court may enforce the same by a writ of possession, or other process sufficient for that purpose.<sup>9</sup> The writ of possession, often called in the books a writ of assistance, is the ordinary process used by the Court to put a party, receiver, sequestrator, or other person, into possession of property when he is entitled thereto, either upon a decree, or upon an interlocutory order.<sup>10</sup>

A writ of possession is usually awarded and issued in the following cases: 1, When on a bill to recover a tract or lot of land on the strength of complainant's title, the Court decrees in his favor; 2, When in a suit to recover possession of a tract or lot of land, the complainant obtains the relief prayed; 3, When the complainant has been deprived of the legal title to, or the possession of, a tract or lot of land by the unequitable conduct of the defendant, and the Court decrees in complainant's favor; 4, When in a case of resulting trust, the Court adjudges the land to be the property of complainant, and vests him with the legal title; 5, When a tract or lot of land is sold by the Master, and the sale confirmed to the purchaser; 6, When receivers or sequestrators are appointed to take possession of a tract or lot of land, and the party in possession refuses to surrender, or a tenant of a party refuses to attorn; and 7, When in any other case, the Court adjudges a party entitled to the possession, whether permanently or pending the suit. The writ may be awarded whenever applied for.<sup>11</sup>

A writ of possession will, also, issue to put a party, a receiver, sequestrator, or other person, in possession of personal property, whenever, in cases similar to the foregoing, the Court, by decree or interlocutory order, adjudges him the possession and awards such writ.

The following is the form of a

#### WRIT OF POSSESSION.<sup>12</sup>

State of Tennessee,

To the Sheriff of Union county :

Whereas, in the case of A B, *vs.* C D, in our Chancery Court at Maynardville, it was ordered and decreed that a writ of possession issue to put said A B [*or, E F* the receiver appointed in said case,] in possession of the following tract of land: [*Here insert a full description.*]

You are, therefore, hereby commanded to take with you the force of your county, if necessary, and immediately enter upon said tract of land, and eject and remove therefrom every person thereon, and put said A B, [*or, E F,*] in full and peaceable possession thereof.<sup>13</sup>

And return to said Court at its next term, to be held in the Court House in Maynardville, on the 2d Monday in November, 1891, how you have executed this writ, by proper endorsement hereon.

Witness, Coram Acuff, Clerk and Master of said Court, the 2d Monday of May, 1891.

CORAM ACUFF, C. & M.

If the writ be for personal property, its command to the Sheriff will be

"to take with you the force of your county, if necessary, and immediately take said property out of the possession of any person having it in custody, and put the said A B, [*or, E F,*] in full and peaceable possession thereof."

If a person not a party, or not the tenant or agent of a party, or not the

<sup>9</sup> Code, §§ 2997; 3251; 3259; *Irvine v. McBee*, 5 Hum., 554. If the property is out of the State, the Court will compel the defendant to execute proper conveyances. See, *ante*, § 652.

<sup>10</sup> 2 Dan. Ch. Pr., 1062; *Payne v. Baxter*, 2 Tenn. Ch., 518.

<sup>11</sup> *Collier v. Railroad*, 5 Cates, 96. It would seem that the writ could be issued by the Clerk and Master on application, as it is a form of execution.

See *Johnson v. Tomlinson*, 13 Lea, 610; and *ante*, § 647, note 8.

<sup>12</sup> 2 Barb. Ch. Pr., 476; Code, § 3359.

<sup>13</sup> A writ of possession is not executed until the person, in whose behalf and for whose benefit the writ issues, is put into the full possession of the entire premises specified in the writ. *Farnsworth v. Fowler*, 1 Swan, 1.

vendee of a party after the bill was filed, is in possession, he must nevertheless surrender the property to the Sheriff on his demand, and apply to the Court by petition to have the possession restored to him.<sup>14</sup>

§ 656. **Writs of Distringas.**—The statute allows a party in whose favor a decree is rendered against a corporation, to sue out a *distringas*, or a *feri facias*, to be levied as well on the choses in action as on the goods, chattels, lands and tenements of the corporation.<sup>15</sup> Under the old Chancery practice, a *distringas* was issued as a sort of original process, to enforce the appearance of a corporation by seizing its property;<sup>16</sup> but now, under the Code, it is in the nature of final process.<sup>17</sup> The following is the form of

#### A WRIT OF DISTRINGAS.

The State of Tennessee,

To the Sheriff of Davidson county :

Whereas, a decree was rendered by the Chancery Court at Nashville in favor of A B, against the Commercial Bank of Nashville, for the sum of one thousand dollars and costs, and a writ of *distringas* ordered to issue to enforce said decree;

You are, therefore, hereby commanded to distrain the choses in action, goods and chattels, lands and tenements of the said Commercial Bank within your county, and the same to keep until the further order of said Court, unless said debt and costs are fully paid. Herein fail not, and make return how you have executed this writ at the next term of said Court, to be held, [*&c.*, as in case of an execution; see, ante, § 653.]

A writ of *distringas* is practically obsolete, or nearly so; but it may be used to advantage when choses in action, or rents, belonging to a corporation are sought to be reached; because, in such a case, the Court may appoint a receiver to collect the choses in action, and the rents.<sup>18</sup>

§ 657. **Writs of Restitution: When Issued, and How Obtained.**—A writ of restitution is a process to restore to a person, ordinarily the defendant, certain specific property taken from him by process, or surrendered by him on order of the Court, in the progress of a suit. It may be issued: 1, to restore to the defendant property replevied by the complainant, in case the replevy bond is insufficient in form, or in amount of penalty, or in respect to the solvency of the sureties;<sup>19</sup> or, 2, to restore to the party entitled property attached in the suit;<sup>20</sup> or, 3, to restore to the party entitled specific property involved in the litigation of which he has been wrongfully dispossessed by process, or on the order of the Court;<sup>21</sup> or, 4, to restore property, not covered by the decree of the Court, taken by the Sheriff from the party entitled and delivered to a party not entitled;<sup>22</sup> or, 5, to restore to a stranger to the suit property of his, which, by order of the Court, or by a misconstruction of an order, or by mistake under an order, has been taken out of his possession and delivered to a party to the suit, or to a receiver or sequestrator in the suit;<sup>23</sup> or, 6, to restore to the defendant land of which he has been dispossessed by the order of the Court in an ejectment, or detainer, or other suit when the decree in favor of the complainant is reversed on bill of review, or on appeal or writ of error; or, 7, to restore to the other party in an ejectment or detainer suit, the land of which one party has become possessed, as complainant or defendant when, pending an appeal,

<sup>14</sup> If the claimant's right to the possession as against the parties to the suit is clear, the Court will determine the matter summarily, and order the property to be returned to him; *Johnson v. Rider*, 2 Shan. Cas., 62; or will order it to be delivered up to the claimant, pending an inquiry as to its ownership, on his giving bond and sufficient security to restore it, in case the decision upon his claim should be against him. 2 Dan. Ch. Pr., 1059.

<sup>15</sup> Code, § 3000.

<sup>16</sup> Smith's Ch. Pr., 144. A corporation, being a ideal and invisible person, could not be attached, and the writ of *distringas* issued to attach its property, and thus enforce its appearance. 1 Barb. Ch. Pr., 75. Corporations are now brought before the

of the nature of a writ of sequestration, as a receiver may be appointed to collect the choses in action. See, 1 Barb. Ch. Pr., 75-76.

<sup>18</sup> A writ of *distringas*, or a writ in the nature of a writ of *distringas*, may also be used when the Court decrees that a party is entitled to the possession of specific personal property, possessing an extrinsic value to the person entitled thereto. Car. Lawsuit, § 425. This sort of writ would be proper to enforce the return of property in a replevin suit in Chancery.

<sup>19</sup> Code, § 3392.

<sup>20</sup> Code, § 4449.

<sup>21</sup> *Caruthers v. Caruthers*, 2 Lea, 71.

<sup>22</sup> *Blair v. Pathkiller*, 5 Verz., 230. Wallen \*

his security for rents and damages becomes insufficient;<sup>24</sup> or, 8, to restore to a tenant not sued the premises of which he was dispossessed by a writ of possession, his possession as tenant being prior to the suit.<sup>25</sup>

1. **A Writ of Restitution, in the Nature of an Injunction**, will also lie in favor of a party who has paid a judgment or decree in whole or in part which was afterward reversed. It sometimes happens that after a decree has been paid, or partly paid, the party so paying has had the decree reversed, on a writ of error, or on a bill of review, and in such a case he is entitled to a writ of restitution in the nature of an execution.<sup>26</sup>

But to entitle a party to a writ of restitution on reversal of the decree, such reversal must be final and not leave questions open which when decided, may show the party is not entitled to the writ.<sup>27</sup>

2. **A Writ of Restitution, How Obtained.** If the person injured by being wrongfully deprived of his property is a party to the suit in which the order was made or the writ issued, he can bring the wrongful dispossession before the Court by motion supported by affidavit when the facts do not otherwise appear;<sup>28</sup> but if he is not a party, he must present his sworn petition to the Court in the cause, fully setting up the facts of which he complains, and praying to be allowed to file his petition in the cause and become a party, *pro hac vice*.<sup>29</sup> The matter is, ordinarily, inquired into and disposed of summarily,<sup>30</sup> unless the grounds of the motion are seriously contested, in which case, the Master may be ordered to report as to the facts, or the Court may decide the controversy directly, on the proofs submitted. In case of a petition the petitioner may be required to give a prosecution bond.<sup>31</sup>

The following is the form of a writ of restitution:

#### WRIT OF RESTITUTION.

State of Tennessee,

To the Sheriff of Roane county:

Whereas, in the case of John Doe *vs.* Richard Roe, *et al.*, in our Chancery Court at Kingston, it was ordered and decreed, on petition of John Jones, that a writ of restitution issue to restore him to the possession of the following tract of land: [*Here insert a full description of the land,*] of which he was unlawfully dispossessed under a writ of our said Court, you are, therefore, hereby commanded, without delay, to take with you the force of your county, if necessary, and immediately enter upon said tract of land, and eject and remove therefrom every person thereon, and restore said John Jones to the full and peaceable possession thereof.

And return to our said Chancery Court at its next term to be held at the Court House in Kingston, on the 2d Monday of November, 1884, how you have executed this writ, by proper endorsement thereon.

Witness, William Clark, Clerk and Master of our said Court, the 2d Monday of May, 1884.

WILLIAM CLARK, C. & M.,  
by JAMES C. POPE, D. C. & M.

If the writ be for personal property, its command to the Sheriff will be:

"to take with you the force of your county, if necessary, and immediately take said property out of the possession of any person having it in custody, and restore it to the full and peaceable possession of said John Jones."

<sup>24</sup> Shan. Code, §§ 4994-4999; Acts of 1879, ch. 85.

<sup>25</sup> *Hickman v. Dale*, 7 Yerg., 149; *Blair v. Pathkiller*, 5 Yerg., 230.

<sup>26</sup> *Gates v. Brinkley*, 4 Lea, 710. The judgment or decree of the Supreme Court should, on reversal in such a case, specify the sum to be recovered by the execution.

<sup>27</sup> 18 Ency. Pl. & Pr., 877.

<sup>28</sup> See, *post*, §§ 784-785.

<sup>29</sup> See, *post*, §§ 792-794.

<sup>30</sup> *Hickman v. Dale*, 7 Yerg., 154.

<sup>31</sup> For a form of a petition, and a further and fuller consideration of the frame of a petition, see, *post*, § 797.

## ARTICLE V.

## SEQUESTRATIONS TO ENFORCE DECREES.

§ 658. Sequestrations Generally Considered.

§ 660. Duties of Sequestrators.

§ 659. Powers of Sequestrators.

§ 661. Form of the Writ of Sequestration.

§ 658. **Sequestrations Generally Considered.**—If the Court see proper in the first instance, or if upon issuance of an attachment for not obeying a decree the delinquent cannot be found, a writ of sequestration may issue against the estate of such delinquent to compel obedience to the decree.<sup>1</sup> The process of sequestration is a writ or commission, directed to certain persons,<sup>2</sup> nominated by the complainant, empowering them to take possession of the defendant's real estate, and receive the rents and profits thereof; and to seize all his personal estate not exempt from execution, and to keep the same in their hands until the defendant shall have performed the decree, and cleared his contempt.<sup>3</sup> If necessary, the Court may order the sequestrators to sell the personal property; and if the delinquent be required, by the order or decree, to deliver to any person, or to deposit in Court, or elsewhere, books, papers, writings, or any other articles or things, the sequestrators have power to seize them and hold them subject to the order of the Court.<sup>4</sup>

A writ of sequestration is indispensable to enforce a decree when the defendant has property in this State, but cannot be found on a writ of attachment for contempt, or evades service of the decree, or is out of the State, and the decree commands the defendant to do some affirmative act, such as to execute a conveyance, or lease, of lands outside of the State, or to execute a release or acquittance of a mortgage, judgment, or lien of record in another State, or to do some other act which cannot be directly or indirectly done by a decree *proprio vigore*.<sup>5</sup>

If either party die during a sequestration, there must be a revivor, not only of the suit, but of the sequestration; and if the suit should be abated, the sequestration would be abated also.<sup>6</sup>

§ 659. **Powers of Sequestrators.**—Sequestrators are clothed with great powers, but the defendant being in contempt cannot be heard to complain. The object of a sequestration is to coerce the defendant into performing a decree, or, on his failing so to do, to indemnify the complainant for such failure. To effectually accomplish this object, the sequestrators may seize all the property of the defendant of every kind and character whatsoever, real or personal,<sup>7</sup> except such as is exempt from seizure by statute. They may break open doors to houses, and may open rooms, safes, and boxes, and take possession of all their contents; may seize all the products of the defendant's farms, and all the rents of his real estate, and, if any tenants refuse to attorn or pay rents, the Court will compel them, as in case of receivers. In a proper case, the Court will order the sequestrators to sell all the personal estate of the defendant; and if any property is of a perishable nature, it is generally ordered to be sold, as of course. The Court will, also, authorize them to lease the real estate of the defendant. If sequestrators are obstructed in the execution of their duties, the Court will aid them by a writ of possession; and it is a contempt of Court

<sup>1</sup> Code, § 4487.

<sup>2</sup> The usual number is four, but if a less number would be adequate, the Court may, no doubt, appoint a less number, even one. Bond may be required of the sequestrators.

<sup>3</sup> 2 Dan. Ch. Pr., 1050.

<sup>4</sup> 2 Dan. Ch. Pr., 1050-1057.

<sup>5</sup> See, Code, §§ 4478-4487.

<sup>6</sup> 2 Dan. Ch. Pr., 1059-1061.

<sup>7</sup> Including choses in action.

to disturb them in their possession of property taken under the sequestration, and the Court will enjoin any suit brought against them to recover property in their possession as such.<sup>8</sup>

§ 660. **Duties of Sequestrators.**—Sequestrators are officers of the Court, and their duties and liabilities are substantially the same as those of receivers. They act under the orders of the Court as directed from time to time. They must seize all the estate of the defendant within reach, and must be diligent in getting possession of it. They are accountable for all they receive, and must make and file with the Clerk and Master a complete inventory of everything that comes into their hands, giving items, amounts and dates. They have no authority to apply the money or property they receive, otherwise than as ordered by the Court, but should hold all moneys in their hands subject to the order of the Court.<sup>9</sup>

The powers, duties and liabilities of sequestrators, and the course and procedure by and against them, are so nearly identical with those of receivers, that to enumerate them and specify them would be only to repeat what is said on these matters in the Chapter on Receivers. The following summary will show this identity: 1, The Court will put sequestrators in possession by proper process when necessary, and will require the tenants of the defendant to attorn to them; 2, It is a contempt of Court to disturb the possession of sequestrators, and if they are dispossessed the Court will restore them to possession; 3, They are accountable for all that they receive; and must make reports, from time to time, of all that comes into their hands, and must pay over all balances in their hands; and 4, A party claiming sequestrated property by title paramount must apply to the Court for an order of restoration, or for leave to sue the sequestrators.<sup>10</sup>

§ 661. **Form of the Writ of Sequestration.**—The writ is, in the main, a recital of the order for the sequestration; and the form of the writ must, therefore, be varied to meet the circumstances of each particular case.<sup>11</sup> The following is a form<sup>12</sup> of

#### A WRIT OF SEQUESTRATION.

The State of Tennessee,

To John Smith, William Jones, James Grant, and Charles Stokes:

Whereas, the Chancery Court at Nashville did, on the 10th day of June, 1890, in a suit therein pending between John Doe, complainant, and Richard Roe, defendant, order the said Richard Roe within ten days after notice, to execute, acknowledge, and deliver to said John Doe, a deed with covenants of warranty and seizin for a certain tract of land in the State of Kentucky, in said decree fully described, and to pay the costs of said suit;

And whereas, an attachment issued against the body of said Richard Roe for his contempt in not obeying said decree, and was returned "Not found."

And whereas, the said Court, on the 27th day of June, 1890, in said suit, ordered a writ of sequestration against the estate of the said Richard Roe, directed to you, all of which fully appears of record in said suit, in our said Court of Chancery;

You, or any two or more of you, are, therefore, hereby commanded, and fully authorized and empowered, to enter upon all the lands, tenements and other real estate whatsoever of the said Richard Roe, and to take, collect, and sequester, not only all the rents and profits of said lands, tenements and other real estate, but also all his goods, chattels, choses in action, and personal estate whatsoever, and detain and keep the same in your possession under sequestration, until the said Richard Roe shall fully perform said decree, and clear his said contempt, and said Court shall make an order to the contrary.

Witness, [as in case of an execution; see, ante, § 653.]

The primary object of the sequestration is to compel the defendant to perform the decree, but the Court may apply the proceeds of the sequestration to the satisfaction of the complainant's demand.<sup>13</sup>

<sup>8</sup> 2 Dan. Ch. Pr., 1050-1057; 1 Barb. Ch. Pr., 68-74.  
<sup>9</sup> 2 Dan. Ch. Pr., 1050-1057; 1 Barb. Ch. Pr., 68-74.

<sup>10</sup> 2 Dan. Ch. Pr., 1050-1059. The Court may hear the application in an informal way, and if the applicant's title is clear, may at once order the prop-

erty to be restored, without a reference to the Master. *Ibid.*

<sup>11</sup> 2 Dan. Ch. Pr., 1051.

<sup>12</sup> 3 Dan. Ch. Pr., 2365; 2 Barb. Ch. Pr., 383; 698.

<sup>13</sup> 2 Dan. Ch. Pr., 1056.

## ARTICLE VI.

## PROCEEDINGS IN ENFORCEMENT OF DECREES ON REMANDMENT.

§ 662. Proceedings on Remandment from the Supreme Court.	§ 664. Proceedings on Remandment for the Execution of an Order or Decree.
§ 663. Proceedings on Remandment from the Court of Chancery Appeals.	§ 665. Proceedings on Remandment from a Federal Court.

§ 662. **Proceedings on Remandment from the Supreme Court.**—On the remandment of a cause from the Supreme Court, the first step is to produce the *procedendo* remanding the cause, and the accompanying decree of the Supreme Court, and to move the Court to have them spread on the minutes, and the cause re-entered on the docket, both of which motions are allowed, of course.

When a remanded cause has thus been re-entered on the docket, it stands exactly as it did when the appeal was granted, except in so far as changed by the decree of the Supreme Court. The decree of the Chancellor appealed from, and the erroneous orders and rulings of the Chancellor excepted to before or at the hearing, are affirmed, modified, or annulled, as required by the decree of remandment.

1. If the bill was improperly dismissed on motion, the defendant must, on remandment, plead, demur, or answer, under the rules.

2. If the bill was improperly dismissed on demurrer, the defendant must plead or answer, under the rules.

3. If the bill was improperly dismissed in consequence of complainant's supposed wrongful failure to comply with some rule, or interlocutory order, the cause will stand on the docket exactly as it stood when dismissed, to be thence proceeded in according to the practice of the Court, as though never dismissed.

4. Where the Chancellor erroneously refused a material motion, as for an amendment to a pleading, or deposition, or for leave to file some pleading, or document, or pauper oath, or bond, or for a reference, or for a report, or for the recommittal of a report, or for the taking or retaking of a deposition, or for a continuance, or in reference to some other matter, on the reinstatement of the cause, the motion refused by the Chancellor will be granted, and the cause will proceed thereafter as though such motion had been allowed originally, and no appeal had ever been taken.

5. Where the order of remandment gives the appellant leave to make additional parties, or to file a new or an amended pleading, bond, or pauper oath, or to introduce additional evidence, or to do some other thing, on the reinstatement of the cause the appellant will be allowed so to do, and thereafter the cause will be proceeded in as though such thing had been originally done in the Chancery Court, and no appeal had ever been taken.

6. Where a demand for a jury was erroneously denied, on remandment a trial by jury will be allowed. On the other hand, where a jury trial was erroneously granted, on remandment the cause will be proceeded in as though such trial had been refused by the Chancellor instead of granted.<sup>1</sup>

7. Where, in case of a trial by jury, material errors were committed by the Chancellor in admitting or excluding evidence, or in charging or failing to charge the jury, or in refusing a new trial on some other ground, on remandment a new trial will be granted, and the cause proceeded with as though the

Chancellor had granted a new trial originally and there had never been an appeal. On the new trial, however, the errors corrected by the Supreme Court will be carefully avoided.

8. Where, in any matter, the Supreme Court has reversed or modified the action of the Chancellor, on remandment such matter will stand reversed or modified accordingly.

9. Where, in any matter, the Chancellor failed to act whether moved on so to do or not, and the Supreme Court decree of remandment indicates what the Chancellor should have done, such action will accordingly be done, or if not done will be deemed to be done, and the case proceeded in accordingly.

10. Where any other act or omission of the Chancellor is corrected by the Supreme Court, or, where the Supreme Court, on its own motion, directs some act to be done, or undone, or omitted to be done, or in some other matter reverses or revises what was done, or omitted to be done, by the Chancellor, on remandment of the cause, the decree of the Supreme Court will, in all respects, be carefully complied with.

After the cause has been remanded, and re-instated on the docket by order of the Chancellor, it is further proceeded in according to the practice of the Court from that stage where the appeal was taken to a final decree.

If the cause is remanded for the execution of an order or decree no order of re-instatement is necessary, as will appear in a following section.<sup>2</sup>

**ORDER OF RE-INSTATEMENT.**

Frank Frank,  
*vs.*  
 Ananias Fraud. } Order of Re-instatement.

In this cause, Leon Jourolmon, Esq., the Solicitor of the complainant, Frank Frank, produced the *procedendo* and decree of the Supreme Court reversing the decree of this Court heretofore pronounced and appealed from, and moved the Court to enter said *procedendo* and decree on the minutes of the Court and to reinstate the cause on the docket, all of which motions are allowed. Said *procedendo* and decree are as follows:

**PROCEDENDO.**

[Here insert it in full.]

**DECREE.**

[Here insert it in full.]

The Clerk and Master is directed to re-enter the cause on his docket, which is done accordingly.

[Supposing the appeal was from a decree sustaining a demurrer and dismissing the bill, and that the Supreme Court reversed the decree, overruled the demurrer and remanded the cause "for answer to the bill and further proceedings according to the practice of the Court," add:]

And, thereupon, the demurrer of the defendant to the bill having been overruled by the Supreme Court, and the cause remanded for answer to the bill and further proceedings, the defendant moved the Court for thirty days in which to file his answer, which motion was disallowed, and the defendant ordered to answer the bill on or before tomorrow, [or some other specified day.]

§ 663. **Proceedings on Remandment from the Court of Chancery Appeals.** The proceedings on remandment of a cause from the Court of Chancery Appeals are in every particular identical with those above set forth in case of remandments by the Supreme Court, *mutatis mutandis*, so that it is unnecessary to restate them.

§ 664. **Proceedings on Remandment for the Execution of an Order or Decree.** Ordinarily on the remandment of a cause by the Supreme Court, or the Court of Chancery appeals, no further action can be taken in it until it has been re-instated on the docket by order of the Chancery Court. This often causes a long, needless and vexatious delay, as six months might intervene between the pronouncement of the decree of the Appellate Court and the next term of the Chancery Court whose decree had been affirmed, modified, or reversed.

<sup>2</sup> See, *post*, § 664.



To remedy this evil, it has been enacted that when a case is remanded by the Supreme Court, or the Court of Chancery Appeals, for the execution of an order of reference, order of sale, or for other proceedings directed in the decree of the Appellate Court, or in the decree of the Chancery Court as affirmed by the Appellate Court, such case is deemed to be re-instated in the Chancery Court from the time of filing with the Clerk and Master a certified copy of the decree or mandate of the Appellate Court; and thereafter such case may be proceeded in in accordance with the decree of the Appellate Court without any action of the Chancery Court thereon; and as fully and effectively as if the decree of the Appellate Court had been re-decreed, or spread of record, in the Chancery Court, in term time, by order of the Chancellor.<sup>3</sup> As soon as a certified copy of the decree or mandate of the Appellate Court is received, the Clerk and Master will file it, copy it upon his rule docket, and notify the Solicitors of record in the case of the filing of the decree or mandate;<sup>4</sup> and, thereupon, the Clerk and Master will, unless otherwise directed by consent of such Solicitors, proceed to execute such decree or mandate as fully and speedily as though so ordered by the Chancellor.

Under this salutary statute the delays incident to appeals are, in many cases, greatly lessened, and the termination of a litigation greatly speeded.

§ 665. **Proceedings on Remandment from a Federal Court.**—When a case has been removed from the Chancery Court to a Federal Court and been afterwards remanded to the Chancery Court, the pleadings, depositions and proofs which were filed in the Federal Court during the pendency of the case there, are as valid and may be used as fully as if originally filed in the Chancery Court.<sup>5</sup> And where the original depositions and pleadings and proofs cannot be obtained from the Federal Court, certified copies may be used instead of the originals.<sup>6</sup>

<sup>3</sup> Acts of 1901, ch. 10, sec. 1.

<sup>4</sup> *Ibid.*, sec. 2. A cause having been remanded for an order of reference to be made as to complainant's damages, the Master proceeded to take proof and assess the damages without an order by the Chancellor so to do; and, on his action being sustained by the Chancellor, the defendant appealed on the

ground that the Master's action was premature. The Supreme Court affirmed the decree. *Madison v. Ducktown S. C. & I. Co.*, *M.S.*, Knoxville, September, 1905.

<sup>5</sup> Acts of 1903, ch. 17, sec. 1.

<sup>6</sup> *Ibid.*, sec. 2.

## PART VI.

### BILLS IN CHANCERY RELATING TO ORIGINAL BILLS.

#### CHAPTER XXXIII.

##### AMENDED AND SUPPLEMENTAL BILLS.

ARTICLE I. Amended Bills.

ARTICLE II. Supplemental Bills.

ARTICLE III. Defences to Amended and Supplemental Bills.

#### ARTICLE I.

##### AMENDED BILLS.

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| <p>§ 666. How Defects in a Bill May be Remedied.</p> <p>§ 667. Amendment of Bills Generally Considered.</p> <p>§ 668. A Bill Amended, and an Amended Bill.</p> <p>§ 669. When an Amended Bill is Proper.</p> <p>§ 670. Difference Between an Amended and a Supplemental Bill.</p> <p>§ 671. What Amendments May be Made.</p> <p>§ 672. What Amendments are Not Allowed.</p> | <p>§ 673. Statutory Provisions Relating to Amending Bills.</p> <p>§ 674. When Amendments May be Made Further Considered.</p> <p>§ 675. How Leave to Amend is Obtained.</p> <p>§ 676. Form and Manner of Amending Bills.</p> <p>§ 677. Effect of an Amended Bill.</p> <p>§ 678. Summary of the Essentials of Amended Bills.</p> <p>§ 679. Form of an Amended Bill.</p> |
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§ 666. **How Defects in a Bill May be Remedied.**—After a suit has been commenced by original bill, it may need amendment in consequence of defects of various kinds. A bill may be defective in its original structure, either (1) from the want of a full statement of the material facts, or (2) from the want of proper parties, or (3) from the want of asking suitable discoveries, or (4) from other like defects, where no event has occurred subsequent to the institution of the suit, affecting the rights or interests of the parties. In such a case, the defect may be cured either by an amendment of the bill, or by an amended bill. On the other hand, a suit may be perfect in its institution; and yet, by some event, subsequent to the filing of the original bill, it may become (1) *defective*, so that no proceeding can be had, either as to the whole, or as to some part thereof, with effect; as, when, although the parties to the suit remain before the Court, some event, subsequent to the institution of the suit, has either made such a change in the interest of those parties, or given to some other person such an interest in the matters in litigation, that the proceedings, as they stand, cannot have their full effect, in which case the defect may be remedied by a supplemental bill;<sup>1</sup> or (2) the suit may become *abated*,

<sup>1</sup> It may be well, however, to state that the present practice in Tennessee on the subject of amending bills is somewhat different from the practice as laid down in Story, Daniel and older works on Chancery Pleadings. In the following particulars our present practice differs somewhat from the old practice: I,

A bill may be amended at any time before a decree; 2, Matter which has occurred since the original bill was filed may be incorporated in an amended bill; and 3, The differences between an amended and a supplemental bill are, in other respects, but little more than nominal, in ordinary practice. See, *post*, § 670.

so that there can be no proceeding in it at all, either as to the whole, or as to a part thereof; as when, in consequence of the death of parties, or of marriage of female parties, or of some other event subsequent to the suit, there is a want of parties before the Court, by or against whom the suit can, in whole or in part, be prosecuted or defended, in any of which cases a bill of revivor in some of its forms may be filed.<sup>2</sup>

§ 667. **Amendment of Bills generally Considered.**—The rights of the parties to a suit are ordinarily determined as though the decree was pronounced *on the very day the bill was filed*; for the object of the suit is to have a decision of the matters in controversy existing at the time the suit is brought. It would seem manifestly just and logical, therefore, to incorporate into the original bill, either by interlineation, or on a separate paper, (1) any matter necessary to the rights of the complainant, and proper to be brought before the Court, that was in existence when the bill was filed, but for sufficient reason was omitted, and (2) to add to the bill any new parties made necessary by such additional facts. And such is the practice of the Courts, their object being to enable the complainant to get before the Court every matter and every party necessary to a full adjudication of the matters of controversy. And although amended bills are sometimes allowed to bring before the Court matters occurring since the suit was brought, nevertheless such a practice creates confusion, and should not be encouraged; but the complainant should be required to file a supplemental bill.<sup>3</sup>

§ 668. **A Bill Amended, and an Amended Bill.**—There is a difference between amending an original bill on its face and filing an amended bill. In our practice, when an amendment can be made in the body of the bill by interlineation, or by writing it on the margin, it can be so made at any time before the defendant has made defence, or even after demurrer, and before argument thereof, without leave; but, if made at any other time, leave of the Court must be had.<sup>4</sup> Any amendment may be made on the face of the bill that would be proper to be made by an amended bill, provided the amendment be not too voluminous to be incorporated into the original bill by interlineation, or insertion on the margin.<sup>5</sup> If, however, such an amendment is too long to be inserted in the body of the original bill, the Court will require it to be brought forward on a separate paper as an amended bill, or as an amendment to the bill. When the new matter is written on the face of the original bill, the bill is a bill amended; when it takes the form of a separate bill, it is an amended bill.<sup>6</sup>

The new matter, and the new parties, that may be brought before the Court are governed by the same rules and considerations whether the bill is amended on its face, or an amended bill is filed. In either case, amendments to a bill are always considered as forming a part of the original bill, and relate to the filing of the bill.<sup>7</sup>

§ 669. **When an Amended Bill is Proper.**—When a complainant has filed his bill, and is advised that the same does not contain such material facts, or make all such persons parties, as are necessary to enable the Court to do complete justice, he may alter it by inserting new matter subsisting at the time of exhibiting his bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such parties as shall be deemed nec-

<sup>2</sup> Sto. Eq. Pl., § 328.  
<sup>3</sup> 2 Barb. Ch. Pr., 59-63, and note; *post*, §§ 680-692.

<sup>4</sup> Code, §§ 4333-4337.

<sup>5</sup> 1 Dan. Ch. Pr., 422, note.

<sup>6</sup> There is a sort of intermediate method of making amendments to bills frequently adopted in term time. Instead of either amending the bill on its face, or filing an amended bill, the complainant is allowed to amend his bill by an entry on the minutes, setting out the very words of the amendment;

time to answer the same. In such cases, the amendment is deemed to have been made in the body of the bill. *Lyon v. Browne*, 6 Bax., 64. This practice, however, should not be encouraged, as the convenience of all parties is promoted by having the bill and its amendments all together, instead of having to search the minutes through to see what amendments to the bill may be found therein. The Court should require the amendment to be incorporated in the bill, as well as entered on the minutes. See *State v. Goldberg*, 5 Cates, 298.

essary; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to complainant's case, or parties which may be dispensed with, the same may be struck out; and the original bill, thus added to or altered, is termed *an amended bill*.

But although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it; for both the original and amended bill constitute but one record.<sup>8</sup> An original bill cannot be properly amended by incorporating anything therein which arose subsequently to the commencement of the suit. Matters which have since occurred, and which are material to perfect the complainant's case, are proper for a supplemental bill.<sup>9</sup>

Amendments to a bill are of two sorts, those which relate to parties, and those which affect the substance of the case: amendments relating to parties are either by addition, or omission of them; or by changing the situation of the parties, by striking out the name of a co-complainant and making him a defendant, as in the case of an infant heir-at-law who has been improperly made a complainant. A complainant ought not to introduce facts by amendment, which have occurred since the filing of the original bill, because as the amendments are held to constitute part of the same record as the original bill, which can only relate to facts which were in existence at the time when it was originally filed, the introduction of matters of a subsequent date would render the bill incongruous. Matter, therefore, which has occurred since the original bill was filed, should be brought before the Court by supplemental bill, and not by amendment to the original bill.<sup>10</sup>

**§ 670. The Difference between an Amended and a Supplemental Bill.**—The technical distinctions between an amended bill and a supplemental bill are two: 1, No matter not in existence when the original suit was brought can be brought forward by an amended bill, but to bring forward such matter is the especial office of a supplemental bill. 2, Matter in existence when the original bill was filed must be brought before the Court by amendment, if the answer has not been filed; but, if the answer has been filed, such matter must ordinarily be brought forward by supplemental bill.<sup>11</sup> However, inasmuch as under our practice a bill may be amended after answer filed,<sup>12</sup> this practically abolishes the latter distinction between the two bills, and the effect of this has been greatly to obliterate the former distinction. An examination of our Reports will show that all distinctions between an amended bill and a supplemental bill are often ignored, and amended bills are frequently allowed to be filed when, in strict practice, supplemental bills should have been filed, and this is done without challenge. Hence, it may be safely laid down as a rule of our Chancery practice, that, at least as to matter in existence when suit was brought, an amended bill may be filed whenever a supplemental bill will lie.<sup>13</sup> The result is, whatever is said in the next article in reference to supplemental bills, will apply to amended bills as to matter in existence when the original bill was filed.<sup>14</sup>

**§ 671. What Amendments May be Made.**—If, at the hearing, the record appears to be defective for want of proper parties, the Court will allow the cause to stand over, for the complainant to amend his bill by adding parties; or, where the parties are too numerous to be brought before the Court, the complainant will be allowed to alter the form of the bill, by making it a bill of complaint on behalf of himself and others: the complainant will be permitted

<sup>8</sup> *Morrow v. Fossick*, 3 Lea, 131; 1 Dan. Ch. Pr., 401. Daniel says that an amended bill must be addressed to the same Chancellor to whom the original bill was addressed, although a change of Chancellors has occurred since the original bill was filed. 1 Dan. Ch. Pr., 402. This is a striking proof of the disposition of the Courts to regard the original bill and the amended bill as practically one pleading. In Tennessee, however, regard is had more to the office than to the officer, and it would be proper to address the amended bill to the incumbent Chancellor.

<sup>9</sup> 2 Dan. Ch. Pr., 1515, note; Sto. Eq. Pl., §§ 332-336; 885; 2 Barb. Ch. Pr., 63.

<sup>10</sup> 1 Dan. Ch. Pr., 402-403; 2 Barb. Ch. Pr., 63; 2 Dan. Ch. Pr., 1515, notes.

<sup>11</sup> 2 Dan. Ch. Pr., 1515-1530, notes; 2 Barb. Ch. Pr., 59-63; Sto. Eq. Pl., §§ 332; 336; 885.

<sup>12</sup> Code, § 4336.

<sup>13</sup> In many cases, the name "amended and supplemental bill" is used in our practice.

<sup>14</sup> See, *post*, § 682.

to show why he cannot bring the necessary parties before the Court. So, also, where a matter has not been put in issue, with sufficient precision, the Court has, upon hearing the case, given the complainant liberty to amend the bill, for the purpose of making the necessary alteration. And the Court will, at the hearing, permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the complainant. And where a complainant has amended his bill, and by accident has omitted to insert in the amended bill the prayer for relief, although it was in the original bill, the Court will allow the complainant to re-amend his bill by inserting it. Wherever improper submissions have been made in a bill on behalf of infants, the Court will, at hearing, order that the bill be amended by striking out the submissions. Upon the same principle, where an infant heir-at-law had been made a co-complainant, the Court ordered the cause to stand over, with liberty to the complainant to amend his bill by making the heir-at-law a defendant.<sup>15</sup>

And it may be said, generally, that any amendment may be made necessary to enable the complainant to get the merits of his case fully before the Court; and to enable the Court to do full justice to all parties interested in the controversy. New parties may be made either complainant or defendant; complainants may be made defendants, and defendants may be made complainants; any new matter may be brought forward, pertinent to and consistent with the case stated in the original bill; new or additional process, ordinary or extraordinary, may be asked; the prayers may be changed; and, in short, any addition, or alteration, may be made that is in furtherance of the object of the original bill, and not inconsistent therewith, or repugnant thereto, provided that such addition or alteration does not make an entirely new suit.

The most usual grounds for amending bills are the following:

1. **To Make New Parties**, such new parties consisting, ordinarily, of persons who are: (1) liable to complainant's demands; or (2) who have an interest in the subject-matter of the suit; or (3) will be entitled to some of the proceeds; or (4) will be subject to some of the liabilities of the suit; or (5) who have probable rights; or (6) who have set up claims to the subject-matter of the suit, that should be adjudicated; or (7) persons who should be bound by the decree either in order to remove clouds from the title, or to give the purchaser a good title, or to prevent further litigation in reference thereto, Courts are very liberal in allowing new parties to be made, and when the defendants already in Court are not prejudiced thereby, and when no delay will result from the amendment, no terms are ordinarily imposed.

2. **To Bring Forward Newly Discovered Facts** that increase or strengthen complainant's equities, or destroy or diminish the defendant's set-offs, or defences. Sometimes it is necessary to file a bill, especially an attachment or injunction bill, in so great haste that it is impracticable to thoroughly investigate the case in all its branches and details. In such a case, this investigation should be made as soon after the bill is filed as possible, and application to amend should be promptly made after its necessity is discovered.

3. **To Take Advantage of Disclosures in the Answer.** It is very common for the answer to disclose facts, or set up defences, previously unknown to the complainant, in consequence of which it becomes necessary to make such corrections in, or additions to, his bill, either as to facts, or as to parties, or as to both, as will enable him to meet, avoid, or overcome these disclosures, if against his interest, or to take advantage of them, if in his favor.<sup>16</sup> Such amendments are allowed with great liberality, and ordinarily without terms, if the facts were unknown to complainant when he filed his bill, and if the application to amend is made at the first opportunity after the filing of the answer, because one of the offices of an answer is to disclose and discover facts unknown to the complainant.<sup>17</sup>

§ 672. **What Amendments are not Allowed.**—Amendments can only be granted where the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto.<sup>18</sup> The new matters set up in the amended bill must be germane to the original bill, and have a connection with the matters set up in the original bill.<sup>19</sup> An amended bill will not be allowed, where the relief sought is inconsistent with that of the original bill; nor where the new matter is repugnant to, or inconsistent with, the original bill,<sup>20</sup> even though stated in the alternative;<sup>21</sup> nor where a new title or cause of action is sought to be set up that is barred by the statute of limitations, or in any other way barred, lost or discharged;<sup>22</sup> or that would make the bill multifarious, or in any other respect demurrable.<sup>23</sup> Nor will an amendment be allowed at the hearing whose effect would be to shift the burden of proof as to a particular matter from the complainant to the defendant.<sup>24</sup>

A complainant cannot by amended bill abandon the original claim set up and aver a new one; thus, he cannot sue first in his own right and afterwards amend so as to sue as administrator.<sup>25</sup> Nor will an amended bill be allowed which seeks a relief directly in conflict with the relief prayed in the original bill. And these rules are not changed by the fact that the same person has the one right as an individual, and the other as administrator.<sup>26</sup> Nevertheless, where the new matters are at all germane to the original bill, and grow out of the same transaction, great liberality is allowed in making amendments, provided they do not make out an entirely new case,<sup>27</sup> and this is especially true as to amendments for want of proper parties before the Court; all amendments, however, to be made on the payment of costs where the amendment causes delay, or creates costs.

If, at the time of filing the original bill, the complainant had no title to the relief prayed, he cannot make out a title by so amending his bill as to introduce facts which have subsequently occurred.<sup>28</sup> Nor can such a sole complainant amend by adding as complainants parties who have a title; nor can parties who have a title have themselves made complainants by amended bill, when the original complainant has no title. But if the original complainant has any such interest as to make him a proper party, then new parties may be made.<sup>29</sup>

The Court will not, after answer filed, allow amendments as to facts known to the complainant when he filed his bill, unless some sufficient excuse is given for the omission.<sup>30</sup>

§ 673. **Statutory Provisions in Relation to Amending Bills.**—According to the Code, the complainant may amend his bill before the defendant has taken out, or the Clerk issued, a copy thereof, and in small matters not affecting the merits, afterwards, without costs.<sup>31</sup>

Material amendments may be made as of course, without application to the Chancellor, after copy of the bill has been issued or taken out, and before the defendant has made defence, upon complainant paying the costs of furnishing a copy of the amendment to such of the defendants as have received or taken out copies of the original bill, and of the notice to be served upon all the defendants of such amendment: amendments may also be made after demurrer and before argument thereof, upon the same terms.<sup>32</sup>

18 1 Dan. Ch. Pr., 401, note.

19 Tappan v. Railroad Co., 3 Lea, 106.

20 Bynum v. Ewart, 6 Pick., 658; Hill v. Harrison, 11 Pick., 300.

21 Masson v. Anderson, 3 Bax., 302; Coleman v. Pinkard, 2 Hum., 190; 1 Dan. Ch. Pr., 408.

22 Trousdale v. Thomas, 3 Lea, 715.

23 Rogers v. Simpson, 11 Heisk., 655.

24 Allen v. Dayton Hotel Co., 11 Pick., 480.

25 Bosley v. Phillips, 3 Tenn. Ch., 649; Tilman v.

Searcy, 5 Hum., 587; Coleman v. Pinkard, 2 Hum., 185; Rogers v. Simpson, 10 Heisk., 655.

26 Moody v. Fry, 3 Hum., 567; Gilliam v. Spence, 6 Hum., 163.

27 Hogan v. McFarland, 6 Bax., 104.

28 1 Dan. Ch. Pr., 401, note.

29 Franklin v. Franklin, 2 Swan, 522.

30 Crowder v. Turney, 3 Cold., 551; 1 Dan. Ch. Pr., 401, notes; Marr v. Wilson, 2 Lea, 229.

31 Code, § 4332.

32 Code, § 4333.

In all other cases the complainant can amend his bill only by leave of the Chancellor given in open Court, or at Chambers, and upon such terms as he may impose.<sup>33</sup> But the Court may, at any stage of the cause, even after argument,<sup>34</sup> if it be thought necessary to justice, permit amendments to the bill, upon such terms as may appear reasonable.<sup>35</sup>

The following form of notice of amendment before answer filed will serve as a guide to the Clerk and Master:

**NOTICE OF AMENDMENT OF A BILL BEFORE ANSWER FILED.**

John Doe,  
vs.  
Richard Roe. } In the Chancery Court at Clinton.  
Mr. Richard Roe v.

You are hereby notified that on the 17th day of June, 1905, the complainant amended his bill in the above entitled cause, as follows:

On the first page, in line 9, he added after the words "on that day," the following words: "and at the same time complainant paid him forty-sever dollars."

On the second page, at the end of line 3, he added these words: [*Here insert them.*]

On the same page, he struck out all the words between the words "on said contract," in line 10, and the words "Complainant further shows," in line 16.

I certify that the foregoing is a true copy of said amendments.

This June 17, 1905.

J. C. SCRUGGS, C. & M.

This notice need not be served on any of the defendants except those who have received or taken out copies of the bill; but all of the other defendants will be notified that the bill has been amended. These notices may be served in the same manner as notices to take depositions. The original notices, with the officer's return endorsed on them, should be filed in the cause and the facts noted in the Master's rule docket.

**§ 674. When Amendments may be Made, Further Considered.**—As a general rule, a bill may be amended at any time between its filing and the adjournment of the term at which the final decree is pronounced,<sup>36</sup> under the terms and conditions stated in the preceding section; and these amendments may cover any, or every, part of the bill, may bring in new parties, change the position of parties on the record, whether complainants or defendants, bring new matters before the Court consistent with the original bill, ask for other process, ordinary or extraordinary, change the prayer, and in any other way alter the original bill: provided always, the changes are in furtherance of the objects of the original bill, and are not inconsistent with them, or repugnant to them. Even after a bill has been in part dismissed on demurrer, and a term elapsed, a bill may be amended, and the amendment will relate back to the filing of the original bill, and restore and preserve an attachment lien.<sup>37</sup>

But, while amendments may thus be made at any time while the bill is pending, it is nevertheless, true that the difficulty of getting leave to amend increases with the lapse of time since the bill was filed, and the liability of the party amending to pay costs increases in like proportion.<sup>38</sup>

An amendment may be made at the hearing so as to bring the beneficiaries before the Court;<sup>39</sup> and if objection for such want of necessary parties is made in the Supreme Court, a decree on the merits will be made, and the cause will be remanded to enable persons having interests to be made parties, or to become parties by petition, and take under the decree already rendered.<sup>40</sup>

If upon the argument of a demurrer, it appears that the ground for demurring can be removed by amendment, the Court, in order to avoid putting the complainant to the expense of filing a new bill, instead of deciding upon the

<sup>33</sup> Code, §§ 4344; 4410; *post*, § 775.

<sup>34</sup> Code, § 4335.

<sup>35</sup> That is, after argument at the hearing.

<sup>36</sup> Code, § 4332-4337; *Lookout Bank v. Susong*, 6 Pick., 590.

<sup>37</sup> *Lookout Bank v. Susong*, 6 Pick. 590; *Patton*

ments is, to allow them when proper, but to onerate the party applying with enough of the costs to secure diligence and skill. This matter will be found fully considered in §§ 526-528, *ante*.

<sup>39</sup> *Perkins v. Hays, Cooke, 189*; Code, § 4337; *Cook v. Hadley, Cooke* 465

demurrer, gives him liberty to amend his bill on payment of the costs incident to the amendment; and where the demurrer is for want of parties, the Court generally annexes to the order allowing the demurrer, leave to the complainant to amend his bill by adding the necessary parties.<sup>41</sup> Our practice is very liberal on the subject of adding new parties, either complainant or defendant;<sup>42</sup> and on sustaining a demurrer for want of a necessary party, it would be reversible error to dismiss the bill: the bill should stand over with leave to amend.<sup>43</sup> Costs should, however, be imposed as the price of the amendment, either where there has been delay, or where the amendment increases the costs of the litigation.

§ 675. **How Leave to Amend is Obtained.**—Leave to amend a bill, or to file an amended bill, is not required unless made after argument of demurrer, or after answer filed; but after such argument or answer, the complainant can amend his bill, or file an amended bill, only by leave of the Chancellor given in open Court, or at Chambers, and upon such terms as he may impose.<sup>44</sup> If the bill is one not required to be under oath, and the application to amend will not create any delay, the Court is liberal in granting leave.

When an amended bill is sought to be filed, after defence made, it should be drawn, and sworn to, before allowed to be filed.<sup>44a</sup> 1, It should be drawn so that the Court may see that it contains matter proper for an amended bill;<sup>45</sup> and 2, It should be sworn to as evidence that the amendment is in good faith, and not a mere invention: otherwise the amendment may be wholly false, or wholly immaterial, or repugnant, or inconsistent with the original bill, or otherwise radically defective.

When leave of the Court is necessary to file an amended bill, some excuse must be given for the omission to insert, in the original bill, the matters sought to be set up in the amendment, if such matters were in existence and known to complainant when the original bill was filed; and the application to amend must be made as soon as the necessity for such an amendment is discovered.<sup>46</sup>

But bills required to be under oath are allowed to be amended with great caution. When a complainant wishes to amend a sworn bill, he must present the proposed amendment in writing so that the Court can see that it is a proper matter for an amendment. He must, also, swear to the truth of the proposed amendment, and show a good reason for not incorporating it into the original bill. The application to amend must be made as soon as the necessity for it is discovered.<sup>47</sup>

An application to strike out an allegation from a sworn bill, or to make alterations in it, should be supported by affidavits showing how the mistake occurred. The Court may refuse to allow a sworn allegation to be stricken out, and may require a supplemental statement on a separate paper, in the nature of an amended bill.<sup>48</sup>

§ 676. **Form and Manner of Amending Bills.**—If the amendment is short, and can be interlined, or written on the margin of the bill, the Court may allow such a course; but if the amendments are long or numerous, they should be made on a separate paper, thus:

<sup>41</sup> 1 Dan. Ch. Pr., 417-419.

<sup>42</sup> Code, § 2798; 2869. Code, § 2799, applies to Chancery practice, then why not Code, § 2798? Hill v. Bowers, 4 Heisk., 275; Speak v. Ransom, 2 Tenn. Ch., 210; Stretch v. Stretch, 2 Tenn. Ch., 140. See, also, Code, §§ 4337-4338; Perkins v. Hays, Cooke, 189; Cook v. Hadley, Cooke, 446; Franklin v. Franklin, 2 Swan, 521; Birdsong v. Birdsong, 2 Head, 290; Gray v. Hays, 7 Hum., 588; Saylor v. Saylor, 3 Heisk., 525, 533.

<sup>43</sup> Gray v. Hays, 7 Hum., 588.

<sup>44</sup> Our Courts are liberal in granting amendments. Our Solicitors are frequently compelled to file bills in term time, amid the complications, embarrassments, confusion and pressure of other business, and have neither the time to give the case that measure

of attention, nor the opportunity of thoroughly investigating the facts, possessed by the English Solicitors. The result is, amendments are oftener needed. Nevertheless, as he who seeks Equity must do Equity, the party seeking to amend should be operated with costs enough to enforce proper diligence. Code, §§ 2863-2871; 2878; 4333-4338; and cases cited, ante, §§ 429; 526. See note 33, supra.

<sup>44a</sup> 1 Dan. Ch. Pr., 401, note.

<sup>45</sup> Bosley v. Phillips, 3 Tenn. Ch., 649.

<sup>46</sup> Marr v. Wilson, 2 Lea, 229; Crowder v. Turney, 3 Cold., 551.

<sup>47</sup> 1 Dan. Ch. Pr., 401, note; Marr v. Wilson, 2 Lea, 229.

<sup>48</sup> 1 Dan. Ch. Pr., 425, note.



## AMENDMENTS TO A BILL.

John Doe,  
*vs.*  
 Richard Roe. } No. 3489.

Amendments to the bill of complainant in this cause, made pursuant to an order of the Court, entered of record on the 1st day of April, 1890:

1. In the third line of the second paragraph of the bill, after the words "and on that day," add "or within a short time thereafter."

2. After the words [name them] in the fifth line of the third paragraph, add the following: [specifying the matter to be added.]

3. Strike out all the words in the fourth paragraph of the bill after the words: [naming them.] L. A. GRATZ, Sol. for Complainant.

Amendments to a bill should not be made by interlineations and erasures on the face of the original bill, except when the changes are very slight; but the Court should require amendments to be made on a separate paper, especially where erasures, or extensive changes, are to be made. The practice of amending pleadings by erasures, and interlineations, on their face, ought not to be tolerated by the Courts.<sup>48a</sup>

If an injunction, a receiver, or other extraordinary preliminary relief, is desired by virtue of an amendment, the proper practice is to file an amended, or a supplemental, bill in due form, and verify it. No extraordinary preliminary relief should be granted, except upon sworn pleadings drawn up in proper form. The price of extraordinary process is meritorious facts, set forth in proper form, and duly verified on the personal knowledge of the affiant.

§ 677. **The Effect of an Amended Bill.**—When an amended bill is filed, the new matter set up in it is deemed to be incorporated into the original bill. The amended bill is only a continuation of the original bill, and a component part thereof, the two bills constituting but one record;<sup>49</sup> and the defendant may make a new defence to the entire bill as amended if he desires.<sup>50</sup>

An amendment, or amended bill, not introducing a new cause of action or a new party, relates back to the filing of the original bill, and preserves the lien on property secured by the original bill;<sup>51</sup> indeed, the original and amended bills are in law but one bill, the amendment becoming a part of the original bill and the original bill becoming *pro tanto* modified.<sup>52</sup> But, if the amendment brings forward a new cause of suit which is barred by the statute of limitations, or makes a new complainant who is barred, the amendment will not so relate back as to defeat the bar, but will take effect from the day it is made.<sup>53</sup>

If the new matter does not affect any of the defendants who have already answered, no new process need be served on them, and no additional answer need be filed by them. As to the new parties, they must be regularly brought into Court, by proper process, and as to them the original and amended bills constitute in effect one original bill, and they have every right of defence thereto that can be made to an original bill,<sup>54</sup> including the right to file a cross-bill. But the new defendants, who have these rights, must not be defendants who are mere successors in interest of parties already before the Court, for such privies will be bound by the acts of those to whose interests they succeed.<sup>55</sup>

When an amended bill makes new parties complainant in privity with the original parties, and sets up no new cause of action, the depositions previously taken are admissible against the defendants;<sup>56</sup> but when an amended bill brings new parties before the Court who have had no chance to cross-examine

<sup>48a</sup> Puterbaugh's Ch. Pl. & Pr., 204. The practice of allowing amendments by erasures and interlineations is not only a temptation to unauthorized doctorings of pleadings, but is also destructive of that certainty which is one of the essentials of pleading. *High v. Batte*, 10 Yerg., 338.

<sup>49</sup> *Morrow v. Fossick*, 3 Lea, 129; 1 Dan. Ch. Pr.,

*Beadle*, 2 Head., 511; *Lookout Bank v. Susong*, 5 Pick., 590.

<sup>50</sup> *Seay v. Ferguson*, 1 Tenn. Ch., 287.

<sup>51</sup> *Bryan v. Zarecor*, 4 Cates, 503.

<sup>52</sup> *Miller v. Taylor*, 3 Shan. Cas., 461.

<sup>53</sup> *Trousdale v. Thomas*, 3 Lea, 715.

<sup>54</sup> *State v. Nashville S. Bank*, 16 Lea, 111.

the witnesses, it is in effect an original bill as to them, and no proof taken before they were made parties can be read against them.<sup>57</sup>

§ 678. **Summary of the Essentials of Amended Bills.**—The following summary comprises most of the essentials of amended bills:

1. Material amendments may be made, either by interlineation or by an amended bill, at any time before plea, or answer filed, or before argument of demurrer, without application to the Chancellor.<sup>58</sup>

2. An amendment can be made after answer or plea filed, or argument of demurrer, only by leave of the Chancellor given in open Court,<sup>59</sup> or at Chambers.<sup>60</sup>

3. The amendment may be made at any time by leave of the Court, even after the hearing.<sup>61</sup>

4. If the amendment is sought to be made, or the bill to be filed, after plea or answer, the application for leave should be made at the earliest opportunity after the necessity for it becomes known; and any delay should be explained by affidavit. The amendment should be sworn to in such a case.

5. The new matter must be either to supply some deficiency in the frame of the bill, or be some necessary party omitted, or some facts pertinent to the controversy not already alleged.

6. The new matter must not be inconsistent with the original bill, nor must it constitute a new and different ground of suit.

7. The new parties, if complainants, must be the privies of the original parties, or have concurrent rights, or a community of interests.

8. The amendment should not consist of any matter that has come into existence since the commencement of the suit, but should be confined to matters that might have properly been included in the original bill, being matters in existence when the suit was instituted.

9. No new process is required unless the amendment makes new parties defendant, and then only as to the new parties.

10. The original and amended bills become one original bill as to the new parties; and they have the same rights of defence as parties to an original bill.

11. An amended bill may, in Tennessee, be filed whenever a supplemental bill may be filed, except when sought to be filed by a defendant to the original bill, or by a new party, or to bring before the Court new matter that has come into existence since the original bill was filed.

§ 679. **Form of an Amended Bill.**—An amended bill should recite the filing of the original, and all the subsequent steps taken in the cause, including issuance and service of subpoena, and the filing of an answer, if such are the facts, as will be more fully seen by the following form:

**AN AMENDED BILL.**

To the Hon. Thomas M. McConnell, Chancellor, holding the Chancery Court at Chattanooga:  
John Doe, a resident of Polk county, complainant,

*v.s.*

Richard Roe, a resident of Hamilton county, defendant. }

The complainant respectfully shows to the Court:

I.

That, on the 9th day of July, 1890, he filed his original bill on your Honor's said Court against the said defendant, Richard Roe, alleging, among other things, that [*here state briefly the material allegations of the original bill.*] In said original bill, complainant prayed that [*here set forth the substance of the prayers.*] All of which allegations and prayers will fully appear by reference to said original bill.

II.

And now, by leave of your Honor, complainant brings this amended bill into your Honor's said Court, and shows to the Court that [*here set out the new matters, new parties, and such other additional, or amendatory, or explanatory matters, as the amended bill is intended to set forth.*]

<sup>57</sup> State v. Nashville S. Bank, 16 Lea, 111.

<sup>58</sup> Code, §§ 4332-4333.

<sup>59</sup> Code, § 4334.

<sup>60</sup> See, post, § 775.

<sup>61</sup> Code, § 4337.

## III.

The premises considered, the complainant prays:

1st. That proper process issue to bring [*any new parties, made by the amended bill, before the Court.*]

2d. That all the defendants to this amended bill be required to answer it, but not on oath. [*If an answer from any defendant is unnecessary, so state, and except him from answering.*]

3d. That complainant have [*the particular relief he seeks by his amended bill if any, specifying it.*]

4th. That complainant may have, also, such other and further relief as he may be entitled to.

LEWIS SHEPHERD, Solicitor.

[*Annex affidavit, as in § 162, ante.*]

## ARTICLE II.

## SUPPLEMENTAL BILLS.

§ 680. Supplemental Bills Generally Considered.

§ 681. Difference Between Amended Bills and Supplemental Bills.

§ 682. Supplemental Bills on Facts Prior to the Original Bill.

§ 683. Supplemental Bills on Facts Subsequent to the Original Bill.

§ 684. A Supplemental Bill Must Not Bring Forward a New Title.

§ 685. Essentials of Supplemental Bills.

§ 686. When a Supplemental Bill May be Filed.

§ 687. How Leave is Obtained to File a Supplemental Bill.

§ 688. Frame of a Supplemental Bill.

§ 689. Form of a Supplemental Bill.

§ 690. An Original Bill in the Nature of a Supplemental Bill.

§ 691. Frame of an Original Bill in the Nature of a Supplemental Bill.

§ 692. Cost Bond and Process on Amended and Supplemental Bills.

§ 680. **Supplemental Bills generally Considered.**—A supplemental bill, as its name implies, is a bill to supply some defect in the original frame or structure of an original bill. In many cases, an imperfection in the frame of the original bill may be remedied by an amendment. Generally, a mistake in the bill in the statement of a fact, or in the omission of a party, should be corrected by an amendment, and not by a supplemental bill. But the imperfections of a bill may remain undiscovered while the proceedings are in such a state that an amendment to the bill will be permitted, according to the strict practice of the Court;<sup>1</sup> or the deficiencies may have occurred after the suit was brought, and therefore not be properly the subject of an amendment.<sup>2</sup> By the strict practice of the Court, no amendment to an original bill is generally allowable after the parties are at issue upon the points of the original bill, and witnesses have been examined.<sup>3</sup> Nor is it generally allowable to introduce into the bill, by amendment, any matter which has happened since the filing of the bill. In such cases, a supplemental bill is the appropriate remedy. And such a supplemental bill may not only be for the purpose of putting in issue new matter, which may vary the relief prayed in the original bill; but, also, for the purpose of putting in issue matter which may prove the complainant's right to the relief originally prayed. Whenever a supplemental bill is not a supplemental suit, but only introduces supplementary matter, the whole record constitutes but one cause. The original and a supplemental bill make, in effect, but one pleading, and any particular, wherein they are in conflict, is to be regarded as not well pleaded.<sup>4</sup>

<sup>1</sup> In Tennessee, an amended bill may be filed at any time, even at the hearing, by leave of the Court. Code, §§ 4332-4337. But such amended bill should not set up any facts, or any rights, except such as existed when the suit was brought. *Ante.* §§ 670;

plemental bill is not kept steadily in view, the Courts having more regard to the substance of the bill than to its name.

<sup>2</sup> 2 Dan. Ch. Pr., 1515, note.

<sup>3</sup> But in such a case, an amended bill may be filed.

And, so it may be stated generally, that a supplemental bill may be filed to bring before the Court: 1, Matters pertinent to the original suit which have occurred since the original bill was filed; 2, Matters which previously existed but which cannot be added to the original bill by way of amendment because the defendants have answered; 3, Matters necessary to obtain an additional discovery; 4, To add new parties; and 5, To remedy defects in the prayer of the bill.<sup>5</sup>

After the Court has decided upon the suit as framed, it may be 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, some other point appears necessary to be made, some material fact must be put in issue, some new party made, or some additional discovery is found requisite. In either event, a supplemental bill is the proper method of bringing these new matters before the Court, at this stage of the suit, unless the Court permit the original bill to be amended.<sup>6</sup>

§ 681. **Difference between Amended Bills and Supplemental Bills.**—In Tennessee, the difference between an amended bill and a supplemental bill, as to bringing forward facts, parties and rights that were in existence when the original bill was filed, has practically become almost obliterated; and even the difference between these two kindred bills as to facts, parties, rights, and interests, that have come into existence since the original bill was filed, is not always observed. Nevertheless, as heretofore shown,<sup>7</sup> there is a marked difference between the bills in the latter case, a difference that is not only emphatically declared in all the treatises on Equity pleading, but is also based on sound principle.<sup>8</sup> In this volume, the distinction will be recognized, more to facilitate a logical discussion of the subject of non-original bills, than to perpetuate the difference in their designations. Besides, the former practice throws much light on the present practice, and no one can become a good pleader without understanding the former practice.<sup>9</sup>

§ 682. **Supplemental Bills on Facts prior to the Original Bill.**—Nothing which occurred prior to the filing of the original bill ought to go into a supplemental bill, unless the original bill has been answered; in which case, an amended bill not being always properly allowable, any new matter necessary to be put in issue may be introduced by supplemental bill, whether it occurred before or after the filing of the original bill.<sup>10</sup> But under our practice, a case seldom, if ever, happens when an amended bill will not be allowed to set up matter which was in existence when the original bill was filed, if a supplemental bill would lie for the same purpose; and hence, as shown elsewhere, there is no longer any practical difference between an amended bill and a supplemental bill, as to facts in existence, at the commencement of the original suit.<sup>11</sup>

§ 683. **Supplemental Bills on Facts Subsequent to the Original Bill.**—When

<sup>5</sup> Lube's Eq. Pl., 188, note. New events, or new matters, which do not change the parties nor their rights and interests, but support the rights and interests in the original bill and add new means of holding the property and rights claimed, may be brought forward by a supplemental bill. *Riddle v. Motley*, 1 Lea, 468.

<sup>6</sup> Sto. Eq. Pl., § 335; Code, § 4335.

<sup>7</sup> See, *ante*, § 670.

<sup>8</sup> 2 Dan. Ch. Pr., 1515, note; 1530, note; and Sto. Eq. Pl., §§ 332; 336; 885; where the authorities are fully cited.

It will be seen by reference to the Code, §§ 4332-4337, that a bill may be amended after answer filed. The old practice required a supplemental bill to bring forward matter of amendment after answer filed. Sto. Eq. Pl., §§ 332; 890, and notes.

Inasmuch as under our practice a bill can be amended, or an amended bill filed, after answer, the distinction heretofore made between an amended bill and a supplemental bill as to matter existing when the original bill was filed, no longer exists. Indeed,

in ordinary practice, supplemental bills are generally termed amended bills. Nevertheless, the distinction in the text as to matter arising after suit brought, is a true and a practical one, and is adhered to by the best pleaders, and favored by those Chancellors most anxious to preserve logical differences, and maintain those distinctions necessary to the science of pleading.

<sup>9</sup> See, *ante*, § 670, for a fuller statement of the original distinction between these bills. The main cause of the obliteration of the distinctions in the names of bills in our State has grown out of the practice of the Courts in judging of the character of a bill by its contents, rather than by its appellation, acting on the maxim that Courts of Equity look at the substance and not at the forms of things, and have more regard to matter than to manner. *Northman v. Liverpool Insurance Co.*, 1 Tenn. Ch., 313; *Cheek v. Anderson*, 2 Lea, 194; *Hunt v. Wing*, 10 Heisk., 144; *Brandon v. Mason*, 1 Lea, 624.

<sup>10</sup> 2 Dan. Ch. Pr., 1530, note.

<sup>11</sup> *Ante*, § 670.

new events, or new matters, have occurred since the filing of the bill, a supplemental bill is, in many cases, the proper mode of bringing them before the Court; for, generally, such facts cannot be introduced by way of amendment to the original bill. But such new events, or new matters, must not change the rights or interests of the parties before the Court; they must merely refer to and support the rights and interests already in the bill.<sup>12</sup> A supplemental bill may, also, be brought, not only to insist upon the relief already prayed for in the original bill, but upon other relief different from that which was prayed for by the original bill, where facts which have since occurred may require it.<sup>13</sup> Thus, if a surety, while seeking indemnity against his principal, has the debt to pay, he must by supplemental bill bring this fact before the Court. A supplemental bill changing the character of the original bill, or introducing matters arising since the original bill, cannot be filed without leave of the Court; but any objection for want of leave will be waived by failing to make it at the proper time.<sup>14</sup>

If the interest of a complainant, who is suing in another's right as administrator, executor, guardian, or trustee, terminates by death, resignation, removal, or otherwise, the person who succeeds him as the representative of the same right, may file a supplemental bill to bring himself before the Court, for he becomes entitled to the same property under the same title. In these cases, there is no change of interest which can affect the questions between the parties, but only a change of the person in whose name the suit may be prosecuted.<sup>15</sup> But, ordinarily, where no question is sought to be raised as to the right of the new complainant to revive the suit, it may be done on motion, and this is the usual practice. This revivor by supplemental bill, or motion, may be had either before or after a decree; but if the case is out of Court, it can only be done by supplemental bill, or by *scire facias*.<sup>16</sup>

Where the subject-matter and the title remain the same, a supplemental bill may introduce matter which may vary the relief to which the complainant is entitled;<sup>17</sup> and so may a supplemental bill bring forward new matter in support of the original cause of action.<sup>18</sup>

**§ 684. A Supplemental Bill must not Bring Forward a New Title.**—To entitle the complainant to file a supplemental bill, and thereby to obtain the benefit of the former proceedings, it must be in respect to the same title, in the same person, as stated in the original bill.<sup>19</sup> Thus, if a person should file an original bill, as heir-at-law, and it should turn out, upon an issue and hearing of the cause, that he is not the heir-at-law, and he afterward purchases the title of the true heir-at-law, he cannot file a supplemental bill to have the benefit of the former proceedings; for he claims by a different title from that asserted in the original bill. His true course would be to file an original bill.<sup>20</sup> So, on a bill to remove a cloud, a title acquired after suit brought cannot be relied on in an amended bill, but an original bill must be filed to set it up.<sup>21</sup>

If the complainant has no title when he files his original bill, he cannot subsequently acquire a title, and then bring it forward by a supplemental bill; but if a complainant had a good inchoate title when he filed his original bill, and afterwards perfects that title, he may set up this latter fact in a supplemental bill. The supplemental matter must not contradict the statements of the original bill.<sup>22</sup> A complainant cannot support a bad title by acquiring a good one after the filing of his original bill, and then bringing it forward by amended or supplemental bill.<sup>23</sup>

<sup>12</sup> Riddle v. Motley, 1 Lea, 468. If the amendments changed the rights or interests of the parties, they would make a new suit, and would be proper for an original bill in the nature of a supplemental bill. Sto. Eq. Pl., §§ 336; 345-352.

<sup>13</sup> Sto. Eq. Pl., § 336.

<sup>14</sup> 2 Dan. Ch. Pr. 1534; Sto. Eq. Pl. § 333.

<sup>17</sup> Adams Eq., 413.

<sup>18</sup> Smith v. St. Louis Ins. Co., 3 Tenn. Ch., 151; 502; Horton v. Thompson, 3 Tenn. Ch., 580; Ridley v. Motley, 1 Lea, 468.

<sup>19</sup> Wing v. Champion, 1 Tenn. Ch., 517.

<sup>20</sup> Sto. Eq. Pl., § 339.

<sup>21</sup> Love v. Moser, 1 Cates, 143.

§ 685. **Essentials of Supplemental Bills.**—The following is a summary of the essentials of supplemental bills:

1. A supplemental bill cannot be filed without leave of the Court.
2. A supplemental bill may be filed at any stage of the suit, even after a decree; and may be filed by a stranger, or a defendant, to the original suit, as well as by a complainant.
3. The application to file the bill should be made at the earliest opportunity after the necessity for it becomes known, and all delays must be explained by affidavit.
4. A supplemental bill should be verified by the oath of the complainant.
5. The purpose of the bill must be either (1) to supply some deficiency in the frame of the original bill, or (2) to bring forward some facts pertinent to the controversy not already alleged, or (3) to make some necessary party not before the Court, or (4) to do any two or more of these things.<sup>24</sup>
6. A person who acquires an interest in the relief prayed for, or who acquires or succeeds to the interest of a complainant, may come before the Court by a supplemental bill.
7. The new matter in the amended bill must not be inconsistent with the original bill; nor must it constitute a new and different cause of action.
8. While a supplemental bill may contain matter that was in existence at the commencement of the suit, nevertheless its more appropriate province is to bring before the Court facts which have since occurred.
9. A supplemental bill will not lie when the same object can be accomplished by amending the original bill.
10. A supplemental bill will lie, before defence made, to set up matters in existence when the original bill was filed: but this is the proper province of an amended bill.
11. No new process is required, unless the bill makes new parties defendant, and then only as to the new parties.
12. The original and supplemental bills become one bill as to the new parties, and they have the same rights of defence to both bills as parties to an original bill.
13. If the new parties are mere successors in interest to former parties, the proof on file may be read by, or against, the new parties.
14. When a defendant, or a new party, wishes to bring a matter before the Court, connected with a pending suit, he should do so by a supplemental bill, especially if the matter has come into existence since the original bill was filed.
15. A new prosecution bond should be given, or pauper oath filed in lieu.<sup>25</sup>

§ 686. **When a Supplemental Bill may be Filed.**—A supplemental bill may be filed, as well after, as before, a decree; and the bill, if after a decree, may be, either (1) in aid of the decree, that it may be carried fully into execution; or (2) that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or (3) to bring new parties before the Court; or (4) it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out, and to give fuller effect, to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court.<sup>26</sup>

After a decree upon the merits winding up an insolvent corporation, on an appeal therefrom, a supplemental bill may be filed to reach other property of

<sup>24</sup> When a bill brings forward both new matter and new parties, it is properly an original bill in the nature of a supplemental bill. Sto. Eq. Pl., § 345. But as the name of the bill is immaterial, if it contain proper substance, it may be called a supple-

mental bill without forfeiture of any of complainant's rights.

<sup>25</sup> But a new bond or oath is not essential, unless objection is made for want of it. See, *ante*, § 71.

<sup>26</sup> Sto. Eq. Pl., § 338.

the corporation, and bring other creditors before the Court, who are seeking to subject such property by independent suits.<sup>27</sup>

A supplemental bill for the purpose of adding new parties may be filed even after a hearing and decree, when it appears that such parties are necessary. In such case, the cause is continued with leave to make new parties.<sup>28</sup> The Court will sometimes, on its own motion, direct a supplemental bill to be filed, if, upon the hearing, the justice of the case, in its own opinion, requires it.<sup>29</sup> A supplemental bill after a decree, however, must not seek to vary the principles of the decree, but to perfect it and make it more effectual. A decree can only be changed by a bill of review.<sup>30</sup>

**§ 687. How Leave is Obtained to File a Supplemental Bill.**—A supplemental bill bringing forward new matter, or changing the original bill, cannot be filed without leave of the Court.<sup>31</sup> In order to obtain this leave, the bill must be properly drawn up and sworn to, and if there has been any delay since the occurrence of the facts now first brought forward, this delay must be satisfactorily explained by affidavit.<sup>32</sup> If the affidavit be satisfactory, the Court will then examine the bill, and if it be a proper bill to be filed, leave will be granted on such terms as to costs as will both secure the defendant against the *laches* of the complainant, and insure diligence on the part of parties making amendments.<sup>33</sup>

A supplemental bill ought to be filed as soon as practicable after the new matter is discovered. For, if the party proceeds to a decree after a discovery of the facts upon which his new claim is founded, he will not be permitted afterwards to file a supplemental bill, in the nature of a bill of review, founded on such facts.<sup>34</sup> On the other hand, if an objection is meant to be taken by the defendant, that a supplemental bill brings forward matters, which might have been introduced by way of amendment, or at an earlier period of the cause, he should do it before he makes answer to the supplemental bill. It will be too late to take the objection at the hearing.<sup>35</sup>

**§ 688. Frame of a Supplemental Bill.**—A supplemental bill must state the fact of the pendency of the original bill, and briefly give the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties, if any; and, in general, the supplemental bill must pray that all the defendants interested in the new matter may appear and answer to the new charges it contains. If the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been already heard; and if the cause has been already heard, it must be further heard upon the supplemental matter. If 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 complainant in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless the interests of the other defendants may be affected by that decree. The supplemental bill should not, however, state the circumstances of the case at length. All that is requisite is, that it should state so much of the suit as shows the nature of the case, and the ground of relief. Where a supplemental bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties defendants to the original bill need not, in general, be made parties to the supplemental bill. And, as a rule, if new parties are brought before the Court upon a supplemental bill, the original defendants

<sup>27</sup> *Smith v. St. Louis Ins. Co.*, 3 Tenn. Ch., 151; 502; affirmed in 6 Lea, 564.

<sup>28</sup> 2 Dan. Ch. Pr., 1533, note.

<sup>29</sup> 2 Dan. Ch. Pr., 1523, note.

<sup>30</sup> 2 Dan. Ch. Pr., 1536, note.

<sup>32</sup> 2 Dan. Ch. Pr., 1523, note.

<sup>33</sup> 2 Barb. Ch. Pr., 73-74.

<sup>34</sup> 2 Barb. Ch. Pr., 74; *Sto. Eq. Pl.*, § 338 *a*; 2 Dan. Ch. Pr., 1523-1530.

<sup>35</sup> *Sto. Eq. Pl.*, §§ 333; 338 *a*.

need not be made parties to the supplemental bill, unless they have an interest in the supplemental matter, or their interests require that the new defendant should be a party to the suit. The facts brought forward by the supplemental bill should be material to the matters in controversy, otherwise a demurrer will lie to the supplemental bill.<sup>36</sup> Neither an amended nor a supplemental bill can contain new matter which contradicts, or is inconsistent with, the statements of the original bill;<sup>37</sup> for a supplemental bill, when properly before the Court, is an addition to the original bill, and becomes a part of it, so that the two are to be taken as one amended bill, and heard together.<sup>38</sup>

A supplemental bill must be sworn to, or the supplemental matter otherwise verified, and it should be made to appear that it was filed at the first opportunity after the supplemental matter was discovered, or the delay fully explained.<sup>39</sup>

As the name and form of a bill is immaterial if necessary substance exists,<sup>40</sup> an original bill containing the necessary substance will be treated as a bill of revivor and supplement in the nature of a cross-bill, and appropriate relief granted.<sup>41</sup>

§ 689. **Form of a Supplemental Bill.**—The form of a supplemental bill is, in the main, similar to the form of an ordinary original bill, the principal differences being (1) that it begins by a recital of the filing of the original bill, and the proceedings thereon; and (2) ends by praying, among other things, that the complainant may have the benefit of all the proceedings upon the original suit.

#### A SUPPLEMENTAL BILL.

To the Hon. A. S. Key, Chancellor, holding the Chancery Court at Madisonville:  
John Jones, a resident of Loudon county, complainant,

*vs.*  
George Brown and Henry Smith, both residents of Monroe county, defendants. }  
Complainant respectfully shows to the Court:

##### I.

That on, or about, January 9, 1890, he filed his original bill in this Court against the defendant, George Brown, stating therein, among other things, the following: 1st. That [setting forth briefly the substance of the original bill, dividing the recital into sub-sections, numbered 1st, 2d, 3d, &c.,<sup>42</sup>] and 4th, praying that [setting forth the prayer in concise form.]

##### II.

That said defendant, Brown, was served with process and answered said bill, alleging in his answer that [setting forth briefly the substance of his answer.]

##### III.

That upon the issue thus made, proof has been taken, and [showing what further steps have been taken in the cause, if any.] For a fuller account of said bill, answer, and other proceedings in the cause, reference is made to the original record.

##### IV.

And now, by way of supplement to his said original bill, complainant further shows unto your Honor, that, since the examination of witnesses in said cause, [or since the last step taken in said cause, such as an interlocutory decree, or a final decree,] he has discovered that [here show the new facts he desires to bring forward, and how they affect the rights of the complainant, and make liable the defendant, or the new party or parties to be brought before the Court.<sup>43</sup>]

<sup>36</sup> Sto. Eq. Pl., § 343.

<sup>37</sup> 2 Dan. Ch. Pr., 1515, note.

<sup>38</sup> 2 Dan. Ch. Pr., 1536, note.

<sup>39</sup> 2 Dan. Ch. Pr., 1523, note.

<sup>40</sup> See, ante, § 43.

<sup>41</sup> Brandon v. Mason, 1 Lea, 624.

<sup>42</sup> The recital should be a brief summary of the bill, thus: stating therein, among other things, the following:

1st. That the defendant Brown, as his guardian, received on or about July 9, 1886, the sum of two thousand dollars from Henry Smith, the administrator of complainant's father, and has failed to pay over the same to complainant, who has attained the age of twenty-one, and who, after attaining his majority had demanded the same, with lawful interest thereon.

2d. That said bill prayed for a decree against said Brown for said sum and interest.

The recital of the answer should be equally as brief.

<sup>43</sup> Thus, in the case supposed, the bill would allege: That on examining said defendant Brown as a witness in said cause, complainant first learned, and now charges the fact to be, that the defendant Henry Smith, as said administrator, never did pay over, or otherwise account for, to his said guardian, all that was lawfully due said guardian from the estate of complainant's father, but only paid over to him the sum of thirteen hundred dollars, whereas the fact is he was then, and has ever since been, accountable to complainant's said guardian and to complainant, not only for the whole of said sum of two thousand dollars, but for a much larger sum, as complainant will show at the hearing; and complainant avers and charges that the defendant, Henry Smith, is liable as administrator to him for about the sum of three thousand dollars, including interest, all of which he has fraudulently withheld.



v.

To the end, therefore, that the said defendant, Henry Smith,<sup>44</sup> [if a new defendant is made,] may show cause, if any he can, why complainant should not have the relief by him prayed in his said original bill, and in this bill, complainant prays:

1st. That proper process issue to bring said defendant, Henry Smith, [if a new party is made,] into Court, and require him to answer the said original bill [if a new party be made,] and this supplemental bill.

2d. That in his answer he make full answer [here make the usual requirements as to the special matters to be answered; or, if his oath is waived, so state.]

3d. That complainant may have the same relief from his said original bill, as if said defendant, Henry Smith, had been made a party thereto. [This prayer is one applicable in a case of a new party.]

4th. That complainant may have the following further relief,<sup>45</sup> [here pray for the additional relief, if any, appropriate to the new facts.]

5th. That complainant may have such further and other relief as in Equity he may be entitled to.

SAM E. YOUNG, Solicitor.

[Annex affidavit: see, ante, § 164.]

§ 690. **An Original Bill in the Nature of a Supplemental Bill.**—A supplemental bill is properly applicable to those cases only where the same parties, or the same interests, remain before the Court; but when new parties, with new interests arising from events since the institution of the suit, are to be brought before the Court, an original bill in the nature of a supplemental bill becomes necessary.<sup>46</sup> It is called an original bill in the nature of a supplemental bill, because it is original as to the new parties and new interests; and it is supplemental also, being an appendage to the former bill as to the old parties and the old interests.<sup>47</sup> Thus, where a husband and wife are defendants to a bill, if, by the death of the husband, a new interest arises to the wife, the suit becomes defective; and an original bill in the nature of a supplemental bill becomes necessary to bring that interest before the Court; for she is not bound by the answer put in during her coverture. So, if a person, *pendente lite*, becomes assignee of the interest of a party in the suit, and wishes to take part in it, he must bring forward his claim by an original bill, in the nature of a supplemental bill.<sup>48</sup> In like manner, if the complainant has made an assignment in bankruptcy, and his assignee in bankruptcy wishes to have the benefit of the suit, he must file an original bill in the nature of a supplemental bill.<sup>49</sup>

§ 691. **Frame of an Original Bill in the Nature of a Supplemental Bill.** A bill for this purpose must state the pendency of the original bill, briefly give the proceedings upon it, specify the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person who has become entitled. It must then show the ground upon which the Court ought to grant the benefit of the former suit to or against the person, who has become so entitled; and it must pray the decree of the Court, adapted to the case of the complainant in the new bill. This bill, although partaking of the nature of a supplemental bill, is not merely an addition to the original bill, but another original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill.<sup>50</sup>

§ 692. **Cost Bond and Process on Amended and Supplemental Bills.**—Proper process issues, as of course, on a supplemental bill, and, also, on an amended bill which so prays: hence, in such cases, a new prosecution bond, or pauper oath, should be filed,<sup>51</sup> especially if a new party is made, or a new cause of suit set up.

<sup>44</sup> Process should not be prayed against any party whose answer is not required. If new parties are made, and their answers only desired, no process should be prayed against the original defendants.

<sup>45</sup> In the supposed case, this further relief would be: That a decree be rendered by your Honor, requiring the defendants, George Brown and Henry

all accounts be taken necessary to ascertain the exact amount.

<sup>46</sup> Sto. Eq. Pl., § 349.

<sup>47</sup> Sto. Eq. Pl., §§ 345-346.

<sup>48</sup> Sto. Eq. Pl., §§ 347-348.

<sup>49</sup> Northman v. Insurance Cos., 1 Tenn. Ch., 312. The name of the bill is immaterial. *Ibid.* See, ante,

## ARTICLE III.

## DEFENCES TO AMENDED AND SUPPLEMENTAL BILLS.

§ 693. Defences to Amended and Supplemental Bills Generally Considered.

§ 694. Demurrers to Amended and Supplemental Bills.

§ 695. Answers to Amended and Supplemental Bills.

§ 696. When an Answer to an Amended Bill Must be Filed.

§ 697. Proceedings After Answer.

§ 693. **Defences to Amended and Supplemental Bills generally Considered.** Defence may be made to an amended, or to a supplemental, bill, (1) by motion to dismiss; (2) by demurrer; (3) by plea; (4) by answer; and (5) by disclaimer. What has been said, heretofore, in reference to these various defences, applies as well to amended and supplemental bills as to original bills. Any ground, sufficient to base a motion to dismiss an original bill, will be sufficient in case of an amended, or a supplemental, bill, if applicable thereto.

§ 694. **Demurrers to Amended and Supplemental Bills.**—A demurrer will lie to an amended or supplemental bill, or to a bill in the nature of a supplemental bill, whenever it appears upon the face of the bill that the complainant has no right to file it, he being either not the original complainant, or there being no such privity between him and the original complainant as entitles him to take the place of the latter in the litigation.<sup>1</sup>

As has already been shown, if the new matter sought to be brought forward was in existence when the original bill was filed, such matter is the proper subject of an amendment to the original bill or of an amended bill; but if the new matter has come into existence since the filing of the original bill, it is properly the subject of a supplemental bill.<sup>2</sup> The distinction, however, in our practice, between an amended bill and a supplemental bill no longer practically exists;<sup>3</sup> and, as a consequence, a demurrer will no longer lie because a supplemental bill is filed when the same end could have been attained by an amendment of the original bill. But if a supplemental bill upon matter arising subsequent to the filing of the original bill is brought against a person, who was not a party to the original bill, and who claims no interest arising out of the matters in litigation in it, the defendant to the supplemental bill may demur; especially, if the supplemental bill prays that he may answer the matters charged in the original bill.<sup>4</sup>

So, if the new facts or events shall have arisen subsequently to the filing of the original bill, but those new matters are immaterial to the relief sought under the original bill, or are such as may come before the Master under the proper decretal order, in the original cause, a demurrer will lie. For, if the new facts or events are not material, they are irrelevant; and if material, and yet they are now properly within the reach of the Court, or before the Master under the original cause, there is no ground why the record should be encumbered with superfluous matter. Another ground of demurrer to a supplemental bill is that the new matter is not properly supplemental to the matters in litigation between the parties to the original bill; but makes a new and different case.<sup>5</sup> If the new matters would make the original bill multifarious, then such new matter would not be the proper subject of an amended or a supplemental bill, and to the extent of such multifarious matter, the bill containing it would be demurrable. The original and amended bills when relating to the same subject

<sup>1</sup> Sto. Eq. Pl., §§ 612-613. See, *ante*, § 684.

<sup>2</sup> See, *ante*, §§ 670; 681.

<sup>3</sup> See, *ante*, §§ 680; 683.

<sup>4</sup> See Sto. Eq. Pl., § 614

<sup>5</sup> Sto. Eq. Pl., § 615-616.

are treated as one bill when demurred to; but a defendant who has answered the original bill cannot, on the filing of an amended bill, rely on any ground of demurrer to which the original bill was subject.<sup>6</sup>

The form of a demurrer to an amended or supplemental bill is as follows:

**DEMURRER TO A SUPPLEMENTAL OR AMENDED BILL.**

John Doe,  
vs.  
Richard Roe, *et. al.* } In the Chancery Court, at Memphis.

The defendant, Romeo Roe, demurs to the supplemental [*or, amended,*] bill filed against him in this cause.

1st. Because the matter of said supplemental [*or, amended,*] bill is wholly inconsistent with, and antagonistic to, the matter of the original bill; and is not matter proper for a supplemental [*or, amended,*] bill.

2d. Because [*State any other grounds of demurrer, and conclude as in § 310, ante.*]

§ 695. **Answers to Amended and Supplemental Bills.**—Pleas will lie to amended and supplemental bills, but they are so seldom filed as to be practically unknown. The common defence on the facts is made by answer. This answer may include a demurrer, if there be proper grounds therefor. If the defendant has not answered the original bill, the usual practice is to answer both the original and supplemental bills in the same answer.<sup>7</sup>

If a new defendant is made, he must answer both the original and supplemental matter, for as to him it is a new suit; if new matter only is inserted in the supplemental bill, the original defendants need answer the new matter only.<sup>8</sup>

The answer is subject to all the rules as to form, substance, verification, filing, and exceptions, that apply to answers to original bills.<sup>9</sup>

The following is the form of an answer to an amended or a supplemental bill, the form in each case being the same:

**ANSWER TO AN AMENDED OR SUPPLEMENTAL BILL.**

John Doe,  
vs.  
Richard Roe, *et. al.* } In Chancery, at Nashville.

The answer of the defendant, Romeo Roe, to the amended [*or, supplemental,*] bill, [*or, to the original and amended bill, or, to the original and supplemental bill,*] filed against him [and others] in this cause.

This defendant, for answer, says: [*Here set out the answer and conclude as in case of an ordinary answer to an ordinary bill.*]

§ 696. **When an Answer to an Amended Bill Must be Filed.**—In all cases where an amendment of the bill is made after answer filed, and an answer thereto is necessary, the defendants are allowed thirty days after the order, or after notice of the amendment, if notice is required by the order, to answer; and failing so to do, or to obtain further time, the matter of amendment may be taken as confessed, subject, however, to be set aside, by the Master before the cause is set for hearing, or by the Chancellor at any time, on good cause shown, accompanied by a full and sufficient answer, and upon such terms as may be imposed.<sup>10</sup>

§ 697. **Proceedings After Answer.**—After the answer has been put in, and issue joined, the amended and supplemental bill and the original bill proceed *pari passu*, practically as one suit. If proof be needed on the issues raised by the amended or supplemental bill, and the answer thereto, it must be made as in case of an ordinary original bill; but a supplemental suit being merely a continuation of the original suit, whatever evidence was properly taken in the original suit, may be made use of in both suits, even though not entitled in the supplemental suit. If there has been no decree in the original suit, before the supplemental bill is filed, both bills will be heard together,<sup>11</sup> and

one decree will be made in both. If there has been a decree in the original suit, the two causes must nevertheless be heard together, so far as further orders may be needed in the original cause. If there be no further orders in the original cause, the supplemental bill must be heard alone; and if it is filed after decree, it must be heard on its own pleadings and evidence.<sup>12</sup>

If the supplemental bill has been improperly filed, or if not proved, it will be dismissed at the hearing; but such dismissal will not affect the complainant's rights to the relief he seeks on his original bill.<sup>13</sup>

<sup>12</sup> *Smith v. St. Louis Ins. Co.*, 3 Tenn. Ch., 151; 502; *Horton v. Thompson*, *Ibid*, 575; 2 Barb. Ch. Pr., 79.

<sup>13</sup> 2 Barb. Ch. Pr., 78-79.

## CHAPTER XXXIV.

## ABATEMENT AND REVIVOR.

- ARTICLE I. Bills of Revivor.  
 ARTICLE II. Statutory Methods of Revivor.  
 ARTICLE III. Bills Akin to Bills of Revivor.  
 ARTICLE IV. Defences to Proceedings to Revive.

## ARTICLE I.

## BILLS OF REVIVOR.

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|---|--|
| § 698. When a Suit in Chancery is Abated.           | § 704. What Matters are in Issue Upon a Bill of Revivor. |
| § 699. Bill of Revivor.                             | § 705. Some General Results of a Revivor.                |
| § 700. When a Revivor is Unnecessary.               | § 706. Summary of the Rules Relative to Revivors.        |
| § 701. The Proper Parties to a Bill of Revivor.     | § 707. Revivor of Décrees.                               |
| § 702. When the Widow Should be Made a Party.       | § 708. Frame of a Bill of Revivor.                       |
| § 703. When a Defendant May File a Bill of Revivor. | § 709. Form of a Bill of Revivor.                        |

§ 698. **When a Suit in Chancery is Abated.**—Whenever a suit in Chancery becomes defective, for want of parties before the Court, by or against whom it can, in whole or in part, be prosecuted, it is said to be abated.<sup>1</sup> An abatement, in the sense of the common law, is an entire *destruction* of the suit, so that it is quashed and ended. But in the sense of Courts of Equity, an abatement signifies only a present *suspension* of all proceedings in the suit, from the want of proper parties capable of proceeding, or being proceeded against, therein. At the common law, a suit when abated, is absolutely dead. But in Equity a suit, when abated, is merely in a state of suspended animation; and may be revived. The death, or marriage, of one of the original parties to the suit, is the most common cause of the abatement of a suit in Equity. As the interest of a complainant usually extends to the whole suit, therefore, upon the death of a complainant, or the marriage of a female complainant, all proceedings become abated. Upon the death of a defendant, likewise, all proceedings become abated as to that defendant.<sup>1</sup> But upon the marriage of a female defendant, the proceedings do not abate, although her husband ought to be named in the subsequent proceedings.<sup>2</sup> Suits by public officers, in their official capacity, do not abate by the death of the individual holding the office, or by the expiration of his term, and no revivor in the name of his successor is necessary.<sup>3</sup>

If any property or right in litigation, vested in a complainant, is transmitted to another, the person to whom it is transmitted, is entitled to supply the defects of the suit, if it has become defective merely; and to continue it, or at least to have the benefit of it, if it is abated. So, if any property or right, before vested in a defendant, becomes transmitted to another person, the complainant is entitled to render the suit perfect, if it has become defective, or to continue it, if it is abated, against the person to whom that property or right is transmitted.

<sup>1</sup> When a party dies, the suit dies as to such party. The suit may, however, be resurrected by a *scire facias*, or a bill of revivor; but, until such a resur-

party is an absolute nullity. *Morrison v. Deaderick*, 10 Hum., 342. But see, *post*, § 888; and note 4, *infra*.

An abatement suspends proceedings.<sup>4</sup> An attachment for contempt, or an injunction, or a receivership, is not affected by the death of the complainant. If the party attached, or enjoined, wishes to be relieved from his situation, he must apply to the Court; and the Court will ordinarily make an order that he be discharged, or the injunction dissolved, if the suit be not revived in a given time.<sup>5</sup>

**SUGGESTION OF DEATH OF A PARTY.**

John Doe,  
*vs.*  
 Richard Roe, *et al.* }

In this cause the death of the defendant, Richard Roe, [or, the complainant, John Doe.] is suggested and proved [or, admitted.]

If no step be taken to revive a suit, an order may be had at the second term after the entry of proof of death,<sup>6</sup> abating the suit, as follows:

**ORDER ABATING A SUIT.**

John Doe,  
*vs.*  
 Richard Roe, *et al.* }

In this cause the death of the defendant, Richard Roe, having been suggested and proved [or, admitted,] at the January, 1905, term of this Court, and no steps having been taken to revive the suit, it is ordered that the suit be abated and discontinued, and that complainant and Henry Doe, his prosecution surety, pay the costs of the cause, for which let an execution issue.

§ 699. **Bill of Revivor.**—According to the general practice of Courts of Equity, the mode of reviving and continuing suits, where there has been an abatement, is by a bill of revivor; and such a bill will lie whenever a party is disabled by death, marriage, bankruptcy, or otherwise, from further prosecuting or defending a suit, provided the interest of such party in the subject or object of the suit survives or continues,<sup>7</sup> to a person not already a party.

If the interest of a party dying so determines, that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest (which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency,) the suit does not so abate, as to require any proceeding to warrant the prosecution of the suit against the remaining parties. But, if the party so dying be the only complainant, or the only defendant, there will necessarily be an end of the suit, if there is no subject of litigation remaining.<sup>8</sup> A suit for divorce and alimony cannot be revived.<sup>9</sup>

Whenever there is an original bill and a cross-bill thereto, if an abatement takes place, there must generally be a bill of revivor in each cause. But if the bills regard an account, and there is a decree for an account, the two causes become thereby so consolidated that one bill of revivor, praying for a revivor of the whole, will revive both causes.<sup>10</sup>

If a man marries an administratrix, and a decree is obtained against him and his wife for a demand out of the assets of her intestate, and the wife dies before the decree is executed, the suit is abated; and the complainant must revive it against the administrator of the wife before any further proceedings can be

<sup>4</sup> While an abatement exists as to a sole complainant or sole defendant, no step can be taken in the cause, whatever, except steps to abate or revive. The Court may, however, make orders relative to property in the custody of the law.

<sup>5</sup> Unless the defendant was brought into Court by publication, in which case a sale of the decedent's land without revivor is valid. *Dunlap v. Harvey*, 3 Cates, 620; Code, §§ 3533-3534; 4380.

<sup>6</sup> 2 Dan. Ch. Pr., 1543-1544. It is said in *Thompson v. Hill*, 5 Yerg., 418, that an injunction against an execution at law stands dissolved by the death of the defendant to the injunction bill, but that his representative cannot take out execution without being guilty of contempt of the Court, unless he obtains leave of the Court, which leave will be granted if a

bill of revivor is not filed within a reasonable time. But this ruling is substantially the same as that stated in the text. The distinction made in this case, between a supplemental bill to bring in devisees and a bill or revivor to bring in heirs, no longer exists in our practice. See *Northman v. Liverpool Co.*, 1 Tenn. Ch., 317.

<sup>6</sup> *Churchwell v. Bank*, 1 Heisk., 782. But the order of abatement will be set aside, if at any time during the term of its entry, steps are taken to revive.

<sup>7</sup> Code, § 2845.

<sup>8</sup> Sto. Eq. Pl., § 356.

<sup>9</sup> *Swan v. Harrison*, 2 Cold., 354; *Owens v. Sims*, 3 Cold., 544.

<sup>10</sup> Sto. Eq. Pl., § 363.

had in the cause against the husband; for the assets in the hands of the wife, as administratrix, are primarily liable to satisfy the decree,<sup>11</sup> and the husband is not liable beyond the amount of such assets which came into his or her hands after the marriage.<sup>12</sup>

§ 700. **When a Revivor is Unnecessary.**—The death of one of the parties to a suit does not, however, produce such an abatement of it as to suspend all further proceedings, unless the interest of such party, or that which he represents, survives to some other person not already a party to the suit. If the whole interest of a party dying survives to another party to the suit, so that no claim can be made by or against the representatives of the party dying, the proceedings do not abate. If a bill is filed by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act relating to it, which may be questioned in the suit; or, if a bill is filed by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives, there is no abatement. If a surviving party can sustain the suit, as in the case of several creditors, complainants on behalf of themselves and other creditors, no revivor is necessary. If the entire interest of the decedent, on his death, descends to other parties before the Court, as in a partition or ejectment suit, or in a suit by or against partners, or joint-owners, in such case there is no abatement, and no need of a revivor, for the persons remaining before the Court have in them the whole interest in the matter in litigation.<sup>13</sup>

If the interest of a party dying absolutely terminates with his death, there is no abatement: this happens on the death of a tenant for life, or on the death of any party having a temporary or contingent interest,<sup>14</sup> terminating with his death. So, if the interest of a female in a suit terminates upon her marriage, no revivor against her husband would be necessary.

If, upon the death of the husband of a female complainant, suing in her right, the widow does not choose to proceed in the cause, the bill is considered as abated, and she is not liable for the costs. But if she takes any step in the suit after her husband's death, she makes herself liable to the costs from the beginning. If she thinks proper to proceed in the cause, she may do so without a bill of revivor; for she alone has the whole interest, and the husband was a party in her right, and therefore the whole advantage of the proceedings survives to her; so that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it. If a female complainant marries pending a suit, and afterwards, before revivor, her husband dies, a bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed. But the subsequent proceedings ought to be in the name, and with the description, which she has acquired by the marriage. And if the wife dies, pending a suit by herself and husband for an account of the rents of her estate, her personal representatives are not necessary parties to a bill of revivor.<sup>15</sup>

If the complainant, in a bill of interpleader, should die after a decree that the defendants should interplead, there will be no abatement of the suit; for by such a decree the suit is terminated as to the complainant, although the litigation may still continue between the defendants under the decree of interpleader; and in that event the cause may still proceed, without any revivor against the representatives of the complainant.<sup>16</sup>

Suits by public officers in their official capacity do not abate by the death of the individual holding the office, or the expiration of his term, and no revivor in the name of his successor is necessary.<sup>17</sup>

§ 701. **Proper Parties to a Bill of Revivor.**—The party who succeeds to the rights of the decedent in the litigation is the proper person by or against

<sup>11</sup> Sto. Eq. Pl., § 360.

<sup>12</sup> M. & V.'s Code, § 3432.

<sup>13</sup> Sto. Eq. Pl., § 357; *Gilchrist v. Cannon*, 1

<sup>15</sup> Sto. Eq. Pl., § 361.

<sup>16</sup> Sto. Eq. Pl., § 362.

<sup>17</sup> *Felts v. Mavor*, 2 Head. 656; *Polk v. Plummer*

whom the bill of revivor should be filed.<sup>18</sup> If land is involved, the decedent's heirs or devisees, or executors holding it under a will, must be made parties; if no land be involved, his administrator or executor must take his shoes.

If a creditor, who sues on behalf of himself and all other creditors, dies, the suit may be revived by his personal representative. If the latter does not choose to revive it, then any other creditor, at least any one who has proved his debt under a decree before the Master, may, by a supplemental bill, continue the cause, and proceed therein for the benefit of all the creditors. And this is on the ground that the creditor, so reviving, was really one of the original complainants, the suit being for his benefit.<sup>19</sup>

A suit which has become entirely abated may be revived as to part only of the matter in litigation, or as to a part by one bill, and as to the other part by another.<sup>20</sup> Thus, if the rights of a complainant in a suit upon his death become vested, a part in his real, and a part in his personal, representatives, the real representatives may revive the suit, so far as concerns his real estate, and the personal representatives, so far as concerns his personal estate.<sup>21</sup> But the better practice would be to allow only one bill to be filed, and to require that all those not joining in it as complainants be made defendants. The rule is general that if some complainants, entitled to file a bill of revivor refuse to join it, they may be made defendants.<sup>22</sup>

A bill of revivor, properly so called, lies only by or against the persons who are the proper representatives of the deceased party as to the matters in controversy. If the suit respects the personal assets only of the deceased party, his executor or administrator is the proper party, by or against whom the bill is to be filed. If the suit respects the real estate of the deceased party, his heirs or devisees are the proper parties to the bill of revivor.<sup>23</sup> If the suit respects both the real and personal estate, then both the real and personal representatives must be parties to the bill.<sup>24</sup> The one question to be answered in considering the proper person to revive, or to revive against, is who, in law, stands in the shoes of the decedent.<sup>25</sup> Hence, if a decedent has parted with his interest pending the suit, it may be revived by or against the successor in interest, instead of the personal representative or heir.<sup>26</sup> Where after a defendant dies, his heirs transfer their interest to a third person before any revivor, the latter should be made a party by a bill of revivor and supplement.<sup>27</sup> So, if the decedent was a bankrupt, the suit should be revived in the name of his assignee in bankruptcy.<sup>28</sup>

If there are several complainants, and the defendant dies, some of them may proceed to revive without the others, if the latter refuse; for the obstinacy of some of the parties shall not hinder the rest from asserting their own interest. But in such cases the original complainants, who refuse to join, should be made defendants to the bill of revivor.<sup>29</sup>

A test for the complainant to apply, when a defendant dies, is: to ascertain which set of his representatives is necessary to enable him to obtain the full relief he seeks on the pleadings as they stand. And a test for the defendants to apply, when a revivor is sought against them by the complainants, is: to ascertain whether the estate they derive from the decedent can, in any way, be directly affected by a decree on the pleadings as they stand.<sup>30</sup>

If the decedent is a complainant and a next friend, a new next friend or guardian must be obtained to prosecute the suit, unless the person for whom the decedent sues has become *sui juris*, in which case no revivor is necessary. If the decedent is a complainant guardian, a new guardian must revive, or a

18 Code, §§ 2855; 2859. See, *ante*, § 113.

19 Sto. Eq. Pl., § 365.

20 Sto. Eq. Pl., § 367.

21 Sto. Eq. Pl., § 367.

22 Sto. Eq. Pl., § 369.

23 Sto. Eq. Pl., § 354 a.

24 *Preston v. Golde*, 12 Lea, 267.

25 Code, §§ 2855; 2859.

26 Code, § 2850.

27 2 Dan. Ch. Pr., 1541, note.

28 *Moffit v. Cruise*, 7 Cold., 137.

29 Sto. Eq. Pl., § 359.

30 The Chapters on Parties will throw light on the question of the proper persons to revive or revive against; especially §§ 113-116.



next friend may revive, on motion, in lieu of the deceased guardian. If the suit is against a decedent guardian, in the right of his ward, it must be revived against the new guardian,<sup>31</sup> but in case there be no new guardian the Court would, on motion, appoint a guardian *ad litem* to represent the person under disability. Where the abatement is occasioned by the marriage of a female complainant, the suit may be revived by the husband and wife jointly, unless the suit was for the wife's separate property, free from her husband's control, in which case a next friend must revive for her, and her husband must be made a defendant.<sup>32</sup>

A suit by an administrator may, on his death, be revived by his administrator, or by an administrator *de bonis non* of the original decedent.<sup>33</sup>

**§ 702. When the Widow Should be Made a Party.**—When the suit is liable to affect lands in which the widow of the deceased defendant has rights of homestead and dower, she should be made a party by bill of revivor, so that she may be bound by the decree, if she have no rights, and so that her homestead and dower may be assigned before sale, if she have such rights, or so that, if she elect, the land be sold free from homestead and dower, and she be given the money value thereof out of the proceeds.

The widow's right to homestead is not derived through the heirs of her husband, and on his death, survives directly to her, and becomes hers; and, on the death of her husband, if she be not made a party to a suit affecting the land in which she claims a homestead, she may litigate her claims in an independent suit.<sup>34</sup> Hence, it is manifest that, when a claim for homestead can be set up, the widow must be revived against. The heirs do not represent her, or her interests; on the other hand, there is some conflict between her rights of homestead, and the heirs' rights, to the same land.<sup>35</sup>

**§ 703. When a Defendant may File a Bill of Revivor.**—A defendant may file a bill of revivor after a decree, in case he has a beneficial interest therein, or can derive a benefit from the further proceedings in the cause. This is especially true after a decree ordering an account, for in such a case both parties are actors. And it would seem, on principle, that where a defendant had concurrent interests with the complainants in the benefits of the relief sought, or had any beneficial interest in the relief sought, he would be entitled to file a bill of revivor;<sup>36</sup> and this right is now fully established by statute.<sup>37</sup>

If one or more of several complainants die, and the suit is not revived within the two terms allowed, the defendant may revive, or elect to proceed to trial with the surviving complainant, or may have the suit abated, if revivor is necessary.<sup>38</sup> But when a bill of revivor is filed by a defendant, it merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. Nor will a revivor by a defendant take from the complainant the conduct of the case, unless so ordered by Court.<sup>39</sup>

When any sole executor or administrator is complainant or defendant, and dies, the suit may be revived by or against the executor, administrator *de bonis non*, or other successor in interest of the decedent.<sup>40</sup>

**§ 704. What Matters are in Issue upon a Bill of Revivor.**—A defendant to a bill of revivor cannot, in his answer to the bill, go into the merits of the controversy in the original suit.<sup>41</sup> If it is alleged in the bill of revivor that he stands in the shoes of the decedent as regards the matters in controversy, that

<sup>31</sup> Code, § 2859. If the suit is by the ward and against a guardian in his own wrong, in such a case, on the guardian's death, the suit must be revived against his administrator, or executor.

<sup>32</sup> 2 Dan. Ch. Pr., 1538.

<sup>33</sup> Wood v. Tomlin, 8 Pick., 514.

<sup>34</sup> Williams v. Williams, 7 Bax., 116; see, *ante*, § 125.

<sup>35</sup> Collins v. Boyett, 3 Pick., 334; see, also, 3 Pick., 148-154.

<sup>36</sup> 2 Dan. Ch. Pr., 1539; Sto. Eq. Pl., § 372.

<sup>37</sup> Code, §§ 2856; 2859; See Brandon v. Mason, 1 Lea., 615.

<sup>38</sup> Code, §§ 2851-2852.

<sup>39</sup> 2 Dan. Ch. Pr., 1540; Sto. Eq. Pl., § 376.

<sup>40</sup> Code, § 2835.

is the only issue.<sup>42</sup> If he is not the heir, or the executor, or administrator, or other successor in interest, of the decedent as alleged, on his denial thereof the complainant in the bill of revivor must prove it, or fail to sustain his bill. On the other hand, if the complainant seeks to revive the suit in his own name as heir, executor, administrator, or other successor, of the decedent, the defendant may deny this, and unless the allegation be proven, the bill must be dismissed. The matters in issue upon a bill of revivor are the matters of issue presented by that bill, and not any matters presented by the original bill.

The only thing for litigation on a bill of revivor is whether the new party brought before the Court has the representative character imputed to him,<sup>43</sup> and whether the time has elapsed within which a bill of revivor is permissible.<sup>44</sup> If, however, the complainant in the bill of revivor does not properly present the question of revivor in his bill; for instance, if he made a mis-statement of the original bill material to the matter of a revivor, the defendant, in his answer to the latter bill, may correct such mis-statement; and so may he, in any case, by his answer to the bill of revivor, bring before the Court any matter proper for the Court's consideration on the question of revivor, or of the proper person to take the shoes of the decedent. Hence, the general rule that upon a bill of revivor, the sole questions before the Court are the competency of the party to revive, and the correctness of the frame of the bill to revive.<sup>45</sup>

Wherever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted by operation of law to an heir at law, or an executor, or administrator, so that the title cannot be disputed, the only question in issue is whether the person seeking to revive, or sought to be revived against, is that representative.

If a suit abates by the marriage of a female complainant, and no act is done to affect the rights of the party but the marriage, no title can be disputed: the person of the husband is the sole fact to be ascertained.<sup>46</sup>

Where a bill of revivor is filed against a non-resident as devisee without attachment of property, a *pro confesso* only creates an issue, and the death of the testator, and the devisee as alleged, must be proved before any decree can be pronounced.<sup>47</sup>

**§ 705. Some General Results of a Revivor.**—Bills of Revivor, in all their varieties, when sustained, have the effect of putting the new parties in the shoes of those they represent, whether the privity be of blood or of estate, by operation of law or act of the parties.<sup>48</sup> On revivor, the suit stands in the same condition as the original bill at the time of the abatement, and is considered as pending from the filing of the original bill, so as not to be affected by the statute of limitations. If the defendant has not answered the original bill, he must answer it after the revivor; or, if a *pro confesso* had been properly taken on the original bill, the benefit of it will accrue to the complainant in the bill of revivor.<sup>49</sup>

If the original bill has been answered, no further answer is required,<sup>50</sup> or allowed, unless a discovery of assets is desired from the personal representative of the deceased defendant; the depositions of witnesses, if any have been taken, may be read at the hearing, or for any other purpose for which the original parties might have used them; and, if the cause has proceeded to a final decree, it will continue in force against the new party.<sup>51</sup>

On a revivor, the new party occupies the shoes of the original party, and is bound by his answer, if filed, and by all orders and decrees affecting him, and by all agreements made by him.<sup>52</sup> And this is especially true of a personal rep-

42 *Berrigan v. Fleming*, 2 Lea, 271.

43 2 Dan. Ch. Pr., 1545, note.

44 *Allen & Hill, exrs., v. Shanks*, 6 Pick., 359.

45 2 Dan. Ch. Pr., 1509, note; *Lewis v. Outlaw*, 1 Tenn., (Overt.) 140.

46 Sto. Eq. Pl., § 364.

47 *Anderson v. McNeal*, 4 Lea, 303.

48 On the subject of privities, see, *ante*, § 165.

49 Sto. Eq. Pl., § 380; *Lewis v. Outlaw*, 1 Tenn., (Overt.) 142; *Berrigan v. Fleming*, 2 Lea, 271.

50 *Lewis v. Outlaw*, 1 Tenn., (Overt.) 143; *Berrigan v. Fleming*, 2 Lea, 271.

51 2 Dan. Ch. Pr., 1540; 1545.

52 *Allen & Hill, exrs., v. Shanks*, 6 Pick., 359.

representative, and of heirs, whether adults or minors, who can take up the defence only at the point where the decedent left.<sup>53</sup>

The new party brought before the Court by revivor, not only stands exactly in the same plight and condition as the party whose place he takes, but as he receives the benefits of all former proceedings, if any, so he is bound by all the liabilities thereof, if any, and may be subject to all the costs of the proceedings from the beginning of the suit.<sup>54</sup> But, when the husband of a female complainant revives a suit after marriage, he gives security for the costs, in which case the original prosecution sureties are discharged from all liability for subsequently accruing costs.<sup>55</sup>

**§ 706. Summary of the Rules Relative to Revivors.**—The following are the principal rules governing revivors *when a defendant dies*.<sup>56</sup>

1. **The Personal Representatives**<sup>57</sup> are the proper persons to revive against, when the relief sought against the decedent would in any way have made him liable for any debt, duty, or damage, or in any way have affected his title, rights, interests, or claims, in or to, personalty of any sort, including money, debts, choses in action, bonds, stocks, securities, real or personal, leases of land, goods, merchandise, and chattels of all kinds.

2. **The Real Representatives**<sup>58</sup> are the proper persons to revive against, when the relief sought against the decedent would, in any way, have affected his title, rights, interests, or claims, in, or to, real estate, not including leases on lands, but including all lands the legal title to which was in him to secure debts, or in him for any other trust purpose.

3. **Both the Real and the Personal Representatives** must be revived against when the relief sought would have affected *both* the real and the personal estate of the decedent, as shown in the two preceding paragraphs.

The following are the principal rules as to who are the proper persons to revive a suit *when the complainant dies*:

1. **The Personal Representatives** are the proper persons to revive, if the object of the suit is to declare, protect, secure, recover, enforce, or otherwise affect, rights to, or interests in, personalty of any kind: the term personalty here includes money, debts, duty, damages, choses in action, bonds, stocks, securities real and personal, leases of land, goods, merchandise, and chattels of all sorts.

2. **The Real Representatives** are the proper persons to revive, if the object of the suit is to declare, protect, secure, recover, or enforce, rights to, or interests in, real estate.

3. **Both the Real and the Personal Representatives** are the proper persons to revive a suit, if rights to, or interests in, both real and personal estate, are sought to be declared, protected, secured, recovered, enforced, or otherwise affected.

And the whole matter may be still further summarized as follows: 1. If the suit affects the personal estate exclusively, the personal representative must exclusively take the decedent's place. 2. If the suit affects the real estate exclusively, the real representatives must exclusively take the decedent's place. 3. If the suit affects both the real and the personal estate, both the real and the personal representatives of the decedent must take his place.

And the fundamental test of the proper set of representatives to take the decedent's place is: which set will be directly benefited or injured by the relief

<sup>53</sup> Brooks v. Gibson, 3 Shan. Cas., 760.

<sup>54</sup> 2 Dan. Ch. Pr., 1540; Lewis v. Outlaw, 1 Tenn., (Overt.,) 140; Berrigan v. Fleming, 2 Lea, 271.

<sup>55</sup> Code, § 2861.

<sup>56</sup> By defendant is here meant a defendant against whom relief is prayed, and not a defendant whose rights and interest are concurrent, in whole or in part, with those of the complainant.

<sup>57</sup> The term, "personal representatives," in this Chapter, includes executors and administrators, and

heirs when there is no executor or administrator, and a revivor is sought by or against them as personal representatives under the Code, § 2849.

<sup>58</sup> The term, "real representatives," in this Chapter includes heirs, devisees, and the assignees of realty transferred during the litigation. It will, also, include the executor when the will devises him any title to the realty in dispute; and, if there be a widow with homestead rights, she would, also, be included among the real representatives, and should be made a party defendant along with the

sought. The set liable to either benefit or injury, as the direct result of the suit, is the proper set to take his place.

§ 707. **Revivor of Decrees.**—A decree may be revived by and against the same parties, by and against whom a pending suit may be revived; and the procedure is the same, as heretofore stated.<sup>59</sup> The revivor may be on a bill filed for that purpose, or on a *scire facias*, under the statute.

Where a bill is filed by a complainant to revive a suit after a decree, and to prosecute the decree, it is not competent for the defendant in his answer to resist the revival, by stating matter which existed before the decree, or which has arisen since, affecting the merits of the decree; and such matter, if stated, will be treated as impertinent. The reason is, that if the facts existed before the decree, and the proper time for making them a part of the defence has been permitted to pass by, the omission cannot be supplied in this manner; and if new matter has arisen since the decree, varying the situation of the parties, other means exist for bringing it forward. The right of a party to prosecute a decree, and to do what is necessary for that purpose, cannot depend upon the merits of the decree.<sup>60</sup>

Where a bill of revivor is brought by a defendant after a decree, it merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided.<sup>61</sup>

Any event that has transpired since the decree was entered, whereby the decree has been satisfied, discharged, released or barred, may be set up in defence to any attempt to revive the decree, whether such attempt be by a bill of revivor, or by a *scire facias*.<sup>62</sup> The defendant to the decree may, also, plead and show that the decree is barred by the statute of limitations.<sup>63</sup>

When a decree is revived, it is not proper to pronounce a new decree for the amount of the former decree and accrued interest; for that can be done only in a suit brought on the former decree. On a revivor, the proper decree is to order that the original decree be, and stand, revived in favor of the new party thereunto entitled, or against the new party standing in the decedent's shoes, as the case may be.<sup>64</sup> The following will serve as a form in case of a revivor, omitting the caption and recitals of the decree:

#### REVIVOR OF A DECREE.

It is, therefore, ordered and decreed by the Court, that the decree, made in this cause, on July 9, 1885, in favor of the complainant, John Doe, and against the then defendant, Richard Roe, for the sum of one thousand dollars, and the costs of the cause, [or, for the tract of land in said decree described,] be and the same is in all things revived against Robert Roe, as the administrator, [or, heir at law,] of said Richard Roe; and that execution issue on said decree of July 9, 1885, for said sum of one thousand dollars, interest thereon, and for said costs, and, also, for the costs of this proceeding, to be levied on the goods and chattels, rights and credits, in the hands of said Robert Roe to be administered, [or, if the revivor is against the heir as to said land, add, after the word "revived," against Robert Roe, the sole heir at law of said Richard Roe; and that a writ of possession issue to put the complainant in possession of said tract of land, and that an execution issue against said Robert Roe, as administrator, for the costs adjudged against his intestate in said decree of July 9, 1885, and against him in his own right for the costs of this proceeding to revive said decree.<sup>65</sup>

If the original decree or the record in the cause, or both, have been lost, mutilated, or destroyed, it may still be revived, either by a bill of revivor, or by a *scire facias*, for, in contemplation of law, the decree is regarded in existence.<sup>66</sup>

§ 708. **Frame of a Bill of Revivor.**—A bill of revivor must state in brief terms: (1) the filing of the original bill, (2) who were the complainants and

<sup>59</sup> See, *ante*, § 574.

<sup>60</sup> Sto. Eq. Pl., § 370 a.

<sup>61</sup> Sto. Eq. Pl., § 376.

<sup>62</sup> Bank v. Vance, 9 Yerg., 471; *McIntosh v. Paul*, 6 Lea, 47.

<sup>63</sup> *McGrew v. Reasons*, 3 Lea, 485.

<sup>64</sup> *Whitworth v. Thompson*, 8 Lea, 487.

<sup>65</sup> The heir would not be liable for the costs of the original suit, such costs being a charge against the decedent's personal estate. In such a case, it would be proper to revive against the heir as to the land, and against the administrator as to the costs.

<sup>66</sup> *Whitworth v. Thompson*, 8 Lea, 485.

defendants to it, (3) what its prayer or object was, (4) the several proceedings thereon, (5) the abatement, (6) the title of the complainant to revive the suit, (7) so much new matter, and no more, as is requisite to show how the complainant becomes entitled to revive, and (8) must charge that the cause ought to be revived, and to stand in the same condition, with respect to the parties to the original cause as it was at the time when the abatement happened; and it (9) must pray, that the suit may be revived accordingly. It may likewise be necessary, in many cases against personal representatives, to charge that they have assets, and to pray that the defendant may answer the bill of revivor; for an admission of assets, or an account of the personal estate may be requisite, from the representative of a deceased party. In this latter case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor 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 a case usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, such accounts may be taken. And, so far, the bill is in the nature of an original bill. But upon a bill of revivor proper, the sole questions before the Court are the competency of the parties to revive or be revived against, and the correctness of the frame of a bill of revivor.<sup>67</sup>

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 to the bill, to which no answer has been filed; the bill of revivor, although requiring in itself no answer, must pray that the person, against whom it seeks to revive the suit, may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or as the amendment, remaining unanswered, requires.<sup>68</sup>

§ 709. **Form of a Bill of Revivor.**—The form of a bill of revivor will, perhaps, better appear by an illustration, than by description.

#### BILL OF REVIVOR.

To the Hon. Albert G. Hawkins, Chancellor, holding the Chancery Court at Huntingdon, for the county of Carroll:

John Doe, complainant,	} Both residents of Carroll county.
vs.	
Robert Roe, defendant.	

Complainant respectfully shows to the Court:

##### I.

That on July 10, 1890, he filed his original bill in this Court against Richard Roe to recover a debt due him from said Roe, [or, to recover a tract of land in said bill described, *or, otherwise, as the case may be, briefly stated.*] The said Richard Roe was made a defendant to said bill by due process, and answered the said bill, [*if such be the fact;*] and depositions were taken in the cause, and other proof filed, [*if such be the facts;*] and the cause was heard, and the following final decree was pronounced [*setting out the decree in full. If no decree was pronounced, this part of the bill will be omitted, of course.*]

##### II.

Since said bill was filed, [or, since said answer was filed; or, since said proof was filed; or, since said decree was pronounced,] the said defendant to said original bill, Richard Roe, has died intestate, [or, testate,] and Robert Roe, the defendant to this bill, has been appointed his administrator, [or, has duly qualified as his executor, or, *if real estate is involved,* is his sole heir at law, or, his sole devisee] and succeeds to all of the rights and liabilities of the said Richard Roe, deceased, in said original cause.

##### III.

Complainant is advised that he is entitled to have said suit [or, decree,] revived against the said Robert Roe as the administrator [or, executor, or, heir, or, devisee,] of the said Richard Roe, deceased; and he, therefore, prays:

1st. That said Robert Roe be made a party defendant to this bill by service of subpoena, [or, by publication, *if he is a non-resident;*] and that he be required to answer this bill, but his oath to his answer is waived.

2d. That said suit, [*or*, decree,] may be revived against him as the administrator [*or*, executor, *or*, heir, *or*, devisee,] of said Richard Roe, deceased, and may on such revivor stand in the same plight and condition as it was at the time of the death of said Richard Roe.

3d. That complainant may have such other and further relief in the premises as equity may require, and as to your Honor shall seem meet.

HAWKINS & HAWKINS, Solicitors.

If the complainant seeks to revive in his own name as administrator, executor, heir, or devisee, he will recite in his bill the death of the original complainant, and that he is his administrator, executor, heir, or devisee, and will pray that the suit, or decree, be revived in his name as such administrator, executor, heir, or devisee, against the defendant, and to stand in the same plight and condition in which it was at the time of the death of the original complainant and for general relief.

ARTICLE II.

STATUTORY METHODS OF REVIVOR.

- |  |   |
|--|---|
| § 710. Revivor by Motion.                                    | § 714. Extent of the Liabilities Resulting From a Revivor.                  |
| § 711. Revivor by <i>Scire Facias</i> , or Notice.           |   |
| § 712. What a <i>Scire Facias</i> Against Heirs Should Show. |   |
| § 713. Defences to a <i>Scire Facias</i> , How Made.         |   |
|  | § 715. Forms Used in Reviving Causes.                                       |
|  | § 716. Statutory Provisions Relative to the Abatement and Revivor of Suits. |

§ 710. **Revivor by Motion.**—The tendency of the times is toward simplicity in pleading; and mere formalism is more and more departed from. Our statutes provide two simple and efficacious methods of revivor: one, by mere motion, and the other by *scire facias*, or notice.<sup>1</sup>

The person entitled to the place of the deceased party, whether complainant or defendant, may, on his own motion, and, of course, on proper proof of his title, take the place of such deceased party, and have the cause revived in his name.<sup>2</sup> If all parties should consent, no proof of the person's title to revive would be necessary. If his title to the place of the deceased party is not admitted, he may prove it by oral evidence, if he is an heir, or an assignee; by written evidence if a vendee; by letters of administration or guardianship, if an administrator or guardian; and by production of the will and record proof of its probate and his qualification, if an executor.

So the adverse party, whether complainant or defendant, may revive the suit against the proper person entitled to the place of the deceased party, with the consent of that person, on mere motion,<sup>3</sup> whether such person be complainant or defendant.

The husband of a female complainant may make himself a party complainant by motion, on giving bond with good security for the prosecution of the suit;<sup>4</sup> and the suit may be revived, at any time before the final disposition thereof, against the husband of a female party, on motion with his consent.<sup>5</sup>

A suit may be revived in the name of infants by their next friend, by motion, they being the heirs and successors of a deceased complainant.<sup>6</sup>

<sup>1</sup> Code, §§ 4425; 2855-2856. While, however, the statutory methods render a bill of revivor unnecessary, in many cases, it must not be, on that account, supposed that the rules and principles governing bills of revivor, and proceedings thereon, are in any way superseded, or abridged. On the contrary, all of those rules and principles apply with full force when a revivor is undertaken, either by motion or by *scire facias*. The motion, or *scire facias*, supercedes the bill of revivor as a pleading, only; the rights, duties, and liabilities of the parties are pre-

cisely the same whether the revivor be attempted or consummated by a bill of revivor, or by motion, or by *scire facias*; and, as a consequence, the rules and principles defining the rights, duties, and liabilities of the parties set forth in the first Article of this Chapter are equally applicable to this Article.

<sup>2</sup> Code, § 2851; 2855.

<sup>3</sup> Code, § 2856.

<sup>4</sup> Code, § 2861.

<sup>5</sup> Code, § 2862.

<sup>6</sup> Code, § 2855; Jones v. McKenna, 4 Lea, 630.

## ORDERS OF REVIVOR ON MOTION.

John Doe,  
*vs.*  
 Richard Roe.

The death of the complainant, John Doe, having been duly suggested and proved, [*or*, admitted,] by consent of parties, and on motion of Daniel Doe, this suit is revived in his name as the administrator, [*or*, executor, *or*, heir,] of said John Doe, deceased.

[*Or, if there be no consent, this form may be used:*

The death of John Doe was this day duly suggested and proved in open Court; and, thereupon, came Daniel Doe and produced and filed his letters of administration on [*or*, his letters testamentary as executor of] the estate of said John Doe, and moved the Court to revive this cause in his name as such administrator [*or*, as the executor of said John Doe,] on consideration whereof said motion was allowed, and said cause revived in the name of Daniel Doe as such administrator, [*or*, executor,] and ordered to stand in the same plight and condition as it was in at the time of the death of the said John Doe.

[*Or, if the revivor is against a party, it may be as follows:*

In this cause, the death of the defendant, Richard Roe, was this day suggested and proved in open Court, and by consent of Robert Roe, given in open Court, this cause is revived against him as the administrator, [*or*, executor, *or*, heir,] of said Richard Roe, deceased, and is ordered to stand in the same condition as when Richard Roe died.

§ 711. **Revivor by Scire Facias, or Notice.**—If the person entitled to the place of the deceased party, does not on his own motion, or by his consent, become a party by revivor, the adverse party, whether complainant or defendant, may revive against him by *scire facias*, or notice.<sup>7</sup> And so, where a female party marries during the progress of a suit, a revivor may be had against her husband, by *scire facias*, at any time before the final disposition of the suit.<sup>8</sup>

The *scire facias*, or notice, may issue in term time, or in vacation,<sup>9</sup> upon motion of the complainant; and it need only (1) give the names of the parties; and (2) recite the filing of the bill, (3) the pendency of the suit, and (4) the death or marriage, as the case may be, of the particular party, and (5) require the person against whom it is issued to appear, and show cause why the suit should not be revived against him, as the person entitled to the decedent's place in the subject-matter of the litigation, or as the husband of the married female party.<sup>10</sup> On the return of the *scire facias* duly executed, the Clerk and Master in vacation, or the Court in term time, will make an order of revivor, as a matter of course, unless good cause to the contrary be shown.<sup>11</sup>

If any additional matter is to be set up, by way of amendment or supplement to the original bill, the method of revivor by *scire facias*, or notice, will be inadequate, and the ordinary Chancery procedure by bill of revivor, in some one of its various forms, must be resorted to.

§ 712. **What a Scire Facias Against Heirs Should Show.**—If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent.<sup>12</sup> The statute evidently contemplates a revivor by or against the heirs as the representatives of the personal estate, rather than of the real estate. The existing practice allowed a revivor by or against the heirs as the representatives of the real estate, and hence there was no need of a statute for such a revivor. For this reason, if the suit affects both the realty and the personality of the decedent, (as a suit to rescind a land sale,) and the defendant sought to be charged dies, and an ordinary *scire facias* issues against his heirs, the presumption of law arises that the revivor is sought against them solely as heirs at law, that is, as representatives of the decedent's real estate; and the heirs have the right to rely on that presumption; and no decree can properly be rendered against them, on such a revivor, holding them liable on a personal judgment, as the representatives of the decedent's personal estate.<sup>13</sup> Hence, if the complainant in any suit, and especially in one of the character mentioned where the defendant may be held liable for either a real

<sup>7</sup> Code, § 2856.

<sup>8</sup> Code, § 2862.

<sup>9</sup> Code, §§ 2857; 4426.

<sup>10</sup> Code, §§ 4428; 2859; *Winter v. Shankland*, 3

<sup>11</sup> Code, § 2857; *Brown v. Rocco*, 9 Heisk., 197. The *scire facias* should be made returnable to, and the cause revived at, a rule day. Code, §§ 4429; 4418. See *post*, § 1163.

or personal recovery, seeks to revive against the heirs of such defendant, and to hold them liable as representatives both of the real and personal estate of the decedent, the *scire facias* must so state on its face, or a revivor based thereon will be deemed to be against them in their capacity as heirs only; and on such revivor no money judgment can be rendered against them as the representatives of the personal estate. And before a revivor can be had against the heirs as personal representatives, it must be shown that there is no person who will administer, and the *scire facias* must aver this on its face. It would, also, be proper where the *scire facias* is awarded by the Court, to show in the order that it was suggested that there was no administrator, and no one who would administer, and that for this reason *scire facias* issue to notify the heirs (naming them) to show cause why the suit should not be revived against them as the personal representatives of the decedent, as well as the real representatives.<sup>14</sup>

§ 713. **Defences to a Scire Facias, How Made.**—The defences to a *scire facias* are the same as to a bill of revivor,<sup>15</sup> and when a revivor is sought by motion, *scire facias*, or notice, under the statutory provisions, the persons proceeded against may resist the revivor upon any sufficient ground, such as that they are not the executors, administrators, devisees, or heirs, or are not all of them,<sup>16</sup> or are not the guardians, or the assignees, or have no interest in the litigation. Or, to express these defences briefly: the defendant to the proceedings to revive, whether such proceeding be by motion, or by *scire facias*, may show either that he does not stand in the shoes of the decedent, or that he has no interest in the suit.

When such a contest arises, the proof may be made in open Court, or by the depositions of witnesses taken upon notice, or by proof before the Clerk and Master on a reference.<sup>17</sup> This last method is the most convenient and most consistent with Chancery practice. Proof of witnesses, orally examined in open Court, should not be heard except by consent of all adverse parties, and in such case they must all be capable of giving their consent.<sup>18</sup>

§ 714. **Extent of the Liabilities Resulting from a Revivor.**—This question has already been somewhat considered, but more especially in view of the non-statutory practice.<sup>19</sup> It may be stated, as a general rule, that the parties made such by a revivor occupy the shoes of the decedent, and are entitled to the rights he possessed, and are subject to all the liabilities he had incurred, down to and including the day of his death, and to none other.<sup>20</sup> If there be any burdens, they must bear them; and if there be any benefits, they are entitled to them.

But when a revivor takes place against persons who represent the estate of the decedent, they cannot be held liable beyond the value of such estate. Hence, on a revivor against an executor or administrator, or against heirs when there is no administrator, they can be held liable only to the extent of the assets, or of the complainant's proportion of the assets, in their hands subject to the decedent's debts. And when a revivor is had against heirs, both as personal and as real representatives, the execution can be levied only on the goods and chattels of the deceased in their possession subject to execution; and, if

<sup>14</sup> Preston v. Golde, 12 Lea, 267. The Code language, (§ 2849), is, "If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent." An allegation in the order, and in the *scire facias*, that no one "will" administer would be difficult of direct proof. The fact, however, that no one has administered, and that reasonable time has elapsed for any one desiring it to have himself appointed administrator, will be accepted by the Court as proof that no one will administer. Besides, if the heirs desire to protect themselves from liability to be revived against, they or some one or more of them can do so by administering themselves.

<sup>15</sup> Allen & Hill, exrs., v. Shanks, 6 Pick., 359, 381. See, *post*, § 720-722.

<sup>16</sup> Mayfield v. Stephenson, 6 Bax., 397.

<sup>17</sup> Campbell v. Hubbard, 11 Lea, 6; Mayfield v. Stephenson, 6 Bax., 401.

<sup>18</sup> In Mayfield v. Stephenson, 6 Bax., 401, where a revivor was had by the administrator and heirs of the complainant, on motion, and it not appearing in the record in what way the heirship was proven, the Supreme Court says they "must assume that the persons named as heirs in this order [of revivor in their names] were either admitted to be the heirs, or proven to be, to the satisfaction of the Court." On a collateral attack, this revivor was held good. From this it may be inferred that parol proof of heirship in such cases is admissible, if the fact of heirship is not controverted.

<sup>19</sup> See, *ante*, § 705.

<sup>20</sup> Allen & Hill, exrs., v. Shanks, 6 Pick., 359.



no such goods, or not sufficient, then only on the lands and tenements of the deceased which may have descended to the heirs, subject to execution.<sup>21</sup> No property, real or personal, that would not be liable to the decedent's debts in case of administration, would be subject to execution against heirs.

§ 715. **Forms Used in Reviving Causes.**—The following forms illustrate the statutory methods of proving the death, marriage, and representative capacity of parties, when a revivor is sought:

**PROOF OF DEATH AND MARRIAGE, AND ORDER FOR A SCIRE FACIAS.**

John Doe,  
vs.  
Richard Roe, et. al. }

In this cause, the death of Richard Roe and the marriage of Rachel Roe were duly proved in open Court; [or, before the Master at the April, 1891, rules,] and it being suggested that Robert Roe is the administrator, [or, sole heir,] of said Richard Roe, deceased; and that John Smith is the husband of said Rachel Roe, on motion of complainant, it is ordered that a *scire facias* issue to make these facts known to said Robert Roe and said John Smith, and to summon them to appear at the next term of this Court, [or, at the June rules of this Court, or, before the Clerk and Master of this Court on the 1st Monday in June next,] to show cause, if any they or either of them have, why this suit should not be revived against the said Robert Roe as administrator [or, sole heir,] aforesaid, and against said John Smith as the husband of said Rachel Roe.

The foregoing form will adequately indicate the phraseology to be used by the Master, in like cases, when the death or marriage of a party is proved before him on a rule day, and a *scire facias* to revive applied for. The following is the usual form of a *scire facias* in the Chancery Court:

**SCIRE FACIAS TO REVIVE.**

The State of Tennessee,

To the Sheriff of Blount county:

Whereas, a bill was filed in the Chancery Court at Maryville, on May 1st, 1890, by John Doe against Richard Roe and Rachel Roe, which suit is still in said Court, pending and undetermined;

And whereas it was suggested at the April, 1891, term of said Court [or, before me, at the April, 1891, rules of said Court,] that said Richard Roe was dead, and that Robert Roe was his administrator [or, sole heir,] and that said Rachel Roe had married John Smith;

And the said complainant having moved for a *scire facias* against said Robert Roe and John Smith to show cause, if any they have, why this suit should not be revived against them respectively as such administrator [or, heir] and husband; and the said Court having, at said April, 1891, term, ordered a *scire facias* to issue;

You are, therefore, commanded to make these facts known to said Robert Roe and said John Smith, and to summon each of them to appear before the said Chancery Court at its next term, to be held in the Court House, in Maryville, on the 3d Monday in October next, [or, to appear before me, at my office, in the Court House in Maryville, on the 1st Monday of June, 1891,] to show cause, if any they, or either of them, have, why the said suit should not be revived against the said Robert Roe as the administrator, [or, heir,] of said Richard Roe, deceased, and against said John Smith as the husband of said Rachel Roe.

This May 4, 1891.

W. C. CHUMLEA, C. & M.

**ORDER OF REVIVOR, ON A SCIRE FACIAS.**

John Doe,  
vs.  
Richard Roe, et. al. }

In this cause, the *scire facias* heretofore ordered to be issued, having been issued and duly served on Robert Roe and John Smith more than five days before the first day of this term, [or, if the revivor be at rules, before this the first Monday of June, 1891,] and neither of them having shown any cause why this suit should not be revived against the said Robert Roe as the administrator [or, heir,] of Richard Roe, and against the said John Smith as the husband of Rachel Roe, it is, therefore, ordered that this suit be revived against them respectively accordingly.

**ORDER OF REVIVOR BY CONSENT.**

In this cause, it being admitted that the defendant, Richard Roe, has died, and the defendant, Rachael Roe, has married, since the last term of the Court, and that Robert Roe is the

administrator [*or, heir,*] of said Richard Roe, and that John Smith is the husband of said Rachel Roe, and said Robert Roe and said John Smith in open Court, [*or, by their respective Solicitors,*] admitting these facts, by their consent this cause is revived against said Robert Roe as said administrator, [*or, heir,*] and against said John Smith as said husband, and is ordered to stand in the same plight and condition in which it was at the time of said death and marriage.

If the revivor is on motion, or by consent of the parties, the orders would be as follows, omitting the style of the cause:

**ORDERS OF REVIVOR, ON MOTION.**

In this cause, the death of John Doe, the complainant, was this day proved in open Court; and thereupon came David Doe, and presented his letters of administration on the estate of said John Doe, deceased, [*or, proved that he was the heir at law of said John Doe, deceased,*] and moved the Court to revive this cause in his name as the administrator [*or, heir,*] of said John Doe, deceased, which motion was by the Court allowed, and the cause revived accordingly, and ordered to stand in the same plight and condition in which it stood at the death of the said John Doe.

**ORDER FOR SCIRE FACIAS TO REVIVE A DECREE.**

John Doe, }  
*vs.* } Order for Scire Facias.  
 Richard Roe. }

In this cause the complainant by his Solicitor, suggested and proved the death of the defendant, Richard Roe, and further suggested that Roland Roe was his administrator [*or executor, or heir, or devisee,*] and moved that a *scire facias* issue against him, the said Roland Roe, to show cause, if any he have, why the decree rendered against Richard Roe in this Court in favor of complainant on the—day of—, 19—, [*giving its date,*] should not be revived against him as such administrator [*or executor, or heir, or devisee.*]

Whereupon, and on consideration of the record in the cause, said motion is allowed and said writ<sup>22</sup> ordered to be issued.

**ORDER REVIVING A DECREE.**

John Doe, }  
*vs.* } Order reviving Decree.  
 Richard Roe. }

In this cause, the *scire facias* heretofore ordered to be issued against Roland Roe, as the administrator [*or executor, or heir, or devisee,*] of the defendant, Richard Roe, now deceased, having been issued and duly served on said Roland Roe more than five days before the first day of this term, and he having shown no cause why the decree rendered against the defendant, Richard Roe, now deceased, in favor of complainant on the...day of..., 19..., [*giving its date,*] should not be revived against him, the said Roland Roe, as the administrator [*or executor, or heir, or devisee,*<sup>23</sup>] of said Richard Roe, on motion of complainant and on consideration of the record in the cause, it is ordered adjudged and decreed, that said motion be allowed and said decree revived, and that complainant have and recover.<sup>24</sup> [*Here set out the decree revived, but substituting the name of Roland Roe as administrator, or executor, or devisee of Richard Roe, in the place and stead of the name of Richard Roe.*].....

It is further ordered and decreed that the Solicitor's lien of Charles H. Smith, Esq., on said former decree attach to the decree hereby revived. The defendant, Roland Roe, as administrator, [*or executor, or heir, or devisee,*] will pay the costs incidental to the *scire facias* and revivor of said decree, for which an execution is awarded.

**§ 716. Statutory Provisions Relative to the Abatement and Revivor of Suits.**

It is provided by the Code that no action shall abate by the death, marriage, or other disability of any of the parties, complainant or defendant, or by the transfer of any interest in the suit by any party, if the cause of action survives or continues.<sup>25</sup>

1. **Statutory Provisions Relative to Abatement by Death.** No civil actions commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived. The intervention of a term between the death of a party and the qualification of the personal representative shall not work an abatement or discontinuance of the suit. Nor shall the suit abate or discontinue for the

<sup>22</sup> If the decree related to land it must be revived against the heir, or devisee; if to personalty or debt, against the administrator or executor. See, *ante*, § 701.

<sup>23</sup> If the decree affects realty, the revivor must be

against the heir, or devisee. See, *ante*, §§ 143; 701.

<sup>24</sup> The complainant is only entitled to interest from the date of the decree. Rogers v. Hollingsworth, 11 Pick., 357.

<sup>25</sup> Code, § 2845.

death of either party, until the second term after the death has been suggested and proved or admitted, and entry to that effect made of record,<sup>26</sup>

**2. Statutory Provisions Relative to Revivors.** If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent. If the decedent has parted with his interest pending the suit, it may be revived by or against the successor in interest instead of the representative or heir.<sup>27</sup>

Where one or more of several plaintiffs, not partners, dies, the person entitled to represent the decedent may revive, by motion, at any time before the cause is tried or abated. But, if the suit is not thus revived within the two terms allowed, the defendant may revive or elect to proceed to trial with the surviving plaintiff, or abate the suit, if revivor is necessary.

When any sole executor or administrator is plaintiff or defendant, and dies, the suit may be revived by or against the executor, administrator *de bonis non*, or other successor in interest of the decedent.

No appeal or writ of error in any cause or court shall abate by the death of either plaintiff or defendant, but may be revived by or against the heir, personal representative, or assign, under the foregoing rules.<sup>28</sup>

The action may be revived by the proper person, entitled to the decedent's place, by motion alone. And by the adverse party against such proper person, by consent of that person, on mere motion; and, without consent, by *scire facias* or notice. The *scire facias* or notice may be sued out in term time or vacation, and the order to revive be made as of course, unless good cause to the contrary be shown on the return of the process.<sup>29</sup>

Where a suit is commenced in the name of one person for the use of another, and the nominal plaintiff dies, the suit may be prosecuted, without revivor, as if the death had not happened.<sup>30</sup>

Suits abated by the death of either party may be revived by or against the heir, personal representative, guardian or assign, as the case may be, who may be legally entitled to the decedent's place in the subject-matter of litigation.<sup>31</sup>

**3. Statutory Provisions for Revivor in Case of Marriage.** No action in a Court of law or Equity by or against a woman abates by her marriage, but may be revived by or against her husband. The husband of a female plaintiff may make himself a party plaintiff by motion, and by giving bond with good security to prosecute the suit with effect, or to pay the costs of suit, as in other cases. On the execution of such bond, the original security for the prosecution is discharged from liability for subsequently accruing costs. The suit may be revived at any time before final disposition thereof, against the husband of a female defendant by motion, with his consent, or by *scire facias* without consent.<sup>32</sup>

**4. Statutory Provisions in Chancery Practice.** The following statutory provisions, in the Chapter devoted to the Practice of Courts of Chancery, are to be construed along with those hereinabove given, and as parts of one general system of revivors:

Upon the death of a defendant, or marriage of a female defendant, the suit may be revived by *scire facias* or notice to the heirs, or personal representatives, or husband, without the necessity of filing a bill of revivor. The Clerk and Master shall issue this *scire facias*, or notice, at any time, upon motion of the complainant, entering the same upon his rules, and including in each writ issued to any county all the parties residing in that county. Persons made defendants under these sections, may make the same defence to the revival of such suits, as if made parties by the former practice of the Courts of Chancery. The *scire facias* need only give the names of the parties, and recite the filing of the

<sup>26</sup> Code, §§ 2846-2848.

| <sup>30</sup> Code, § 2858.

bill, pendency of the suit, and death or marriage as the case may be, and thereupon require the parties against whom it is issued, to appear and show cause why the suit should not be revived. Bills of revivor, amended, and supplemental bills, if resorted to, may be filed at any time in the Clerk's office; and the process may be made returnable, and the suit revived at a rule day.<sup>33</sup>

### ARTICLE III.

#### BILLS AKIN TO BILLS OF REVIVOR.

§ 717. Original Bills in the Nature of Bills of Revivor. | § 718. Bills of Revivor and Supplement.  
 of Revivor. | § 719. The Name of the Bill Immaterial.

§ 717. **Original Bills in the Nature of Bills of Revivor.**—In most of the cases already stated, there is no other fact to be ascertained than whether the new party brought before the Court has the character imputed to him. If he has, the revivor is of course. But there are many cases, in which there are other facts which may be brought into litigation besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor does not technically apply. Under such circumstances, an original bill, in the nature of a bill of revivor, is the appropriate pleading to bring those facts before the Court, and to put the original proceedings again in motion, and to enable the new party to have the benefit of the former proceedings.<sup>1</sup> Thus, if the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest, that the title to it, as well as 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 bill of revivor. An original bill upon which the title may be litigated, must be filed.<sup>2</sup>

The ground of this distinction between bills of revivor, and bills in the nature of bills of revivor, is that the former, in case of death, are founded upon mere privity of blood, or representation by operation of law; the latter, upon privity of estate, or title by the act of the party. In the former case, nothing can be in contest, except whether the party be the heir or personal representative; in the latter, the nature and operation of the whole act by which the privity of estate or title is created, is open to controversy. Thus, for example, the heir may be made a party by a bill of revivor; for his title is by mere operation of law. But the devisee must come in by a bill in the nature of a bill of revivor; for he comes in as a purchaser under the testator, in privity of estate or title, which may be disputed.<sup>3</sup>

A bill in the nature of a bill of revivor cannot be brought, except by some person who claims in privity with the complainant in the original bill. Thus, for example, if a bill is filed by a devisee under a will, and afterwards the will is set aside, or a subsequent will is proved, by which the same property is devised to another devisee; in such a case, the heir, or latter devisee, as the case may be, cannot, by a bill in the nature of a supplemental bill, avail himself of the proceedings in the original suit; for there is no privity between the complainant in the original suit and the complainant in the supplemental bill. But if the bill had been filed by the deviser himself for some matter touching the estate devised, then the heir or second devisee might file a supplemental bill in the nature of a bill of revivor, notwithstanding the first devisee has already

<sup>33</sup> Code, §§ 4425-4429; Ch. Rule, XI; § 1200, *post*,  
<sup>1</sup> Sto. Eq. Pl., § 377.

<sup>2</sup> Sto. Eq. Pl. § 378.

<sup>3</sup> 2 Dan. Ch. Pr., 1508, note; Sto. Eq. Pl., 379.

filed such a bill; for he derives his title solely from the devisor, independently of the first devisee.<sup>4</sup>

An original bill, in the nature of a bill of revivor, should generally state the same facts as a bill of revivor. It should state the filing of the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted. It should, also, charge the validity of the transmission, and state the rights which have accrued by it, and should pray that the suit may be revived, and the complainant have the benefit of all the former proceedings thereon.<sup>5</sup>

Where a bill, in the nature of a bill of revivor, is filed by any one not a party to the original suit, all of the parties to the original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as complainants or defendants.<sup>6</sup>

§ 718. **Bills of Revivor and Supplement.**—This bill is a mere compound of a bill of revivor and of a supplemental bill, and in its separate parts it must be framed and proceeded upon in the same manner. It becomes proper where not only an abatement has taken place in a suit, but defects are to be supplied, or new events are to be stated, which have arisen since the commencement of the suit.<sup>7</sup> Thus, if a suit becomes abated, and by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a devise, under certain circumstances, although a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it; yet, to bring before the Court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, show the devise, or other act by which their rights are affected.<sup>8</sup>

§ 719. **The Name of the Bill Immaterial.**—As already stated, the name of a bill is immaterial in our practice. Our Courts look at substance of bills, and allow or disallow them accordingly.<sup>9</sup> It matters not whether a bill is called a bill of revivor, or an original bill in the nature of a bill of revivor, or a bill of revivor and supplement, or an original bill in the nature of a bill of revivor and supplement, or whether it is given any name at all; if it contain the proper averments, and makes the proper persons parties, and has the proper prayer, it is a proper bill.<sup>10</sup> Nevertheless, it is important to know the various varieties of bills of revivor, in order to fully comprehend the cases to which they apply, the term when they are to be filed, the facts they must allege, and the relief to be prayed. Hence, in drawing a bill of revivor, of any kind, while it is necessary to insert all the essentials hereinbefore set out, it is not necessary to call the bill by any other name than a bill of revivor; indeed, it is not necessary to name it at all.

<sup>4</sup> Sto. Eq. Pl., § 385.

<sup>5</sup> Sto. Eq. Pl., § 386.

<sup>6</sup> 2 Dan. Ch. Pr., 1508, note.

<sup>7</sup> 2 Dan. Ch. Pr., 1546, note.

<sup>8</sup> Sto. Eq. Pl., § 387.

<sup>9</sup> Murphy v. Johnson, 23 Pick., 552.

<sup>10</sup> Northman v. Liverpool Ins. Co., 1 Tenn. Ch., 312. See, *ante*, §§ 43; 269. *Nihil facit error nominis cum de corpore vel persona constat.* (An error of name amounts to nothing when there is certainty as to the thing or person.)

## ARTICLE IV.

## DEFENCES TO PROCEEDINGS TO REVIVE.

§ 720. Defences to a Revivor.

§ 721. Demurrers to Bills of Revivor.

§ 722. Defence by Plea in Bar.

§ 720. **Defences to a Revivor.**—It is very seldom that any defence exists, or is made, to a bill of revivor, or to a *scire facias*; but (1) when the complainant to such a proceeding is not entitled to have the suit revived in his name and for his benefit; or (2) when the defendant to the bill, or *scire facias*, is not the proper person to revive against; or (3) when the proceeding is to revive a decree, and the defendant can show that the decree has been paid, released, or otherwise discharged, or is barred by the statute of limitations, in any of such cases the defendant may demur to the bill, or *scire facias*, if the matters of defence appear on its face, and may plead to the bill or *scire facias*, if the matter of defence does not appear on its face. The defences to a *scire facias* are the same as those to a bill of revivor,<sup>1</sup> and the latter have heretofore been fully considered.<sup>2</sup>

§ 721. **Demurrers to Bills of Revivor.**—If a bill of revivor, or a bill in the nature of a bill of revivor, does not show a sufficient ground for reviving the suit, or any part of it, either by or against the person by or against whom it is brought, the defendant may, by demurrer, show cause against the revival. Indeed, although the defendant does not demur, yet, if the complainant does not show a title to revive, he will take nothing by his suit at the hearing. A demurrer to a bill of revivor, or to a bill in the nature of a bill of revivor, may be: (1) either for want of privity, or (2) for want of sufficient interest in the party seeking to revive, or (3) for some imperfection in the frame of the bill.

1. **For Want of Privity.** We have already had occasion to consider in what cases a bill of revivor, technically so called, may lie; and, it was then stated, that it is confined to cases of representation of the party deceased by the mere appointment and operation of law. Thus, the executor or administrator alone is the party by or against whom a bill of revivor, technically so called, will lie as to matters touching the personalty of the deceased; and the heir at law of the deceased is the only party by or against whom a bill of revivor will lie as to matters touching the realty. This is properly a privity by operation of law.<sup>3</sup> On the other hand, there may be a privity of right and title under the deceased, by a transfer or conveyance of that right and title to a person, who is not in by mere operation of law, and is not the personal or real representative of the deceased. In such a case, a pure bill of revivor will not lie by or against such person; but a bill in the *nature* of a bill of revivor will. In each of these cases if the appropriate bill was not brought by the party, seeking to revive, a demurrer would formerly have lain;<sup>4</sup> but now, in our practice, the name of the bill is immaterial, if the substance be material.

It is laid down by Story, that, (1) if an administrator *de bonis non* should seek, by a pure bill of revivor, to revive a decree, obtained by a former administrator, a demurrer would lie; for the administrator *de bonis non* comes not in, in privity with the former administrator, who obtained the decree; but paramount to him, and purely as the representative of the intestate; and (2) if a bill of revivor should be filed by or against the assignee of a bankrupt or an

<sup>1</sup> Allen & Hill, exrs., v. Shanks, 6 Pick., 359.  
<sup>2</sup> See, *ante*, § 704.

<sup>3</sup> Sto. Eq. Pl., §§ 617-618.  
<sup>4</sup> Sto. Eq. Pl., § 618.

insolvent, or the committee of a lunatic's estate, or a purchaser, or a devisee of the estate in question, a demurrer would lie for the want of the proper right of representation in such a bill;<sup>5</sup> but in Tennessee, no demurrer would lie in such cases, the distinction between a pure bill of revivor, and a bill in the nature of a bill of revivor, being one merely of name and not of substance.

Nevertheless, there must be privity of estate between the party by or against whom the bill of revivor is brought and the deceased party, or a demurrer will lie for that reason; but it is immaterial whether this privity be by operation of law or by contract of the parties, as it is also immaterial whether the bill be called a bill of revivor, or a bill in the nature of a bill of revivor, or whether any name at all be given it.<sup>6</sup>

2. **For Want of Interest.** Ordinarily, if the party seeking to revive, has no interest in the further proceedings, and can derive no benefit from them, he is not entitled to a bill of revivor, and a demurrer will therefore lie. A defendant may have such an interest as will entitle him to a bill of revivor, as for example in cases of account,<sup>7</sup> in suits for partition or sale for partition, or when he has concurrent rights with the deceased complainant, or in any other case where he will take a benefit under the decree.

3. **For Some Imperfection in the Frame of the Bill.** The proper parties must be made to such a bill, to the end that the Court may be able to make a complete decree, leaving no roots for subsequent litigation to spring from; and if the bill of revivor is deficient in parties, a demurrer will lie to it on that ground.<sup>8</sup> If, however, the defect of parties existed before the abatement, a demurrer will not lie to a bill of revivor for want of the deficient parties, the only office of a bill of revivor being merely to put the cause in the same plight and condition in which it was at the abatement.<sup>9</sup> Where, however, any defect exists in the original bill, either for want of proper parties, or for want of proper allegations, or for want of any matter proper to be brought forward by an amended or a supplemental bill, it would be proper to incorporate all of these matters in the bill of revivor, which would then be properly termed a bill in the nature of a bill of revivor and supplement.

And in general, whenever the bill shows on its face either that the complainant has no right to revive the suit, or that the defendant is not a proper party against whom the suit should be revived, because not in the chain of representation, a demurrer will lie. And if the statements in the bill of revivor do not show a title to revive, or a liability to be revived against, or if the bill is otherwise fatally defective, the complainant cannot, on demurrer, supply the defect by reading the record of the original bill, although that record be referred to in the bill of revivor.<sup>10</sup>

§ 722. **Defence by Plea in Bar.**—If any of the foregoing defences do not appear on the face of the bill, or *scire facias*, it may be brought forward by a plea in bar. The defendant to the proceeding to revive may, by a negative plea, deny that he is the, or a, heir, administrator, executor, husband, or other proper successor, of the original defendant; or he may, by a negative plea, deny that the party seeking to revive in his own name, is the heir, administrator, executor, husband, or other proper successor, of the original complainant. If the proceeding is to revive a decree, the defendant to the proceeding may, in addition to the foregoing defences, plead that the decree has been paid, released, or otherwise discharged, or is barred by the statute of limitations.

<sup>5</sup> Sto. Eq. Pl., § 619.

<sup>6</sup> *Ante*, § 43.

<sup>7</sup> Sto. Eq. Pl., § 621.

<sup>8</sup> As to the proper parties to a bill of revivor, see, *ante*, §§ 113-116; 701.

<sup>9</sup> Sto. Eq. Pl., § 624.

<sup>10</sup> Sto. Eq. Pl., § 626.

CHAPTER XXXV.

BILLS TO CARRY DECREES INTO EXECUTION.

§ 723. Bills to Carry Decrees Into Execution. | § 724. Form of a Bill to Carry a Decree Into Execution.

§ 723. **Bills to Carry Decrees into Execution.**—A bill to carry a decree into execution is proper where a party's rights have become so embarrassed, by events subsequent to the decree, that no ordinary process upon the original decree will be effectual to carry it into execution. This happens, generally, in cases where parties have neglected to proceed upon the decree until subsequent events make it necessary to have the decree of the Court to settle and ascertain their rights under it.<sup>1</sup> Sometimes such a bill is exhibited by a person who was not a party; or who does not claim under any party to the original decree; but who claims in a similar interest; or who is unable to obtain the determination of his own rights, till the decree is carried into execution. Or, it may be brought by or against any person, claiming as assignee of a party to the decree. The Court, in these cases, in general, only enforces, and does not vary, the decree. But upon circumstances it has sometimes considered the original directions, and varied them in case of mistake. And if it would be inequitable to enforce a decree, the Court may refuse to do so: for this purpose the Court has full power to look into the merits of the case.<sup>2</sup> But, although the original decree may be controverted, upon a bill to carry it into execution, it is only the defendant in the new suit who can call it in question; the complainant never can. He must, if not satisfied with the decree, impeach it by a bill of review, or some similar proceeding.<sup>3</sup>

A bill to carry a decree into execution is generally in part an original bill, and in part a bill in the nature of an original bill, and it is sometimes a bill of revivor, or a supplemental bill, or both, as the exigencies of the case may require. And the frame of the bill, and the course of proceeding upon it, varies accordingly.<sup>4</sup>

§ 724. **Form of a Bill to Carry a Decree into Execution.**—The bill should recite the fact of the filing of the original bill, the proceedings thereon, the decree pronounced, and why the decree has not been executed, and should pray that it be enforced. The following is a form of

A BILL TO CARRY A DECREE INTO EXECUTION.

To the Hon. David M. Key, Chancellor, holding the Chancery Court at Chattanooga:  
 John Doe, administrator of James Doe, deceased, a resident  
 of Hamilton county, complainant,  
*vs.*  
 Richard Roe, Robert Roe, Rachel Roe, and Rosanna Roe,  
 all residents of Hamilton county, defendants. }  
 Complainant respectfully shows to the Court:

I.

That in the year 1860, a bill was filed in your Honor's Court at Chattanooga, by James Doe, against Roland Roe, to enforce a vendor's lien said James had in and to the following tract of land, in said town of Chattanooga, on the bank of the Tennessee river: Beginning

1 Huddleston v. Williams, 1 Heisk., 581.  
 2 2 Dan. Ch. Pr., 1585-1586; Sto. Eq. Pl., §§ 429-430, notes.  
 3 2 Barb. Ch. Pr., 88.  
 4 2 Barb. Ch. Pr., 88; Chestnut v. Frazier, 6 Bax., 217. The name of the bill is immaterial if its allegations be sufficient. Brandon v. Mason, 1 Lea, 624. It may be called a supplemental bill. Herd v. Bewley, 1 Heisk., 524; see, ante, § 43.



[&c., giving its metes and bounds,] containing about five acres, which tract said James had conveyed to said Roland by deed, retaining an express lien on its face to secure the payment of the unpaid purchase-money, amounting to about four hundred dollars. Said bill prayed for a decree for said four hundred dollars, and for a sale of said land to satisfy said lien debt. The bill was answered by said Roland, the defendant thereto; and such further proceedings were had that in December, 1861, a decree was pronounced granting the prayer of the bill, and adjudging that said Roland owed said James four hundred dollars of the said purchase-money, and ordering a sale of said tract to satisfy the decree.

## II.

Complainant further shows that said decree was never executed for the following reasons:

1st. Soon after its rendition, the war between the United States and the Confederate States broke out, and in consequence thereof the Courts were closed, and have only been recently reopened.

2d. Since said decree, all the record of the cause has been totally lost,<sup>5</sup> so that the original file, the orders on the minutes of the Court, and the decree cannot be found; and complainant is credibly informed, and verily believes, and on that information and belief avers, that they were all totally burned and destroyed during said war.

3d. The same James Doe became of unsound mind during the war, and so continued until his death intestate, which occurred in Chattanooga on June 10, of the present year. Your complainant is his only heir at law, and is also administrator, appointed and duly qualified by the County Court of Hamilton County, and entitled to all his estate, real and personal, in his two-fold character of heir and administrator.

4th. Since complainant's appointment as administrator, his intestate's papers have come into his hands, and he has discovered thereby all the facts herein alleged in reference to said suit and decree, none of which facts were known to him before.

5th. The said Roland Roe was killed early in said war, and the defendants, who are adults, are his only heirs, he leaving no widow, no personal estate whatever, and no will, and no one having ever administered on his estate. The defendants are all living on said land, and are claiming to own it under said deed to their father.

## III.

The papers and records in said cause and said decree having been thus lost and destroyed, and all of the original parties to the suit being dead, complainant is advised that it will be necessary to file this bill (1) to revive said suit, (2) to supply said lost papers and said decree, and (3) to carry said decree into execution; and therefore, the premises considered, he prays:

## IV.

1st. That those named as defendants in the caption of this bill be served with proper process and required to answer this bill, but not on oath.

2d. That said lost papers and said decree be set up and supplied, according to law and the practice of this Court.

3d. That said decree be revived in complainant's name as said administrator, and against said defendants as the heirs at law of said Roland Roe; and that, if an administrator of said Roland Roe be necessary, your honor will appoint one, more than six months having elapsed since his death, and no administrator having ever been appointed, and no person will apply or can be procured to administer his estate.

4th. That said decree of December, 1861, for said sum of four hundred dollars, and for the sale of said land, be, by decree of your Honor, set up and carried into execution, and said tract of land sold, and the proceeds of the sale applied to the satisfaction of said decree.<sup>6</sup>

5th. And that complainant have such other, further, and general relief as he may be entitled to.

BURCH COOKE, Solicitor.

[Annex affidavit: see, ante, §§ 155; 164.]

<sup>5</sup> Although the papers in a cause may be lost, in fact; nevertheless, in the eye of the law, they are not lost, and litigants are entitled to the benefits of them

as still existing, and in force. *Randall v. Payne*, 1 Tenn. Ch., 145; *Whitworth v. Thompson*, 8 Lea, 485.

<sup>6</sup> See *Chestnutt v. Frazier*, 6 Bax., 217.

## CHAPTER XXXVI.

## CROSS BILLS.

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| <p>§ 725. Cross Bills Generally Considered.</p> <p>§ 726. Relation of a Cross Bill to the Original Bill.</p> <p>§ 727. Cross Bills for Relief, When Proper.</p> <p>§ 728. Cross Bills When Not Proper.</p> <p>§ 729. What Relief Can be Obtained by a Defendant Without a Cross Bill.</p> <p>§ 730. In What Cases a Cross Bill Should be Filed.</p> <p>§ 731. Time for Filing a Cross Bill.</p> | <p>§ 732. Frame of a Cross Bill.</p> <p>§ 733. Form of a Cross Bill.</p> <p>§ 734. Answer as a Cross Bill.</p> <p>§ 735. Form of an Answer Filed as a Cross Bill.</p> <p>§ 736. Prosecution Bond, and Process on a Cross Bill.</p> <p>§ 737. Defences to a Cross Bill.</p> <p>§ 738. The Hearing on a Cross Bill.</p> |
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§ 725. **Cross Bills generally Considered.**—When a defendant cannot effectually make his defence, or assert his rights in the subject-matter of a litigation, by an answer to the bill; and especially when he needs some affirmative remedy or relief, he may file a cross bill for that purpose. A cross bill, as its name implies, is a bill brought by a defendant in a suit against the complainant in the same suit, or against the complainant and other defendants in the same suit, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts, or (2) to bring before the Court new matter in aid of the defence to the original bill, or (3) to obtain full relief for all the parties to the matters in controversy, or (4) some affirmative relief touching the matters of the original bill.<sup>1</sup> A cross bill which seeks no discovery or relief, and makes no defence, which was not equally available by way of answer to the original bill, is unnecessary, and will be dismissed, on motion, or demurrer.<sup>2</sup> A cross bill may be filed by a defendant, not only against the complainant, or against the complainant and one or more of the defendants, but it may also bring in new parties when necessary for the complete determination of the matters involved in the original suit;<sup>3</sup> but the complainant in the original suit, should be made a defendant to the cross bill in all cases.<sup>4</sup> A cross bill may bring new parties before the Court, but they do not thereby become parties to the original bill. New parties cannot, however, be made by cross bill, unless they are connected with the original matter in litigation.<sup>5</sup> The cross bill for a discovery gives a perfect reciprocity of proof to each party, derivable from the answer of each; but inasmuch as all parties to a suit are now competent witnesses, a cross bill, for a discovery only, is seldom filed, and is almost obsolete.<sup>6</sup>

§ 726. **The Relation of a Cross Bill to the Original Suit.**—It must be kept in mind that a cross bill is an auxiliary suit, a dependency of the original litiga-

<sup>1</sup> Perkins Oil Co. v. Eberhart, 23 Pick., 428, citing the above section of this book, then § 662.

<sup>2</sup> Sto. Eq. Pl., § 389; Montgomery v. Olwell, 1 Tenn. Ch., 169; Hergel v. Laitenberger, 2 Tenn. Ch., 251; Woodard v. Bird, 21 Pick., 671; Huffmaster v. Payne, 3 Shan. Cas., 119.

<sup>3</sup> Pollard v. Welford, 15 Pick., 120, citing the above section of this book, then § 662.

<sup>4</sup> 2 Dan. Ch. Pr., 1548-1549, notes; Hergel v. Laitenberger, 2 Tenn. Ch., 251. It will not be a cross bill unless it makes the complainant in the original bill a defendant. *Ibid.*

<sup>5</sup> 2 Dan. Ch. Pr., 1548, notes; Stockard v. Pinkard, 6 Hum., 121; Hildebrand v. Beasley, 7 Heisk., 121; Huffmaster v. Payne, 3 Shan. Cas., 119; Henderson v. Anderson, MS. Knoxville, 1880. In Cobb v.

Baxter, Chancellor Cooper held that new parties could not be brought in by cross bill. 1 Tenn. Ch., 405. Chancellor Cooper in 2 Tenn. Ch., 785, refers to Odum v. Odum [Owen] as sustaining Cobb v. Baxter; but in Odum v. Owen, 2 Bax., 446, it was an answer filed as a cross bill, and not an independent cross bill. It is well settled that a new party cannot be brought in by an answer filed as a cross bill. McGavock v. Morrison, 3 Tenn. Ch., 355; Hall v. Fowlkes, 9 Heisk., 754; *post*, § 734.

<sup>6</sup> When, however, a defendant needs the evidence of the complainant as to some single point, or as to a very few points, it may be a good policy to obtain a discovery from him by cross bill, rather than to examine him as a witness, and thereby incur the risks incident to his own self cross-examination.

tion, and can be sustained only on matter growing out of the original bill.<sup>7</sup> It is for this reason a cross bill must be heard with the original bill. If a cross bill be set for hearing, the legal effect thereof is to set the original bill for hearing, also; for the cross bill incorporates itself with the original bill, and the two bills really constitute one cause.<sup>8</sup> And even when the decree on a cross bill alone has been appealed from, so wedded are the two bills that the appeal takes them both up; and, in the Supreme Court, the whole case on both bills is open for re-adjudication; so much so, that there the decree on the original bill, though not appealed from, may be reversed.<sup>9</sup>

The dismissal of the original bill by the complainant ordinarily carries the cross bill with it, or the answer when filed as a cross bill;<sup>10</sup> but when either the cross bill, or the answer filed as cross bill, sets up grounds for affirmative relief on which proof has been taken, the dismissal of the original bill by the complainant does not carry with it the cross bill, or answer filed as a cross bill; but leaves such cross bills in Court for prosecution to final decree.<sup>11</sup>

New and incongruous matter cannot be introduced into the litigation by means of a cross bill, except as a basis for an equitable set-off. Thus, on a bill to wind up a partnership, the defendant cannot by cross bill be allowed to have an account as to a prior and different partnership,<sup>12</sup> unless he seeks, on sufficient grounds, to set off one against the other.

**§ 727. Cross Bills for Relief, When Proper.**—A cross bill for relief may be filed whenever any question arises between the defendant and the complainant, or between two defendants to a bill, that cannot be determined completely without a cross bill, or cross bills, to bring every matter in dispute completely before the Courts to be litigated by the proper parties, and upon the proper proofs. In such a case, it becomes necessary for some one or more of the defendants to the original bill to file a cross bill against the complainant and one or more of the other defendants to that bill, and thus bring the litigated points fully before the Court.<sup>13</sup> When a cross bill seeks affirmative relief, it partakes of the nature of an original bill, and consequently the relief sought must be such as the Court has jurisdiction to grant.<sup>14</sup>

As this species of bill is a mode of defence, a defendant is sometimes of necessity obliged to resort to it in cases where, by the rules of pleading in Equity, he would not be able to avail himself of the matter of his defence in any other way. Thus, if the matter of defence arises after the cause is at issue, as if the complainant has given the defendant a release, or if there has been a payment, or an award, or a recovery in another suit for the same cause of action, or if any other thing has happened, since answer was filed, to terminate the complainant's right of recovery, or to make it inequitable for him further to prosecute his suit in whole or in part, the defendant must set these matters up by a cross bill. In such cases a cross bill is somewhat in the nature of a plea since the last continuance, at common law.<sup>15</sup>

A cross bill being generally considered as a defence to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation, the complainant in the cross bill, is not, at least, as against the complainant in the original bill, obliged to show any ground of Equity to support the jurisdiction of the Court. It is treated in short as a mere auxiliary suit, or as a dependency upon the original suit.<sup>16</sup>

**§ 728. Cross Bills, When Not Proper.**—A cross bill is proper only when it is related to the subject-matter of the original suit; and its principal, if not ex-

<sup>7</sup> 2 Dan. Ch. Pr., 1548, note; Hergel v. Laitenberg, 2 Tenn. Ch., 251; Sto. Eq. Pl., § 399; Beal v. Smithpeter, 6 Bax., 356.

<sup>8</sup> Hergel v. Laitenberg, 2 Tenn. Ch., 251; Cocke v. Trotter, 10 Yerg., 213.

<sup>9</sup> Woodrum v. Kirkpatrick, 2 Swan, 218. See, also, Napier v. Elam, 6 Yerg., 108; Randall v. Payne, 1 Tenn. Ch., 148.

<sup>10</sup> *Res accessaria sequitur rem principalem.*

<sup>11</sup> Partee v. Goldberg, 17 Pick., 664; Sto. Eq. Pl., § 399, note.

<sup>12</sup> Carey v. Williams, 1 Lea, 53.

<sup>13</sup> Sto. Eq. Pl., § 392; Perkins Oil Co. v. Eberhart, 23 Pick., 428, citing the above section of this book, then § 664.

<sup>14</sup> Sto. Eq. Pl., § 398.

<sup>15</sup> Sto. Eq. Pl., § 393; 2 Dan. Ch. Pr., 1550.

<sup>16</sup> Sto. Eq. Pl., § 399; Mitf. Eq. Pl., 82.

clusive, offices are: 1, to bring before the Court, more fully than can be done by an answer, some defence to the bill in connection with its subject-matter; or 2, to obtain some affirmative relief arising out of the matters set forth in the bill, and which could not be had on answer only; or 3, to obtain a discovery in aid of the defence to the original bill.<sup>17</sup> In any event, a cross bill must be confined to the matters referred to in the bill, or to matters equitably connected therewith.<sup>18</sup> Hence, a cross bill cannot inject a new cause of action into the suit, cannot bring forward matters not referred to in the original bill and not equitably connected therewith, nor set up matters wholly without the scope of the original bill. All such new, independent and distinct matters involve a new, independent and distinct suit, and must be set up in an original bill.<sup>19</sup>

A cross bill setting up matter wholly original is misnamed a cross bill, and is in substance and in fact an original bill, and may be stricken from the files on motion, as not belonging to the suit in which it is filed, or may be demurred to because the matter it brings forward is not connected with the matter contained in the original bill, but is wholly foreign thereto.<sup>20</sup> If, however, such a bill is answered, it is the duty of the Chancellor, on his own motion, to order such so-called cross bill to stand as an original bill, and to be docketed as such, and to be proceeded with as an original bill; in which case a cross bill may be filed to it, if desired.

Inasmuch as the Chancery Court has now full jurisdiction of all matters of purely legal cognizance, except certain suits for unliquidated damages, and inasmuch as the Code authorizes the uniting in one bill of several matters of Equity, distinct and unconnected, against one defendant,<sup>21</sup> it would be no breach of the spirit of our legislation, and of our liberal Chancery practice, to allow in a suit by one complainant against one defendant a cross bill (1) to set up a legal as well as an equitable matter connected with the matters in question, or (2) to set up a cause of action, equitable or legal, that is distinct and unconnected with the matters in question<sup>22</sup> by way of set off, as in the Circuit Court.<sup>23</sup>

### § 729. What Relief can be Obtained by a Defendant Without a Cross Bill.

The general rule of Chancery pleading is that a defendant cannot obtain any affirmative relief either against a co-defendant, or against the complainant, as to the subject-matter of the suit, without a cross bill;<sup>24</sup> but in Tennessee, the practice is to render such a decree, upon the pleadings and proof, as will settle all the rights of either complainants or defendants in and to the subject-matter of the suit, as against each other, and as will, also, settle the rights of the defendants, as between themselves, in and to the subject-matter of the litigation. Our Courts so mold their decrees as to make a final and complete disposition of the entire subject-matter, determining the rights of all the parties in reference thereto, regardless of their attitude as complainants or defendants upon

<sup>17</sup> Sto. Eq. Pl., §§ 389-392; *Montgomery v. Olwell*, 1 Tenn. Ch., 169; *Hergel v. Laitenberg*, 2 Tenn. Ch., 254; *Beal v. Smithpeter*, 6 Bax., 358.

<sup>18</sup> Sto. Eq. Pl., § 401; *Campbell v. Foster*, 2 Tenn. Ch. 402; *Macey v. Childress*, 2 Tenn. Ch. 441. The rule stated in the text is not always rigorously adhered to, and our Courts sometimes evince a disposition to relax it. See *Lewis v. Glass*, 8 Pick., 147.

<sup>19</sup> *Carey v. Williams*, 1 Lea, 53; *Cohen v. Woolard*, 2 Tenn. Ch. 686; *Dan. Ch. Pr.*, 1743. If new, original and distinct matters could be brought forward by cross bill, the defendant to such a cross bill would himself have the right to file a cross bill against such a cross bill, and so *ad infinitum!*

When a cross bill is in substance, an original bill, any defence may be made to it which could have been made to it if filed as an original bill, including a plea in abatement, or a demurrer, to the jurisdiction when the cross defendant is not suable in the county where the cross bill is filed; and all this is true of an answer filed as a cross bill. *Chattanooga Pole Co. v. Young*, Knoxville, 1904. Such a cross bill is, also, demurrable because not properly a cross bill. See, *post*, § 737.

<sup>20</sup> *Campbell v. Foster*, 2 Tenn. Ch., 402; *Hergel v. Laitenberg*, 2 Tenn. Ch., 251. But, ordinarily, if the parties do not complain of such an irregularity, the Chancellor will not. *Ibid.*

<sup>21</sup> Code, § 4327.

<sup>22</sup> See, *Lewis v. Glass*, 8 Pick., 147, where it is said that matters for relief not referred to in the original bill, and not within its scope, may be set up in a cross bill.

<sup>23</sup> Code, §§ 2918-2922. There is as much reason to apply these sections of the Code to Chancery procedure as there is to apply sections 2902 (as to grounds for pleas in abatement), and section 2934, (abolishing general demurrers); and three sections are in the same chapter, and the first section of this chapter confines them to "legal proceedings," Code, § 2880; but the Courts hold that they apply to proceedings in Chancery. However, in *Cooper & Stockell v. Stockard*, 16 Lea, 140, it is said that this chapter of the Code applies *exclusively* to actions at law; and such seems to have been the purpose of the codifiers.

<sup>24</sup> 2 Dan. Ch. Pr., 1550.

the record.<sup>25</sup> But a defendant can have no relief on an answer setting up matters for relief not referred to in the original bill, and not within its scope.<sup>26</sup>

But no adjudication will, ordinarily, be made which will result in a recovery in behalf of a defendant, especially a recovery requiring process for its enforcement, unless such defendant has concurrent rights with the complainants, but, because of disability, or non-residence, or some other sufficient cause, he is made a defendant to the bill, and his rights therein set out, and affirmative relief prayed in his behalf, as (1) in suits for partition, or sale for partition; or (2) suits by wards against their guardians; or (3) suits by some of the owners of a common fund; or (4) suits by some creditors or other persons in behalf of themselves and all others having concurrent rights; or (5) suits to sell the lands of a decedent to pay debts; or (6) suits to wind up an insolvent estate, or an insolvent partnership, or an insolvent corporation; or (7) suits to enforce a trust for the benefit of creditors, or others, and the like. But a cross bill is not necessary to obtain the benefit of credits, or other matters of discharge, or of an adjudication sustaining the defendant's title when assailed, or of a decree for balance due defendant on a bill for an account.<sup>27</sup>

In all doubtful cases, however, a cross bill, or an answer filed as a cross bill, is the safer practice; and is indispensable when a defendant seeks (1) a recovery of land, chattels, or money;<sup>28</sup> or (2) a rescission, or reformation, of a contract, or deed; or (3) a specific performance, when the bill is for a rescission; or (4) an injunction; or (5) an equitable set-off;<sup>29</sup> or (6) a writ of possession.

§ 730. **In What Cases a Cross Bill should be Filed.**—It may be stated that, as a rule, a cross bill works no injury to the party filing it; and, if he fails to obtain the benefits anticipated therefrom, he is seldom, if ever, left in any worse position as a result of filing the cross bill. For this reason, a cross bill is often filed when there is good reason to believe that the relief sought thereby could be obtained under the bill and answer, the Solicitor of the defendant deeming a cross bill a prudent precaution.<sup>30</sup>

Cross bills should be filed in the following cases:

1. When the complainant impeaches a mortgage, trust deed, or express lien on land; and the defendant is able to defeat the bill, and desires, in the same suit, to enforce the mortgage, trust deed, or other lien, by an affirmative decree.<sup>31</sup>

2. When the bill attacks the defendant's deed, and seeks to have it declared a cloud on complainant's title; and the defendant, on the other hand, seeks to have his said deed declared the better title, and to be put in possession of the land, or to have his possession and title quieted by injunction, or to have a recovery for taxes paid, or betterments made, on the land,<sup>32</sup> or other affirmative decree.

3. When the object of the bill is to have notes, or other written instruments, declared void, and delivered up to be cancelled; and the defendant not only can show that the note, or other instrument, is legal, but, also, desires to enforce it by an affirmative decree in the same suit.

<sup>25</sup> Henshaw v. Wells, 9 Him., 568; Ingram v. Smith, 1 Head, 411; Elrod v. Lancaster, 2 Head, 571; Gentry v. Gentry, 1 Sneed, 87; Allen v. Baugus, 1 Swan, 404; LaGrange v. R. R. v. Rainey, 7 Cold., 457; 2 Dan. Ch. Pr., 1370, note; Sto. Eq. Pl., § 392, note; Code, §§ 2970-2974; Davis v. Reaves, 7 Lea, 585.

<sup>26</sup> Lewis v. Glass, 8 Pick., 147, citing the above section of this book, then § 665.

<sup>27</sup> 2 Dan. Ch. Pr., 1550-1551, notes; Allen v. Allen, 11 Heisk., 387; Polk v. Mitchell, 1 Pick., 634; Fisher v. Stowell, 1 Pick., 316; LaGrange and M. R. R. v. Rainey, 7 Cold., 420.

<sup>28</sup> Bussey v. Gaut, 10 Ham., 238.

<sup>29</sup> Elsey v. Stamps, 10 Lea, 709; Mrzena v. Bruckler, 3 Tenn. Ch., 161.

<sup>30</sup> This precaution is often deemed advisable on the ground that parties should not experiment with the Court, and should not unnecessarily hazard their

interests. The Chancellor is often embarrassed by doubts as to his right, or power, to grant the defendant relief on the original pleadings; and, in consequence of these misgivings, sometimes concedes a scant relief to a defendant, to whom a larger measure of relief would have been cheerfully granted, had he filed a cross bill, putting all the facts in issue, and praying such larger relief. Equity delights to do complete justice, and not by halves. See, *ante*, § 38. And for this reason favors cross bills.

<sup>31</sup> Where a bill seeks to enforce a mortgage, the defence that the mortgage was obtained by fraud may be made by answer; in such a case a cross bill is not necessary. The answer must, however, specify the defence. Gentry v. Fagan, 1 Pick., 491. See, Griffith v. Security Association, 16 Pick., 410; and, *ante*, § 358.

<sup>32</sup> Strother v. Reilley, 21 Pick., 48.

4. Where, in an ejectment suit, the defendant will be able to show that he is a tenant in common with complainants, and is entitled to, and desires to have, pay for his improvements, and to have the land partitioned, or sold for partition, in the same suit.

5. Where the bill is filed to sell the land of a decedent to pay his debts, and the widow, or the heirs, claim any title to, or interest in, the land, and desire to have that title, or interest, affirmatively declared and enforced, in the same proceeding.

6. Where, on a bill for the general distribution of an estate; or, on a bill to wind up a partnership; or, on a bill for a general accounting,<sup>33</sup> the defendant has claims against the complainant, or one defendant has claims against the fund sought to be distributed, proper for an independent bill, he may bring the claim forward by cross bill, either as a means of obtaining a set-off, or as a means of collecting his debt.<sup>34</sup>

7. Where the complainant seeks to enforce a vendor's lien, the defendant should file a cross bill, if he seeks to obtain relief because of failure of the complainant's title, in whole or in part; or, because of breach of any of the complainant's covenants; or, because of any fraud, especially if he wishes to recover back any of the purchase price already paid.

8. Where the matters in controversy cannot be so settled as to do full justice to the, or a, defendant without bringing other parties before the Court, a cross bill is necessary for that purpose.

9. Where, on a bill to wind up an insolvent estate, or an insolvent partnership; or, on a bill to distribute a fund among creditors, or others, a defendant has any lien on the fund, or superior Equity thereto, it is always prudent to assert his priorities by a cross bill.

10. Where a specific performance of a contract is sought by a bill, the defendant, if he seeks a rescission, or seeks to have the balance of the purchase-price paid him, or seeks to recover back what he has already paid on the contract, should file a cross bill for that purpose.

11. Where, since the defendant's answer was filed, a new defence has arisen, as where a release has been obtained, or payment has been made, or there have been an accord and satisfaction, or a reference to arbitrators, or an award, or the title of the complainant has been ended by his death, or bankruptcy, or where in any other way the complainant's cause of action has ceased to exist, in whole, or in part, since the answer was filed, the defendant must file a cross bill in order to set up these new defences.<sup>35</sup>

12. Where the bill seeks a recovery on a deed, note, or other written instrument, executed by the defendant, and the defendant seeks not only to defeat any recovery thereon because of failure of consideration, fraud, duress, drunkenness, infancy, coverture, or because the consideration was illegal or against public policy, or because of any other defence vitiating such deed, note or other instrument, but seeks, also, to have such deed, note or other instrument delivered up and cancelled, and, if a deed, declared a cloud on his title, he must file a cross bill.

And it may be stated, generally, that a cross bill must be filed whenever the, or a, defendant needs (1) to bring a new party before the Court; or (2), desires to obtain the benefit of new facts, or new defences, which have come into being since the suit was commenced; or (3), needs some affirmative relief against the complainant, or a co-defendant,<sup>36</sup> and especially, (4), if such affirmative relief consists in the allowance of a set-off, or in the recovery of money or property, or the enforcement of a right by injunction, execution, sale, or writ of posses-

<sup>33</sup> But, where, on a bill for an account, a balance is found to be due the defendant, he is entitled to a decree for such balance, without filing a cross bill. See, *Decrees, ante*; see, also, *Allen v. Allen*, 11 Heisk., 387; *Fisher v. Stovall*, 1 Pick., 316.

<sup>34</sup> A cross bill is necessary when a defendant surety seeks a contribution against his co-sureties, even

on a bill filed for contribution by a surety. *Gross v. Davis*, 3 Pick., 226.

<sup>35</sup> This sort of cross bill is in the nature of a plea *puis darrein continuance* at common law. 2 Dan. Ch. Pr., 1550, note. See, *ante*, § 524, note.

<sup>36</sup> *Lewis v. Glass*, 8 Pick., 147, citing the above section of this book, then § 666.



containing one hundred acres, more or less, and praying (1) that he might be relieved from said purchase, because of alleged fraudulent misrepresentations relative to the number of acres, and the title to said land; and (2) that the two purchase-money notes, given by him to complainant, might be delivered up, and cancelled; and (3) that the whole trade might be rescinded; and (4) for general relief. This bill your complainant has this day answered fully, meeting and denying all the equities set up in said original bill. Reference is made to said bill and answer for their contents in full.

## II.

Complainant further shows unto your Honor that said two notes are for five hundred dollars each, both dated June 1, 1886, and one of them due one year, and the other two years, after date, each drawing interest from date; and, to secure their payment, an express lien was retained on said land, in the face of the deed executed and delivered to the defendant for said land. Said deed is on file in said cause, and is referred to for a fuller description of its contents; said two notes are herewith filed, marked "Exhibit A," and "Exhibit B," and are made a part of the bill, and they, along with said deed, will be read at the hearing as evidence.

## III.

Complainant further states that said notes are overdue, and are wholly unpaid; and that, since the defendant filed his said bill, he has begun to cut the valuable timber on said land, and convert said timber into railroad ties. Said timber is absolutely necessary to said land for fencing, building, firewood, and other farm purposes, and its destruction is waste, and will cause irreparable injury to said land, and greatly impair its value. The defendant is insolvent, and said land will be inadequate security if much of its timber is cut off.

## IV.

The premises considered, complainant prays:

1st. That proper process issue to compel the defendant, Richard Fen, to answer this bill; but his oath to his answer is waived.

2d. That a writ of injunction be directed by your Honor to issue, to restrain the defendant from cutting any more of said timber for any other than strictly farm purposes.

3d. That complainant have a decree for the amount due on said two notes, and that said amount be declared a lien on said land, and that said land be sold in satisfaction of said lien on a credit of six months, and in bar of all equity of redemption.

4th. That complainant have such further and other relief as he may be entitled to.

This is the first application for an injunction in this case.

EMERSON ETHERIDGE, Solicitor.

[*Annex affidavit, as in §§ 161-164, ante.*]

§ 734. **An Answer as a Cross Bill.**—One of the improvements made in Chancery pleadings by our Code, is the right it gives a defendant to convert his answer into a cross bill. The provisions of the statute are as follows:

The defendant may, by proper allegations, file his answer as a cross bill, and require a discovery from the complainant; in which case a demurrer or pleas may be filed, or other proceedings had upon the answer as upon a cross bill. And the Court shall act upon all the matters properly involved in the pleadings; and give such relief, either for the plaintiff or defendant, as the nature of the case may require to do complete justice.<sup>44</sup> If the defendant file an answer by way of cross bill, he may waive the oath of the complainant to his answer thereto.<sup>45</sup>

An answer filed as a cross bill under these provisions is not confined to a discovery, but may well be based on any proper matters of Equity growing out of the original bill, or connected therewith, entitling the defendant to affirmative relief on a cross bill separately filed.<sup>46</sup>

When it is considered that the public welfare is promoted by making a speedy end to litigation, that a multiplicity of suits should always be prevented when possible, and that Equity delights to do complete justice and not by halves, it is manifest that the policy of the statute allowing an answer to be filed as a cross bill should be favored and furthered by the Courts.<sup>47</sup> It has accordingly been held that, where the parties, improperly made defendants to an answer filed as a cross bill, do not object to being thus brought before the Court, before

<sup>44</sup> Code, §§ 4323-4324.

<sup>45</sup> Code, § 4409.

<sup>46</sup> *Odum v. Owens*, 2 Bax., 446; *Hall v. Fowlkes*, 9 Heisk., 753.

<sup>47</sup> The Code, in defining an answer, says that it should contain "a prayer for dismissal or counter-

relief, according to the nature of the case." Code, § 4315. This language would seem to imply that a defendant might get "counter-relief" by praying for it without a cross bill. See, on this point, *ante*, § 373.



filing their answer, it is too late for them to object afterwards; and the Court will adjudicate all the matters involved in the cross bill and the answer thereto. Where parties waive objection to the jurisdiction in such cases, it is the duty of the Court to hear the cause upon its merits.<sup>48</sup>

Any matter that would be a proper matter for a separate cross bill at the time the answer is filed, may be incorporated in the answer, and on such incorporation any relief may be prayed that could, on the facts, be obtained by means of a separate cross bill. An answer thus drawn may be filed as a cross bill, and in addition to its office as an answer to the bill, will have all the rights incident to a separate cross bill, except the right to bring new parties before the Court.<sup>49</sup> And having all the rights of a separate cross bill it is, also, subject to all the duties of such a cross bill, and a prosecution bond must be given, and process, and copy of the cross bill, must issue to bring those made defendants before the Court, in their new character as defendants to the cross bill.

When an answer is filed as a cross bill it cannot bring any new party, or new matter, before the Court; it must be confined to the matters set up in the original bill, and matters incident thereto; it can be filed as a cross bill against the complainant only;<sup>50</sup> or, at most, against some other party to the suit.<sup>51</sup> But, if no objection is taken to an answer filed as a cross bill against new parties, and the defendants to such cross bill submit to answer, it is too late to object to the irregularity at the hearing; and, in such a case, the Court will decree on the merits.<sup>52</sup>

Under our practice, an answer filed as a cross bill is not strictly a defensive pleading. On such an answer, the original bill may be dismissed, and affirmative relief granted on the prayers of the cross bill: such relief, however, should relate to the subject-matter of the original litigation. Thus, on a bill filed to set aside a deed, or to enforce a mortgage, or to have a note cancelled, or to reform a contract, the defendant may, on answer filed as a cross bill, (1) have said deed declared valid, and his lien for purchase-money enforced; or (2) have said mortgage declared void, and removed as a cloud on his title; or (3) have said note declared binding, and a recovery decreed him thereon; or (4) have said contract declared correct, and have it enforced.

§ 735. **Form of an Answer Filed as a Cross Bill.**—When a defendant intends to file his answer as a cross bill, he must first answer the bill fully. In this answer he may, however, weave the facts on which the prayers of his cross bill will be based; or he may reserve such facts until he has answered, and then allege them. The following general form will indicate how an answer and cross bill are joined.<sup>53</sup>

**ANSWER FILED AS A CROSS BILL.**

John Doe,  
vs. }  
Richard Roe, et al. } In the Chancery Court, at Knoxville.

The answer and cross-bill of Richard Roe to the bill filed against him and others, in the above entitled cause.

This defendant, for answer to said bill, says:

I.

That he admits that [*here insert such matters, if any, in the preliminary statements of the bill, as the defendant admits.*] But the allegation that [*here insert what is denied*] is denied, and the complainant is required to prove it, this defendant having no knowledge, information, or belief relative thereto.

II.

Further answering, the defendant says [*here give his answer to other allegations, his explanations, and his history of the controversy.*]

<sup>48</sup> Campbell v. Foster, 2 Tenn. Ch., 409; Burem v. Foster, 6 Heisk., 338; Odam v. Owens, 2 Bax., 446; Hall v. Fowlkes, 7 Heisk., 753.  
<sup>49</sup> See, ante, §§ 405; 732-733.  
<sup>50</sup> Hall v. Fowlkes, 9 Heisk., 754; Morrow v. Morrow, 2 Tenn. Ch., 554; Hergel v. Laitenberger, 2 Tenn. Ch., 251; McGavock v. Morrison, 3 Tenn.

Ch., 355; Huffmaster v. Payne, 3 Shan. Cas., 119.

<sup>51</sup> Masson v. Anderson, 3 Bax., 300.

<sup>52</sup> Odam v. Owen, 2 Bax., 446; Hall v. Fowlkes, 9 Heisk., 745. See Article on WAIVER, ante, § 71.

<sup>53</sup> For a fuller form of an answer filed as a cross bill, see Joinder of Defences, ante, § 405.

## III.

And now having fully answered the said bill, and being advised that, on the facts by him hereinbefore alleged, he is entitled to relief, he assumes the character of cross-complainant, and prays:

1st. That this answer may be filed, deemed and treated as a cross-bill, and that a subpoena and copy hereof be served on the complainant to the original bill, John Doe, to compel him to answer this cross-bill, but his oath to his answer is waived.

2d. That [*here insert the special relief the complainant in the cross-bill deems himself entitled to.*]

3d. That he may have such further and other relief as he may be entitled to at the hearing.

L. A. GRATZ, Solicitor.

If any extraordinary process is sought, the answer and cross bill must be sworn to, even when the oath to the answer has been waived by the complainant in the original bill. If the defendant does not wish to swear to his answer, he must file a separate cross bill.

§ 736. **Prosecution Bond and Process, on a Cross Bill.**—On the filing of a cross bill, or of an answer as a cross bill, before any process can issue a prosecution bond, or pauper oath in lieu, should be filed;<sup>54</sup> and in case of an answer filed as a cross bill the Clerk and Master and the complainant in the original bill may ignore it as a cross bill until a prosecution bond is given, or a pauper oath filed.<sup>55</sup> An answer filed as a cross bill should, like a cross bill, pray for an answer as well as for proper relief.

§ 737. **The Defences to a Cross Bill.**—Every defence may be made to a cross bill that can be made to an original bill, except objections to the local or personal jurisdiction of the Court; and even these objections may be made by plea in abatement, or demurrer, if the cross bill brings forward new matters to which, if in an original bill, such objections would lie.<sup>55a</sup> The defendant to the cross bill may: 1, Move to dismiss the cross bill because (1) it is unnecessary, the same defences being admissible, or the same relief obtainable, by means of an answer; or (2) because no prosecution bond was given; or (3) because of the want of some other prerequisite to the issuance of the subpoena to answer; or (4) because of manifest want of Equity on its face; or 2, The defendant may demur to the cross bill; or 3, He may plead in bar any single matter that would be a defence; or 4, He may answer the cross bill. But he is not required to answer it until his own bill has been answered.

But the ordinary defences to a cross bill are made by a motion to dismiss, by demurrer, or by answer. As a rule, all the grounds of demurrer to an original bill are equally applicable to a cross bill. When a cross bill is proper, has already been fully considered,<sup>56</sup> but it may be generally stated that a cross bill has only two offices: 1, It is a means of making a more effectual defence than can be made by an answer; and 2, It is a means of obtaining some affirmative relief connected with the subject-matter of the original suit not obtainable by means of an answer. Hence, it follows that a cross bill cannot bring before the Court any matters distinct from, and independent of, the matters sought to be litigated in the original suit. No matter is proper for a cross bill that would make the original bill multifarious, if incorporated in the latter, and this may be deemed a test of the propriety of the matter in a cross bill.

If cross bills were not thus confined to the matters in litigation in the original suit, the new matters brought forward by the cross bill might be so distinct as to constitute really a new original suit, on a new, original, and independent cause of action, in which case a second cross bill might lie to the first cross bill, and thus cross suits be multiplied without end. If, therefore, a cross bill should be filed containing matters distinct and independent from those contained in the original bill, it would be open to demurrer for this cause.<sup>57</sup> If,

<sup>54</sup> *Curd v. Davis*, 1 Heisk., 575; *Harrell v. Harrell*, 4 Cold., 377.

<sup>55</sup> *Ibid.* But where an answer filed as a cross bill without prosecution bond, or pauper oath is answered, it is too late to require a bond at the hearing. No cost bond is required of a defendant, in the Cir-

cuit Court when he pleads a set off. See *Hall v. Fowlkes*, 9 Heisk., 754.

<sup>55a</sup> See, *ante*, § 728, note 19.

<sup>56</sup> See, *ante*, §§ 727-730.

<sup>57</sup> *Sto. Eq. Pl.*, § 631. See, *ante*, § 728.

however, such a multifarious cross bill should be answered and regularly heard on the proof, the Court would probably decree as to the distinct and independent matters, treating the cross bill *pro tanto* as in the nature of an original bill.

§ 738. **The Hearing on a Cross Bill.**—A cross bill is usually heard along with the original bill, and as a part of the original cause. The two bills and their respective answers and proofs are deemed one record, and, ordinarily, one and the same decree closes the litigation raised by both the original and the cross bill.<sup>58</sup> At the hearing, the cross bill may be dismissed and relief granted on the original bill, or the original bill may be dismissed and relief granted on the cross bill, or relief may be granted on each bill, or both bills may be dismissed.

At the hearing, the original bill and the answer thereto are generally first read, then the cross bill and its answer; then the original complainant reads his proof in chief; the complainant in the cross bill next reads his proof as to all the issues raised by both bills and answers, including his rebutting proof, and the original complainant concludes the reading of the evidence by putting in any he may have in rebuttal. The Solicitor for the original bill, ordinarily, has the right to open and close the argument as well as the evidence; but, if the cross bill confesses and avoids the issues raised by the original bill, or otherwise shifts the burden of proof, the Solicitor for the cross bill would have the right to open and close both the evidence and the argument.<sup>59</sup>

<sup>58</sup> *Cocke v. Trotter*, 10 Verg., 213. In *Carroll v. Taylor*, 18 Pick., 451, it is said that where a cross bill sets up equities which do not affect the equities of the original bill, and the original bill is not ready to be disposed of, the cross bill may be heard on its

own equities, and a final decree pronounced thereon. But such a cross bill would seem to be, in reality, an original bill under a misnomer.

<sup>59</sup> See, *ante*, § 534, note 20.

## PART VII.

## INTERLOCUTORY APPLICATIONS IN SUITS IN CHANCERY, AND PROCEEDINGS THEREON.

## CHAPTER XXXVII.

## MOTIONS IN COURT, AND PROCEEDINGS THEREON.

- ARTICLE I. Motions Generally Considered.  
 ARTICLE II. Motions by the Complainant.  
 ARTICLE III. Motions by the Defendant.  
 ARTICLE IV. Motions Common to Both Parties.  
 ARTICLE V. Motions by Strangers and *Quasi* Parties.  
 ARTICLE VI. Motions about Paying Money into, or out of, Court.

## ARTICLE I.

MOTIONS GENERALLY CONSIDERED.<sup>1</sup>

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| <p>§ 739. Motions and Petitions Defined and Distinguished.<br/>         § 740. The Main Divisions of Motions.<br/>         § 741. The General Law of Motions.</p> | <p>§ 742. Practical Suggestions Concerning Motions.<br/>         § 743. How Motions are Heard.</p> |
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§ 739. **Motions and Petitions Defined and Distinguished.**—A motion is an *oral* application to the Court, the Chancellor, or the Master, for some order in relation to the suit in which the application is made; and a petition is a *written* application addressed to the Court, or Chancellor, for some order in relation to the suit in which the petition is prayed to be filed. When the application is by a party to the suit, and is based on matters apparent of record, it is usually made by motion; when the matters do not sufficiently appear of record, the motion in reference thereto must be supported by an affidavit of the necessary facts not of record; and when there must be brought before the Court, not only new facts, but also new collateral issues, the application is generally by petition.<sup>2</sup> When a stranger seeks to make an application to the Court, he should always do so by petition; but a party, or a *quasi* party, may, as a rule, present any matter orally, accompanied, when necessary, by affidavits. A stranger cannot make a motion before the Master, or present him a petition; he can only be heard by the Chancellor in open Court. If, however, a stranger's case is urgent, and his equities sufficient, he may file an original bill in the nature of a cross bill,<sup>3</sup> and in this way get a hearing before the Chancellor, at Chambers; and the Chancellor may, in a proper case, allow such a bill to be filed as a petition in

<sup>1</sup> Motions have been already largely considered. See, *ante*, §§ 214-219; 233-239; 514-525. The student is referred to these sections, and to the Index.

<sup>2</sup> 2 Dan. Ch. Pr., 1587.

<sup>3</sup> *Stretch v. Stretch*, 2 Tenn. Ch., 140. Where a third person claims under, or in privity with, a litigant, the proper mode of bringing his interest before the Court is, by an original bill in the nature of a supplemental bill: it cannot, ordinarily, be done by petition. Where there is no privity, a person in-

terested in the subject-matter or objects of the suit, should bring forward his claim by an original bill, in the nature of a supplemental bill, or in the nature of a cross bill, as the case may be. *Comfort v. McTeer*, 7 Lea, 661. See, *ante*, § 690. But see *Banks v. Banks*, 2 Cold., 548, where, however, no objection seems to have been made by the complainant. See, Code, § 2799.

the original cause. As a general rule, however, no such practice is known in Equity as allowing a stranger to become a defendant to a pending suit, on his own application, over the objection of the complainant, especially where he sets up a right not noticed in the bill, for this would be to try rights without any issue joined.<sup>4</sup>

§ 740. **The Main Divisions of Motions.**—Motions are divided into (1) motions of course, and (2) special motions.

1. **Motions of Course**, in our practice, are motions, whether made in Court, at Chambers, or at rules, the opposite party would have no right to resist, without, at least, supporting affidavits. Indeed, a motion of course is one which may properly be made without notice to the other party, and without his having the right to be present when it is made, because there is no discretion to refuse it, when properly made. Motions of course include motions for (1) orders for publication, (2) for appointment of guardians *ad litem*, (3) for a judgment *pro confesso*, (4) for a *scire facias* to revive, (5) for a revivor, when no defence is made, (6) for a vacation of a *pro confesso*, and leave to file an answer, before final decree, in case of defendants not served with subpoena, (7) for amendment of bills, before argument of demurrer, (8) for amendment, or perfection, of prosecution bonds, (9) for an order specifying which of several parties notice to take proof shall be served on, (10) for an attachment to compel an answer, (11) for a judicial attachment, (12) for the appointment of an administrator, on a bill filed for that purpose, (13) for the abatement of a suit after lapse of two terms since proof of complainant's death, and (14) for an order of sale when land has been levied on, and not sold.

2. **Special Motions** are those which the Chancellor may, in the exercise of his discretion, either grant or refuse;<sup>5</sup> and on which the opposite side would have the right to be heard. Whenever the Chancellor is bound to exercise his discretion, he is bound to hear the other side, if it demand a hearing; and he is generally bound not to exercise that discretion, until he has given the other side a chance to be heard. Special motions are generally allowed, or disallowed, upon consideration of the record, or of an affidavit, or of a petition, and after argument heard thereon. All motions, not of course, are special.

§ 741. **The General Law of Motions.**—It may be stated as a general law of motions, founded on essential justice, that (1) the more rigorous the motion, or (2) the more damaging its effects upon the opposite party, or (3) the more it prevents a hearing of the opposite party on the merits, or (4) the more it closes the door against the right to plead, or (5) to make proof, or (6) the more technical, or arbitrary, it is in nature, operation, or effect, the more strict the Court should be in not allowing it, unless the party making it shows clearly that he has fully, and in good faith, complied with every preliminary or prerequisite to such motion, that he is clearly entitled to it, and the other party clearly liable to be so moved against.

On the other hand, motions that do not shut the door against a party's right to plead, or make proof; motions that can readily be relieved against, if erroneous, or unduly oppressive; motions promotive of a right founded in substantial justice; motions for the protection of the rights of parties under disability; motions looking to the speeding of a hearing on the merits; and motions, ordinarily denominated motions of course, will be readily allowed, no objections appearing on their face, or *abunde*.

§ 742. **Practical Suggestions Concerning Motions.**—It is of great importance to know what motion to make in reference to a particular matter; and where doubt exists either as to the kind of motion, or as to whether the motion can be supported by the record, you should thoroughly investigate these matters in advance; and not needlessly consume the time of the Court by bringing up

<sup>4</sup> *Stretch v. Stretch*; *Comfort v. McTeer*, cited | <sup>5</sup> 2 Dan. Ch. Pr., 1592.  
above.

the matter before you are fully prepared to inform the Court as to all matters connected with your motion.

Having mastered the facts and law applicable to your motion, you should next reduce your motion to writing, and prepare a brief to support it, if it is likely to be antagonized. Any motion worth the making is worth entering on the minutes. Besides, both the Court and the opposite party have a right to know exactly what your motion is, and a motion in parol is liable to be misunderstood, misconstrued, or misremembered; and it should, therefore, be committed to writing before it is presented to the Court.

If the record does not adequately present the facts on which your motion is to be based, prepare your petition, or affidavit, or obtain the other necessary evidence, before you make the motion. Why waste the time of the Court, and why advertise your own want of knowledge or diligence, by making a motion the record will not sustain?

After your motion has been made, see that it is entered on the minutes; and, after the Court has ruled on your motion, have the action of the Court entered of record, also. If you have supported your motion by affidavits, or other extraneous matter not of record, incorporate them in a way-side bill of exceptions, if the Court rules against you, and you deem your motion of sufficient importance to perpetuate the facts on which it was based.

Nothing so admirably displays an accomplished Solicitor as the appropriateness of his motions, the precision of their frame, the production of the necessary authorities to support them, and the ready marshaling of the facts in the record on which they are based.<sup>6</sup>

**§ 743. How Motions are Heard.**—When the time for hearing a motion has arrived, the Solicitor who appears on behalf of the motion should bring it to the attention of the Court. If the motion is based on the record in the case, after briefly stating his motion he should read, if necessary, such and so much of the record as may be necessary to enable the Court to comprehend the premises.<sup>7</sup> If the motion is based on a petition or affidavit, or other document, that fact should at once be brought to the Court's attention, and so much of it read as may be sufficient to give the Court the necessary information as to the grounds of the motion.

After the facts in the case have been duly presented, and the reasons and authorities in support of the motion stated, in case such are deemed necessary, the Solicitor supporting the motion will give way to the adverse side, the Solicitor representing which will, thereupon, briefly state his objections to the motion, if any, and will read any other part of the record, or present any other affidavits or documents necessary and proper to inform the Court and support his own contention. Having done this, he will briefly present his reasons and authorities, if any be deemed necessary, why the motion should not be allowed. The Solicitor<sup>8</sup> making or supporting the motion will then conclude the argument; and, if the Court wishes to further consider the matter, the Solicitor will pass the papers up, or see that they are sent to the Chancellor's chambers.

<sup>6</sup> A very large part of a Court's time is often wasted by abortive motions. No Solicitor should rise to make a motion unless (1) the time is opportune, (2) the right to make the motion has fully matured, (3) he fully understands his case, and the purpose and effect of the motion, (4) and has at hand the record, petition or affidavit, requisite to sustain the motion. A Solicitor should know that he is right before he undertakes to go ahead in making motions.

All motions must be based: 1st, on the record in the cause; or 2d, on an affidavit, or something equivalent in force, such as some other record, or some writing under seal, or a certificate; or 3d, on a petition bringing forward matters not otherwise appearing; or 4th, on some matter of which the Court can take judicial notice, or can inquire about, orally, of the Solicitors or officers of Court, or of some other

person present. As to showing cause, see, *ante*, § 62, sub-sec. 8.

<sup>7</sup> Solicitors should keep in mind that the probabilities are that the Chancellor knows little or nothing as to the grounds of the motion, or the necessity or expediency thereof, until duly made known to him by the counsel in the case: hence the importance of a full and clear statement of the case. As to when a motion is heard, see, *ante*, § 531, sub-sec., 6.

<sup>8</sup> Where there are more Solicitors than one on a side, ordinarily the junior Solicitor on each side opens, and the senior Solicitor concludes the argument. The counsel that opens should, ordinarily, have consideration for the ability of his colleague, and not undertake to consume all the time and make all the argumentation allowable for his side, for the senior counsel is presumed to be more able and equally willing.

## ARTICLE II.

## MOTIONS BY THE COMPLAINANT.

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| <p>§ 744. Motions by the Complainant to Get the Defendant Into Court.</p> <p>§ 745. Motions by the Complainant to Perfect His Pleadings.</p> <p>§ 746. Motions by the Complainant to Produce an Issue.</p> | <p>§ 747. Motions by the Complainant to Prepare the Case for Hearing.</p> <p>§ 748. Motions by the Complainant to Protect or Enforce His Rights Pending the Litigation.</p> <p>§ 749. Motions in Reference to Decrees.</p> |
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§ 744. **Motions by the Complainant to Get the Defendant into Court.**—Until the defendant is properly before the Court by service of subpoena, or by attachment of his property and publication, or by publication alone, the complainant's main duty is to take the necessary steps to bring him in. If the subpoena has not been served he should move for an *alias*, or a judicial attachment, as heretofore shown. If the defendant has died, or, being a woman, has married, before service of process, proper steps to revive the suit must be taken as shown elsewhere.

§ 745. **Motions by the Complainant to Perfect his Pleadings.**—The complainant is usually allowed to do all that is necessary to present his case fully and fairly to the Court, provided he take the right method, in the right time. As already shown, he may amend his bill at any time before the defendant has made defence, or in case a demurrer is filed, at any time before argument thereof, without application to the Chancellor. In all other cases, however, he must obtain leave of the Chancellor to amend his bill, such leave to be obtained on motion in open Court, or at Chambers.<sup>1</sup> If the Court be in session when the necessity for the amendment is discovered, the better practice is to move the Court for leave to amend. The proper time to make the motion, is the very first opportunity after the discovery of the deficiency sought to be remedied; all Courts require diligence and vigilance, but Courts of Equity most of all.

The following are the principal motions by a complainant, looking to the perfection of his pleadings, and to adapting them to the facts of his case, and to the relief he desires:

1. **Motions to Amend His Bill.**<sup>2</sup> The motions may, under certain limitations elsewhere shown, be made at any time between the filing of the bill and the final decree. The difficulty of obtaining leave, and the price to be paid therefor, being generally, in direct proportion to the length of time elapsed since the answer was filed. These motions are: 1, Motions to amend by correcting some date, or amount, or name, or description of property; 2, Motions to amend by making new parties, or new allegations as to old parties, or by doing both; 3, Motions to amend by bringing forward new matters in existence when the bill was filed, so as to enlarge the scope of the bill, or to sue on an additional ground, or on an additional claim, or for an additional debt, or for an additional piece or pieces of property, real or personal, or to set up any additional Equity; 4, Motions to amend by dismissing his bill as to any defendant, or defendants, or as to any debt, piece of property, claim, demand, Equity or other matter, set forth in his original, or amended, or supplemental bill; 5, Motions to amend the prayer; and 6, Motions that include any two or more of the preceding matters.

2. **Motion for Leave to File an Amended Bill.**<sup>3</sup> If the changes sought to be made in the original bill are few and short, and can be easily made by interlineations, or on the margin, the Court will allow the original bill to be

<sup>1</sup> See, *ante*, § 675.

<sup>2</sup> Code, §§ 4332-4335. See, *post*, § 775.

<sup>3</sup> See, *ante*, § 675.

amended, on its face, if no answer has been filed, or if the defendant does not desire to answer as to the amendments. But if the changes are too numerous, or too voluminous, to be easily incorporated into the body of the original bill; or, if new issues are raised and new parties are made, after answer filed, the complainant must move the Court for leave to file an amended bill, in which case he should have the amended bill drawn and ready to exhibit to the Court, along with an affidavit explaining his delay; and if the delay has been great and much proof has been taken, the proposed amended bill should, also, be sworn to, as an evidence of good faith.

**3. Motion for Leave to File a Supplemental Bill.**<sup>4</sup> If some event has happened, or some matter or fact has arisen, or come into existence, since the filing of the original bill, and such event, matter, or fact, in any way so materially changes the rights of the complainant, or the duties of the defendant, as to make it necessary or proper to bring it, and any consequent new parties before the Court, this must be done by a supplemental bill; and leave to file such a bill must be obtained from the Court, or Chancellor at Chambers, in the same way as leave is obtained to file an amended bill.

**4. Motion to Revive.**<sup>5</sup> If the complainant dies, the person entitled to revive may do so, on motion, supported by proper evidence of his rights. So, the husband of a female complainant may become a party complainant, on motion, supported by proof of his marriage, and on filing a prosecution bond. If a female defendant marries, the marriage must be suggested and proved, and an order for a *scire facias* against the husband moved for. If a defendant dies, the death must be suggested and proved, and an order for a *scire facias* against his proper representatives moved for. If a *scire facias* has been already executed and no defence made thereto, the complainant must move the Court to revive the cause. The subject of reviving suits is fully treated of in a previous Chapter.

**5. Motion to Have an Administrator Appointed.**<sup>6</sup> Where the estate of a deceased person should be represented, and there is no executor or administrator, or the executor or administrator is adversely interested, the Court will on motion appoint an administrator *ad litem*.

**§ 746. Motions by the Complainant to Produce an Issue.**<sup>7</sup>—After the bill is filed, the duty devolves on the complainant to take every step necessary to bring the suit to an issue, so that the taking of proof may begin. The following are the principal motions to be made for this purpose:

**1. Motion for a Guardian ad Litem.**<sup>8</sup> A guardian *ad litem* may be appointed for a minor, or for a person of unsound mind, by the Court, by the Chancellor, or by the Master, on motion, supported by a sworn bill, or by affidavit, showing that the defendant is under such a disability.

**2. Motion for a Pro Confesso.**<sup>9</sup> If an adult defendant, who is *sui juris*, has failed to make defence as required by the subpoena, or order of publication, the complainant may have his bill taken for confessed, on motion, supported by the return on the subpoena, or by proper proof of publication. He may, however, obtain a *pro confesso* from the Master, on like proof.

**3. Motion for a Judicial Attachment.**<sup>10</sup> If a subpoena to answer is returned endorsed, "not to be found in my county," the complainant may, on motion, supported by such return, obtain a judicial attachment against the estate of the defendant.

**4. Motion for an Attachment to Compel an Answer.**<sup>11</sup> If the defendant has been served with a subpoena to answer, and fails to answer, and the complainant desires an answer under oath, he may move for an attachment against the body

4 See, *ante*, § 687.  
5 See, *ante*, § 745.  
6 See, *post*, § 985.  
7 See, *ante*, § 514.

8 See, *ante*, § 216.  
9 See, *ante*, § 217.  
10 See, *post*, § 883.  
11 See, *ante*, § 219.



of the defendant, supporting his motion by a subpoena showing service, or by an affidavit of such service.

5. **Motion to Set a Plea or Demurrer Down for Argument.**<sup>12</sup> If the complainant conceive any plea, or demurrer, to be naught either for the matter or manner of it, he may move the Court to hear argument as to its sufficiency.

6. **Motion to Have a Cause Revived.**<sup>13</sup> If a defendant dies, or a female defendant marries, the complainant may revive against the decedent's proper representative, or against the husband, by bill of revivor, or by *scire facias*. To obtain the latter, a motion must be made, supported by proof of the defendant's death, or marriage. The complainant may take steps to revive before the Master, without waiting for the Court to come. On the return of process duly executed, a revivor may be had on motion, in case no defence is shown in due time.

7. **Motion for an Administrator.**<sup>14</sup> If an administrator becomes necessary in the progress of the suit, and the Court has the right to appoint one, it may be done on motion, supported by a proper record. If the bill is filed to have an administrator appointed, the Chancellor may make the appointment at Chambers.

8. **Motion for Creditors to File Their Claims.**<sup>15</sup> If a bill is filed to wind up an insolvent estate, or an insolvent corporation, or partnership, on motion of complainant, supported by the proper record, the Court will order creditors to be notified to file and prove their claims.

§ 747. **Motions by Complainant to Prepare his Case for Hearing.**—There are motions to be made by the complainant looking to the preparation of his suit for trial. Most of these motions will be found in the Article on Motions Common to both Parties;<sup>16</sup> but the following are specially applicable to the complainant.

1. **Motion Where the Defendant Fails to Answer Interrogatories.**<sup>17</sup> If a non-resident defendant fails to answer duly filed interrogatories, by a given day, specified in a peremptory order by the Court, or Clerk, requiring such interrogatories to be answered, the complainant may, on motion, have such defendant's answer taken off the files, and the bill taken for confessed.<sup>18</sup>

2. **Motion to Strike a Pleading or Other Paper From the File.**<sup>19</sup> If the defendant, or the Clerk for him, file any pleading, or other paper, in a cause without lawful authority, or if a defendant file any paper in a cause not proper to be filed, the complainant may, on motion, have such pleading or paper stricken from the files. Thus, if a plea, or additional plea, or amended plea, or an original or amended demurrer, or an original or amended answer, is filed after the time therefor has expired, or without leave where leave is necessary, it may be stricken from the files, on motion of the complainant. If a plea or answer, that must be sworn to, is filed without verification, or, if no verification is needed, is filed without being signed by the defendant, or his Solicitor, or if it be the plea or answer of a person under disability, and is filed in person, or by Solicitor, and not by guardian, or next friend, or if any paper of any kind has been improperly filed by the defendant, or a defendant, it may be taken off the files, on motion of the complainant.

§ 748. **Motion by Complainant to Protect or Enforce his Rights Pending the Litigation.**—During the progress of the cause, the complainant is frequently obliged to ask the Court for some interlocutory order to prevent the removal, injury, transfer, or destruction, of the property in litigation, or to more fully secure or protect it, or to sell it, or to collect the rents and profits of it, or some

12 See, *ante*, § 262.

13 See, *ante*, § 745, sub-sec. 4.

14 See, § 745, sub-sec. 5.

15 See, *post*, §§ 1001; 1035; 1335.

16 See, *post*, §§ 753-762.

17 See, *post*, § 1122.

18 Code, §§ 4463-4464. If, however, the defendant

should show, by affidavit, a good excuse for his default, and should fully answer the interrogatories before the term ended, the Court would set aside the order *pro confesso*, on his paying the costs of the cause.

19 See, *ante*, §§ 179; 233, note 3; *post*, 751, sub-sec. 7.

order to enforce a previous order of the Court, or to compel obedience to a previous order, or to prevent interference with the orders or officers of the Court. These interlocutory orders are obtained on motion; and must, usually, be supported by a sworn petition, or by affidavit. The following are some of such motions:

1. **Motion for an Injunction or Restraining Order.**<sup>20</sup> A complainant may move for an injunction, or a restraining order, at any time before a final decree, either on the bill, if it lays sufficient ground, or on a sworn petition. If a ground for an injunction arises pending the litigation, it may be obtained on motion, supported by a sworn petition: in such a case a restraining order is usually entered on the minutes, if Court is in session. If Court be not in session, application must be made to the Chancellor, at Chambers.

2. **Motion for a Receiver.**<sup>21</sup> If a receiver becomes necessary during a litigation, the complainant may have one appointed on motion supported by an affidavit, or a sworn petition. If Court be not in session, application must be made to the Chancellor, at Chambers, such application to be supported by the original bill, or by petition, or by both, due notice being given to the other party.

3. **Motion for an Attachment for Contempt.**<sup>22</sup> If a defendant, or other person, has violated, or refused to obey, any writ or order of the Court, or has interfered with any officer of the Court, the complainant may have him attached for contempt, on a petition filed for that purpose.

4. **Motion for Alimony Pending the Suit.**<sup>23</sup> If a wife, in a bill for divorce, shows a meritorious case, and prays for alimony pending the suit, the Court will, on motion, make her a suitable allowance until the next term. She may strengthen her motion by an affidavit, showing her necessities. The Court will be more liberal, if she is, also, ready for trial, and the defendant seeks a continuance.

5. **Motion to Require Money, Choses in Action, or Other Personalty, to be Deposited With the Master.**<sup>24</sup> When there is any particular fund, especially a trust fund, in litigation, or any specific *choses in action*, chattel, or any other article of personal property, the custody, or ownership, of which is in dispute, the party thereunto entitled, ordinarily the complainant, may move the Court to require the party in possession to pay, or deliver it into Court, subject to the future orders of the Court. Such motion is generally supported by both the bill and the admissions in the answer.

6. **Motion to Pay Out, Transfer, Loan or Impound Funds in Court.** Any money in the Master's hands, that cannot be, at once, paid out, may, on motion, be loaned, subject to the order of the Court, or for a definite period. So, funds may, on motion, be transferred from one cause to another, entries showing this being made in each cause. So, funds in Court may, on motion, supported by a sworn pleading, or by a petition, or sometimes by an affidavit, be impounded to await the decision of the cause to which it belongs, or to be held subject to the decision in another cause.

§ 749. **Motions in Reference to Decrees.**—After a decree has been pronounced, it is often necessary to take some steps in Court, in order to get its full benefit. Some of these steps are the following:

1. **Motion for an Instanter Execution.** If a defendant is making away with his property, or threatening to do so, or other sufficient cause be shown, the complainant may move for an instanter execution, supporting his motion by affidavit.<sup>25</sup>

2. **Motion for Judgment on a Note.** Whenever a note given for property sold, or money loaned, is overdue, judgment may be had thereon on motion, supported by the note, and the record in the cause.<sup>26</sup>

20 See, *post*, § 890.

21 See, *ante*, § 176.

22 See, *post*, §§ 845-848; 918-923; 1196.

23 See, *post*, §§ 1097-1098.

24 See, *post*, §§ 765-769.

25 Code, § 3010.

26 See, *ante*, § 643.

3. **Motion to Set Aside the Satisfaction of a Decree.** If property which has been sold to satisfy an execution is recovered from the purchaser, the satisfaction may be set aside, and a *scire facias* awarded to have the decree revived, on motion supported by affidavit.<sup>27</sup>

## ARTICLE III.

## MOTIONS BY THE DEFENDANT.

§ 750. Motions Looking to a Dismissal of the Suit.

§ 751. Motions by the Defendant to Perfect His Defence.

§ 752. Motions to Set Aside, or Modify, Interlocutory Orders.

§ 750. **Motions Looking to a Dismissal of a Suit.**—The complainant is required not only to properly institute his suit, but also to keep it in due progress towards a final decree, and not allow any deficiencies to arise, or to remedy them in case they do arise. For any failure herein his suit is liable to be dismissed. If at any time during the progress of a suit, a ground for its dismissal exists, the defendant may take advantage of it by motion; and, as a rule, he must make his motion at the first opportunity after his right thereto arises. If, instead of moving to dismiss, he takes some other affirmative step, he will not ordinarily be allowed to go back and make a motion to dismiss. The following are some of the principal grounds of motions to dismiss:

1. **Motions for a Rule on Complainant's Solicitor to Show His Authority.**<sup>1</sup> If the defendant has good reason to believe that the bill has been filed without any proper authority from the complainant, he may, on making such an affidavit, move the Court for a rule on the Solicitor who filed the bill to produce his authority to appear for the complainant; and all proceedings will be suspended until such authority is produced, or proved.

2. **Motion to Dismiss the Bill.** If the bill is liable to be dismissed for any reason before demurrer, it may be done on motion, the motion specifying the ground on which it is based, and accompanied by the proper proof when the ground is outside of the bill itself. The grounds of such motions have heretofore been stated.<sup>2</sup>

3. **Motion to Require a Better Prosecution Bond.**<sup>3</sup> If the prosecution bond is, or becomes, insufficient either (1) in the amount of the penalty by reason of the costs of the suit being great, or (2) in the solvency of the security by reason of the death, removal from the State or the insolvency of the surety, on affidavit of the fact, a motion may be made that the complainant be required to give a sufficient prosecution bond, or to justify his sureties.

4. **Motion to Dispauper the Complainant.**<sup>3a</sup> If the complainant is prosecuting the suit on the pauper oath, the defendant may have him dispaupered at any time before the hearing, on showing by the testimony of disinterested persons that the allegation of poverty is probably untrue.

5. **Motion for a Rule on the Complainant to Take Steps.**<sup>4</sup> If the complainant fail to keep his suit moving on towards a final decree, by putting it at issue, or by keeping it duly revived, or by furnishing the Master with evidence for a report, or by not complying with some order made, or by not amending his bill,

<sup>27</sup> Code, §§ 2990-2996.

<sup>1</sup> See, *ante*, § 233.

<sup>2</sup> See, *ante*, §§ 268-271.

<sup>3</sup> See, *ante*, § 234.

<sup>3a</sup> Code, 3194. But dispaupering should be cautiously done. *Brumley v. Hayworth*, 3 Yerg., 423.

The law should be liberal to poor persons. *Heatherly v. Hill*, 8 Bax., 170. The law of England allowing paupers to sue without paying costs was passed in 1495, and is more liberal to poor litigants than ours. See, 1 Dan. Ch. Pr., 37-44, 111.

<sup>4</sup> See, *ante*, § 239; Code, §§ 4389-4390.

or by otherwise failing to exercise due diligence, the defendant may make a rule in the Clerk's office on the complainant to take the necessary step in the progress of the suit, and on his failure to do so, the defendant may, in open Court, move the Chancellor for a peremptory rule on the complainant.

6. **Motion Where the Complainant Fails to Answer Interrogatories.**<sup>5</sup> If a non-resident complainant fails to answer duly filed interrogatories by a given day, specified in a peremptory order by the Court, or Clerk, requiring such interrogatories to be answered, the defendant may, on motion, have the bill dismissed.<sup>1</sup>

7. **Motion to Abate a Suit.**<sup>6</sup> If the death of the complainant has been proved and so entered on the minutes, the defendant may move to abate the suit if it is not revived during the second term after such entry.

§ 751. **Motions by the Defendant to Perfect his Defence.**—The defendant, within certain limits, is allowed to do what is reasonably necessary, to present his defence, so as to enable him to fully avail himself of all the law and the facts applicable to his case.

1. **Motion for Further Time to Make Defense.**<sup>6a</sup> If the defendant needs additional time within which to make his defense, he should apply therefor to the Master, or to the Chancellor, unless the Court be in session, and then to the Court.

2. **Motion to Require the Complainant to Elect.**<sup>7</sup> When the complainant is suing the defendant both at law and in Equity, at the same time and for the same matter, the Court will, on motion of the defendant, require the complainant to elect which of the two suits he will prosecute. Such motion cannot be made, however, until the defendant has answered. If the complainant considers that the bill and action at law are for different matters, and that he ought not to be compelled to elect, he may resist the motion.

3. **Motion to File a Cross Bill.**<sup>8</sup> If the defendant needs a cross bill, either the better to make his defence, or to obtain some affirmative relief connected with the subject matter of the suit, he may, on motion, obtain leave to file a cross bill for that purpose. The cross bill should ordinarily be presented and read in support of the motion; and if there has been any delay, such delay should be accounted for by affidavit, or the Court will not stay the hearing of the original cause.

4. **Motion to Amend a Pleading.**<sup>9</sup> The defendant cannot amend any of his pleadings, whether a demurrer, a plea, or an answer, without leave; this leave can only be obtained on motion in open Court, or at Chambers, accompanied by the proposed amendment. If a sworn answer is sought to be amended, the amendment tendered must, also, be verified; and the occasion and the necessity for the amendment must be clearly shown by affidavit.

5. **Motion for Leave to Withdraw an Answer.**<sup>10</sup> Sometimes the Court will allow an answer to be withdrawn, and a demurrer to be filed to the bill. The motion for such leave must be accompanied by an affidavit clearly showing why the demurrer was not originally filed.

6. **Motion by Wife for Leave to Answer Separately.**<sup>11</sup> Whenever a wife's interests are antagonistic to her husband's, or when she dissents from his answer, or is living apart from him, she may on motion, supported by evidence of the fact, obtain leave to answer separately.

7. **Motions to Strike Pleadings, and Other Papers, from the File.**<sup>12</sup> If a complainant, or the Clerk for him, files any pleading, or other paper, in a cause,

<sup>5</sup> Code, §§ 4463-4464. If, however, the complainant should, by affidavit, before the term closed, excuse his default, and should fully answer the interrogatories, the Court would set aside the order of dismissal, and restore the cause to the docket, on the payment of all the costs of the suit.

<sup>6</sup> See, *ante*, § 698.

<sup>6a</sup> See, *ante*, § 237.

<sup>7</sup> *Cooke v. Dodson*, 1 Tenn. (Overt.), 169; 1 Barb. Ch. Pr., 247; 1 Dan. Ch. Pr., 815-817.

<sup>8</sup> A cross bill may be filed as a matter of right,

but it is a common practice to move for leave, especially if it is desired to have the original and cross suit heard together. The proper time to file a cross bill is when the answer is filed. See, *ante*, §§ 400; 728-729.

<sup>9</sup> See, *ante*, § 745.

<sup>10</sup> See, *ante*, § 232.

<sup>11</sup> See, *ante*, § 236.

<sup>12</sup> *Cox v. Breedlove*, 2 Yerg., 499; *Wilson v. Wilson*, 10 Yerg., 200. *Dance v. McGregor*, 5 Hum., 428. See, *ante*, § 747, sub-sec., 2.

without lawful authority so to do, or if a paper, not proper to be filed by the complainant, has been filed by him, the defendant may, on motion, have such pleading, or other paper, taken off the files. Thus, if a bill is filed without authority, or is unknown to the forms of the Court, or if an amended or supplemental bill, or bill of review for new matter, is filed without lawful authority, it may, on motion of the defendant, be taken off the files.

§ 752. **Motions to Set Aside, or Modify, Interlocutory Orders.**—When any interlocutory order has been made on motion of the complainant, on account of which the defendant is aggrieved, he may bring such order before the Court on motion, supported by affidavit,<sup>12a</sup> and move the Court, or Chancellor at Chambers, to set aside or modify such order, or otherwise release him from its effect, in whole or in part. Among such motions are the following:

1. **Motion to Set Aside a Pro Confesso.**<sup>13</sup> A *pro confesso* may be set aside on motion, supported by affidavit excusing the delay, and a sworn answer showing a meritorious defence; and in some cases, without an affidavit or a sworn answer. A *pro confesso* may also be set aside by the Master at rules, upon a good cause shown, and the filing of a sufficient answer.<sup>14</sup>

2. **Motion to Dissolve an Injunction.**<sup>15</sup> When a defendant, or even a third party, feels aggrieved, or is injured by an injunction, he may move for its dissolution, supporting his motion by a sworn answer, or by showing want of equity in the bill, or in case of a stranger, by a petition. This motion may, also be made before the Chancellor at Chambers.

3. **Motion to Vacate the Appointment of a Receiver.**<sup>16</sup> When the debt is paid, or the suit compromised, or a bond is given to comply with the decree of the Court, or when in any case a receiver is no longer necessary, on motion for that purpose, the receiver will be discharged, and the property in his hands restored to the former possessor. So, a motion may be made to vacate an order appointing a receiver, such a motion being supported by a sworn answer. This motion may be made before the Chancellor, in vacation.

4. **Motions to Discharge or Reduce a Levy or Bond.**<sup>17</sup> Where more property has been attached than is necessary to satisfy the debt and costs, or when a replevy bond is excessive, the levy or bond may be reduced on motion supported by a sworn answer, or by a sworn petition, and notice to the other side. This motion may be made before the Chancellor as well in vacation as in term. A levy or bond may be, also, discharged in proper case, on like procedure.

<sup>12a</sup> As to showing cause in support of a motion, see, *ante*, § 62, sub-sec. 8.

<sup>13</sup> See, *ante*, §§ 207-213; 888-890.

<sup>14</sup> Code, § 4420.

<sup>15</sup> See, *post*, § 854.

<sup>16</sup> See, *post*, § 917.

<sup>17</sup> Code, § 4451.

## ARTICLE IV.

## MOTIONS COMMON TO BOTH PARTIES.

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| <p>§ 753. Motions in Reference to Pleadings, or Other Papers, Improperly Filed.</p> <p>§ 754. Motions Where More Suits Than One About the Same Subject-Matter.</p> <p>§ 755. Motions to Consolidate Similar Causes.</p> <p>§ 756. Motions in Reference to Evidence.</p> <p>§ 757. Motions in Reference to Rulings by the Master.</p> | <p>§ 758. Motions for a Reference to the Master.</p> <p>§ 759. Motions in Reference to a Master's Report.</p> <p>§ 760. Motions in Reference to the Trial.</p> <p>§ 761. Motions in Reference to Sales.</p> <p>§ 762. Motions in Reference to the Correction of Errors.</p> |
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§ 753. **Motions in Reference to Pleadings, or other Papers Improperly Filed.** If any pleading, exhibit, deposition, or other paper, has been filed without lawful authority, or is filed after the lapse of the limit allowed, or is not entitled, or is not marked filed, or for any reason ought not be on the file, it may, on motion of any party aggrieved, be taken off the files, or, as it is sometimes expressed, stricken from the files. All motions to strike a pleading or other paper from the files, are heard summarily by the Court, the grounds of these motions being ordinarily apparent on the face of the record. When a pleading is alleged to be filed by a Solicitor without his alleged client's authority, the motion by the adverse party to take it off the files should be based on an affidavit of such want of authority; and it may be stated, as a general rule, that when the ground of a motion to strike from the files is based on matters outside of the record, such matter must be made to appear by affidavit.

§ 754. **Motions where More Suits than One about the Same Subject-Matter.** It frequently happens that there are pending in the same Court two or more suits relating to the same subject-matter, such as: (1) suits by different creditors to reach the same property or fund of a common debtor; (2) suits by different beneficiaries of the same trust; (3) suits by different claimants of liens on the same property; (4) suits brought by different next friends of the same person under disability against the same defendant as to the same matter; (5) suits by different persons, whether administrators, executors, legatees, distributees, or creditors, to administer the same estate; (6) suits by different wards against the same guardian about the same general default; (7) suits by different creditors, legatees, or distributees, against the same executor or administrator for the same *devastavit*, or default; and (8) suits of like character in which all or most of the evidence in one case would be pertinent in the other cases, and the decree of recovery in one case would probably have to be considered in the other cases in order to properly distribute the fund, or otherwise equitably adjudicate the respective and perhaps conflicting rights and claims of the parties in the other cases.

Where two or more suits of the foregoing character are brought in the same Court, the Court will, on motion of the complainant in the suit first brought, stay the proceedings in all the other suits, except in so far as they, or any of them, seek to have adjudicated matters not set up in the first suit. Or, if it appears that a subsequent bill is more comprehensive, or otherwise better adapted to have all the matters in controversy fully determined, the Court may, on motion of the complainant in such bill, stay proceedings on all the other bills, unless the complainant in the bill first filed will so amend his bill as to cover the field included by all the other bills.<sup>1</sup> The Court will, in such cases, con-

<sup>1</sup> 1 Dan. Ch. Pr., 797-798.

sider in what way the interests of all the parties may be best promoted, looking to the saving of costs, an early hearing, and a complete decree settling all the various equities of all the parties in all the suits. Where the complainants in the different suits are seeking the same fund, or to share in the same recovery, the Court will ordinarily allow the complainants in the stayed suits to become parties to the suit allowed to be prosecuted; or will allow the preferred bill to be so amended as to bring before the Court all the parties and all the matters of the other bills, and to pray for an injunction against the further prosecution of the other suits;<sup>2</sup> or, where the same property or fund is claimed by different complainants from the same defendant, will allow the latter, when he sets up no claim of his own, to file a bill of interpleader.

§ 755. **Motions to Consolidate similar Causes.**—Instead of staying proceedings, the Court will, in any of the foregoing eight cases, except the fourth, order all of the causes to be consolidated, if no party object to the motion.<sup>3</sup> This is a more common and a more convenient practice than the practice of staying the subsequent suits; inasmuch as it enables references, reports, and decrees to be made in the consolidated cause, sufficiently comprehensive to include all the various matters of controversy contained in each, and all the various equities and priorities, however numerous, and however conflicting; and enables the Court to properly distribute the fund, when a fund is involved, and to adjudicate all questions as to the title, when the title is involved, and all other matters.

The practice of consolidating causes where the same fund or property is being sought by different creditors and claimants in different suits in the same Court, is a most salutary one, greatly to be favored. It lessens the costs, and thereby enables the debtor to pay more of his debts; it lessens the labor of counsel; and it enables the Court to administer the fund to the greatest advantage, and with the fewest difficulties to all, besides preventing a multiplicity of trials.

It must not be forgotten, however, that a consolidation of causes, whether by consent, or by order of the Court without consent, does not change the rules of Equity pleading, nor the rights of the parties, those rights must still depend on the pleadings in the respective causes, and the evidence applicable thereto;<sup>4</sup> and an appeal in one case will not necessarily carry up the other case, or cases.<sup>5</sup>

Where several suits are brought by different creditors against the same insolvent corporation in different Chancery Courts, that Court in which is filed the bill embracing the whole matter in litigation may enjoin the creditors in the other suits from prosecuting their independent suits, and require them to come in under the general bill on which the injunction was granted.<sup>6</sup> If none of the bills is filed as a general creditor's bill, any of the complainants may file an amended and supplemental bill as well for himself as for all other creditors and claimants who may choose to make themselves parties, and pray for all proper accounts, that the property be sold, and assets administered under the orders of the Court, that a receiver be appointed, and for general relief. Upon such an amended and supplemental bill being filed, the complainant would be entitled to fiats for an attachment and an injunction against the common

<sup>2</sup> *Hadley v. Freedman's S. & T. Co.*, 2 Tenn. Ch., 122; 130; *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 502. See Article on General Creditors' Bills.

<sup>3</sup> The Court cannot, ordinarily, compel a consolidation against the consent of the parties. *Knight v. Ogden*, 3 Tenn. Ch., 409; *Ogburn v. Dunlap*, 9 Lea, 162. The Court should, however, hear the causes at the same time, and onerate the parties refusing to consent to a proper consolidation with all the extra costs caused by the refusal to consolidate. Parties should not be allowed to consume a fund, or oppress a defendant, by an unnecessary multiplication of costs. By adopting the practice of taxing the parties, refusing to agree in a proper case to a

consolidation, with all the costs of the cause thereafter accruing, consolidations in proper cases will generally be consented to by all parties. The Court may, on its own motion, consolidate causes claiming the same fund against the same defendant. *Clement v. Clement*, 5 Cates, 40. See, *ante*, § 754.

<sup>4</sup> *Brevard v. Summar*, 2 Heisk., 105; *Lofland v. Coward*, 12 Heisk., 546; *Masson v. Anderson*, 3 Bax., 290. *Ogburn v. Dunlap*, 9 Lea, 169.

<sup>5</sup> *Ogburn v. Dunlap*, 9 Lea, 162.

<sup>6</sup> *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 502; same case, 6 Lea, 564. See Article on General Creditors' Bills, *post*, §§ 1033-1034.

debtor and his estate on giving proper bonds;<sup>7</sup> and the Court will restrain all creditors from suing in any other cause.

The statute provides that if separate suits to enforce mechanic's liens be brought in the same Court they shall be consolidated.<sup>8</sup> So, on the filing of an insolvent bill by the personal representatives, or a creditor, the Chancellor may enjoin all other suits against the estate.<sup>9</sup>

**ORDER TO CONSOLIDATE CAUSES.**

John Doe, <i>et al.</i> ,	}	Order of Consolidation.
<i>vs.</i> } No. 546.		
Henry Jones,		
Richard Roe, <i>et al.</i> ,	}	
<i>vs.</i> } No. 561.		
Sarah Brown, <i>et. al.</i> ,	}	
and		
William Smith, <i>et. al.</i> ,	}	
<i>vs.</i> } No. 571.		
Richard Roe, <i>et. al.</i>		

On motion of complainant John Doe, [*or, by consent of parties,*] and it appearing that these three suits relate to the same subject-matter, it is ordered by the Court that they be consolidated, and considered and heard together, and that the proof hereafter taken in either cause may be read as to all the causes, provided notice to take depositions be served by the defendants on John Doe, Henry Jones, and William Smith, and by the complainants on Richard Roe and Sarah Brown, or on their respective Solicitors.

When two or more causes are consolidated or heard together, the decree will have the following title, commencement, and recitals:

**DECREE IN CAUSES, CONSOLIDATED, OR HEARD TOGETHER.**

John Doe, <i>et al.</i> ,	}	Consolidated Causes.
<i>vs.</i> } No. 546.		
Henry Jones,		
Richard Roe, <i>et al.</i> ,	}	
<i>vs.</i> } No. 561.		
Sarah Brown, <i>et al.</i> ,	}	
and		
William Smith, <i>et al.</i> ,	}	
<i>vs.</i> } No. 571.		
Richard Roe, <i>et. al.</i> ;		

These three causes were heard together by consent of all parties, [*or, if the causes have heretofore been consolidated, begin thus:* These three causes having heretofore been consolidated and ordered to be heard together, came on for hearing] this June 24, 1893, before Hon. John K. Shields, Chancellor, upon all the pleadings and proofs on file, and all the record in each cause, on consideration of which the Chancellor was of opinion that [*Here give the Chancellor's findings of fact, if it is desired to set them out specifically.*] and it is so adjudged and decreed.

It is therefore ordered, adjudged and decreed by the Court that [*Here set out the decree, following the specific findings, if they have been previously given. See §§ 566-568.*]

**§ 756. Motions in Reference to Evidence.**—During the progress of a suit many questions arise in reference to the taking of depositions, the production of documents, the extension of the time for taking proof, the exceptions to depositions, and other matters relative to the proof. Among such questions are the following:

1. **Motion to Produce Documents.** If the defendant's answer shows that he has in his possession, or under his control, any documents, or books, relevant to the matters in dispute, their production in the Master's office may be obtained on motion, supported by the pleadings themselves. So, if the complainant has a document, or book, in his possession, or under his control, the Court may order it to be produced and filed with the Master, on motion supported by affidavit, or other competent proof, or on motion supported by a cross bill and answer thereto.

2. **Motion as to Notice to Take Depositions.** If either party desires the length of the notice for taking a deposition to be enlarged, or restricted, he may move

<sup>7</sup> Hadley v. Freedman's S. & T. Co., 2 Tenn. Ch., 122; 130.

<sup>8</sup> Code, § 3546.  
<sup>9</sup> Code, §§ 2383-2384.



therefor, supporting his motion by an affidavit. So, he may move for an order that service of notice on one or more of several adversaries shall be notice to all. Both of these orders may be made by the Master, on like motion.

**3. Motion to Extend the Time for Taking Proof.** Either party may move for an order extending his time for taking proof, or for an order opening the cause for further proof, supporting his motion by a special affidavit, or affidavits. These motions may be made before either the Chancellor at Chambers, or before the Master in vacation.

**4. Motion to Re-Examine a Witness.** A witness may be re-examined as to the same matters, on leave obtained from the Chancellor or Master, by motion, supported by an affidavit showing cause. A witness may be cross-examined; or, if his deposition has been suppressed, it may be retaken, without any order for that purpose.

**5. Motion in Reference to Exceptions to Depositions.** If amendments are needed to a deposition to obviate exceptions, or if a party's exceptions have been overruled by the Master, or sustained and an appeal taken, he may obtain leave to make the amendment, or have it made, or may obtain the action of the Chancellor on his exceptions, by bringing the matter forward by motion, supported in case of amendments by affidavit. It will be too late to make these motions after the trial of the cause has begun. These motions may be made in vacation, before the Chancellor, on notice.

§ 757. **Motions in Reference to Rulings by the Master.**—The Master is clothed with large powers, and may at his office make many rulings. Any of these rulings may be appealed from and revised or reversed by the Chancellor. These rulings usually consist of: (1) sustaining, or overruling, exceptions to answers; (2) allowing, or disallowing, a *pro confesso*; (3) extending, or refusing to extend, the time for answering; (4) setting aside, or refusing to set aside, a *pro confesso*; (5) overruling, or sustaining, exceptions to depositions; (6) extending, or refusing to extend, the time for taking proof; (7) reviving or refusing to revive, a cause; (8) admitting, or rejecting, evidence on the taking of an account or the making of a report.

In all of these cases the appeal should be entered in writing at the time it is taken, and should be brought before the Chancellor by motion, supported by all the papers the Master had before him.

§ 758. **Motions for a Reference to the Master.**—As a rule, the Court will not refer a matter to the Master, except on a hearing of the cause; but if the parties consent to such a reference, it will be ordered on mere motion. The Court will, also, on mere motion, order a reference to the Master in the following cases previous to the hearing: 1, To report on the advisability of a partition, or sale of land; 2, To report whether it is necessary to sell the land of a decedent to pay his debts; 3, To report the assets and liabilities of an insolvent estate; and 4, to report whether it is manifestly to the interest of minors or married women to sell their land for their maintenance and education, or for reinvestment. The frame and form of these references will be found in the chapters treating of these particular suits.

If any pleading filed in the cause is unnecessarily prolix, or contains unnecessary and false allegations of a scandalous nature or grossly impertinent, the opposite party may, on motion, have the pleading referred to the Master to be revised, or the Court may order particular parts of the pleading to be stricken out.<sup>10</sup>

§ 759. **Motions in Reference to a Master's Report.**—The subject of Master's reports and of proceedings thereon have been fully considered in a separate Chapter.<sup>11</sup> The following are the principal motions in reference to a Master's report:

10 Code, § 4316.

11 See, *ante*, §§ 611-620.

1. **Motion to Take up the Exceptions to a Master's Report.** When a Master's report has been excepted to, it is ordinarily heard on the exceptions when the case is regularly reached on the docket; but it is in the discretion of the Chancellor to hear the report and the exceptions earlier, on motion supported by sufficient cause. If the term of the Court is short, and a recommittal and new report is desirable instanter, so as to expedite the final disposition of the cause, the Court will, ordinarily, take up the report and exceptions on motion, especially if the arguments will be brief and pointed.

2. **Motion to Confirm a Master's Report.** When the time for filing exceptions to a Master's report has expired, and no exceptions have been put in, the party in whose favor the Master has reported may call up the report on motion and have it confirmed. This is the usual practice in all the cases mentioned in the preceding section, where a reference will be made previous to the hearing. The report will be confirmed when the cause is reached on the docket, of course, if not excepted to.

3. **Motion to Recommit a Report.** If a Masters' report be founded on illegal evidence, or if there be evidence not considered by the Master, or not filed when his report was made, the party injured may, on motion, supported by the record, or by affidavit, have the report recommitted. The affidavit should show why the new evidence was not taken before the report was made, and should have all the definiteness and particularity required on a motion for a new trial.

§ 760. **Motions in Reference to the Trial.**—There are various motions pertaining to the trial which must be made before the hearing has been entered upon: these motions are generally the following:

1. **Motion for a Trial by Jury.** Either party may, upon motion made at the proper time, have a jury to try and determine any material fact in dispute. No affidavit is needed in support of this motion.

2. **Motions in Reference to Evidence.** Before the trial begins each party should see to it that all his evidence is marked filed, that none of his depositions stand suppressed, and that none of his exceptions to depositions are undisposed of. He may bring these matters before the Court by mere motion, but must do so before the trial begins, or it will be too late.

3. **Motion for a Continuance.** When the case is reached on the docket, either party not ready for trial may move for a continuance, supporting his motion by affidavit, or by an agreement signed by the opposite party. The affidavit must, in all cases, be special, and must be strong in proportion to the length of time the affiant has had to prepare for trial.

§ 761. **Motions in Reference to Sales.**—When the Master is ordered to make a sale of land, there are often various motions required before the sale is perfected and the purchaser gets a title, and among them are the following:

1. **Motion to Confirm a Sale.** If a report of a sale is on file, either party, or the purchaser, may move for a confirmation, after the time for excepting to the report has expired.

2. **Motion to Set Aside a Sale.** If a sale has been irregularly or unlawfully made, it may be set aside on motion, supported by a record, or other proof of the irregularity or illegality of the sale. The purchaser, himself, may make the motion, supporting it by a petition, showing defect in the title, or great deficiency in quantity, or any other fact entitling him in Equity to be relieved.

3. **Motion to Open Biddings.** If any party in interest is dissatisfied with the price bid for land, and can secure an advanced bid of at least ten per cent., he may have the biddings opened, on motion supported by a petition, and the written offer of the proposing advance-bidder, tendering good security for his proposed bid.

4. **Motions to Revive a Decree of Sale.** If for any reason, except a satisfaction

of the decree, the Master fails to sell land ordered to be sold, the decree of sale may be revived, on mere motion.

5. **Motions for the Benefit of the Purchaser.** If the purchaser wishes to have a lien declared paid, or to obtain a deed, or to have a reference as to encumbrances, or as to taxes, or to have a writ of possession awarded him, he may move therefor, supporting his motion, when encumbrances are alleged, by affidavit or other evidence thereof.

6. **Motions for an Order of Sale.** When the Sheriff levies on land and returns the execution unsatisfied for want of time to advertise and sell, on motion of the party interested in having the land sold, the Court will award an order of sale to the Sheriff to sell the land.

§ 762. **Motions in Reference to the Correction of Errors.**—If either party is aggrieved by a decree, he must apply to the Court in due time by motion, or otherwise, for the appropriate remedy. These remedies will be more fully shown hereafter; they are, in brief, as follows:

1. **Motions to Correct the Minutes.** Sometimes an erroneous entry is made on the minutes, or an erroneous order is made by the Court: in such cases the party aggrieved may move to have the minutes corrected, or the erroneous order revised, or set aside, supporting his motion by affidavit when the error is not shown by the record itself.

2. **Motion for a Writ of Error Coram Nobis.** If a decree is rendered against a party by reason of an error of fact in a proceeding of which he had no notice, or which he was prevented by disability from showing or correcting, or in which he was prevented from making defence by surprise, accident, mistake, or fraud, without fault on his part, he may reverse the same by a writ of error *coram nobis*, which may be had upon notice, supported by a petition.

3. **Motion to Rehear a Cause.** If an erroneous decree has been pronounced, and the term of the Court has not ended, the party aggrieved may move for a rehearing, supporting his motion by a petition.

4. **Motion to File a Bill of Review.** If an erroneous decree has been made, and the term has closed, or thirty days elapsed, the party injured may file a bill of review; if the bill be based on newly discovered evidence, leave to file it must be had. This leave must be obtained by motion, supported by a petition, or by the proposed bill properly framed for that purpose, and duly sworn to.

5. **Motion to Correct a Decree.** Any clerical error, mistake in the calculation of interest, or other mistake in a decree, may be amended on motion, supported by the record, or the Chancellor's notes.

6. **Motion to Retax Costs.** If costs have been improperly, erroneously, or illegally taxed, or omitted to be taxed, the party aggrieved may move the Court to retax the costs, and include costs omitted, or correct errors made. The motion must be accompanied by an affidavit setting forth the errors or omissions complained of.

7. **Motion for an Appeal.** If any party is dissatisfied with any decree, he may move for an appeal, supporting his motion by a proper appeal bond, or by the pauper oath, or he may get time within which to file his bond or oath.

## ARTICLE V.

## MOTIONS BY STRANGERS AND QUASI PARTIES.

§ 763. Motions by Strangers to the Suit. | § 764. Motions by a *Quasi* Party.

§ 763. **Motions by Strangers to the Suit.**—As a rule, no person can be heard in reference to a suit, or in reference to the property or matters involved in the litigation, unless he is a party to the suit, or the agent or Solicitor of a party. There are, however, certain persons, who, while not parties to the pleadings, are parties to some of the subsequent proceedings in a cause, such as (1) persons who file claims or come in under a decree in the cause; (2) receivers, trustees and guardians, appointed by the Court, (3) reported bidders for, and purchasers of, property sold by order of the Court, and (4) the sureties on notes and bonds filed in a cause; these persons are often termed *quasi* parties, and they have the right to make any motion required by their interest, or their duties; but persons who are neither parties nor *quasi* parties, will not, as a rule, be heard except by a sworn petition. The following are the most common motions by persons not parties to the suit:

1. **Motion for Leave to Become a Party.** If any person, not a party to a suit for the recovery of property, has an interest in the property involved in the litigation, he may present a petition to the Court and move for leave to become a party defendant, to the end that he may assert his rights in the premises.<sup>1</sup>

2. **Motion for Leave to File a Claim.** When the estate of a decedent, or the assets of an insolvent firm, corporation, or other person, is being administered in the Chancery Court, any creditor may, on motion, supported by a petition, have leave to become a party and prove his claim. The petition should specify the claim, and show that it is a subsisting *bona fide* indebtedness.

3. **Motion for Leave to Reclaim Property in the Custody of the Court.** If a stranger has an interest in, or title to, any property in the custody of the Court, he may obtain leave to assert his rights, by motion supported by a petition, the petition setting forth the rights of the petitioner with precision and particularity.<sup>2</sup>

4. **Motion for Leave to Sue a Receiver.** The Court will not allow its receiver, or other officers, acting under its orders to be harassed by suits in other Courts.<sup>3</sup> Hence leave must be obtained, by motion, supported by petition or affidavit, before any suit can be brought against a receiver. The petition should detail the rights of the petitioner, and show the necessity of enforcing them against the receiver.<sup>4</sup>

§ 764. **Motions by a Quasi Party.**—All persons who (1) have been reported as bidders for, or purchasers of property ordered by the Court to be sold, or (2) who have been by the Court or Master appointed receivers, trustees, or guardians, or (3) who are named as creditors in a bill to administer assets,<sup>5</sup> or (4) who have filed claims in a cause, or come in under a decree, or (5) who are sureties on any note, bond or other obligation filed in a cause, are, in a limited sense, parties; that is, they have a right to be heard by the Court in any matter affecting the property by them purchased or bid for, or their rights, liabilities or duties as receiver, trustee, guardian, claimant, or surety. And so the Master, or his deputy, the sheriff, or his deputy, or any other officer of the Court, may move the Court for directions or instructions in any matter growing

<sup>1</sup> Code, § 2799.

<sup>2</sup> The practice in such cases is stated in the Chapter on Petitions. See, *post*, §§ 794-795.

<sup>3</sup> 2 Dan. Ch. Pr., 1743.

<sup>4</sup> See Chapter on Receivers, *post*, § 910.

<sup>5</sup> Allen & Hill, exrs., v. Shanks, 6 Pick., 359.

out of the proper discharge of their official duties, all other parties interested having due notice thereof. Such motions would require the support of affidavits, or petitions, when the facts do not fully appear of record. The following are the principal motions in such cases:

1. **Motions by a Purchaser of Property at a Master's Sale.** If a purchaser of property at a Master's sale desires a reference as to alleged encumbrances,<sup>6</sup> or as to disputed titles, or disputed boundaries, or desires to be relieved from his purchase, he may make a motion therefor, supporting it by a petition fully setting forth the particulars. He may have a reference as to unpaid taxes, or may have an order for a deed, or for a writ of possession, or have a lien declared paid, on mere motion, provided he is entitled thereto, and the Court has not lost its jurisdiction of the suit.

2. **Motion to Have Satisfaction of a Decree Set Aside.** If a stranger buys property at an execution sale, and such property is recovered from him, he may on motion supported by affidavit, have a *scire facias* against the defendant in order to have the satisfaction set aside, and the original decree revived for his benefit.<sup>7</sup>

3. **Motions in Regard to Bids.** A person who has rights as a bidder or purchaser at a Master's or receiver's sale, may, when his interests so require, bring those rights to the attention of the Court. If the facts do not fully appear in the Master's or receiver's report, he may bring them before the Court by petition. Thus, if the Master should fail or refuse to report David Doe as the highest and best bidder, he may bring the matter before the Court by petition, and have the report corrected or the biddings opened.

4. **Motions by a Receiver, Guardian, or a Trustee.** If a receiver, guardian or trustee desires to be discharged, or to have his accounts passed on, or to have an allowance made him, or to report any matter to the Court relating to his duties, or to obtain instructions from the Court, he may bring the matter before the Court by motion, supported by the record, or a report, or a petition, or an affidavit, according to the character of the matter, and the necessity for showing forth facts not otherwise appearing.

5. **Motions by Claimants.** A creditor or claimant may except to a Master's report as to his debt or claim, or may by motion supported by petition or affidavit, bring any matter before the Court in reference to his debt or claim, or in reference to any other claim which he seeks to resist.

6. **Motions by Sureties.** Sureties on any note or bond executed in the cause may, by motion, bring before the Court any matter affecting their liability: they may have a reference to the Master as to any payments or credits they may claim, and may invoke the decision of the Court on any question involving their rights or duties. Sureties on bonds desiring to be released may be heard on motion for that purpose, on giving the notice required by law.<sup>9</sup>

<sup>6</sup> Code, § 3310.  
<sup>7</sup> Code, §§ 2990-2996.

<sup>8</sup> *Crudington v. Hogan*, 21 Pick., 448.  
<sup>9</sup> Code, §§ 3665-3671.

ARTICLE VI.

MOTIONS ABOUT PAYING MONEY INTO, OR OUT OF, COURT.

§ 765. When Money Will be Ordered to be Paid Into Court.  
 § 766. When a Complainant Will be Ordered to Pay Into Court.

§ 767. When a Defendant Will be Ordered to Pay Into Court.  
 § 768. Investment of Money Paid Into Court.  
 § 769. Discretionary Powers of the Court in Paying Money.

§ 765. **When Money will be Ordered to be Paid into Court.**—There are many cases wherein the Court will order money, or choses in action, to be paid into the Clerk's office before a final decree. This order is ordinarily made on the defendant, but it may be made on the complainant, also. The order is, however, never made against a defendant unless he admits (1) that he has the money, or chose in action, in his possession, or under his control; (2) that it belongs to the complainant; and (3) that it is a trust fund.<sup>1</sup> There are cases, however, where a defendant will be ordered to pay in money that is not trust money, but in such cases the defendant must clearly admit that he has a fund in his possession belonging to one or more of the parties to the suit, that he is willing the Court may determine its disposition, and he must make a tender of it in his answer, without actually depositing it with the Clerk and Master.

A complainant will be ordered to pay money into Court when, on his own admission in his bill, he owes the defendant a certain sum which it is equitable he should pay before he can require the defendant to do equity, or before he can, in good conscience, ask the interposition of the Court as against the defendant.

When money has been paid into Court upon an order, such payment is merely a collateral security, and is not to be taken as the property of the opposite party, until so adjudged upon the hearing: it belongs to the party who may be eventually found entitled to it, and it may be ordered to be returned to the party paying it in, if, on the hearing, he show a right to it.<sup>2</sup>

An order for the payment or transfer of a fund should always be entitled in the cause to which the fund belongs. A fund may be transferred from one cause to another upon petition filed in the cause from which the transfer is sought,<sup>3</sup> in which case, there should be an order of record in such cause showing the transfer, and, also, an order of record in the cause to which the transfer is made, showing the receipt of the fund, and whence derived.

§ 766. **When a Complainant will be Ordered to Pay into Court.**—Under the operation of that beneficent jurisdictional maxim, He who seeks Equity must do Equity,<sup>4</sup> the Court will require a complainant to do things which the Court could not require of him if he was a defendant. If a complainant, seeking Equity, admits that he has in his possession money, or choses in action, belonging to the defendant, or admits that he is indebted to the defendant in a definite sum, the Court will require him to do Equity, at least to the extent of his admission, by paying into Court the money, or thing, admitted to belong to the defendant; and compliance with this requirement by the complainant will be the condition on which relief, temporary or permanent, will be granted him. The ordinary cases in which this preliminary order is made are the following:

1. **Payment Into Court as the Condition of Injunction Relief.** If in a bill ten-

<sup>1</sup> 1 Dan. Ch. Pr., 1770-1774. A trust fund is a ward of Chancery.  
<sup>2</sup> 2 Dan. Ch. Pr., 1778.  
<sup>3</sup> 2 Dan. Ch. Pr., 1803. If the facts sufficiently

appear in the record, the transfer may be made on motion.  
<sup>4</sup> *Ante*, § 39.

dered for a fiat for injunction, the complainant admits any money to be due the defendant, or fails to allege any sufficient Equity against any part of the matter sought to be enjoined, the Chancellor may require the complainant to pay into Court the amount admitted to be due, or not sufficiently contested, before any injunction as to the residue.<sup>5</sup>

2. **Payment Into Court by a Trustee Seeking the Aid of the Court.** When an executor, administrator, guardian, trustee, or other fiduciary, has a trust fund in his hands, and applies to the Court for its instruction as to how such funds should be disposed of, the Court will, on motion of a defendant, order the fund to be paid into Court.<sup>6</sup>

3. **Payment Into Court by a Purchaser Who Seeks a Specific Performance.** A purchaser, in possession of the land, or a non-resident purchaser, filing a bill for specific performance, will be required to pay the unpaid consideration money into Court.<sup>7</sup>

4. **Payment Into Court by a Party Seeking Redemption.** Where a bill is filed by the debtor to enforce his right of redemption, alleging tender and refusal of the purchase-money, the money should be brought into Court when the bill is filed; and if not, the Court may order the complainant to pay it in.<sup>8</sup>

5. **Payment Into Court on a Bill of Interpleader.** On a bill of interpleader being filed in reference to money, or a chose in action, the complainant may be required to pay it into Court.<sup>9</sup>

6. **Payment Into Court by Other Complainants.** When a partner owes the firm an individual debt, he will not be allowed to come into Equity for an account, without paying his private debt, for he who seeks Equity must do Equity.<sup>10</sup>

§ 767. **When a Defendant will be Ordered to Pay into Court.**—It may be stated as a general rule that to obtain an order upon a defendant to pay money into Court before the final hearing, it must appear that he who asks for such an order has an interest in the money, and that he who holds it has no equitable right to it, but holds it in trust: and these facts must so appear as not to be open to any further controversy; and must, ordinarily, appear by the admission of the defendant in his answer, or in an affidavit, or in a written stipulation.<sup>11</sup> The Court will not make such an order where the defendant either denies the possession of a trust fund, or denies the complainant's right to it.<sup>12</sup>

The ordinary cases wherein a defendant will be ordered to pay money, or *chose in action*, into Court before final decree, are when a guardian, executor, administrator, trustee, or other fiduciary, admits in his answer that he has trust funds in his hands belonging to the complainant, in which case the Court will, on motion of the latter, order such funds to be paid into Court. This order will be made on a defendant, who is a trustee by implication, as well as on an express trustee; and where only a part of the fund claimed is admitted by the defendant to be in his hands, the Court will order that part to be paid in. The Court will order trust funds to be paid into Court, without any allegation, or proof, that there has been any abuse of the trust, or that the fund is in danger pending the litigation; but in all such cases it must clearly appear that the fund is a trust fund, and not a mere debt.<sup>13</sup>

§ 768. **Investment of Money Paid Into Court.**—Where a fund in Court is likely to remain there longer than six months, the Court will, on application of any party in interest, order it to be loaned out, or otherwise invested. Where funds belong to an infant, or a *non compos*, who has no general guardian, or belong to a beneficiary, who is entitled to the interest only, or belong to heirs, legatees, or distributees, who are non-residents, or unknown, or are in litigation in another cause, or in another Court, or in any case where the in-

<sup>5</sup> Ch. Rule, VI, § 4; see, *post*, § 1195.

<sup>6</sup> 2 Dan. Ch. Pr., 1772, note.

<sup>7</sup> 2 Dan. Ch. Pr., 1775.

<sup>8</sup> *Simmons v. Marable*, 11 Hum., 437.

<sup>9</sup> See, *post*, §§ 1106-1115.

<sup>10</sup> 2 Dan. Ch. Pr., 1776-1777.

<sup>11</sup> 2 Dan. Ch. Pr., 1770-1773, notes; 1779-1780.

<sup>12</sup> 2 Dan. Ch. Pr., 1780.

<sup>13</sup> 2 Dan. Ch. Pr., 1770-1774.

terest of the parties entitled will be manifestly promoted thereby, the Court will direct the Master to loan or invest such funds, specifying in the decree the manner and length of such investment.<sup>14</sup>

No money paid into Court can lawfully be loaned out by the Master, or otherwise by him invested, without an express order of the Court.<sup>15</sup>

Where money is in Court, or has been invested by order of the Court, the fact that some of the parties to the cause have married, or died, or that the suit has otherwise abated, will not prevent the Court from making all necessary orders to pay out the fund to the parties entitled;<sup>16</sup> nor will such facts prevent the Court from taking judgment on notes given for loaned money, or from taking other steps necessary to secure or collect notes or other property in the custody of the Court.

**§ 769. Discretionary Powers of the Court in Paying out Money.**—Where a party before the Court has a clear right to a fund, or to any part thereof, he is entitled to a decree therefor, in accordance with his right; and the Court is bound to pronounce such a decree, where properly demanded. But there are occasionally small sums of money in the Master's office, long unclaimed, or belonging to minors, or persons of unsound mind: in such cases, Courts of Chancery, by virtue of their general inherent powers to do Equity, and act as general guardian of persons under disability, will exercise a large discretion, in ordering these small sums to be so paid out as to do those entitled the most good. Thus, where the amount belonging to a minor, or *non compos*, is too small to warrant the expense of a general guardian, the Court may order it to be paid to his guardian *ad litem*, or next friend, or to his parent, or to a near kinsman, or other trustworthy person, with orders to apply it as the best interests of the party under disability may require.<sup>17</sup> Where there is a small sum due an infant wife, the Court may order it to be paid to her, on the joint receipt of herself and husband, when her necessities require it. Where a fund belongs to unknown heirs, and has remained long unclaimed in the Master's office, the Court may distribute it among the known living heirs, on their written agreement to refund when ordered, but without requiring any refunding bond. Where there is a fund in Court, belonging to the estate of a decedent, too small to justify administration, the Court may order it to be paid out to the person who would have been entitled to administer, or to some other trustworthy person, to be expended for the benefit of those entitled. And in general, in very small matters, where persons are under disability, the Court may, as their general guardian, exercise a discretion not at all permissible in larger matters.<sup>18</sup>

<sup>14</sup> As to the investment of proceeds of sale of land for partition, see Code, § 3321; and, in case of sale for re-investment, see Code, § 3338, which is imperative. *Mason v. Tinsley*, 1 Tenn. Ch., 154. See, *post*, § 972.

<sup>15</sup> 2 Dan. Ch. Pr., 1789.

<sup>16</sup> 2 Dan. Ch. Pr., 1799.

<sup>17</sup> 2 Dan. Ch. Pr., 1800-1803, notes. Where the fund does not exceed the sum of one hundred and fifty dollars, and the minor has no general guardian, the Court may disburse the same through the Clerk and Master for the support, maintenance and educa-

tion of such minor, or may direct the fund to be paid to the natural guardian of such minor, or other persons having the care of such minor, to be applied for the support and education of the minor, subject to such terms and conditions as the Court may impose. Acts of 1899, ch. 177.

<sup>18</sup> The general doctrines of this section will be found fully supported by 2 Dan. Ch. Pr., 1794-1803, notes; and by the common practice of Chancery Courts. See, Article on Suits Where the Chancery Court Acts as Guardian, *post*, §§ 968-971.



## CHAPTER XXXVIII.

## MOTIONS AT CHAMBERS, AND PROCEEDINGS THEREON.

ARTICLE I. Jurisdiction of the Chancellor at Chambers.

ARTICLE II. Proceedings before the Chancellor at Chambers.

## ARTICLE I.

## THE JURISDICTION OF THE CHANCELLOR AT CHAMBERS.

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| <p>§ 770. Jurisdiction of the Chancellor at Chambers Generally Considered.</p> <p>§ 771. Jurisdiction to Rule on Demurrers, Pleas, or Any Motion, or Other Application.</p> <p>§ 772. Jurisdiction of the Chancellor at Chambers to Confirm Sales.</p> | <p>§ 773. Jurisdiction of the Chancellor at Chambers to Make a Final Decree.</p> <p>§ 774. Jurisdiction of the Chancellor at Chambers to Grant an Appeal.</p> <p>§ 775. Jurisdiction of the Chancellor at Chambers, Under Acts Prior to 1903.</p> |
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**§ 770. Jurisdiction of the Chancellor at Chambers Generally Considered.**

The powers of the Chancellor at Chambers in Tennessee have always been greater than those ordinarily exercised. Some Chancellors refrained from exercising many of these powers because of the inconvenience to them and to suitors, especially when there were only two or three Chancellors for the whole State, and the Courts were often a hundred miles from a suitor; and other Chancellors seeing these powers not generally exercised had misgivings as to their existence, or hesitancy as to their exercise.

Formerly in England<sup>1</sup> the common law Courts were held at stated periods, and were attended by crowds of people, visitors, witnesses, litigants, attorneys, barristers, bailiffs and other officers of the Court with their insignia of office, and above all loomed the Judge, gowned in black silk, like a big woman, with a monstrous white wig on his head. On the other hand, the Chancery Court was in session, directly or indirectly, nearly all the time. There were in attendance upon it no visitors, no witnesses, few or no litigants, only a few lawyers called "Solicitors," and only one or two bailiffs. A very large proportion of the Court's business was dispatched by the Masters, of whom there were several, or by Vice-Chancellors; and these did the business of the Court, not so much in term time as at Chambers, the Court having exclusive jurisdiction, not only of all equitable litigation, but also of the persons and estates of minors, idiots and lunatics, appointing their guardians and caring for their estates and the expenditures thereof.

But in North Carolina and Tennessee, at first, the Chancery Courts and the Circuit Courts were held at the same times and by the same Judges, and the Equity business was generally postponed until the law business was over, and the jurors and witnesses discharged, and the Judges and lawyers anxious to close the term so as to go to their homes, or to the next Court. And after the adjournment of the Court, the Judge and the lawyers, in most of the county seats, were not seen until the lapse of four months, when the new term of the Circuit Court began. The Judges being thus inaccessible, very little Chambers business was transacted, and in consequence, Chancery litigation was greatly prolonged.

<sup>1</sup> The Judicature of England was greatly changed in 1875. See, *ante*, § 9.

As the State grew in population and wealth, however, and the Chancery Courts were separated from the Circuit Courts, and the number of Chancellors increased, and a Chancery Court held in almost every county, and later in every county, business at Chambers began to revive, Chancellors resumed the exercise of their jurisdiction at Chambers; by legislation, and by Court rules, the powers of the Chancellors at Chambers were enlarged and defined, and by recent legislation,<sup>2</sup> these powers have been still more enlarged, until now it is more difficult to tell what the Chancellor may not do at Chambers than what he may do, especially with consent of parties.

In general, the Chancellor's jurisdiction at Chambers now extends from the hearing of the simplest motions, such as to amend pleadings, to the supremest acts of adjudication, such as the rendition of final decrees and their enforcement by all necessary final process, as will be, hereinafter, more fully shown.

**§ 771. Jurisdiction to Rule on Demurrers, Pleas, or Any Motion or Other Application.**—The Chancellor has jurisdiction to hear and determine, in vacation and at Chambers, all issues<sup>3</sup> and questions arising on demurrers, dilatory pleas,<sup>4</sup> motions and applications to amend pleadings,<sup>5</sup> and for any action,<sup>6</sup> in any cause pending in his Division, either by consent of parties, or on notice by the party desiring such action, such notice to be given in the same way and manner as in case of motions to dissolve injunctions,<sup>7</sup> as shown below.<sup>8</sup>

The language of the statutes is broad enough to include any motion and the adjudication of any question that can be made in open Court during the progress of a suit.<sup>9</sup>

**§ 772. Jurisdiction of the Chancellor at Chambers to Confirm Sales.**—On application of a party interested, and ten days' notice to the opposite party, the Chancellor may at Chambers confirm sales of land, where the report of sale has been on file for thirty days, and has not been excepted to, and the biddings not raised; provided the Clerk and Master certifies, under his official seal, that there is, in his opinion, no reasonable prospect of the bid being raised as much as three per cent. But if the Clerk and Master certifies that there is a reasonable prospect of the bid being raised as much as three per cent., no action shall be taken on such motion, and the papers shall be returned to the Clerk and Master that he may receive advanced bids.<sup>10</sup> The Chancellor, however, is not bound to confirm a sale when the Clerk and Master certifies that there is no reasonable prospect of such advanced bid, but he has full discretion in the matter, and may confirm the sale, or refer the matter back to the Clerk and Master, to receive advanced bids, if any be made. No sale, however, shall be confirmed unless the parties in interest, or their Solicitor of record, shall have been given ten days' notice of the time and place of the application therefor: in case the party in interest is a non-resident, such notice shall be filed with the Clerk and Master for ten days, and it shall be so noted on his rule docket.<sup>11</sup>

**§ 773. Jurisdiction of the Chancellor at Chambers to Make a Final Decree.** While it is entirely proper to give the Chancellor power at Chambers to pass on any issue or question that may arise in a suit in Chancery, preliminary to

<sup>2</sup> See Acts of 1903, ch. 248; and Acts of 1905, ch. 427.

<sup>3</sup> It would seem from the use of the word "issues," that "issues" of fact arising on dilatory pleas, might be within the statute, one of its objects being to "expedite" the litigation by getting everything out of the way of a final hearing on the merits.

<sup>4</sup> By "dilatory pleas" is ordinarily meant pleas in abatement; but as pleas in abatement are now heard along with the merits of the controversy, as heretofore shown, (see, *ante*, § 261,) they need no longer delay the final decision of the cause. It would require only a liberal interpretation of the statute to hold that any plea, whether in abatement or in bar, which is insufficient, is dilatory, as such a plea delays a hearing on the merits.

<sup>5</sup> Acts of 1903, ch. 248, sec. 1.

<sup>6</sup> Acts of 1905, ch. 427, sec. 1. The vacation

powers conferred on the Chancellor by the second clause of the first section of this Act cannot be exercised out of the county where the suit is pending, unless by consent of the parties.

<sup>7</sup> *Post*, § 854.

<sup>8</sup> See Article on Procedure, *post*, § 778.

<sup>9</sup> The words of the Act of 1903 are "all issues and questions arising on demurrers, dilatory pleas, motions and applications to amend pleadings;" and the words of the Act of 1905, "any action desired." As an "issue" or "question" of fact may arise on a "dilatory" plea, it would seem from the letter of the law, that the Chancellor could determine it, notwithstanding the Act of 1897, ch. 121. See, Pleas in Abatement, *ante*, §§ 260-261.

<sup>10</sup> Acts of 1903, ch. 248, sec. 2.

<sup>11</sup> *Ibid*.

a final hearing on the merits, on the adverse party being notified of the application for such action, it would be going too far to allow the Chancellor to make a final decree at Chambers, except by consent. And so the statute provides that the Chancellor shall have jurisdiction to hear and determine, by final decree, any cause pending in his Division, except a divorce suit,<sup>12</sup> but that this jurisdiction shall depend on the consent of the parties, or their Solicitors. When, however, a cause is thus submitted to him for adjudication, he is not obliged to pronounce a final decree in it, for he may find it unripe for such an adjudication, either because of defective pleadings or defective proofs, in which case he may make any order necessary to fully prepare the cause for final hearing; he may remand it to the rules for proof on a particular point, or generally, or he may order pleadings to be amended, or new parties made, or a cross bill to be filed, or any other act or thing done, necessary to enable him to do justice, and administer equity between the parties,<sup>13</sup> or to expedite the litigation.

**§ 774. Jurisdiction of the Chancellor at Chambers to Grant an Appeal.** Any party dissatisfied with any decree rendered<sup>14</sup> at Chambers, under this and the foregoing sections, may, at the time the decree is rendered, or within twenty days thereafter, pray for an appeal,<sup>15</sup> which the Chancellor may permit, and may allow the appellant not to exceed thirty days in which to give bond, or otherwise comply with the terms of the decree.<sup>16</sup> The order granting the appeal, if made at Chambers, shall be endorsed by the Chancellor, and transmitted to the Clerk and Master, and by him entered, as in case of the decree appealed from.<sup>17</sup>

A bill of exceptions will lie to any act or omission of the Chancellor at Chambers, when it would lie in a like case at term time.<sup>18</sup>

**§ 775. Jurisdiction of the Chancellor at Chambers, under Acts Prior to 1903.** The Chancellor is vested with extensive powers during vacation by statutes passed prior to 1903. These powers are wholly unaffected by the Acts of 1903 and 1905, except in so far as they have been thereby confirmed or enlarged. No notice is required to authorize the Chancellor to discharge any of the powers specified in this section, except the following: 1, Hearing motions, and making orders to prepare a case for hearing; 2, Making orders to carry orders or decrees into execution; 3, Regulating and revising the actions and rulings of the Master; 4, Dissolving or modifying injunctions and appointing receivers; and 5, Discharging or reducing any levy or bond in an attachment suit, in all of which cases, five days' notice shall be given by the party desiring the action of the Chancellor.

The powers of the Chancellor at Chambers based on legislation prior to 1903 are as follows:

1. **Powers in Relation to Extraordinary Process.** The Chancellor may in vacation (1) grant injunctions, attachments of property, and *ne exeat*;<sup>19</sup> (2) may appoint receivers;<sup>20</sup> (3) may discharge or reduce any levy in an attachment

<sup>12</sup> Acts of 1905, ch. 427, sec. 1.

<sup>13</sup> The submission of a cause for a final decree carries by necessary implication, authority to do any less act in connection with the case. *Omne majus dignum continet in se minus dignum.* (Every matter of large importance includes what is of less importance.) *Cui licet quod majus non debet quod minus est non licere.* (He to whom the greater power is granted ought to have the lesser power.)

<sup>14</sup> The statute says "entered," but this is evidently a typographical error, as it says the appeal may be prayed for "at the time the decree is rendered." *Ibid.*, § 4. See, ante, § 502, note 2.

<sup>15</sup> The Act expressly allows an appeal only when "the Chancellor, in the exercise of his discretion permits an appeal;" and, as it has been decided that no writ of error will lie from decrees made at Chambers, (*Lindsay v. Allen*, 4 Cates, 637,) a strict construction of the Act would prevent any revision of final decrees rendered at Chambers, unless by "permission" of the Chancellor. But, as the Acts were, manifestly, not intended to restrict appeals or writs

of error, a liberal construction would allow an appeal as a matter of right, and a writ of error from any final Chambers decree after its entry on the minutes, or in the minute book, and especially after the authentication and approval thereof by the signature of the Chancellor at the succeeding term of his Court. A decree thus entered and approved becomes in fact a decree of the Court; this is shown by the fact that final process issues thereon. See secs. 3, 7 and 9, of Act of 1903; also, § 2 of the Act of 1905. If not then a decree of the Court, or in every respect as effective as a decree of the Court, the statute would probably be unconstitutional. If a term of the Court should open before the time for appealing had expired, an appeal could be taken in open Court as soon as the decree was entered on the minutes and approved by the Chancellor.

<sup>16</sup> *Ibid.*, § 4.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Code, § 4434.

<sup>20</sup> Code, § 4452.

case; (4) may discharge or reduce any bond in cases of injunction, *ne exeat*, and attachment;<sup>21</sup> (5) may dissolve, or modify, injunctions;<sup>22</sup> (6) may grant an attachment for a defendant who fails to answer,<sup>23</sup> or for any other person guilty of a contempt;<sup>24</sup> and (7) may grant a *habeas corpus* where a defendant, or other person, has been committed by him for a contempt,<sup>25</sup> and discharge the prisoner.<sup>26</sup>

**2. Powers in Relation to Proceedings in the Master's Office.** The Chancellor may, at Chambers, hear and determine appeals from the rulings of the Master: (1) on exceptions to answers; (2) on receiving and filing an answer; (3) on exceptions to depositions, (4) in granting or refusing a *pro confesso* order; (5) in setting aside, or refusing to set aside, a *pro confesso* order; (6) in appointing, or refusing to appoint, a guardian for a person of unsound mind, or a guardian *ad litem* for an infant; (7) in reviving, or refusing to revive, a cause on *scire facies* or bill of revivor, (8) in extending, or refusing to extend, the time for taking proof, and (9) in any other case wherein the Master has done any act, made any order, or refused to do an act or make an order, either on a rule day, or at any other time in vacation.<sup>27</sup>

**3. Other Powers at Chambers.** The Chancellor may, at Chambers: (1) order publication for creditors on an insolvent bill;<sup>28</sup> (2) may appoint an administrator on a bill filed for that purpose, and order the sale of the decedent's property;<sup>29</sup> (3) may hear and determine any motion necessary and proper to prepare a case for final hearing;<sup>30</sup> (4) may make orders and issue process to carry a decree into execution; (5) may appoint special commissioners to take accounts; (6) may appoint persons to serve original, mesne, or final process;<sup>31</sup> (7) may appoint guardians *ad litem*; (8) may swear parties to bills or to answers; (9) may appoint special terms for any of his Courts;<sup>32</sup> and (10) may issue a peace warrant,<sup>33</sup> a search warrant,<sup>34</sup> and a warrant for the arrest of a fugitive from justice from another State.<sup>35</sup>

## ARTICLE II.

### PROCEEDINGS BEFORE THE CHANCELLOR AT CHAMBERS UNDER THE ACTS OF 1903 AND 1905.

§ 776. The Chambers of the Chancellor.  
 § 777. How Causes are Heard at Chambers.  
 § 778. Notice or Consent Required for Hearings at Chambers.  
 § 779. Forms of Proceedings at Chambers, and of Entries Recording the Same.  
 § 780. Orders and Decrees at Chambers How Entered of Record.

§ 781. How Orders and Decrees at Chambers are Authenticated.  
 § 782. Force and Effect of Orders and Decrees at Chambers.  
 § 783. Exceptions to Orders and Decrees Made at Chambers.

**§ 776. The Chambers of the Chancellor.**—The office room assigned the Chancellor in the Court House is called his "*Chambers*"; and if there be no such room, then his private office, or his quarters at the hotel, or any place where

21 Code, § 4451.  
 22 Code, §§ 4444-4445.  
 23 Code, §§ 4360-4367.  
 24 Ch. Rule, VII, § 2; *post*, § 1196.  
 25 Code, §§ 3723; 4482-4483. The Chancery Court, but not the Chancellor, may grant a *habeas corpus*, in any case, under the Act of 1877.  
 26 Code, § 4367. See Chapter on Contempts, *post*, § 918-924.  
 27 Code, § 4416.  
 28 Code, § 2371.

29 Code, §§ 2213-2215.  
 30 Code, § 4410.  
 31 Code, §§ 4410-4415.  
 32 Code, § 3941.  
 33 Code, § 4943.  
 34 Code, §§ 4943; 5320.  
 35 Code, §§ 4943; 5345.  
 The Chancellor is authorized to solemnize the rites of matrimony, Code, § 3949; and visit the Insane Asylum, Code, § 1523.

he transacts business, is, for euphemism, called his "*Chambers.*" Sometimes when the proceeding is very important, or the number of attendants large, Chambers proceedings are held in a Court room. But wherever the place may be that the Chancellor transacts any business as a Chancellor, that place, *pro hac vice*, becomes his Chambers, provided it be not his Court room, while his Court is in session and he presiding.

While, ordinarily, the attendance of the Sheriff, or a deputy is not necessary or required, at Chambers, nevertheless cases may and do arise when the presence of such an office may be necessary, especially while the Chancellor is exercising some of the enlarged jurisdiction conferred on him by the Acts of 1903 and 1905. In any event, the Chancellor may command the attendance of the Sheriff at his Chambers whenever, in his discretion, such attendance is necessary or important.

And so, for like reasons and in like manner, the attendance of the Clerk and Master may be required at Chambers, and he may be required to bring with him any files or papers in his office needed in the matter pending.

**§ 777. How Causes are Heard at Chambers.**—The Chancellor hears and determines the questions presented to him under the preceding Article, at the time and place specified by consent, or in the notice; but if he can do so without disregarding some other public duty, or without great personal inconvenience, he is required to fix an early date and convenient place at which he will hear the same. At such hearing he has all the powers he possesses at a regular term of Court, as to the questions submitted to him for his determination.<sup>1</sup> The file of papers in the cause being heard may be looked to by the Chancellor in determining the questions submitted to him.<sup>2</sup>

If the matter to be acted on by the Chancellor at Chambers, is a matter of minor importance, the hearing on it, if any hearing is required at all, will ordinarily be informal; but if the matter is one of grave consequence, especially if argument is to be heard, and parties and witnesses or spectators are present, the hearing will approximate, in formality and dignity of procedure, a like hearing in open Court, and the same procedure will be observed.

The Chancellor will first satisfy himself that the parties are consenting to his jurisdiction, or that the notice required by the statute has been duly given; for, without consent or legal notice, he would have no right to act in any case under the Acts of 1903 and 1905.

**§ 778. Notice or Consent Required for Hearings at Chambers.**—A party desiring to bring any matter, or the hearing of any cause, before the Chancellor at Chambers must, (1) obtain the consent of parties adversely interested, or (2) give the notice required by the statute; but no cause can be heard and determined by final decree unless the parties, or their Solicitors, consent to such hearing.<sup>3</sup>

In all cases, except for a final hearing and the confirmation of land sales, the notice of the intended application shall be given in the same way and manner as in case of motions to dissolve injunctions.<sup>4</sup> If any party has been *pro confessoed* a copy of the notice filed with the Clerk and Master of the Court where the cause is pending, for five days will be sufficient, provided the Clerk and Master enters it on his rule docket. Guardians, guardians *ad litem* and Solicitors representing parties under any disability, may consent and give notice under this section.<sup>5</sup> The power to act at Chambers under this section cannot,

<sup>1</sup> Acts of 1903, ch. 248, § 1.

<sup>2</sup> *Ibid.*, § 5.

<sup>3</sup> It would be well for the Chancellor to require a written consent in all cases of final hearing. The writing will save many differences of opinion and much contention as to what was included in the consent. The losing party will seek to restrict the consent, and the winning party will want to enlarge it. See, *post*, § 1141, sub-sec. 4.

<sup>4</sup> See Article on the Dissolution of Injunctions, §

854. In case of confirmation of land sales, ten days' notice is required, and consent for a final hearing.

<sup>5</sup> Act of 1905, ch. 427, § 1. This means that guardians, guardians *ad litem* and Solicitors representing parties under disabilities of any kind, may bind those they represent in any case under the Acts of 1903 and 1905 either by bringing matters before the Chancellor at Chambers, or consenting to their being brought.

however, be exercised outside of the county in which the suit is pending, unless by consent of parties.

§ 779. **Forms of Proceedings at Chambers, and of Entries Recording the Same.**—The following forms may be of some benefit in proceedings at Chambers under this and preceding sections:

**NOTICE OF AN APPLICATION TO THE CHANCELLOR.**

John Doe, }  
*vs.* } No. 713.—In Chancery at Bristol.  
 Richard Roe. }

The defendant is hereby notified that at 10 a. m. on the 12th day of September, 1905, in the office of the Clerk and Master at Bristol, Tenn., I will apply to Chancellor Hal H. Haynes for an order overruling the demurrer [*or plea*] filed by him in this cause [*or for such other order or action of the Chancellor as may be desired.*]  
 This Sept. 1, 1905. CAMPBELL & BOREN, Solicitors for Compl't.

**ORDER MADE AT CHAMBERS.**

John Doe, }  
*vs.* } No. 713.—In Chancery at Bristol.  
 Richard Roe. }

This cause came on to be heard before me this Sept. 12, 1905, in the office of the Clerk and Master at Bristol, on application of the complainant that the demurrer [*or plea,*] of the defendant be overruled, and it duly appearing that legal notice of this application has been given [*or, and the defendant having waived notice, or the defendant being present in person, or by Solicitor, as the case may be,*] on consideration of the premises, the Chancellor is of opinion that said demurrer is bad, and the same is therefore overruled, [*or, that said plea is insufficient and dilatory, and the same is therefore overruled and disallowed,*] and the defendant is required to answer the bill on or before the 30th instant.<sup>6</sup>

This order made on Sept. 12th, 1905, and the Clerk and Master will enter it at once on the minutes of his Court.

HAL H. HAYNES, Chancellor.

**ENTRY ON THE MINUTE BOOK.**

Chancery Court at Bristol, Tenn.<sup>7</sup>

Order and Decrees, made at Chambers by Chancellor Hal H. Haynes, since the last term of said Court.

John Doe, }  
*vs.* } No. 713.—In Chancery at Bristol.  
 Richard Roe. }

[*Here insert the foregoing order in full, including its date and the Chancellor's signature, then add.*]

The above order received by me through the Post Office [*or by express,*] Sept. 13, 1905. John Smith, C. & M., and entered in the minute book, [*or on the minutes,*] Sept. 13, 1905.

JOHN SMITH, C. & M.

**PRAYER FOR, AND GRANT OF, APPEAL.<sup>8</sup>**

John Doe, }  
*vs.* } No. 713.—In Chancery at Bristol.  
 Richard Roe. }

The defendant, Richard Roe, prays an appeal from the decree of the Chancellor at Chambers overruling his demurrer in this cause, and the Chancellor being of opinion that an appeal is proper, grants said appeal, and allows the defendant thirty days in which to give bond, [*or, file a pauper's oath.*]

The Clerk and Master will enter this order on his minutes, [*or, in his minute book;*] and, on the appeal bond being filed [*or oath taken*] in season, will forward a transcript of the record in the cause to the Supreme Court.

Sept. 12, 1905.

HAL H. HAYNES, Chancellor.

This prayer for, and grant of, an appeal, may, when made at the time the decree is pronounced, be entered just below the decree, and on the same paper.

§ 780. **Orders and Decrees at Chambers, How Entered of Record.**—The orders and decrees made by the Chancellor at Chambers, under this and the preceding section, must be in writing and signed by the Chancellor, and trans-

<sup>6</sup> The 30th is the Saturday before the next rule day, and if the defendant does not answer on or before that day, a *pro confesso* can be entered against him on the following Monday.

<sup>7</sup> If the entry is on the unclosed minutes this head line may be omitted.

<sup>8</sup> An appeal is the only method of obtaining a revision of a decision at Chambers. A writ of error will not lie. Lindsay v. Allen, 4 Cates, 637. But see, *ante*, § 774, note 15.

mitted by him, under seal, by registered letter or express, to the Clerk and Master of the Court where the respective causes are pending, and the Clerk and Master shall note upon each the exact time of its receipt by him; and he shall enter it and all endorsements thereon, at once in his minute book, under an appropriate heading,<sup>9</sup> showing that it is an order or decree made at Chambers; and when so entered it shall have the same force and effect as if made and entered at term time.<sup>10</sup>

If the minutes of the Court shall have been left open,<sup>11</sup> then the orders and decrees made at Chambers may be entered on the open minutes as in term time, under an appropriate sub-head, thus: "Orders and Decrees made at Chambers." Each order and decree should have at its foot, in addition to the endorsements on the decree and the date it was made by the Chancellor, an entry showing when it was made on the minute book.

§ 781. **How Orders and Decrees at Chambers are Authenticated.**—At the next term<sup>12</sup> of the Court, after the entry of a Chambers order or decree on the minute book, or in the minutes, the Chancellor is required to examine it, and if found correct he approves it and signs the minutes.

#### CHANCELLOR'S APPROVAL OF THE MINUTES.

The foregoing order, [or orders and decrees,] made by me at Chambers since the last term of the Court have been examined and found correct, and are hereby approved.

November 4, 1905.

HAL H. HAYNES, Chancellor.

If any error be discovered in any order or decree he will have it corrected so as to conform to the original decree.

The Chancellor may leave his record of the term's proceedings unadjourned until Court in course, in which event any order or decree made at Chambers may be entered on the minutes as in term time, and shall be as effective as if made during term time; provided that all the steps are taken by the applicant, the Chancellor and the Clerk and Master, that are required to be taken by them, in case of orders and decrees at Chambers when the record is closed.<sup>13</sup> Orders and decrees so entered have all the force and effect of orders and decrees made and entered in term time; and if the decree is final it may be appealed from, and if not appealed from may be enforced by execution, writ of possession or other proper final process as in case of other final decrees.<sup>14</sup> But when the record is left open the Chancellor may close it at any convenient time, but in any event not later than the next regular term of the Court.<sup>15</sup>

§ 782. **Force and Effect of Orders and Decrees at Chambers.**—Any final decree at Chambers, made pursuant to the preceding sections, when entered by the Clerk and Master, either in his minute book or on the unclosed minutes of his Court, has the same force and effect as if made and entered at term time,<sup>16</sup> and may in like manner be appealed from, and if not appealed from is enforced by executions, writs of possession, and other final process therein provided; and it is the duty of the Clerk and Master, after the expiration of thirty days from the entry of a final decree upon the minutes of his Court, to issue all necessary process, as in case of final decrees made and entered in term time.<sup>17</sup>

<sup>9</sup> An appropriate heading would be:

CHANCERY COURT AT BRISTOL, TENNESSEE.

Orders and decrees made at Chambers by Hon. Hal. H. Haynes, Chancellor, since the last term of this Court.

<sup>10</sup> Acts of 1903, ch. 248, §§ 1 and 3.

<sup>11</sup> There is a difference between an entry made in the minute book and an entry made on the minutes: the former is made when the minutes of the preceding term have been closed, and so a fuller caption is required. When the minutes of the Court have been left open by the Chancellor, then a Chambers order may be entered on the minutes under the caption given in the text.

<sup>12</sup> The Act says at the next regular term, but as this is merely directory, the authentication can better

be done at the next term, whether regular or special. Besides, the Act of 1905, ch. 427, § 2, requires objections to Chambers orders and decrees to be made "before or during the next regular or special term of Court succeeding the entry of such order or decree on the minutes."

<sup>13</sup> Acts of 1905, ch. 427, § 2.

<sup>14</sup> Acts of 1903, ch. 248, secs. 3, 7, and 9.

<sup>15</sup> Acts of 1905, ch. 427, § 2.

<sup>16</sup> Acts of 1903, ch. 248, §§ 3, 7, and 9; Acts of 1905, ch. 427, § 2. It is clear that the two Acts give a Chambers order, or decree, when entered by the Clerk and Master, all the efficacy of a Court order or decree.

<sup>17</sup> Acts of 1903, ch. 248, § 7.

And what is true as to the force and effect of a final decree at Chambers, is, *a fortiori*, true of any order made at Chambers.

§ 783. **Exceptions to Orders and Decrees Made at Chambers.**—If proper notice<sup>18</sup> of an application to the Chancellor at Chambers was not given to the exceptant, or if the Chancellor heard the question presented at an adjourned time and place whereof the exceptant had no notice, or if in any way the exceptant was not sufficiently notified, or if notified failed to be present on good grounds, or if in any way unjustly prejudiced by the order made, or by the transmission or entry thereof, and he desires to except to the order, or if he desires to except to a decree on the merits made without his consent, he must make his objections and take the proper steps to present them before or during the next regular or special term of the Court succeeding the entry of the order or decree; or the irregularity or want of notice, or other failure to comply with the provisions set out in this section, will be deemed waived and the defect cured.<sup>19</sup>

<sup>18</sup> If the defendant to the application was present at the hearing thereof that cures want of, or defect in, a notice.

<sup>19</sup> Acts of 1905, ch. 427, § 2.



## CHAPTER XXXIX.

## AFFIDAVITS.

§ 784. Office of an Affidavit.

§ 785. By Whom Affidavits Should be Made.

§ 786. Requisites and Frame of an Affidavit.

§ 787. Weight and Effect of an Affidavit.

§ 788. Affidavits to Bills, Petitions, Pleas and Answers.

§ 789. Forms of Affidavits to Bills, Petitions, Pleas, and Answers.

§ 790. Before Whom Affidavits Must be Made.

§ 784. **Office of an Affidavit.**—An affidavit is a statement reduced to writing, and sworn to before some person authorized to administer the oath.<sup>1</sup> The ordinary offices of an affidavit are (1) to aid in supporting or opposing, an application for an order of the Court, whether such application be based on a motion, or on petition; (2) to serve as a substitute for an officer's return of service of process, notices and other papers, (3) to verify bills, answers and pleas, when verification is necessary; and (4) in general, to bring before the Court facts which do not otherwise appear in the record of a cause.

Affidavits are ordinarily needed in support of motions in the following cases: (1) motions for publication when personal service is dispensed with; (2) motions for the appointment of guardians *ad litem*; (3) applications for process without bonds for costs or damages; (4) applications for an injunction; (5) for an attachment of property; or (6) for a receiver; (7) motions to set aside a *pro confesso*; (8) to extend the time for taking proof; (9) to re-examine a witness to the same facts; (10) for a continuance; (11) for an attachment for contempt; (12) for better prosecution surety; (13) for a new trial, or re-hearing; (14) for leave to file a bill of review for new facts; (15) for retaxation of costs, and (16) for all other cases wherein the grounds of the motion do not already sufficiently appear of record.

Affidavits are not a part of a Court record, even if filed, unless made so by a bill of exceptions, or by an order on the minutes in the nature of a bill of exceptions. All affidavits read in a cause should, however, be duly filed, and the Court may decline to hear them until they are filed.

§ 785. **By Whom Affidavits Should be Made.**—As a general rule, an affidavit should be made by the person who has personal knowledge of the facts, unless a good reason is shown for its being made by some other person. An affidavit may be made by an agent, or by a Solicitor, when he has personal knowledge of the facts;<sup>2</sup> but, as a rule, not otherwise. The leading affidavit should be made by the party himself, unless he is sick, or absent, or the suit is being conducted by an agent, or attorney in fact: corroborating affidavits may be made by any one having personal knowledge of the facts.<sup>3</sup> Where, however, the facts are peculiarly and personally within the knowledge of the Solicitor, his affidavit

<sup>1</sup> 1 Barb. Ch. Pr., 597; 3 Greenl. Ev., § 380. *In judicis non creditur nisi juratis.* (In judicial proceedings nothing is believed unless sworn to.) See, *ante*, § 62, sub-sec. 2. The Judges, Solicitors, attorneys, clerks, sheriffs, and other officers of the Court, are all sworn, and what they do and say officially is under the sanction of their respective oaths.

<sup>2</sup> And his affidavit should show that he is acquainted with the facts, *Cbeatham v. Pearce*, 5 Pick., 668.

<sup>3</sup> 1 Barb. Ch. Pr., 599. The general rule of evidence, that the best evidence obtainable must be produced, is as applicable to affidavits as to other evidence. Affidavits should, therefore, be made by those best acquainted with the facts to be proved, or a

sufficient reason given for their not being so made; and all writings referred to in affidavits should be exhibited, or a sufficient excuse given for not so doing. See *Topp v. White*, 12 Heisk., 201; 1 Dan. Ch. Pr., 395, note; *Cook v. Dews*, 2 Tenn. Ch., 496; *Totten v. Nance*, 3 Tenn. Ch., 264.

The affidavit of a Solicitor is, ordinarily, insufficient to supply the place of an affidavit by his client, unless the Solicitor show that the facts deposed to are within his personal knowledge and not within the knowledge of his client, or unless some other good reason be given why the party himself does not depose in place of his Solicitor. This rule holds good in case of affidavits to amend bills or answers, in which case the party must swear to the amend-

should always accompany that of his client, especially when diligence, good faith, surprise, or want of notice is involved, during the progress of a suit.

When a married woman sues by next friend, her bill should be sworn to by herself, unless the facts upon which the bill rests are peculiarly within the knowledge of the next friend, and the bill, or affidavit, so shows.<sup>4</sup> The next friend of an infant generally signs and swears to the bill, unless the infant best knows the facts, and is of a suitable age, in which case he may sign and swear to the bill.<sup>5</sup> The bill of a corporation must be sealed with the seal of the corporation, if it have one, and if it needs verification, must be sworn to by some officer or agent who knows the facts set out in the bill.<sup>6</sup> Petitions should be sworn to by the petitioners, and not by agents, or Solicitors.<sup>7</sup> Answers must be sworn to by the defendants filing them, if adults and of sound mind; if infants, or of unsound mind, their guardians, or guardians *ad litem* must swear to their answers.

**§ 786. Requisites and Frame of an Affidavit.**—The ordinary parts of an affidavit are: 1, The proper title or style; 2, The venue; 3, The name of the deponent; 4, The substance, or statement of facts; 5, The conclusion; 6, The signature; and 7, The oath and jurat. These parts will be separately considered.<sup>8</sup>

1. **The Title, or Style, of the Cause.** An affidavit must be correctly entitled in the cause, or matter, in which it is made; and an affidavit made in one cause cannot be read for the purpose of obtaining an order in another cause.<sup>9</sup> But in proceedings for contempt against a witness, or other person not a party to the suit, all affidavits subsequent to the order for the attachment should be entitled in the name of the State, on the relation of the party prosecuting the attachment against the person attached.<sup>10</sup> In entitling an affidavit where the parties are numerous, it is sufficient to give the name of the first complainant, and of the first defendant, adding "and others," or "*et al.* Thus, John Doe, *et al.*, vs. Richard Roe, *et al.*"<sup>11</sup>

2. **The Venue.** The venue should appear on the face of the affidavit, so that it may be known in what county and State the oath was taken. The venue may be placed next below the style of the cause; or it may be prefixed to the jurat. If the affidavit is sworn to in open Court, and the jurat so shows, that is sufficient evidence of the venue.

3. **The Name of the Affiant.** The person making the affidavit should begin his statement by giving his name and place of residence, and if he is a party, or has any connection with the suit, or is a solicitor, witness, or officer, he should so state. It is, also, often important to state his age and business; these facts often add force to his statements.<sup>12</sup>

4. **The Substance, or Statement of Facts.** An affidavit must be pertinent to the application based on it, and must be free from prolixity, impertinence, and scandal.<sup>13</sup> An affidavit should give all the necessary circumstances of time,

ment: his Solicitor may, however, make a supplementary affidavit. *Cook v. Bee*, 2 Tenn. Ch., 343; *Wilson v. Wilson*, 2 Lea, 17. The affidavit may be by one of two partners. *Cheatham v. Pearce*, 5 Pick., 668. An affidavit to a petition by an "agent," without any explanation as to the character of his agency or his knowledge of the facts, is a nullity. *Reid v. Hoffman*, 6 Heisk., 440.

<sup>4</sup> *Smith v. Republic L. Ins. Co.*, 2 Tenn. Ch., 631. In *Leftwick v. Hamilton*, 9 Heisk., 313, it was held that the next friend is the proper party to make oath to the truth of the facts set forth in the bill. There is really no necessary conflict between the two cases; if the married woman has personal knowledge of the facts, and the next friend has not, she should swear to the bill, and *vice versa*; the question being, which one has the necessary personal knowledge of the facts, on which the equity of the bill is based. See *Reid v. Hoffman*, 6 Heisk., 440.

<sup>5</sup> 2 Barb. Ch. Pr., 361.

<sup>6</sup> 1 Dan. Ch. Pr., 395, note; 2 Barb. Ch. Pr., 361.

<sup>7</sup> *Johnson v. Murray*, 12 Lea, 109.

<sup>8</sup> The requisites of an affidavit given in this section will be found in 3 Greenl. Ev., §§ 380-382; and in 1 Barb. Ch. Pr., 600-604.

<sup>9</sup> 1 Barb. Ch. Pr., 600. The reason of this rule is that the misentitling of an affidavit will exempt the deponent from the punishment of perjury, although his oath is false. *Ibid.*

<sup>10</sup> 1 Barb. Ch. Pr., 600.

<sup>11</sup> *Et al.* is the correct abbreviation for both complainants and defendants, and for both the singular and plural numbers. See *Reukert v. Elliott*, 11 Lea, 242; 3 Greenl. Ev., § 380.

<sup>12</sup> 3 Greenl. Ev., § 380.

<sup>13</sup> It is scandalous and impertinent in an affidavit to draw inferences, or state arguments, reflecting on the character, or impeaching the motives of the adverse party, or his Solicitor. 1 Barb. Ch. Pr., 602-603. The Court should refuse to hear an affidavit containing scandalous and impertinent statements. See, *ante*, § 150. What is there said as to bills is true of all papers filed in a cause.

place, and manner, and other material incidents; and its matter should be sufficient, when considered by itself, or in connection with other affidavits, to warrant the application based on it, or supported by it. The matter it contains, and all the material circumstances attending it, should be stated positively, so that the Court may be fully informed as to the truth of the matter. An affidavit should give facts,<sup>14</sup> and not hearsay, opinions, inferences, or conclusions of law. When the deponent swears to words spoken, it is a proper precaution to add, "or words to that effect." Affidavits ought also to be legibly written in ink, and in one handwriting, without any interlineations or erasures, except such as are noted before signing.

**5. The Conclusion.** After the substance, or statement of facts, has been set forth, an affidavit usually concludes thus: "And further this deponent saith not." This conclusion, however, is not essential; it is intended to mean that the deponent has no further knowledge on the subject; and it would be highly culpable in the deponent to suppress any facts that would nullify, or materially modify, the statements made.<sup>15</sup>

**6. The Signature.** An affidavit must be duly signed at the foot thereof, on the right hand side. If the affiant can possibly sign his own name, he should do so; if not, he should make his mark, and his signature should be duly witnessed.

**7. The Oath, and Jurat.** The deponent must not only be duly sworn to the truth of the contents of his affidavit,<sup>16</sup> but the officer must, also, certify that fact, in a jurat written at the foot of the affidavit, upon the left hand side: the jurat should be duly dated, and signed officially.

An affidavit in support of a motion or petition is usually in the following form:

**FORM OF AN AFFIDAVIT.<sup>17</sup>**

John Doe, *et al.*,  
*vs.*  
 Richard Roe, *et al.* } In the Chancery Court, at Loudon, Tenn.

John Den,<sup>18</sup> being duly sworn, says that he is a resident of Loudon, Tenn., is 38 years of age, and is a farmer and school teacher; and that he knows of his own personal knowledge the following facts: [*Here set forth the facts and circumstances, particularly, giving dates and localities.*] And further this deponent saith not.

JOHN DEN.

**Jurat,**

Subscribed and sworn to, [*or, affirmed,*]  
 before me, [in open Court,] this Aug. 23, 1890. }  
 N. H. GREER, C. & M.

**§ 787. Weight and Effect of an Affidavit.**—Courts act only on what is sworn to;<sup>19</sup> and when a fact, or state of facts, is duly verified by the affidavit of a competent person, the Court accepts such affidavit, for the particular occasion, as absolutely true;<sup>20</sup> unless it is highly improbable, or unreasonable, or is self-contradictory, or vague and unsatisfactory, or is merely on information, or is contradicted by the record. Thus, where an affidavit, whether of a party, or of another person, is required in support of a motion, or petition, (which is its proper office,) it is ordinarily received for that purpose as conclusive evidence of

<sup>14</sup> An act is a thing of time, place and circumstance. Broom's Leg. Max., 102; and facts are composed mainly of acts. An affidavit should specify time, place, quantity, quality, circumstance, incident and limitation. Every fact should be faithfully photographed in connection with its immediate surroundings; and every complete statement of a fact includes considerations of quantity, quality, time when, place where, circumstances in which, incident to what, and limitations how and by what.

<sup>15</sup> A deponent who would suppress facts, known to him, that would change the force or effect of his affidavit, is guilty of perjury in his heart. The wilful suppression of a material truth is equivalent to the wilful suggestion of a material falsehood.

<sup>16</sup> The oath administered to the deponent is as follows: "You swear [*or affirm*] that the contents of

*this affidavit, by you subscribed, are true. So help you, God.*"

<sup>17</sup> See Index, for other and fuller forms of affidavits.

<sup>18</sup> If the affidavit is made by more than one person its statement will begin thus: "E F, aged 38 years, and I J, aged 29 years, both farmers and residents of said county, being duly sworn, severally depose and say: and first, this deponent, E F, for himself says that" [here giving his statements in full]. "And the deponent, I J, for himself, says that" [here give his statements. And then if there be facts to which both may severally swear, the affidavit may proceed thus:] "And these deponents further severally say: [giving the balance of the affidavit.]

<sup>19</sup> *Jurato creditur in judicio.*  
<sup>20</sup> Greenl. Ev., §§ 384-385.

the facts it contains. And the like effect should be given to them by the Master, when used in support of motions before him.

§ 788. **Affidavits to Bills, Petitions, Pleas, and Answers.**—All bills and petitions that pray for extraordinary process, such as bills for injunctions, attachments, *ne execats*, and receivers; all bills for divorce, for the appointment of administrators, for the sale of the property of persons under disability, or to set up lost instruments, or to have an inquisition of lunacy, or for a *mandamus*, or for a writ of replevin, all bills in the name of the State against corporations, public trustees, and usurpers of office, and all bills of interpleader, bills for the administration of insolvent estates, for the perpetuation of testimony, to take testimony *de bene esse*, and to review decrees on facts, and all bills setting out facts requiring the appointment of a guardian *ad litem*, or process by publication,<sup>21</sup> must be sworn to; and all answers<sup>22</sup> must be sworn to, unless the bill waives an answer under oath, or unless it be the answer of a corporation.<sup>23</sup> All pleas must be sworn to, unless they are based on matters of record in the Court. And all petitions presented to the Court during the progress of a suit, on which the action of the Court is sought, must be verified.

The force of a bill, petition, or answer, depends greatly on the character of the affidavit attached to it; for no bill, petition, or answer can be any stronger than its verification; and if the verification is on mere information and belief, the pleading is but little more than hearsay.<sup>24</sup> So, if the verification is direct and positive, but by a third person who is not shown to be acquainted with the facts, it has but little force.<sup>25</sup> An injunction bill, sworn to on information and belief, is utterly inadequate to withstand a motion to dissolve the injunction, when the answer is sworn to positively, and directly, on the personal knowledge of the defendant. On the other hand, vain is the effort to dissolve an injunction, when the answer is sworn to on information and belief, and the bill is on the direct personal knowledge of the complainant;<sup>26</sup> the difference between the two is the difference between hearsay and evidence. An answer on information and belief simply makes an issue, even when an answer on oath is called for.<sup>27</sup>

§ 789. **Forms of Affidavits to Bills, Petitions, Pleas, and Answers.**—The form and substance of affidavits to bills, petitions, and answers, are substantially as follows:

**AFFIDAVIT TO A BILL, PETITION, OR ANSWER.**

State of Tennessee, }  
County of Campbell. }

John Doe [*the complainant, or petitioner, or defendant.*] makes oath [*or, affirms,*] that the statements in his foregoing bill [*or, petition, or, answer,*] are true of his own knowledge, except as to the matters therein stated to be on information and belief, and these matters he believes to be true. JOHN DOE.

**Jurat,**

Sworn to [*or, affirmed,*] and subscribed for me, March 30, 1891. }  
JOHN J. GRAHAM, C. & M. }

**ANOTHER FORM OF AFFIDAVIT TO A BILL, PETITION, OR ANSWER.**

State of Tennessee, }  
County of Campbell. }

John Doe, [*the complainant, or defendant,*] makes oath [*or, affirms,*] the statements in his foregoing bill, [*or, petition, or, answer,*] made as of his own knowledge, are true, and those made on information and belief, he believes to be true. JOHN DOE.

[*Jurat, as above.*]

21 See, *ante*, § 161.  
22 A joint answer must be sworn to by all the defendants. *Cook v. Dews*, 2 Tenn. Ch., 496.  
23 As to sworn answers of corporations, see §§ 379, note 20; 789.  
24 See *Reid v. Hoffman*, 6 Heisk., 440; and *Smith v. Republic Life Ins. Co.*, 2 Tenn. Ch., 631; *Davis v. Reaves*, 2 Lea, 651.  
25 *Topp v. White*, 12 Heisk., 201.  
26 1 High on Injunc., § 35; 2 *Ibid.*, §§ 1505-1507; see Chapter on Injunctions, *post*, §§ 838-843.

27 *Wilkin v. May*, 3 Head, 175; *McKissick v. Martin*, 12 Heisk., 313. Bills and answers are often sworn to, in such a defective or indefinite manner, that they cannot be regarded as sworn to at all. The author has had numerous bills presented to him, as Chancellor, for fiat, with nothing to them to show verification except the jurat. The distinction between an affidavit and a jurat is sometimes overlooked. See *Lookout Bank v. Noe*, 2 Pick., 21.

If the complainant makes his mark, the better practice is to begin the affidavit thus:

John Doe [*the complainant, or petitioner, or defendant,*] makes oath [*or, affirms,*] that he has heard his foregoing bill [*or, petition, or answer,*] read and knows the contents thereof: and that the statements therein made as of his own knowledge are true, and those made as on information and belief, he believes to be true.

Witness:

JOHN BROWN.

[*Jurat, as above.*]

His  
JOHN X DOE.  
mark

When a bill, petition or answer is sworn to by an agent, Solicitor, or attorney, the affidavit should show that fact; and should, also, show the affiant's knowledge.<sup>28</sup>

**AFFIDAVIT OF AN AGENT, OR SOLICITOR.**

State of Tennessee, }  
County of Campbell. }

Hawk Powers makes oath that he is the Solicitor [*or, agent, or, attorney in fact,*] of the complainant [*or, defendant,*] that he has read [*or, heard read,*] the above bill [*or, answer,*] and knows the contents thereof, and that the same is true of his own knowledge,<sup>29</sup> except as to the matters therein stated to be on the information and belief of the complainant, [*or, defendant,*] and that as to those matters he believes it to be true. HAWK POWERS.

[*Jurat, as above.*]

This form will do when a bill, or answer, is filed by a corporation, and is sworn to by its president, or other chief officer. In such a case, the following form may be used, also:

**AFFIDAVIT TO THE PLEADING OF A CORPORATION.<sup>30</sup>**

State of Tennessee, }  
County of Shelby. }

Frank Faithful makes oath that he is the president [*or, secretary, or treasurer,*] of the Coal Mountain Company, the complainant [*or, defendant,*] corporation, and that the foregoing bill [*or, answer,*] of said company is true of his own knowledge, except as to the matters therein stated to be on information and belief, and that as to those matters he believes it to be true; and he hereto affixes the seal of said company in further attestation of the truth of its bill [*or, answer.*] FRANK FAITHFUL, President.

[*Jurat, as above.*] (L. S.)

**AFFIDAVIT TO A PLEA IN ABATEMENT,<sup>31</sup> OR A PLEA IN BAR.<sup>32</sup>**

State of Tennessee, }  
County of Campbell. }

The defendant, Richard Roe, makes oath that his foregoing plea is true [in substance and in fact.] RICHARD ROE.

Sworn to and subscribed before me,  
this June 7, 1905. WINSTON BAIRD, C. & M.

§ 790. **Before Whom Affidavits Must be Made.**—Affidavits to bills, petitions, pleas and answers, and, also, to any statement or writing used for judicial purposes and needing verification, may be made before any Judge, Justice of the Peace, Clerk of Court, or Notary Public in this State, and in another State before any Judge or Justice of the Peace, accompanied by a certificate of his official capacity by the Clerk of his Court, or before any State Commissioner or Notary Public under their seals of office.<sup>33</sup> The Court or Clerk and Master may appoint a special commissioner to administer oaths either in this or any other State.<sup>34</sup>

28 Cheatham v. Pearce, 5 Pick., 668.  
29 Reid v. Hoffman, 6 Heisk., 440.  
30 A bill or answer of a corporation, needing verification, must be sealed with the corporation seal, and sworn to by some officer or agent, 2 Barb. Ch. Pr., 361; see, ante, § 379, note 20.  
31 See Pleas in Abatement, ante, § 254.

32 See Pleas in Bar, ante, § 340.  
33 Code, §§ 4331, 4398. But in Fawcett v. Railway Co., 5 Cates, 246, it was held that a pauper oath taken before a Notary Public in another State was void.  
34 Code, § 4399.

## CHAPTER XL.

## PETITIONS.

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|--|---|
| § 791. Petitions Generally Considered.                         | § 796. When a Petition is Not Proper.           |
| § 792. Petition by a Party to the Suit.                        | § 797. The Frame and Form of a Petition.        |
| § 793. Petition by a <i>Quasi</i> Party to the Suit.           | § 798. When and Where a Petition Must be Filed. |
| § 794. Petition by a Stranger to the Suit.                     | § 799. The Hearing of a Petition.               |
| § 795. Frame and Form of a Petition <i>Pro Interesse Suo</i> . |   |

§ 791. **Petitions Generally Considered.**—A petition is a written request, addressed to the Chancellor, setting forth some matter of fact, or ground of complaint, as to which the petitioner prays the Chancellor to make some order, or give some direction.<sup>1</sup> Petitions for interlocutory orders must, of course, be filed in some cause in the Court, and must invoke the action of the Court in reference to some matter connected with such cause. A petition must always state by whom it is presented; it may be filed by any one who can file a bill; but, if the petitioner is under any disability, he or she must appear by guardian, or next friend. A petition must state the material facts upon which the application contained in it is based, must conclude with a prayer for the particular order desired, and must be sworn to.<sup>2</sup>

Where an application to the Court is by some party to the suit, and is based on some matter contained in the record, it may be made by motion; but where the application is based on matters not contained in the record, or where it is made by a person not a party to the suit, it must be made by petition. When a stranger files a petition he may be required to give a cost bond; but a petition by parties to the suit seeking some incidental relief can be prosecuted without a bond for costs.<sup>3</sup>

§ 792. **Petition by a Party to the Suit.**—The most common cases wherein a party is required to file a petition are : 1, Where, when a defendant is made a party by publication, or by attachment and publication, he, or his heirs, or representatives, after a final decree on a *pro confesso*, desire to contest the complainant's bill;<sup>4</sup> 2, Where a party desires to discharge, or reduce, a levy or bond, in proceedings under extraordinary process;<sup>5</sup> 3, Where a party seeks to have biddings opened, or reopened; 4, Where a party has been aggrieved by some interlocutory order, which the Court has yet the power to modify, or vacate; 5, Where a party desires to bring before the Court a case of contempt, not committed in its presence;<sup>6</sup> 6, Where a party, imprisoned for contempt, seeks to be released on a *habeas corpus*;<sup>7</sup> 7, Where a party applies for a writ of error *coram nobis*,<sup>8</sup> or a rehearing;<sup>9</sup> and 8, Where a party seeks a restraining order, or an injunction, or receiver, on grounds arising during the litigation.

§ 793. **Petition by Quasi Party to the Suit.**—A *quasi* party is a person who,

<sup>1</sup> 2 Dan. Ch. Pr., 1603. The term petition, in our practice, is a comprehensive term, including not only written requests for interlocutory orders, but even a written ground of complaint, on which a subpoena may issue, to which an answer may be filed, and by means of all which rights may be adjudicated, and decrees pronounced and enforced. A divorce may be had, land may be partitioned, or sold for partition, and some other suits may be begun, by petition. Indeed, if the proper objection is not made by the proper party, and at the proper time, the Court may, on petition and answer thereto, adjudicate matters proper for an original bill. *Majors v. McNeilly*, 7

Heisk., 294. In this Chapter, however, the term petition is used in the narrower sense stated in the text. See, *ante*, § 133.

<sup>2</sup> 2 Dan. Ch. Pr., 1604-1605.

<sup>3</sup> *Yowell ex parte*, 7 Heisk., 561.

<sup>4</sup> Code, §§ 3533; 4380; 4381; *ante*, § 213.

<sup>5</sup> Code, § 4451; *Markham v. Townsend*, 2 Tenn. Ch., 715.

<sup>6</sup> Ch. Rule, VII, §§ 2; 1196, *post*.

<sup>7</sup> Code, § 3722.

<sup>8</sup> Code, § 3111.

<sup>9</sup> Ch. Rule, XV, § 1; *post*, §§ 1204; 1217-1220.

while not a formal party complainant or defendant, is, nevertheless, before the Court in some capacity, ordinarily, either (1) as a creditor who has been allowed to file a claim,<sup>10</sup> or (2) as a purchaser of property sold and so reported by the Master;<sup>11</sup> or (3) as a surety on a note, or bond, filed in the cause;<sup>12</sup> or (4) as a receiver, sequestrator, or other person, acting under the immediate and special order of the Court, in some particular cause.

A *quasi* party may ordinarily bring before the Court, by motion, any matter pertaining to his interest in the suit, and may support his motion by affidavit, when necessary. In the following cases, however, he must file a petition: 1, Where he is named in a bill to administer assets as a creditor, but is not made a party, and wishes to set up his claim in the suit; 2, Where a creditor desires to contest the claim of some other party, or to assert some other right not apparent on the record; 3, Where a purchaser at a Master's sale, wishes to be relieved from his purchase, or to recover back the purchase-money, or to have an abatement in the price;<sup>13</sup> 4, Where a receiver, or sequestrator, or other officer, of the Court wishes to bring forward some matter connected with the cause wherein he is interested, such matter not otherwise sufficiently appearing, such as that he has been interfered with, or sued while in discharge of his duty, or wishes the direction of the Court, or desires to be discharged;<sup>14</sup> 5, Where any *quasi* party wishes to bring any matter, pertinent to the cause, and material to his interests, before the Court, and the grounds of motion do not sufficiently appear on the face of the record.

§ 794. **Petition by a Stranger to the Suit.**—When a person, not a party, desires to take some step, assert some right, or obtain some benefit, in a cause pending in Court, he must do so by petition. The most usual cases are: 1, Where a creditor of an estate, being administered in Chancery, desires to file and prove his claim; and it matters not whether such estate be that of a dead or of a living person; all that is requisite is that the Court is undertaking to distribute the assets among those lawfully entitled to share in the distribution.<sup>15</sup> A creditor, not made a party, may come in by petition when an administrator, or a creditor, files a bill to sell the land of a decedent to pay debts; or when a bill is filed to wind up an insolvent estate;<sup>16</sup> or when an insolvent firm, or an insolvent corporation, is being wound up in Chancery. 2, Where a person has an interest in the subject-matter of the suit, or in the recovery sought or obtained, he must make himself a party by petition, if he seeks to assert that interest. Thus, where a person has an interest in a trust fund, or trust property of any kind, in the custody of the Court, or sought to be administered or distributed in Court;<sup>17</sup> or where the benefit of a recovery, or of a fund, enures to the benefit of a third person not before the Court;<sup>18</sup> or where a third person claims the specific property in litigation, or an interest therein;<sup>19</sup> or where a suit is brought by a few of many having concurrent rights or interests, in behalf of all; in any such case he must file a petition.<sup>20</sup> 3, Where property, which has

<sup>10</sup> *Ewing v. Maury*, 3 Lea, 381.

<sup>11</sup> *Eagan v. Phister*, 5 Sneed, 298.

<sup>12</sup> *Majors v. McNeilly*, 7 Heisk., 299.

<sup>13</sup> *Deaderick v. Smith*, 6 Hum., 138. But after the sale is confirmed, and the term is past, a sale can be set aside only for fraud, accident, or mistake; and then an original bill must be filed. *Spence v. Armour*, 9 Heisk., 167. See, *Foster v. Bradford*, 1 Tenn. Ch., 400.

<sup>14</sup> Receivers, sequestrators, and others acting under the immediate special orders of the Court, are officers of the Court, and are treated as such; nevertheless, they at times assume relations to the suit somewhat analogous to *quasi* parties, and are liable on their bonds as *quasi* parties.

<sup>15</sup> *Richardson v. Richardson*, Thomp. Cas., 66.

<sup>16</sup> Code, § 2373; *Miller v. Taylor*, 2 Shan. Cas., 462; *Reid v. Huff*, 9 Hum., 359. But if a debt is specified in an insolvent bill as valid, it is not necessary for the creditor thus named in the bill, to file a petition: he is a *quasi* party, and by filing his

claim with the Master within time, he will save the bar of the statute, and be entitled to a report in his favor. *Camp v. Sherley*, 9 Lea, 255. If the parties acquiesce in the claims being filed, without petition, in an insolvent proceeding, the owners of such claims thereby become *quasi* parties, with the right to be heard and to appeal. *Ewing v. Maury*, 3 Lea, 381. For fuller statement of the practice in administration suits, see the Chapter on that subject.

<sup>17</sup> *Birdsong v. Birdsong*, 2 Head, 289.

<sup>18</sup> *Saylors v. Saylors*, 3 Heisk., 533.

<sup>19</sup> Code, § 2799; *Hill v. Bowers*, 4 Heisk., 272; *Trecee v. Trece*, 5 Lea, 221. A petition in such a case should be verified by affidavit. *Hunt v. Wing*, 10 Heisk., 139. The petitioner must show an interest in the property. *Stretch v. Stretch*, 2 Tenn. Ch., 140; and the claim to the property must not have been acquired pending the litigation. *Exchange Bank v. Andrews*, 12 Heisk., 306.

<sup>20</sup> Sto. Eq. Pl., §§ 90; 96; 99; 104; 208.

been seized by a receiver, sequestrator or other person, acting under the orders of the Court, or which has been otherwise impounded, or which is about to be sold, by the Court, or is otherwise in jeopardy, belongs to a stranger<sup>21</sup> to the suit, whose title is paramount to that of any of the parties, the person claiming the paramount title must file a petition in the Court, by whose authority the property has been seized, setting forth his title, and praying to have the property returned to his possession. Such a petition is a petition *pro interesse suo*.

The reasons why a petition is necessary in the above cases are, ordinarily, the following: 1, The Court has no jurisdiction to determine any question in dispute unless it is raised by some proper pleading; 2, Proof cannot lawfully be taken upon any matter or issue not presented or raised by some proper pleading; 3, No person is bound by a decree in a cause or matter to which he was not a party; 4, A stranger to a cause, if allowed to take proof, or to contest a matter, or to intermeddle, might greatly increase the costs and yet have given no security to pay the same.

**§ 795. Frame and Form of a Petition Pro Interesse Suo.**—When a receiver, sequestrator, or other officer of the Court, seizes, or is put in possession of, property under a special order of Court, and such property is claimed by a stranger to the suit, the latter will not be allowed forcibly to reclaim the property, nor to replevy it, nor bring any other sort of suit against such officer in reference thereto; for the Court will consider any such proceeding a contempt and will deal with the offender accordingly.<sup>22</sup>

The only courses open to such claimant are: 1, to present a petition *pro interesse suo*<sup>23</sup> in the cause wherein the receiver or other officer is acting, setting forth in such petition his rights to such property, and when and under what circumstances he was deprived thereof, and praying for a writ of restitution; or 2, if his title is prior and superior to that of any of the litigants, he may file an original bill against those litigants claiming the property, and set forth his title, and enjoin them from interfering with his property.<sup>23a</sup>

The Court will order the petition to be filed, and give the complainant in the original bill leave to answer it if he so desire. If the answer dispute the title of the petitioner, the Court will either summarily dispose of the matter,<sup>24</sup> or, if desired by either party, will refer the matter to the Master to hear proof and report on the petitioner's claim.<sup>25</sup>

The petitioner must ordinarily show that his title to the property in question is paramount to that of any of the parties to the suit; and if he claims under any party to the suit he must show that he acquired his title before the bill was filed, and paid a valuable consideration therefor; and if he have any written evidences of title he should file them with his petition. His petition must be verified by his affidavit. The following is a form for such a petition:

**PETITION PRO INTERESSE SUO.**

John Doe,  
vs.  
Richard Roe, *et al.* } In Chancery, at Kingston.

To the Hon. W. B. Staley, Chancellor.

Your petitioner, John Jones, a resident of Roane county, respectfully shows to your Honor that on the 1st day of June, 1884, the Sheriff of Roane county, by virtue of a writ of possession, placed Henry Crumbliss, the Receiver in this cause, in possession of the following property belonging to petitioner: [*Here describe the property.*]

Petitioner represents to your Honor that said property was not liable to said seizure; that said property is his own, and has been in his possession for....years, [*stating how long.*]

21 If the property of a stranger to the suit is levied upon, or otherwise seized by a Sheriff, under a general writ of attachment or execution, the stranger may recover it in replevin, or sue for its conversion; but if a Sheriff should seize any property of a stranger by virtue of a special writ directing him to seize it, the latter must apply to the Court by petition for its return to him. It would be a

contempt of Court to sue the Sheriff for doing what the Court commanded him to do.

22 See, *ante*, § 794, note, 21; *post*. §§ 894; 910.

23 *Ibid.*, § 656, note.

23a *Haynes v. Rizer*, 14 Lea, 247.

24 *Luckman v. Dale*, 7 Yerg., 154.

25 If petitioner's claim is disputed he may be required to file a cost bond.



and that he acquired his title thereto in the following manner. [*Here state how, and if he have any paper title let him file it as exhibit A to his petition.*]

Petitioner, therefore, prays that the said Receiver be directed to restore said property to him, and that a writ of restitution issue, if necessary.

And petitioner prays for general relief.

JAMES SEVIER, Solicitor.

[*Annex affidavit: see, ante, § 789.*]

If the decision is in favor of the petitioners, an order of the Court, to its officer in possession of the disputed property, to restore it to the possession of the petitioner, is ordinarily sufficient; but if not a writ of restitution will be awarded.<sup>26</sup>

§ 796. **When a Petition is not Proper.**—While our own practice is liberal, in allowing a stranger to interevne by petition, to set up his claim to property, or to a fund, in controversy in the Chancery Court, as shown in the preceding section, nevertheless, to allow a third person to inject new matter into a litigation, not germane to the issues presented by the pleadings, would be to allow interminable confusion, incongruous issues, and general multifariousness, wholly at variance with every principle of true pleading, and tending inevitably to vexatious perplexity, alike to the litigants and to the Chancellor. For these reasons, no intervention should be allowed in any case where the new matters sought to be introduced are irrelevant, multifarious, incongruous, or otherwise proper for an original bill.<sup>27</sup>

And, while the Code allows any and all matters to be brought forward in a suit between one complainant and one defendant,<sup>28</sup> nevertheless, where there are more parties than two, the Chancellor should not allow matters, wholly foreign to the objects of the original pleadings, to be introduced by petition. Such a practice is not only in violation of the fundamental rules of Equity and good pleading,<sup>29</sup> but tends greatly to confuse and delay the final determination of the cause, increases instead of diminishing costs,<sup>30</sup> and multiplies grounds of appeal to the Supreme Court. It may be stated, as a general rule, that no matter should be allowed to be introduced into a cause by a petition which is (1) proper matter for an independent original bill; or (2) which could be brought forward by an amendment to the bill, or by an amended or supplemental answer, or by a cross bill, on the part of the defendant; or (3) which, if contained in the bill, would make it multifarious, or if set up in the answer would be impertinent and no defence; or (4) which would tend to create confusion, perplexity or delay, without any compensating advantages.

To avoid the perplexities, resulting from the anomalous and reprehensible practice of filing improper petitions in a cause, and taking issue and making decrees on them, our Supreme Court constrained by the statute,<sup>31</sup> and prompted by a most commendable disposition to do justice despite such gross irregularities, have dealt with such petitions as though they were original bills, and have given the consequent relief.<sup>32</sup>

§ 797. **The Frame and Form of a Petition.**—A petition for an interlocutory order contains all of the essentials of a supplemental bill, except the prayer for process, and does sometimes pray that notice of its filing may be given to

<sup>26</sup> For form of the writ, and other information in reference to the writ, and to a petition *pro interesse suo*, see, *ante*, § 657.

<sup>27</sup> See *Stretch v. Stretch*, 2 Tenn. Ch., 140.

<sup>28</sup> Code, § 4327.

<sup>29</sup> *Stretch v. Stretch*, 2 Tenn. Ch., 140.

<sup>30</sup> Many of these illogical and anomalous interventions result from a niggardly disposition to save a few dollars in costs. Chancellors should be slow to allow any practice, which will retard or confuse the orderly determination of the matters presented by the original pleadings, even though there be a probability that two or three dollars may possibly be saved thereby. While Courts should be cautious not to cause or allow unnecessary costs, nevertheless, neither justice, nor those rules whereby justice is evoked, should be sacrificed upon the altar of a false economy. These attempts to save costs often

result in an increase of costs, and in expensive and vexatious delays.

<sup>31</sup> Code, § 4516.

<sup>32</sup> *Majors v. McNeilly*, 7 Heisk., 294; *Richardson v. Keel*, 9 Lea, 74; *Horn v. Denton*, 2 Sneed, 125, as construed in *State v. Kellar*, 11 Lea, 404. The Supreme Court being forbidden to reverse any decree, unless for errors which affect the merits, Code, 4516, the duty of maintaining the rules of good pleading devolves almost exclusively upon the Chancellors. An examination of our reports will show that it is possible for our Chancellors to introduce some wholesome reforms in Chancery pleading. The Supreme Court has again and again admonished the inferior Courts on this subject. *Roberts v. Stewart*, 1 Yerg., 390; *Cherry v. Hardin*, 4 Heisk., 203; *Maupin v. Whitson*, 2 Heisk., 1.

those adversely interested. It must (1) be addressed to the Chancellor of the Court in which it is to be filed; (2) it must specify the cause to which it relates, and in which it seeks for some order; (3) it must contain in detail the facts, or matters, which justify or authorize the order sought; and (4) must pray for the particular order desired, and may, also, pray for general relief.<sup>33</sup> A petition should be signed and sworn to;<sup>34</sup> and, like all other pleadings, must avoid scandalous and impertinent matter.

**PETITION BY A CREDITOR.**

John Doe, Admr., &c., }  
*vs.*  
 Richard Roe, *et al.* }

To the Hon. B. M. Estes, Chancellor:

Peter Poe, a resident of Shelby county, Tennessee, respectfully shows to your Honor that David Doe, the intestate of the complainant, died justly indebted to your petitioner in the sum of two hundred dollars, evidenced by a note of hand, dated July 8, 1888, due one year after date with interest from date. This note is made part of this petition, and is herewith filed, and marked "Exhibit A." Said note was given to John Jones in part payment of the tract of land sought to be sold in this cause; and to secure its payment a lien was retained on the face of the deed, executed by said Jones to said David Doe, for said land. Said note was by said Jones, for value received, in due course of trade, and before maturity, endorsed and transferred to petitioner, and is now his property, and wholly unpaid.

Petitioner prays to be allowed to become a party to this cause, and to have said note and debt declared a preferred claim, and paid in full out of the proceeds of said land when sold. Petitioner prays for all necessary orders, references, and decrees, and for general relief.

GEORGE B. PETERS, Solicitor.<sup>35</sup>

State of Tennessee, }  
 County of Shelby. }

Peter Poe makes oath that the statements in his foregoing petition are true [to the best of his knowledge, information, and belief.]

PETER POE.

Sworn to and subscribed  
 before me, May 1, 1890.

FERD. DE SOTO, J. P. }

A petition may be amended on proper application at any time, even during the argument. Leave to amend is almost of course,<sup>36</sup> if applied for in due season.

**§ 798. When and Where a Petition Must be Filed.**—In contemplation of law the Courts are always open for the filing of any pleading, deposition, petition, affidavit, proof, or other paper or document, relating to any matter pending in Court, or to any new matter any person desires to bring before the Court, whether Court be in session or not.<sup>37</sup> So, a petition may be filed at any time, and if it relate to a matter in Court should be filed in the cause to which it relates, and should be so entitled. The question of the right of the person to file it, and of its sufficiency and truthfulness, are questions to be determined by the Court when properly raised.

**§ 799. The Hearing of a Petition.**—If a petition is in the nature of a formal motion, and all the facts necessary to its due consideration appear of record, or otherwise, in the cause, it is summarily heard and disposed of, after the manner of a motion. If, however, the facts alleged in the petition do not otherwise appear, and are denied, or at least not admitted, the Court usually directs the Master to hear proof and report as to the facts. If the facts alleged in the petition do not entitle the petitioner to the relief he seeks, or if the relief he seeks is not proper to be granted in that cause, or in that form, or by such a summary course of procedure, the opposite party may move the Court to dis-

<sup>33</sup> 2 Dan. Ch. Pr., 1604-1605.

<sup>34</sup> Hunt v. Wing, 10 Heisk., 139; 151.

<sup>35</sup> A petition, like a bill, may be signed by the petitioner in person, but the Solicitor who draws the petition generally signs it, and has his client swear to it. Judge Cooper, in Johnson v. Murray, 12 Lea, 117, says the practice is objectionable of permitting petitions to be filed, signed and sworn to, by agents and Solicitors, instead of by the parties themselves.

The practice is well settled, however, that either a bill or petition may be signed by the Solicitor, alone. Swan v. Newman, 3 Head, 289; Litton v. Armstead, 9 Bax., 514.

<sup>36</sup> 2 Dan. Ch. Pr., 1610.

<sup>37</sup> Bledsoe v. Wright, 2 Bax., 471. When a right may be barred, or embarrassed, by delay, the petition should be filed at once, whether the Court be in session or not.

miss the petition, assigning his grounds; this motion is in the nature of a special demurrer, and, if successful, the petition is dismissed.

If the petition presents an issue of fact, the opposite party may plead to it, or he may answer it,<sup>38</sup> as though it were a bill; and if it presents an issue of law, he may demur to it, although the common practice is to move to dismiss it.

<sup>38</sup> The sworn answer of a complainant to the petition of an intervening creditor merely makes an issue. *Irvine v. Dean*, 9 Pick., 346.

CHAPTER XLI.

SUITS FOR INJUNCTIONS, AND PROCEEDINGS THEREIN.

- ARTICLE I. Injunctions Generally Considered.
- ARTICLE II. In What Cases Injunctions will be Granted.
- ARTICLE III. How Injunctions are Obtained, Issued, and Served.
- ARTICLE IV. Pleadings in Injunction Suits, and Reliefs Granted.
- ARTICLE V. Violations of Injunctions, and Remedies Therefor.
- ARTICLE VI. The Dissolution of Injunctions.
- ARTICLE VII. Injunction and Refunding Bonds, and their Breach.

ARTICLE I.

INJUNCTIONS GENERALLY CONSIDERED.

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| <p>§ 800. The Injunctive Power Generally Considered.</p> <p>§ 801. Injunctions Defined.</p> | <p>§ 802. Office of a Temporary Injunction.</p> <p>§ 803. Office of a Mandatory Injunction.</p> |
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§ 800. **The Injunctive Power Generally Considered.**—The main object of civilized society and the chief purpose of law is to secure to every individual his life, liberty and property.<sup>1</sup> The common law aimed to protect a man's right to his property by punishing the violation of that right. But such protection did not always protect; the damages awarded the owner of the property were not always paid, and when paid were often inadequate, especially when the injury could not be repaired by payment of damages.

But when the Chancery Court was established with its peculiar powers and processes, borrowed largely from the Roman law, it did not undertake so much to punish, as to prevent, the violation of the rights of property. Acting on its maxim, Equity acts specifically and not by way of compensation, the Chancery Court laid its mighty hand upon the would-be violator, and commanded him to desist from the wrong he was doing, and refrain from doing the wrong he was threatening, menacing him with both bodily imprisonment and pecuniary punishment, if he persisted. When a matter was in dispute the Chancery Court forbade a party to take the law in his own hands, but required him to abide the decision of the Court; and, in a proper case, compelled him to put matters *in statu quo*, and thus undo his own wrong.

In no one particular, perhaps, has the immense superiority of the jurisprudence of Equity over that of the common law been so manifest as in its remedy by injunction to prevent a wrong, in place of the common law remedy of damages after the wrong had been committed; and yet no process of Chancery was so vigorously resisted by the lawyers of England; and Lord Coke, as the great champion of the common law, regarded the process of injunction, especially when it interfered with suits and judgments at law, as a high handed violation of the fundamental law of England.

§ 801. **Injunctions Defined.**—A writ of injunction is a judicial process,<sup>2</sup> operating *in personam*, and requiring the person, to or against whom it is directed, to do or refrain from doing a particular thing. The process is restora-

<sup>1</sup> For what the word "property" includes, see, *ante*, § 56; *post*, § 804, note 2. Equitable property, <sup>2</sup> The process of injunction is termed the "right arm of the Court of Chancery." 1 Barb. Ch. Pr., § 882. 615.

tive as well as preventive, being used both in the enforcement of rights, and the prevention of wrongs. In general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed; and it is, therefore, to be regarded more as a preventive than a remedial process.

With reference to their character,<sup>3</sup> injunctions are either, 1, Mandatory, commanding the defendant to do a particular thing; or 2, Prohibitory, commanding him to refrain from doing a particular thing. With reference to their duration, injunctions are either temporary or perpetual.

1. **Temporary Injunctions**, frequently called interlocutory or preliminary injunctions, are such as are granted at any time before final hearing, generally upon the presentation of the bill to the Chancellor; and continue until the coming in of the answer, or until a hearing upon the merits, or the further order of the Court. A temporary injunction is provisional in its nature, and does not conclude a right.

2. **Restraining Orders** are interlocutory injunctions granted during a litigation to prevent the enforcement of some order made in the cause, or to stay the hand of a party or an officer of the Court, or to enjoin persons not parties from bringing suit as to a matter pending wherein assets are being administered, or granted in any other case when necessary to prevent any inequitable or illegal act injurious to any party.

3. **Perpetual Injunctions** are granted only at a final hearing upon the merits, and usually form a part of the final decree, and are conclusive upon all the parties. Indeed, a perpetual injunction is, in effect, a decree of the Court whereby a defendant is perpetually inhibited from the assertion of an assumed right, or perpetually restrained from the commission of an act which would be contrary to Equity and good conscience.

§ 802. **Office of a Temporary Injunction.**—The office of a temporary, or interlocutory, injunction is to preserve the subject-matter in controversy in its then condition; and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured, or endangered. It cannot be used for the purpose of taking property out of the possession of one party, and putting it into the possession of another; nor does it, ordinarily, go to the extent of ordering a defendant to undo what he has already done, since it might thereby do the defendant an injury as great as that of which the complainant complains. The jurisdiction being ordinarily exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction, Courts of Equity will, except in extreme cases, only act prospectively, and interpose such restraint only as may suffice to stop the mischief complained of, and preserve matters *in statu quo*.

§ 803. **Office of Mandatory Injunctions.**—While Courts of Equity rarely allow interlocutory mandatory injunctions, their jurisdiction so to do is firmly established. The principal office of an interlocutory mandatory injunction is to compel the defendant to restore the subject-matter of controversy to the situation it was in before the commission of the act complained of. Courts of Equity, however, rarely directly command the doing of a positive act on an interlocutory application; they reach the same result indirectly, by framing the injunction so as to prohibit the defendant from doing the reverse of what

<sup>3</sup> The *common injunction*, mentioned in the old reports and books of practice, was the writ of injunction which issued, as of course, upon the default or delay of the defendant in answering the bill; and its effect upon a pending suit at law was determined by the progress of that suit at the date of the issuance of the writ. If the injunction was obtained before the declaration at law was filed, but before plea, the suit proceeded to issue, but no further; if

obtained after issue was joined, the suit proceeded to judgment, but stopped there until the determination of the suit in Equity. *Hendrick v. Dallum*, 1 Tenn., (Overt.), 427; 2 Sto. Eq. Jur., § 892; *Chadwell v. Jordan*, 2 Tenn. Ch., 636; *Patterson v. Gordon*, 3 Tenn. Ch., 20. The common injunction has ceased to exist in this State, every injunction being now special. *Patterson v. Gordon*, 3 Tenn. Ch., 21.

he is desired to do. Even then the jurisdiction is exercised with extreme caution, and is confined to cases where the Courts of law are unable to afford adequate redress, or where the injury cannot be compensated in damages.<sup>4</sup>

Mandatory injunctions, issued after a final decree and in enforcement thereof, are in the nature of an execution, and are sometimes called judicial writs;<sup>5</sup> they will be found more fully considered in the Chapter on Decrees.<sup>6</sup>

ARTICLE II.

IN WHAT CASES INJUNCTIONS WILL BE GRANTED.

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| <p>§ 804. Injunctions Generally Considered.</p> <p>§ 805. Injunctions in Behalf of Sureties.</p> <p>§ 806. Injunctions in Behalf of Creditors.</p> <p>§ 807. Injunctions in Behalf of Married Women.</p> <p>§ 808. Injunctions Pertaining to Partnerships.</p> <p>§ 809. Injunctions Pertaining to Executors and Administrators.</p> <p>§ 810. Injunctions Pertaining to Mortgages, Trust-Deeds, and Title-Bonds.</p> <p>§ 811. Injunctions Pertaining to Written Contracts.</p> <p>§ 812. Injunctions to Prevent a Cloud Upon Title.</p> <p>§ 813. Injunctions to Protect the Process and Officers of the Court.</p> <p>§ 814. Injunctions Against Suits, Judgments, and Executions.</p> | <p>§ 815. Injunctions Against Commissioners, and Public Officers.</p> <p>§ 816. Injunctions Against Illegal Taxes.</p> <p>§ 817. Injunctions Against Taking Private Property Without Compensation.</p> <p>§ 818. Injunctions Against Public and Private Corporations.</p> <p>§ 819. Injunctions Against Waste, Trespasses, and Similar Wrongs.</p> <p>§ 820. Injunctions Against Nuisances.</p> <p>§ 821. Injunctions to Protect Easements.</p> <p>§ 822. Injunctions to Protect Franchises.</p> <p>§ 823. Injunctions in Other Cases.</p> <p>§ 824. Mandatory Injunctions, When Granted.</p> <p>§ 825. Cases Not Proper for Injunctive Relief.</p> <p>§ 826. Form of Bill to Enjoin and Abate a Nuisance.</p> |
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§ 804. **Injunctions Generally Considered.**—The various cases in which the Chancery Court will interfere by injunction, are almost as numerous as the matters which fall within its equitable jurisdiction;<sup>1</sup> but it may be laid down as a fundamental rule, applicable to all cases, that, wherever a legal or equitable right exists, whether arising from contract, from the legal or equitable ownership of property,<sup>2</sup> or otherwise, the violation of that right will be enjoined on proper application to the Chancery Court, unless the legal remedy of compensatory damages would be full, adequate, and complete.<sup>3</sup> If damages cannot be compensatory from the nature of the injury, an injunction will be granted,<sup>4a</sup> for, in such a case, the injury will be irreparable.<sup>5a</sup>

The old rule, that an injunction would not be granted when there was a plain, adequate remedy at law, has lost much of its force in Tennessee (1) in consequence of the Chancery Court being now clothed with full authority to determine all actions triable at law except suits for unliquidated damages;<sup>6a</sup> and (2) in consequence of the Court's statutory injunctive powers to restrain the injury, removal, or destruction of property, real or personal, involved in the litigation.<sup>7</sup> By virtue of the letter and spirit of these two statutes, an

<sup>1</sup> High on Injunc., 3; Post v. Railroad, 19 Pick., 184, citing the above section [then § 784] of this book. See, *post*, § 819, note, 62.

<sup>2</sup> Sto. Eq. Jur., § 861.

<sup>3</sup> See, *ante*, §§ 32; 651; see, also, *post*, § 824.

<sup>4</sup> 2 Dan. Ch. Pr., 1620.

<sup>5</sup> A man's property consists not only of his lands and tenements, goods and chattels, rights and credits, as generally understood, but he has, also, a property right to his life, person, limbs, liberties, health, reputation, occupation and labor, and to the enjoyment of his senses of sight, smell, hearing and taste, and of the moral sense. See, *ante*, § 56.

<sup>6</sup> Weaver v. Davidson County, 20 Pick., 320, citing the above section [then § 786] of this book.

<sup>4a</sup> 3 Pom. Eq. Jur., § 1338. Weaver v. Davidson County, 20 Pick., 320, citing the above section of this book, then § 786.

<sup>5a</sup> As to what is meant by "compensatory damages" and "irreparable injury," see, *post*, § 819, note 62.

<sup>6a</sup> Acts of 1877, ch. 97. See, *ante*, §§ 21; 26-29.

<sup>7</sup> Code, § 3767.

injunction may be properly granted: (1) to restrain the violation of any right of the complainant, incident to the subject-matter of the suit; (2) to restrain any tortious conduct of the defendant, that is injurious or destructive to the property in litigation; (3) to restrain the removal of any specific personal property sought to be recovered in the suit; and (4) to restrain any other act of the defendant injuriously affecting complainant's rights in or to the subject-matter of the litigation. And in none of these cases will the fact that the complainant may have a plain and adequate remedy at law, be at all material in considering the jurisdiction of the Court in granting the injunction, for the reason that the Court has, and is, exercising jurisdiction in the very suit wherein the injunction is sought.

§ 805. **Injunctions in Behalf of Sureties.**—Injunctions are granted in behalf of a surety against a suit at law by the creditor whenever by any act of the creditor, or principal debtor, or a co-surety, the surety has been released, or discharged, as where the debt has been paid, or novated, or where the contract has been changed, or the time of payment extended, without the surety's consent,<sup>8</sup> or where the creditor delays to sue after notice or demand.<sup>9</sup>

§ 806. **Injunctions in Behalf of Creditors.**—An injunction will be granted against debtors and their privies, in behalf of creditors, in the following cases: 1, To prevent the fraudulent transfer or removal of the debtor's property, whether in his hands, or in the hands of a *mala fide* purchaser, or of a trustee;<sup>10</sup> 2, To prevent the waste, removal, or transfer, of property on which the complainant has a lien; 3, To prevent a multiplicity of suits, the cost of which will absorb the common fund.<sup>11</sup>

No injunction, however, will be granted on behalf of a mere general<sup>12</sup> creditor, to prevent the debtor selling or encumbering his property, when no grounds therefor are alleged except the fact of indebtedness, the insolvency of the defendant, and the fear that he may sell or encumber.<sup>13</sup>

§ 807. **Injunctions in Behalf of Married Women.**—A wife is entitled to an injunction against her husband and his creditors or bargainees, to protect her homestead rights, or her rights to her separate estate, or to the rents and profits of her realty; and on filing a bill for divorce and alimony, or for maintenance, against her husband, she is entitled to an injunction to prevent him (1) from interfering with her conduct or person; (2) from interfering with the custody of the children, or property, in her possession; (3) from collecting the rents and profits of her separate estate, or of her realty; (4) and from selling or encumbering his own property, or selling any choses in action, or other personalty belonging to her.

§ 808. **Injunctions Pertaining to Partnerships.**—Courts of Equity will enjoin members of a partnership from doing acts inconsistent with the duties of a partner, or with the partnership agreement, or violative of the rights of the complaining partner. A partner may be enjoined from excluding his co-partner from the partnership business, or books; or from misappropriating partnership assets. And where a dissolution is prayed and a receiver is proper, the Court will enjoin any or all of the partners from collecting any firm debts, or interfering with the firm assets or books, or doing any act in the firm name.<sup>14</sup>

§ 809. **Injunctions Pertaining to Executors and Administrators.**—Injunctions will be granted on application of executors or administrators: 1, Against

<sup>8</sup> 2 High on Injunc., § 1375; 1 Sto. Eq. Jur., §§ 324-326; 2 *Ibid.*, § 883. See "Sureties," and "*Quia Tinet*," in our Digests.

<sup>9</sup> See, *post*, § 962. The obligations of a surety are *strictissimi iuris*, and cannot be extended beyond the limits of his engagement. *Hardison v. Yeaman*, 7 Cates, 639.

<sup>10</sup> Code, §§ 4283-4289; 2 High on Injunc., § 1402.

<sup>11</sup> 2 High on Injunc., § 1406.

<sup>12</sup> A general creditor is one who has no judgment

or decree for his debt, or lien or equity to secure it. Such a creditor is sometimes called a creditor at large.

<sup>13</sup> 1 High on Injunc., §§ 131; 326; 2 *Ibid.*, 1403; *McKeldin v. Gouldy*, 7 Pick., 677, citing the above section of this book, then § 788. Some lien, trust, fraud, or inequitable conduct must be alleged to obtain such an injunction. *Ibid.*

<sup>14</sup> 2 High on Injunc., §§ 1330-1358.

any creditor suing after the suggestion of the insolvency of the estate and the transfer of the administration to the Chancery Court;<sup>15</sup> and 2, Against the widow, or any creditor, distributee, legatee, or other person, improperly interfering with the assets of the estate.

Injunctions will be granted in behalf of the person entitled against executors or administrators to prevent (1) their appropriation of exempt property, or (2) the waste or misapplication of the assets of the estate, or (3) selling property bequeathed when not needed to pay debts, or (4) doing any other act not authorized by the will, or the law.

**§ 810. Injunctions Pertaining to Mortgages, Trust Deeds, and Title-Bonds.** The Court of Chancery is often applied to for injunctions relative to matters connected with mortgages, trust deeds, and title-bonds, the applications coming sometimes from the owner of the lien, and sometimes from the debtor.

1. **Injunctions in Behalf of the Mortgagee, or Creditor.** The property in such a case is devoted to the payment of the money advanced, or of the debt thereby secured; and the Chancery Court will grant injunctions against any cutting of timber, removal of fixtures or buildings, or other waste, by the maker of a mortgage or deed of trust, or holder under a title-bond, or other person in possession or control of the premises; mortgaged or conveyed in trust, or held under a title-bond, where such waste will make the security insufficient. An injunction will also be granted to protect the rights of a mortgagee to chattels, by enjoining their removal, sale, or injury.<sup>16</sup>

2. **Injunctions on Behalf of the Debtor.** The enforcement of a mortgage or trust deed will be enjoined on application of the maker or his assignee, (1) when it was obtained on fraud; (2) when there has been a total failure of consideration; (3) when the complainant is not bound, by reason of some accident, or mistake, in its execution, against which Equity will relieve; (4) when the debt secured by the instrument has been fully paid, or (5) is barred by the statute of limitations.<sup>17</sup> An injunction will not be granted, however, to enjoin a sale in such cases, unless notice of the application be given to the trustee, or mortgagee, as hereafter shown.<sup>18</sup>

**§ 811. Injunctions Pertaining to Written Contracts.**—The Chancery Court will, in some cases, enjoin the attempted violation of a valid contract, or the attempted enforcement of an invalid contract.

1. **The Enforcement of an Invalid Deed, Note, or Other Contract in Writing Will be Enjoined** when its existence, or possession by the defendant, may result in some injury to the maker. Thus, when a deed, note, or other contract in writing is not binding in Equity, because executed by accident or mistake, or obtained by fraud, or without lawful consideration, or is void for any other reason, a Court of Equity will not only enjoin its enforcement, or transfer, but will, also, order it to be delivered up for reformation if erroneous, or for cancellation if void, or voidable.<sup>19</sup>

2. **The Violation of Valid Contracts Will be Enjoined** in any case when such contract would be specifically enforced by the Court, as in case (1) of restrictive covenants in deeds, leases, and other instruments, creating equitable covenants; (2) of contracts of a negative nature, such as agreements not to carry on a particular trade, not to build in a certain way or place, not to run trains past a particular station without stopping, not to publish a rival book or newspaper,<sup>20</sup> not to remove fixtures, not to use leased property in a particular way or for a specified purpose, not to allow property leased or conveyed to be used for the manufacture or sale of spirituous liquors, and generally not to allow or do any other thing that may lawfully be stipulated against.<sup>21</sup>

<sup>15</sup> Code, §§ 2382-2384.

<sup>16</sup> See *Moore v. Knight*, 6 Lea, 427; 1 High on Injunc., §§ 478-481; 3 Pom. Eq. Jur., §§ 1345; 1348, notes; 1 Jones on Mortg., § 684.

<sup>17</sup> 2 Jones on Mortg., §§ 1801-1820.

<sup>18</sup> See §§ 828-829.

<sup>19</sup> 3 Pom. Eq. Jur., §§ 1375-1377; *Jones v. Perry*,

10 Yerg., 83; *McMinn v. Richmond*, 6 Yerg., 1; *Owens v. Mynatt*, 1 Heisk., 675. See "Cancellation," and "Cloud on Title," in our Digests.

<sup>20</sup> 3 Pom. Eq. Jur., §§ 1341-1344; 2 High on Injunc., §§ 1167-1181.

<sup>21</sup> 2 High on Injunc., §§ 1134-1158.



§ 812. **Injunctions to Prevent or Remove a Cloud upon Title.**—The title to real estate will be protected by the Chancery Court against any illegal act or instrument likely to cast a cloud upon it, or bring it into question. Hence, the Court will, on application of the owner, enjoin any sale of his land that will not pass the title, and that may illegally subject him to suit, whether such sale is attempted by a Sheriff under a void proceeding, or a satisfied judgment, or execution, or by a trustee, or attorney in fact, under a void or satisfied instrument, or by any other person not having lawful authority. The Court, on like application, will enjoin any party who has a void or invalid grant, deed, mortgage, or other writing, to the complainant's land, from setting up any claim thereunder, or attempting to enforce it; and will, at the hearing, declare such deed, grant, or mortgage, a cloud on complainant's title, and will order it to be delivered up and cancelled, and the cloud removed.<sup>22</sup> And a wife may have removed from her title, or her homestead, any cloud caused in any of the foregoing ways, or caused by any deed or other conveyance made by her husband, or by herself, without her privy examination.<sup>23</sup>

§ 813. **Injunctions to Protect the Process, and Officers of the Court, and Purchasers under its Decrees.**—Courts of Chancery do not allow any other Court to interfere with their processes, or their officers, or with purchasers under its decrees.<sup>24</sup> Any interference, by suit or otherwise, with the subpoenas, injunctions, attachments, or other writs of the Chancery Court, or with the officer executing the same, will be restrained by injunction, and if necessary by attachment of the person of the wrong-doer. So any interference, by suit or otherwise, with the rights, duties, powers, or possession, of a receiver, sequestrator, special commissioner, or Clerk and Master, will be enjoined; and if necessary the intermeddler will be attached for contempt of the Court.<sup>25</sup> The Chancery Court has full power and inclination to afford perfect redress to all persons wronged by its processes, or officers, and requires all such persons to apply for redress to it, by petition filed in the particular cause wherein the alleged wrong was committed.

§ 814. **Injunctions Against Suits, Judgments, Decrees, and Executions.** Whenever a person is liable to be injured inequitably by a suit brought, or a judgment rendered, or an execution issued or levied,<sup>26</sup> he may protect himself by an injunction.<sup>27</sup>

1. **Injunctions Against Suits at Law Before Judgment**<sup>28</sup> will be granted on application of the defendant to the suit in the following cases:

1. Where the suit is founded on a deed, note of hand, or other contract in writing, not binding on the defendant, because of a failure of consideration, or of some fraud, or accident, or mistake, in its execution, the plaintiff in the suit not being an innocent purchaser.<sup>29</sup>

<sup>22</sup> Johnson v. Cooper, 2 Yerg., 524; Jones v. Perry, 10 Yerg., 83; Almony v. Hicks, 3 Head, 41; Carter v. Taylor, 3 Head, 30; Merriman v. Polk, 5 Heisk., 717; see, "Cloud on Title," "Rescission," and "Cancellation," in our Digests; 1 High on Injunc., §§ 372-381; 1 Sto. Eq. Jur., § 711a. See Bills *Quia Timet*, post, § 1042.

<sup>23</sup> Coleman v. Satterfield, 2 Head, 260; Cantrell v. County, 3 Tenn. Ch., 426; McCallum v. Pettigrew, 10 Heisk., 394. As to clouds on homesteads, see Marsh v. Russell, 1 Lea, 543; Williams v. Williams, 7 Bax., 116; Collins v. Boyett, 3 Pick., 334; 1 High on Injunc., § 438; See "*Quia Timet*," and "Homestead," in our Digests. Such a bill will lie without possession, and in behalf of a mere warrantor. Jones v. Nixon, 18 Pick., 95.

<sup>24</sup> Cope v. Payne, 3 Cates, 128.  
<sup>25</sup> Turner v. Breedon, 2 Lea, 713; 2 Sto. Eq. Jur., § 891; 1 High on Injunc., §§ 54; 57.

<sup>26</sup> The jurisdiction, power, and utility of the Chancery Court were originally based, to a very large extent, upon the necessity of some injunctive instrumentality to prevent plaintiffs using the Courts

of law to obtain or enforce judgments contrary to Equity and conscience. 3 Pom. Eq. Jur., § 1360.

<sup>27</sup> When a party brings a suit he impliedly contracts with the Court that in the prosecution of such suit he will do nothing contrary to good reason and good conscience, and the Court, as the representative of the State, impliedly contracts with such party to give him such a judgment as in good reason and good conscience he ought to have on the facts alleged and proved. To this extent the Court requires the defendant to submit. But if the plaintiff obtains a judgment by suppressing or fabricating evidence, or by taking an unconscientious advantage of the defendant, or by any other fraud, a Court of Chancery, on due application, will enjoin the plaintiff from enforcing a judgment so obtained, and thus taking advantage of his own wrong, provided such defendant really had a meritorious defence, and was guilty of no negligence or other fault in the case.

<sup>28</sup> Injunctions in such cases operate on the parties, and not upon the Courts where the suit at law is pending. Burke v. Ellis, 21 Pick., 702.

<sup>29</sup> 1 High on Injunc., § 47. The ground of the

2. Where a multiplicity of suits<sup>30</sup> are brought by the same plaintiff, or different plaintiffs, against the same defendant concerning the same subject-matter.<sup>31</sup>

3. Where the defence is (1) purely equitable,<sup>32</sup> or (2) legal and equitable, or (3) is hampered by difficulties, complications or embarrassments, too confusing or perplexing for investigation and solution by a jury;<sup>33</sup> and

4. Where, in any other case, a party plaintiff has an unfair advantage at law, whereby he may make the Court of law an instrument of injustice, and obtain a judgment therein contrary to Equity and good conscience.<sup>34</sup>

The fiat to a bill to enjoin a suit at law on a money demand should require the defendant to confess judgment at law as the condition of the injunction; otherwise, the complainant after litigating in Chancery may dismiss his bill and renew the litigation at law.<sup>34a</sup>

The following is the form of a bill to enjoin a suit at law, and of a proper fiat for such a bill:

**BILL TO ENJOIN A SUIT UPON A NOTE.**<sup>34b</sup>

[For address and caption see, ante, §§ 155-164.]

Complainant respectfully shows to the Court:

I.

That on December 4, 1846, Roland Roe brought a note for four hundred dollars to him and requested him to sign it, saying that the note had been executed to him by Henry Den, complainant's father-in-law, that Den was slow in paying it, and that he, Roland Roe, wanted complainant to sign the note the better to warrant him in urging Den to pay it. Complainant, being young, not quite twenty years of age, and inexperienced in business, and feeling flattered by the praises of said Roland Roe as to complainant's ability to get his father-in-law to pay the note, and as to complainant's general capacity to do things; and being, also, assured by said Roland Roe, that, in no event, would he ever call on complainant to pay the note, that his signature to it would be a mere form, and mere personal favor, signed said note, relying on said assurances, without receiving any consideration therefor, and without any purpose of being bound thereby.

II.

That soon after complainant signed said note said Roland Roe died, intestate, and the defendants are his administrators. As such administrators they called on complainant to

interference of the Chancery Court in such cases is, that the defendant is enabled to make a better defence in Equity, or to obtain some substantial relief not obtainable at law. *Chadwell v. Jordan*, 2 Tenn. Ch., 637.

A Court of Equity should not, ordinarily, grant an injunction to stay proceedings at law before judgment, unless the party applying for the injunction will confess judgment in the suit at law, such judgment to be dealt with as the Court granting the injunction may order. It is inequitable to allow the defendant at law to litigate the same matter in both Courts; and unless he is required to close the legal contest, by confessing judgment in the suit at law, he may, after a long litigation in Chancery, dismiss his bill, and then renew his defence in the Court of law. *Chadwell v. Jordan*, 2 Tenn. Ch., 635; *Perkins v. Woodfolk*, 3 Bax., 412; *Rhinehart v. Murray*, 15 Lea, 471; *Mathews v. Donglass, Cooke*, 136; 2 Dan. Ch. Pr., 1623-1624; *Mullins v. Aiken*, 2 Heisk., 538; *King v. Baker*, 1 Yerg., 451; *Haynes v. Bank*, 22 Pick., 425, citing this note and the above section of this book, then § 796.

<sup>30</sup> Two suits are a multiplicity. *Pearl v. Nashville*, 10 Yerg., 179. See *Ducktown Co. v. Fain*, 1 Cates, 56.

<sup>31</sup> 1 High on Injunc., §§ 61-65; *Tarbox v. Hartenstein*, 4 Bax., 78.

<sup>32</sup> The following are illustrations of equitable defences:

1. Defences based on fraud, accident, or mistake, and requiring parol evidence to vary, reform or cancel a note, deed, or other written instrument, sued on, or to show a condition annexed. *Perry v. Patterson*, 5 Hum., 133; *Breeden v. Griggs*, 8 Bax., 163; *Bell v. Gamble*, 9 Hum., 117; *Cornelius v. Morrow*, 12 Heisk., 630; 2 Dan. Ch. Pr., 1624.

2. Defences setting up an equitable title against the legal title sued on, as where a mortgagee sues at law the mortgagor to recover the land mortgaged, or a vendor sues at law to recover land he had con-

tracted in writing to convey to the defendant, or a trustee sues the beneficiary.

<sup>3</sup> Where an equitable estoppel is relied on. *Moses v. Sanford*, 2 Lea, 655.

<sup>4</sup> Where the defence is the fraud of the plaintiff in procuring the instrument sued on, or some accident or mistake, in its execution, or illegality in its consideration, and some affirmative relief is necessary to protect the defendant, such as the reformation of the instrument, or its cancellation and surrender. *Pom. Eq. Jur.*, 1363; *Broyles v. Arnold*, 11 Heisk., 488; *Porter v. Jones*, 6 Cold., 313.

<sup>5</sup> Where a discovery from the plaintiff at law is necessary for the defence. 2 Dan. Ch. Pr., 624. But a discovery can now be had at law, Code, § 3891.

<sup>6</sup> Where new parties are necessary to complete justice.

<sup>33</sup> *Newborn v. Glass*, 5 Hum., 521; *Lindsay v. James*, 3 Cold., 477. Cases where there is a multiplicity of contracts, or where there are mutual accounts of a complicated nature, would come under this head.

<sup>34</sup> 2 Sto. Eq. Jur., § 885. But the fact that enforcement of a judgment would be against conscience, will not, of itself, warrant an injunction. However unjust and unconscionable the demand may be, on which judgment was obtained, if, through neglect or carelessness, no defence was interposed at law, relief will not be granted in Equity. 1 High on Injunc., § 166.

<sup>34a</sup> *Haynes v. Bank*, 22 Pick., 425, citing the above section, then § 796, of this book. See note 29, *supra*. But the Chancery Court has no jurisdiction to enjoin proceedings in a Court of concurrent jurisdiction in a case where such Court can do as complete justice. Such a bill is demurrable. *Dixon v. Railroad*, 7 Cates, 362. See, *ante*, § 294.

<sup>34b</sup> This bill is based on *Bell v. Gamble & Montgomery, admsrs.*, 9 Hum., 117. As to the nature of the fiat on such a bill see note 29, *supra*, and *Haynes v. Bank*, 22 Pick., 425.

pay said note, when he protested that he was not liable, and stated to them the foregoing facts. But, notwithstanding said facts, the defendants have brought suit on said note in the Circuit Court of Knox county. Complainant could plead that he was under twenty-one years of age when he signed said note, but he is not willing so to do; first, because that is not his real defence, and second, because such a plea is not only humiliating to him, but he is advised that it implies he would otherwise be bound to pay said note.

## III.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*, see, *ante*, §§ 158; 164.]  
 2d. That a writ of injunction issue, by order of your Honor, restraining and prohibiting the defendants, and their attorneys and agents, from further prosecuting said suit against complainant on said note in said Circuit Court, and from prosecuting any similar suit in any other Court; and that at the hearing said injunction be made perpetual, and said note cancelled.

3d. That complainant have such other and further relief as he may be entitled to.

This is the first application for an injunction in this case.

T. LYON, Solicitor.

[*Annex affidavit; see, ante*, §§ 161; 164.]

## FIAT.

To the Clerk and Master at Knoxville:

File this bill, and on complainant giving an injunction bond in the penalty of one thousand dollars, conditioned as required by law, issue an injunction prohibiting the defendants from proceeding in their said suit against complainant any further than to take judgment on said note; which they are allowed to do. Complainant will withdraw any plea he may have filed in said suit, and allow the suit to proceed to judgment. No steps shall be taken on said judgment without leave of the Chancery Court, in this cause.

Feb. 10, 1848.

WILLIAMS, Chancellor.

**2. Injunctions Against Judgments at Law.** The Chancery Court is not a Court empowered to review proceedings in other Courts, and to correct errors and irregularities in their proceedings.<sup>35</sup> This jurisdiction belongs to the Supreme Court.<sup>36</sup> The Chancery Court will not, therefore, enjoin a judgment at law merely because of any irregularity or error committed by the Court rendering the judgment; and, in order to make out a case that will authorize the Chancery Court to enjoin a judgment at law, the defendant to such judgment must make out some one of the following cases:

1. An injunction against a judgment at law will be granted on application of the defendant to the judgment, if he show (1) that he had a valid legal defence to the suit on the merits, and (2) that he was prevented from making that defence by the fraud of the plaintiff, or by some surprise, accident, or mistake, and (3) that there was no negligence, or other fault, on his part, or on the part of his agents, or attorneys.<sup>37</sup> The defendant to the judgment must show in his bill all of these essentials.<sup>38</sup>

2. Injunctions against judgments at law will also be granted when the defendant to the judgment had a good defence on the merits, but one not available in a Court of law;<sup>39</sup> or if available it was hampered by difficulties, complications, or embarrassments, too confusing and perplexing for investigation and solution by a jury.<sup>40</sup> And it may be stated as a general principle, that any

<sup>35</sup> A bill of injunction will not lie to enjoin a judgment rendered by a Justice of the Peace, or a Circuit Court, when the only complaint is the erroneous action of the Justice of the Peace, or Circuit Court (1) in allowing or disallowing amendment, or (2) in allowing or disallowing demurrers, pleas or other defences, or (3) in admitting or rejecting evidence, or (4) in allowing or disallowing claims or credits, or (5) in allowing or disallowing motions, or (6) in denying what was law or applying what was not law, or (7) in granting or refusing an appeal, or (8) in accepting or refusing a bond or pauper oath, or (9) in doing or refusing to do some other thing during the progress of the suit. All such errors committed by a Justice of the Peace must be corrected by the Circuit Court on appeal, or *certiorari*; and all such committed by the Circuit Court must be corrected by the Supreme Court on appeal or writ of error, or in some cases by a *supersedeas*.

<sup>36</sup> *Greenlaw v. Kernahan*, 4 Sneed, 371; *Glenn v. Maguire*, 3 Tenn. Ch., 695; *Kindell v. Titus*, 9 Heisk., 738.

<sup>37</sup> 1 High on Injunc., § 114; *Kearney v. Smith*, 3 Yerg., 127; *Prater v. Robinson*, 11 Heisk., 391; *Kirkpatrick v. Utley*, 14 Lea, 96; *Taylor v. Railroad*, 2 Pick., 233; *Williams v. Pile*, 20 Pick., 273. A judgment based on the appearance of an attorney without authority may be enjoined. *Courtney v. Dyer*, 2 Shan. Cas., 360.

<sup>38</sup> *Hickerson v. Raignel*, 2 Heisk., 335; *Rowland v. Jones*, 2 Heisk., 321.

<sup>39</sup> For illustrations of defences not available at law, see *supra*, note 32.

<sup>40</sup> 1 High on Injunc., § 114; *Frierson v. Moody*, 3 Hum., 561; *Newbern v. Glass*, 5 Hum., 520; *Chester v. Apperson*, 4 Heisk., 639; *Cornelius v. Thomas*, 1 Tenn. Ch., 283.

facts which prove it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a Court of law, or of which he might have availed himself but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a Court of Equity to interfere by injunction to restrain the adverse party from availing himself of such judgment.<sup>41</sup>

3. Void and voidable judgments and decrees will be enjoined without showing any facts, except such as demonstrate their nullity.<sup>42</sup> If a judgment or decree is, for any reason, void or voidable,<sup>43</sup> as where vitiated by fraud, accident or mistake, or where the Court had no jurisdiction of the person, or of the subject-matter, such a judgment may be enjoined.<sup>44</sup> A judgment of the Supreme Court, if void or voidable, for any reason, may be enjoined in Chancery,<sup>45</sup> and proceedings in this State, based upon a judgment rendered in another State, may be enjoined for any cause which would authorize an injunction against a judgment of one of our own Courts.<sup>46</sup>

4. If the defendant to the judgment has any set-off, and the plaintiff is insolvent, or has removed from the State, an injunction will be granted against the judgment.<sup>47</sup>

Nevertheless, while a Court of Chancery will, in a proper case, enjoin a judgment at law, it will not stop there, but will either grant a new trial in the Circuit Court,<sup>48</sup> or will itself determine the rights of the parties and grant the plaintiff at law the recovery he was entitled to, if any,<sup>49</sup> or deny him any recovery, if he is not entitled to any.<sup>50</sup>

3. Injunctions Against Executions at Law, or in Chancery, will be granted in the following cases:

1. Where the judgment is void,<sup>51</sup> or voidable, or has been fully paid, or otherwise satisfied, or is barred by the statute of limitations.<sup>52</sup>

2. Where the execution is levied upon the land of a person not a party to the lawsuit.<sup>53</sup>

### § 815. Injunctions Against Commissioners and Public Officers.—Whenever

<sup>41</sup> 2 Sto. Eq. Jur., 887; *Scurlock v. Scurlock*, 8 Pick., 629, citing the above section of this book, then § 796.

<sup>42</sup> In such cases, the Chancery Court will not inquire whether the defendant at law had a valid defence. It is enough if he show that the judgment or decree complained of is void. *Ridgway v. Bank*, 11 Hum., 523; *Bell v. Williams*, 1 Head, 229.

<sup>43</sup> There is a wide difference between a void judgment and a voidable judgment. See, *ante*, §§ 446; 565. A void judgment binds nobody; it bars nobody; it is a nullity, and no judgment at all; and justifies no act done under it. *Holmes v. Eason*, 8 Lea, 760; *Finley v. Gaut*, 8 Bax., 151. A voidable judgment, however, binds everybody, and justifies every act done under it, until reversed or set aside. A voidable judgment may be reversed by the Supreme Court, on appeal or writ of error, but cannot be revised, corrected, or set aside, by the Chancery Court, except for fraud, accident, or mistake, in obtaining it, and then only on a bill filed for that purpose. A voidable judgment, though full of errors, is as valid as a judgment perfectly regular, whenever offered in evidence in either the Chancery or Circuit Court. *Greenlaw v. Kernaahan*, 4 Sneed, 371. If the Court rendering the judgment in question had jurisdiction of the person and of the subject-matter, and had authority to make such a judgment, the fact that there was no evidence to support the judgment, or that gross irregularities appear in the record, are matters wholly immaterial on a collateral attack. And what is here said of void and voidable judgments is equally true of void and voidable decrees. As to the difference between void and voidable decrees and judgments, see *Greenlaw v. Kernaahan*, 4 Sneed, 371; *Hopper v. Fisher*, 2 Head, 254; *Kindell v. Titus*, 9 Heisk., 738; *Finley v. Gaut*, 8 Bax., 151; *Pope v. Harrison*, 16 Lea, 82; *Vanvabry v. Staton*, 4 Pick., 351. See "Judgments" in our Digests, for many other cases. See, also, *ante*, §§ 446; 565.

<sup>44</sup> *Caruthers v. Hartsfeld*, 3 Yerg., 366; *McNairy v. Eastland*, 10 Yerg., 310. It will be absolutely void, if rendered without service of process, or ap-

pearance. *Bell v. Williams*, 1 Head, 229; 1 High on Injunc., §§ 238-239; 2 Dan. Ch. Pr., 1625, note; *Grader v. Coltart*, 3 Shan. Cas., 562. Or if rendered in the wrong county in a local suit. See, *ante*, § 177, notes 17; 30. 2 Dan. Ch. Pr., 1567; *Douglass v. Joyner*, 1 Bax., 32. See, also, *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 506; *Walker v. Day*, 8 Bax., 77; *Maddox v. Apperson*, 14 Lea, 604.

<sup>45</sup> *Kinzer v. Helm*, 7 Heisk., 672; *Smith v. Van Beber*, 1 Swan, 110; *Newman v. Justices*, 1 Heisk., 791; *Murphy v. Johnson*, 23 Pick., 552.

<sup>46</sup> *Wilson v. Robertson*, 1 Tenn., (Overt.) 266; *Winchester v. Jackson*, 3 Hay., 305; *Turley v. Taylor*, 6 Bax., 382; *Gettys v. Gettys*, 3 Lea, 261; *Chancy v. Bryan*, 11 Lea, 589.

<sup>47</sup> *Gregory v. Hasbrook*, 1 Tenn. Ch., 218; *Howe S. M. Co. v. Zachary*, 2 Tenn. Ch., 478. These set-offs may have existed when the suit at law was instituted, or may have been subsequently acquired. *Fields v. Carney*, 4 Bax., 137. But if in existence when the suit was instituted, and if pleaded and passed on in the suit at law, no injunction will lie. *Gregory v. Hasbrook*, 1 Tenn. Ch., 218. See "Set-off," in our Digests.

<sup>48</sup> *Kirkpatrick v. Utley*, 14 Lea, 96; *Prater v. Robinson*, 11 Heisk., 394. New trial at law awarded. *Holcomb v. Canady*, 2 Heisk., 610; *Burem v. Foster*, 6 Heisk., 333.

<sup>49</sup> *Jones v. Kincaid*, 5 Lea, 677.

<sup>50</sup> *Hickerson v. Raignel*, 2 Heisk., 329. See, *post*, §§ 1206-1209.

<sup>51</sup> *Rucker v. Moore*, 1 Heisk., 729; *Insurance Co. v. Webb*, 22 Pick., 425. As to the distinction between void and voidable judgments, see, *ante*, §§ 446-565.

<sup>52</sup> 2 Sto. Eq. Jur., § 876.

<sup>53</sup> *Merriman v. Polk*, 5 Heisk., 717; 2 Dan. Ch. Pr., 1624; 1 High on Injunc., § 119. Executions based on Chancery decrees that are void may, also, be enjoined. *Douglass v. Joyner*, 1 Bax., 34; *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 502.

commissioners, or public officers, appointed by the Legislature, the Governor, the County Court, or a public corporation, or other authority, undertake to do some act not authorized by the Constitution or laws of the State, or by the particular order or authority under which they act, they will be enjoined by the Chancery Court on the application of any person liable to be irreparably injured by their illegal or unauthorized act.<sup>54</sup>

Sheriffs, Clerks and Masters, and Solicitors, should not be enjoined merely because they are doing their duty in obedience to process, or the order of the Court,<sup>55</sup> except, perhaps, as a means of notifying them of the granting of the injunction. If no relief is prayed against them, the bill should so state, so as to relieve them of the necessity and expense of making defence. If, however, they are guilty of any misconduct, or have the property in dispute in their possession, or under their control,<sup>56</sup> they may both be made parties, and be required to answer.

**§ 816. Injunctions Against Illegal Taxes.**—No injunction can be granted against the collection of a tax due the State,<sup>57</sup> but if a county or city, or other public corporation, attempt through its officers to collect any tax not warranted by the law, or the Constitution, the Chancery Court has jurisdiction to enjoin the collection of such a tax,<sup>58</sup> and any one tax-payer may sue on behalf of himself and all others, and enjoin the collection of the entire tax.<sup>59</sup>

**§ 817. Injunctions Against Taking Private Property without Compensation.** Private property cannot lawfully be taken for public roads, streets, bridges, building sites, or other public purposes, or for railroads or turnpikes, without just compensation being paid, previous to the taking, or statutory security given; and Courts of Chancery will enjoin any attempt to unlawfully deprive the owner of his property for any of said purposes, provided the suit be brought in due season.

**§ 818. Injunctions Against Public and Private Corporations.**—Courts of Chancery will, by injunction, prevent corporations doing illegal acts.

1. **Public Corporations May be Enjoined** from doing any act in violation of their charters, or doing any act not authorized by their charters.<sup>60</sup> They may be enjoined from levying particular taxes, or paying or issuing particular bonds, or incurring or paying particular debts, or making particular contracts, or holding particular elections, or doing other particular acts, when such conduct is in violation of law or their charters. Public corporations include counties, as well as towns and cities, and the County Court may be enjoined in any of the foregoing instances.

2. **Private Corporations Will be Enjoined** from doing any acts not authorized by their charters, or from misappropriating their funds or assets, or from making and enforcing unauthorized assessments, or from engaging in a business, or entering into contracts not authorized by their charters, or from over-issuing stock;<sup>61</sup> or from doing any other act not authorized by their charters, or by some statute.

**§ 819. Injunctions Against Waste, Trespasses, and Similar Wrongs.**—Courts of Chancery will aid the owner of real estate, or of an interest therein, to protect his property or interest against persons guilty of waste, trespass, or other irreparable mischief.<sup>62</sup>

<sup>54</sup> See "*Quia Timet*," in our Digests.

<sup>55</sup> *Montgomery v. Whitworth*, 1 Tenn. Ch., 176. See, *ante*, § 94.

<sup>56</sup> *Weakley v. Woodward*, 2 Ch. Apps., 586; 2 High on Injunc., § 1551. See, *ante*, § 94.

<sup>57</sup> But a bill will lie when the officer is acting under a void process, for then *quoad hoc* he is not an officer. *Alexander v. Henderson*, 21 Pick., 431.

<sup>58</sup> 2 Sto. Eq. Jur., § 893 *a*; *University v. Cheney*, 8 Cates, 259.

<sup>59</sup> *Keese v. Board of Education*, 6 Cold., 127; *Hunter v. Justices*, 7 Cold., 49.

<sup>60</sup> *Trading Stamp Co. v. Memphis*, 17 Pick., 181.

<sup>61</sup> 2 Dan. Ch. Pr., 1650, note.

<sup>62</sup> "Adequate compensation" and "compensatory damages" seem to mean such compensation, or damages, as will fully remunerate the party injured, and enable him to put himself in as good a condition as he was before the injury of which he complains. And what is meant by "irreparable damages," "irreparable mischief," and "irreparable injury," seems to be such damage, mischief, or injury, as, (1) either materially impairs the value of the fee, or (2) is estimable only by conjecture, and not by any accurate standard, or (3) is so often repeated as to

1. **Waste** is the destruction or injury of lands, mines, quarries, wells, springs, fields, fruit, shade or ornamental trees, gardens, shrubbery, meadow, timber, houses, improvements, or fixtures, by one rightfully in possession, but not owning the fee, to the prejudice of the heir or of him entitled to the reversion or remainder; or to the prejudice of a mortgagee, tenant in common, or maker of a title-bond; and, on the application of such person, an injunction will issue to prevent any irreparable waste begun or threatened by the dowress, homesteader, tenant by the courtesy, tenant for life, tenant in common, mortgagor, holder under a title-bond, lessee, or purchaser under a parole agreement avoided by him,<sup>63</sup> or their privies, agents, or servants.<sup>64</sup>

In real actions, and in actions for the recovery of personal property in specie, the Court in which the suit is pending, may restrain the injury, removal or destruction of the property by injunction until the cause is finally disposed of.<sup>65</sup>

2. **Trespasses** are akin to waste, the distinction being that waste is the abuse or destruction of property committed by a person, who while not absolute owner has, nevertheless, a present right to its legitimate use, while a trespass is an act injurious to, or destructive of, property by one who has no right whatever to its use.<sup>66</sup> Where trespasses on realty are likely to result in irreparable injury, or in a multiplicity of suits, or where such trespasses cannot be compensated in damages,<sup>67</sup> either by reason of the peculiar character of the property, or by reason of the insolvency of the trespasser, an injunction will lie to restrain such trespassers, on a bill therefor being filed by the owner of the land.<sup>68</sup>

3. **Similar Wrongs** include (1) those cases where a person so uses his own property, or so exercises his own rights, as to irreparably injure another; and (2) those cases where personal rights are so wantonly invaded as to work great discomfort, inconvenience, or annoyance to the complainant, such as acts endangering life or limb, or disturbing sleep, or injuring health, and acts that tend to mortify complainant's feelings by publications, and the like.

The following form may be of value in framing bills to stay waste: it is so drawn as to apply to any one of various cases:

#### BILL TO STAY WASTE.

[For address and caption, see, ante, §§ 155;164.]

Complainant respectfully shows to the Court:

#### I.

That he is the owner of the fee [or the mortgagee, or a tenant in common,] of the following tract of land: [Here describe it; see, ante, § 172.]

#### II.

That said tract of land is now in possession of defendant C D, who has a life estate therein as the endowed widow of E D, [or as a tenant by the courtesy, or as a homesteader, or who is a tenant in common with complainant, or who has mortgaged said land to complainant, or who holds under a title bond from complainant, or who went into possession under complainant on a parole agreement of purchase, which he has avoided and repudiated, or who is a lessee of complainant, or who is a tenant under the defendant C D.<sup>68a</sup>]

necessitate a multiplicity of suits, or (4) is irreparable because of its injury to health, comfort, or convenience, or because of the insolvency of the defendant. See 10 A. & E. Ency. of Law, §§ 817-856; 876-884; 939-940; 3 Pom. Eq. Jur., §§ 1347-1358; 2 Sto. Eq. Jur., §§ 913-929 e.

<sup>63</sup> Code, § 3405.

<sup>64</sup> 2 Dan. Ch. Pr., 1629-1630; 3 Pom. Eq. Jur., § 1348; 1 High on Injunc., §§ 649-696; 2 Sto. Eq. Jur., §§ 909-919. See, "Waste," in our Digests.

<sup>65</sup> Code, § 3767. This section, and the Act of 1877, ch. 97, have greatly enlarged the jurisdiction of the Court in cases of waste, trespass, nuisance and injury to easements. See, ante, § 36. To constitute waste there must be a lasting injury to the estate, and a permanent depreciation of its value. Lunn v. Oslin, 12 Pick., 28.

<sup>66</sup> Walker v. Fox, 1 Pick., 161.

<sup>67</sup> 1 High on Injunc., § 650; 2 Dan. Ch. Pr., 1631.

<sup>68</sup> 3 Pom. Eq. Jur., § 1357; 1 High on Injunc.,

§ 697-738; 2 Sto. Eq. Jur., §§ 928-929. Now that our Courts of Chancery have jurisdiction to try the legal title to real and personal property, its power to do complete justice, in every case of trespass, is greatly enlarged; and they will enjoin (1) the cutting of timber, shrubbery, fruit trees, or any other trees; (2) the digging of coal, stone, or mineral; (3) the injury or removal of fences, houses, fixtures, or other improvements, or other property; (4) the interference with springs, or streams, or roads, or rights of way, or easements; (5) injuries to riparian rights; or (6) any other act violative of the complainant's rights of property, or use or possession of property. As to injuries to riparian rights, see Webster v. Harris, 3 Cates, 668.

<sup>68a</sup> Show fully and clearly the character of the defendant's possession, and if a tenant of the owner of the life estate is committing the waste, make him a defendant, also.

## III.

That the defendant C D, [or E F, the tenant of C D,] is committing waste on said tract of land by cutting down and selling the valuable trees<sup>88b</sup> growing on said land which is now inadequately timbered. He has already felled a large number of said trees, including a very large and valuable black walnut tree hitherto preserved for ornament, shade, and its fruit; and, unless restrained by your Honor's order, will probably continue to cut, sell and remove the valuable trees on said tract.<sup>88c</sup> [Or, if the waste consists in destroying valuable shade, fruit or ornamental trees, or opening mines or quarries, or impairing the permanent value of houses, fixtures, meadows, fields, roads or waters, specify the particulars and character of such injuries, and wherein they permanently injure the value of the tract.]

## IV.

That [If an attachment be necessary or expedient, here lay grounds therefor by showing the defendant is insolvent and is consuming or removing, or has removed, the cut timber, or coal mined, or stone quarried, or other subjects of the waste, from the said tract of land for sole or use.<sup>68d</sup>]

## V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [ &c.; see, ante, §§ 158; 164.]

2d. That your Honor grant him a writ of injunction to restrain the defendant [or defendants,] his [or their] servants, workmen and agents from committing waste, spoil, or destruction upon the said tract of land, or any part thereof, and especially from cutting down timber or other large trees, and from cutting down fruit, ornamental or shade trees [specifying the various acts of the defendant or defendants complained of.]

3d. That complainant have a decree against the defendant [or defendants,] for the damages done by the waste and other injuries committed on said tract of land as herein set out.

4th. That an attachment issue to impound the trees cut down as aforesaid, and to impound the lumber made from them [or to impound the coal mined, stone quarried, or other subject of the waste,] and that a receiver be appointed to take possession of and sell the same.

5th. That complainant have such other and further relief as he may be entitled to.

This is the first application for writs of injunction and attachment, and for a receiver, in this case.

[Annex affidavit; see, ante, § 789.]

JOSEPH STORY, Solicitor.

§ 820. **Injunctions Against Nuisances.**—The Chancery Court will, on application of the person injured, enjoin all nuisances<sup>69</sup> which interfere with the health or comfort of the complainant, or endanger, depreciate, or destroy, his property or his business; such as (1) acts or occupations which cause noxious noises, sights, vapors, smokes, odors, or stenches; (2) the erection of houses for the storage of powder, or oil, or other explosive combustibles; or the building of stables, steam factories, slaughter houses, glue or soap factories, brick kilns, bawdy-houses,<sup>70</sup> or other offensive establishments, near the complainant's house: (3) an injury to complainant's water-rights by diversion, destruction, or pollution, of the water; (4) the obstruction of complainant's rights of way over roads, streets, or bridges; (5) an injury to complainant's land by mill-dams and other interferences with running water;<sup>71</sup> or (6) any similar act injurious to comfort, health, property or business, not to be adequately compensated for in damages. And the Court will not only enjoin a nuisance, but will award damages caused by the nuisance.<sup>72</sup>

§ 821. **Injunctions to Protect Easements.**—Courts of Equity will interfere by injunction, on behalf of the party injured, to protect his rights to easements,

<sup>88b</sup> *Arbor dum crescit, lignum cum crescere nascit.* (It is a tree as long as it is growing; it is wood when it ceases to grow.)

<sup>88c</sup> Trees not essential to the value of a tract may be cut and sold if necessary to make new fields of more value, or if the proceeds are applied in improvements on the land.

<sup>68d</sup> In such a case complainant is entitled to an equitable attachment to be levied upon the subject of the waste. See, post, § 882.

<sup>69</sup> The jurisdiction of the Court of Chancery to do complete justice in cases of nuisances has been fully effectuated by the statute giving the Court power to determine the legal titles and rights of the parties. Formerly, the Court often refused to act until the legal titles and rights of the parties had been determined by a suit at law. 2 Dan. Ch. Pr., 1629; 1639, notes.

<sup>70</sup> Next after the right to life no rights are more deserving of protection and vindication than the

right to one's health, and the right to the enjoyment of one's senses of sight, smell, hearing and taste, for without the enjoyment of these life itself cannot be enjoyed; and whatever materially impairs any of these rights is a nuisance. What grossly violates one's moral sense is, also, a nuisance. *Weakley v. Page*, 18 Pick., 178. Since the Act of 1877 the Chancery Court can, as a law Court, determine whether the matter complained of is a nuisance, and if so, can then as an Equity Court enjoin it. This rule reconciles many inconsistent decisions.

<sup>71</sup> *Coulter v. Davis*, 13 Lea, 451; *Naff v. Martin*, 2 Shan. Cas., 451; 2 Dan. Ch. Pr., 1629; 1639-1641, notes; 3 Pom. Eq. Jur., §§ 1349-1351; 1 High on Injunc., §§ 739-847; 2 Sto. Eq. Jur., §§ 921-927. See "Nuisances," in our Digest. See "Bill to Enjoin and Abate a Nuisance," post, § 826.

<sup>72</sup> *Richi v. Chattanooga Brewing Co.*, 21 Pick., 651. See, ante, §§ 36; 38.

and will enjoin: (1) the closing of a right of way, or road, or a public square, or public graveyard;<sup>73</sup> (2) the destruction or impairment of rights to water for mills, factories, or domestic use;<sup>74</sup> or (3) the removal or weakening of a party wall, or any serious interference with it.<sup>75</sup> The Court will, also, enjoin the violation of contracts or covenants granting or creating easements.<sup>76</sup>

§ 822. **Injunctions to Protect Franchises.**—Where the Legislature has granted a franchise, the Chancery Court will protect it by injunctive process. Among these franchises are: (1) right of turnpike, bridge and ferry companies to collect tolls; and (2) right of railroad, telegraph and other companies to operate under their charters, and to possess and enjoy the exclusive privileges and franchises conferred by their charters.<sup>77</sup>

§ 823. **Injunctions in Other Cases.**—There are many other cases in which a Chancery Court will grant an injunction to prevent wrongs, unconscientious conduct, and irreparable injury, among which are the following:

1. **The Transfer of Specific Property** will be enjoined, when, if transferred, irreparable loss would result to the owner, or beneficiary, or lien owner; or, in case of negotiable securities, to the maker or endorser.<sup>78</sup>

2. **The Violation of Any Trust**, either (1) by the executor; administrator, guardian, or other trustee executing the trust; or (2) by any stranger intermeddling therewith, will be enjoined.<sup>79</sup>

3. **The Collection of Purchase-Money for Land** will be enjoined<sup>80</sup> when the title fails in whole or in part, or is in controversy, or there is a breach of the covenants,<sup>81</sup> and there has been a fraud in the sale,<sup>82</sup> or the vendor is insolvent,<sup>83</sup> or the contract is executory.<sup>84</sup>

4. **Tenants Will be Enjoined** from doing acts in violation of their lease or of good husbandry, from removing manure or crops, from plowing up meadowlands, from injuring orchards, shrubbery, walks or buildings, from sowing seeds of deleterious crops or vegetation, or from committing any waste.<sup>85</sup>

5. **The Enforcement of a Penalty, or a Forfeiture**, will be enjoined when it was inserted in the contract merely to secure the enforcement of some act, or the enjoyment of some right, or benefit, and adequate compensation may be made for the breach, especially when the forfeiture was occasioned by accident, fraud, surprise, or ignorance.<sup>86</sup>

6. **The Following Acts** will, also, be enjoined: (1) the infringement of trade-marks;<sup>87</sup> (2) the disclosure of secrets of trade, title, composition, or manufacture;<sup>88</sup> (3) the publication of private letters, or other private writings;<sup>89</sup> (4) and in general, the breach of any contract, the commission of any tort, or the violation of any right, when the legal remedy would be inadequate.<sup>90</sup>

§ 824. **Mandatory Injunctions, When Granted.**—Mandatory injunctions are seldom granted before a final hearing, although they may be granted on interlocutory applications. The Court, however, seldom commands the defendant to

<sup>73</sup> Brew v. Van Deman, 6 Heisk., 433; Crutchfield v. Car Works, 8 Bax., 242. And will require the defendant to remove his obstructions. Leake v. Cannon, 2 Hum., 169.

<sup>74</sup> Cox v. Howell, 24 Pick., 130.  
<sup>75</sup> 1 High on Injunc., §§ 848-896; 3 Pom. Eq. Jur., § 1351; 2 Sto. Eq. Jur., §§ 295-297 a.

<sup>76</sup> 2 Pom. Eq. Jur., § 689; 3 *Ibid.*, § 1342.

<sup>77</sup> 1 High on Injunc., §§ 897-933.

<sup>78</sup> 3 Pom. Eq. Jur., § 1340.

<sup>79</sup> 3 Pom. Eq. Jur., §§ 1339-1340.

<sup>80</sup> A purchaser in possession under a deed must ordinarily rely upon the covenants and warranties in his deed, and, in the absence of fraud or insolvency on the part of his vendor, must pay the purchase-money, and this is so even when the vendor has no title. Brown v. Woods, 1 Cold., 610; Land Co. v. Hill, 3 Pick., 578.

<sup>81</sup> 2 Dan. Ch. Pr., 1653, note.

<sup>82</sup> Ingram v. Morgan, 4 Hum., 66; Topp v. White, 12 Heisk., 165.

<sup>83</sup> Young v. Butler, 1 Head, 640; Baird v. Goodrich, 5 Heisk., 20.

<sup>84</sup> Topp v. White, 12 Heisk., 165; Buchanan v. Alwell, 8 Hum., 516. The bill in such a case must specifically set forth the fraud or defects of title relied on. Jones v. Fulghum, 3 Tenn. Ch., 193. But a purchaser, after deed made and possession taken under it, cannot, in the absence of fraud, concealment, or misrepresentation, enjoin the collection of the purchase-money, because of breach of any of the covenants, unless the seller is insolvent. Land Co. v. Hill, 3 Pick., 578. And this is so even when the vendor had no title. Brown v. Woods, 1 Cold., 610.

<sup>85</sup> 2 Dan. Ch. Pr., 1655; 1656.

<sup>86</sup> 2 Sto. Eq. Jur., §§ 1314-1315; 1 Pom. Eq. Jur., §§ 433-460.

<sup>87</sup> 2 High on Injunc., §§ 1063-1085; 2 Sto. Eq. Jur., § 951; Filley v. Rosenbaum, 3 Shan. Cas., 395; Simmons Medicine Co. v. Mansfield Drug Co., 9 Pick., 84. But State Courts have no jurisdiction to enjoin the infringements of patents and copyrights.

<sup>88</sup> 2 Sto. Eq. Jur., § 952; 2 Dan. Ch. Pr., 1651.

<sup>89</sup> 2 Sto. Eq. Jur., §§ 944-949.

<sup>90</sup> 3 Pom. Eq. Jur., § 1338.



do any positive act by an interlocutory order; it contents itself, in an interlocutory proceeding, with prohibiting the defendant from doing the reverse of what he is desired to do. Mandatory injunctions are never granted, unless the injury is irreparable, and unless the complainant uses extraordinary diligence in applying for it in cases where delay or acquiescence would be prejudicial to the defendant.<sup>91</sup>

1. **Mandatory Interlocutory Injunctions** would seem to be proper, (1) where the act complained of is a gross violation of a property right, and was done in great haste, or in secrecy, and manifestly to avoid a prohibitory injunction; or (2) was a high-handed outrage on complainant's plain rights of use or possession, and the act is yet warm, and the mandatory injunction restoring the *statu quo*, while doing the complainant exceeding great benefit, will do the defendant but little or no injury.<sup>92</sup> A mandatory interlocutory injunction will ordinarily be granted (1) to compel the defendant to undo acts done during the progress of the suit;<sup>93</sup> or (2) to undo, remove, or discontinue, a nuisance or trespass of an irreparable nature.<sup>94</sup>

A mandatory interlocutory order, or injunction, will also be granted to require one party to permit the other to inspect a house, if necessary for the purpose of the suit; or to permit him to have access to the furniture in a house for the purpose of valuation;<sup>95</sup> or to permit him to inspect a mine for the purpose of determining the extent of the injury done by the party in possession to the party applying for the order.<sup>96</sup>

2. **Mandatory Final Injunctions** frequently form a part of final decrees.<sup>97</sup> In such cases, the decree and injunction command and require the defendant to do some affirmative act, such as (1) to surrender the possession of property, real or personal, or choses in action, or deeds, or other papers; or (2) to execute deeds, releases, acquittances, or other instruments; or (3) to pay money into Court; or (4) to do some ministerial acts as an officer;<sup>98</sup> or (5) to abate a nuisance; or (6) to maintain a bridge, or road, when so bound by law;<sup>99</sup> and on his default in any of these cases, the defendant will be committed to jail until he performs the act, or otherwise purges his contempt.<sup>100</sup>

§ 825. **Cases not Proper for Injunctive Relief.**—The Chancery Court sits to declare, protect and enforce the rights of property,<sup>101</sup> the obligations of contracts, express and implied, and the duties imposed by conscience and good faith in reference to property, and not to inflict penalties, or to interfere with the procedure in criminal cases, or to deal with political or ecclesiastical<sup>102</sup>

<sup>91</sup> 3 Pom. Eq. Jur., § 1359; *Post v. Railroad*, 19 Pick., 184; citing the above section of this book, then § 806.

<sup>92</sup> See 10 A. & E. Ency. of Law, 789-790; 2 Dan. Ch. Pr., 1613; 1661-1662, notes; High on Injunc., §§ 358; 708; 792; 804; 1150; 1158.

<sup>93</sup> 2 Sto. Eq. Jur., § 229 *b*, note; *Leake v. Cannon*, 2 Hum., 169.

<sup>94</sup> 10 A. & E. Ency. of Law, 789. Thus, the Court will enjoin (1) a sewer from being kept open, or (2) the continuance of a malicious obstruction to an easement, or (3) the continuance of a continuing trespass. *Ibid*.

<sup>95</sup> 2 Dan. Ch. Pr., 1663.

<sup>96</sup> 1 High on Injunc., § 737. Mandatory interlocutory injunctions will be granted in the following cases: (1) to compel the restoration of running water to its natural channel when wrongfully diverted therefrom to complainant's great injury, such natural channel running through his lands; (2) to compel the removal of a very great nuisance, suddenly created, where irreparable injury would result before a final hearing; (3) to compel the removal of obstructions placed in complainant's right of way; (4) to compel the removal of obstructions from a navigable river; (5) to compel the return of water to a mill or factory where the flow has been wrongfully cut off; (6) to compel the closing of a sewer; (7) to restore to a wife the possession of her separate estate where the husband has wrongfully excluded her therefrom; (8) to compel the opening of a public highway wrongfully closed; (9) to compel

the removal of water pipes wrongfully laid in complainant's soil; (10) to compel a water company to continue its supply of water when such supply has been wrongfully and oppressively discontinued; (11) to compel the restoration of a party wall; (12) to compel a partner to return partnership books to the firm's office, the articles of co-partnership requiring them to be kept there; and (13) generally, in any case where the injury is of so serious or material a character that the restoration of things to their former condition is the only remedy that will meet the requirements of the case. See, 22 Am. Law Register, 403-407, and cases there cited; and High on Injunc., §§ 792; 1331.

<sup>97</sup> 1 Sto. Eq. Jur., § 861

<sup>98</sup> *Condon v. Maloney*, 24 Pick., 82.

<sup>99</sup> *Dyer Co. v. Railroad*, 3 Pick., 712.

<sup>100</sup> See Chapter on Contempts, *post*, § 918.

<sup>101</sup> See, *ante*, § 56, for definition of the word property.

<sup>102</sup> *Travers v. Abbey*, 20 Pick., 665. The Chancery Court will not review the action of a Church affecting the status of its members among themselves. *Nance v. Bushy*, 7 Pick., 303. A Church is an *imperium in imperio* in dealing with religious matters and with its members as to such matters, and is not in those respects subject to Caesar. The Chancery Court can consider ecclesiastical matters only when necessary to the determination of some property right. *Ibid*. And so of political matters.

matters, or to intermeddle with co-ordinate departments of the government.<sup>103</sup>

Equity has no jurisdiction to restrain the commission of crimes, or to enforce mere moral obligations, or the performance of mere moral duties; nor will it interfere for the prevention of an illegal act merely because it is illegal; in all cases, an injury to the legal or equitable rights, or property, of the complainant must be involved.<sup>104</sup>

The Chancery Court will not grant an injunction (1) to stay proceedings in a criminal proceeding; nor (2) to stay proceedings on a mandamus, information, or writ of prohibition;<sup>105</sup> nor (3) to stay proceedings on an award in a Court of law, except for fraud, accident, or mistake; nor (4) to stay any proceedings in a suit in a Court of law, unless there be some special ground for equitable relief not equally available in the latter Court; nor (5) to stay proceedings on a judgment in a Court of law, unless there be some special grounds of equitable relief existing before the judgment, or some other ground of relief arising since the judgment, not equally available in the latter Court;<sup>106</sup> nor (6) to stay proceedings in a suit in another Court of Chancery, or Court exercising Chancery jurisdiction, in a matter the latter Court may properly determine;<sup>107</sup> nor (7) will an injunction be granted against the exercise of discretionary powers by corporations or their officers, where there is no fraud; nor (8) against the exercise of discretionary powers by any public officer;<sup>108</sup> nor (9) will an injunction be granted against a non-resident, upon whom personal process has not been served;<sup>109</sup> nor (10) will the Court, by a mandatory injunction, undertake to enforce the performance of continuous duties;<sup>110</sup> nor (11) to make an order that it cannot enforce, especially an order in reference to matters outside of the State;<sup>111</sup> nor (12) will an interlocutory injunction lie against an officer collecting State taxes;<sup>112</sup> nor (13) against an officer of the United States discharging a duty under an Act of Congress;<sup>113</sup> nor (14) will an injunction lie for violations of statutory copyrights;<sup>114</sup> nor (15) against a person proceeding under the national bankrupt laws;<sup>115</sup> nor (16) will an injunction of any sort be granted, in any case manifestly unfit for injunctive relief.

§ 826. **Form of Bill to Enjoin and Abate a Nuisance.**—The following form of a bill to enjoin and abate a nuisance will be found applicable to many cases constantly arising:

#### BILL TO ENJOIN AND ABATE A NUISANCE.<sup>116</sup>

[For address and caption, see, ante, § 164.]

Complainant respectfully shows to the Court:

##### I.

That he is the owner and possessor of the following tract of land in the....civil district of Blount county. [Insert description; see, § 172.]

##### II.

That there is a grist and saw mill on said tract using the water of Mill creek for power. This mill has been so located and operated over thirty years, without interference, interruption or dispute, except as hereinafter stated. Said mill is operated by what is called an undershot water-wheel, the water flowing through a mill race from said creek, and has always been so operated; and cannot be operated any other way without very heavy expense and the purchase of a site for another dam higher up the creek, and of a right of way for a mill race thereto.

<sup>103</sup> The Chancery Court cannot restrain the Legislature from passing, nor the Governor from approving, an unconstitutional bill. *Bates v. Taylor*, 3 Pick., 319; nor can it command the Governor to do an official act. *Ibid.*

<sup>104</sup> High on Injunc., § 20.

<sup>105</sup> High on Injunc., § 20. If the party proceeding by indictment is the complainant, however, the Court may require him to abandon the prosecution. 2 Dan. Ch. Fr., 162L.

<sup>106</sup> 1 St. Eq. Jur., § 893.

<sup>107</sup> *Deaderick v. Smith*, 6 Hum., 138; *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 506.

<sup>108</sup> 2 High on Injunc., §§ 1186; 1240; 2 St. Eq. Jur., § 955 a.

<sup>109</sup> 1 High on Injunc., § 33.

<sup>110</sup> 2 Dan. Ch. Fr., 1663.

<sup>111</sup> *W. U. Telegraph Co. v. W. & A. Railroad*, 8 Bax., 54; 1 High on Injunc., § 33. *Extra territorium jus dicenti impune non paretur.* Broom's Leg. Max., 104.

<sup>112</sup> Acts of 1867-8, ch. 79, sec. 16.

<sup>113</sup> 2 High on Injunc., 1322.

<sup>114</sup> 2 High on Injunc., § 989.

<sup>115</sup> 1 High on Injunc., § 300.

<sup>116</sup> This bill is based on *Naff v. Martin*, 2 Shan. Cas., 451. See, ante, § 820.

## III.

That about a year ago the defendant bought and took possession of the tract of land on said creek below complainant's said tract and adjoining the same, and at once began the construction of a mill and dam thereon, the dam being thrown across said creek very near complainant's land, and not more than one hundred yards from his said mill. The result is that defendant's dam backs the water of the creek up on complainant's mill-wheel, and so retards the current that there is not force enough in the same to turn the wheel.

## IV.

That complainant, to avoid trouble, at great expense raised his mill-wheel two feet, and so changed his dam and race as to give a swifter and larger flow of water. But no sooner had complainant completed this work than the defendant raised the height of his dam, and thus caused the back water to flow up on complainant's wheel as injuriously as before. And, in addition to said dam of defendant, he has allowed a very large fallen tree to remain across said creek, thus increasing the back flow of water, and completely drowning the wheel of complainant's mill, whereby complainant is prevented from grinding and sawing for his customers as was his wont, to his great financial injury and the ruin of his business.

## V.

Complainant would further show to your Honor that as the result of said dam and fallen tree on defendant's land, the back water of said creek in wet weather flows over a large part of complainant's meadow, and some of his plowed land, doing great damage thereto; and also drowns complainant's spring, from which his family and tenants and employees get their drinking and cooking water. Complainant offered to remove said tree at his own expense, but the defendant refused him permission so to do.

## VI.

The premises considered, complainant prays:

1st. That subpoena to answer issue [See, *ante*, §§ 158; 164.]

2d. That an injunction issue to restrain and prohibit the defendant from allowing said dam and tree to remain as aforesaid; and that said dam and tree be declared a nuisance and abated by the Sheriff at the defendant's expense.<sup>117</sup>

3d. That complainant may be granted damages<sup>118</sup> for the injuries done as aforesaid, and have such other and further relief as he may be entitled to.

This is the first application for an injunction in this case.

[*Annex affidavit; see, ante*, §§ 161; 164.]

WILL A. McTEER, Solicitor.

## ARTICLE III.

## HOW INJUNCTIONS ARE OBTAINED, ISSUED, AND SERVED.

§ 827. How Injunctions are Obtained.

§ 828. When Notice of the Application for an Injunction is Required.

§ 829. When Notice of the Application May be Required.

§ 830. Forms of Fiats for an Injunction.

§ 831. Injunctions on the Pauper Oath.

§ 832. Second Applications for Injunctions.

§ 833. Discretion of the Chancellor in Granting Injunctions.

§ 834. Form of a Writ of Injunction.

§ 835. Issuance and Service of the Injunction.

§ 836. When a Prayer for an Injunction is Not Necessary.

§ 837. When Injunctions Will be Continued, or Made Perpetual.

§ 827. **How Injunctions are Obtained.**—An interlocutory injunction may be obtained at any time,<sup>1</sup> in vacation, as well as in term, and whether the Court be sitting or not; and may be obtained at any stage of the suit, from the time the bill is drawn and verified to the hearing of the cause, on a proper case therefor being made out. The application should, however, be made without delay, or the writ may be refused because of the acquiescence or *laches* of the complainant.<sup>2</sup>

<sup>117</sup> The Court may order the defendant to abate the nuisance, say in ten days, and on his failure so to do direct the Sheriff to do so, at the defendant's expense. See *Leake v. Cannon*, 2 Hum., 169.

<sup>118</sup> The Chancery Court has inherent jurisdiction to abate a nuisance, and in the same suit award damages for the injuries caused by the nuisance.

*Richi v. Chattanooga Brewing Co.*, 21 Pick., 651: 1 Pom. Eq. Jur., 181; 237; 2 Jaggard on Torts, 807. See, *ante*, § 36. The Chancellor can call a jury to assess the damages, if he so desire.

<sup>1</sup> It may be obtained on Sunday. 2 High on Injunc., § 1584. See, *ante*, § 186.  
<sup>2</sup> 2 Dan. Ch. Pr., 1663.

A fiat for an interlocutory injunction is ordinarily obtained before the bill is filed, upon application therefor to some Judge, or Chancellor, at Chambers. Whenever his bill praying for an injunction<sup>3</sup> has been drawn and sworn to,<sup>4</sup> the complainant may, without any notice whatever to the defendant,<sup>5</sup> except as hereafter shown,<sup>6</sup> present it to any Chancellor, Circuit Judge, or Judge of a special Court,<sup>7</sup> for a fiat. The application is made wholly *ex parte*, and at Chambers;<sup>8</sup> unless the bill has already been filed, in which case it may be made to the Court where filed.

If, after the bill has been filed, the necessity for an immediate injunction should arise, and the Court not be in session, the complainant may draw an amended or supplemental bill, stating the new facts and showing the urgency, and obtain a fiat from the Chancellor at Chambers. If the Court be in session an injunction may be obtained in the same way, or on petition, or on motion supported by affidavit.<sup>9</sup> If the Court be in session, a restraining order will be granted of record, if the defendant is before the Court.

**§ 828. When Notice of the Application for an Injunction is Required.**—An injunction cannot be granted to stay the sale of real estate, under a deed of trust or mortgage, with a power of sale, executed to secure the payment of loaned money, on application of the borrower, unless the complainant gives twenty days' notice to the trustee or mortgagee of the time when, the place where, and the Judge, or Chancellor, before whom, the application for the injunction is to be made; and no Judge, or Chancellor, can act upon the application, unless it is accompanied by proof evidenced by return of a sheriff, constable, or attorney, that the notice has been served on the trustee or mortgagee, or he is not to be found in the county of his usual place of residence, or is a non-resident.<sup>10</sup>

In order, however, that the complainant may have time to give the required notice, the Judge, or Chancellor, may grant a fiat for an interim injunction<sup>11</sup> to postpone the sale until the application for an injunction can be acted on at the regular hearing thereof, on notice. This fiat may be in the following form:

#### INTERIM FIAT.

To the Clerk and Master of the Chancery Court, at Huntingdon:

Upon complainant filing this bill, and giving an injunction bond in the penalty of one thousand dollars, conditioned to pay such costs and damages as the Court may adjudge against him, you will issue the injunction prayed for in the bill, such injunction to continue in force until [*here specify the day, allowing the time requisite to enable the complainant to give the twenty days' notice;*] on or before which day a further order will be made, on notice to the defendant.

January 29, 1891.

ALBERT G. HAWKINS, Chancellor.

Such order may be, also, in the following words:

#### FIAT TO DELAY A LAND SALE.

To the Clerk and Master, at Huntingdon:

Upon the foregoing bill being filed, and prosecution bond being given, issue an order to the defendant [*trustee or mortgagee.*] commanding him to postpone the sale of the property mentioned in the bill until the complainant has time to give the required notice of his foregoing application for an injunction, and until said application has been acted on.

January 29, 1891.

ALBERT G. HAWKINS, Chancellor.

On the day specified in the notice, the application for an injunction will be

<sup>3</sup> An interlocutory injunction will not be granted unless prayed for in the bill. 2 Sto. Eq. Jur., §§ 862-863.

<sup>4</sup> The bill must be sworn to either by the complainant or by some other person acquainted with the facts; and the affiant must make oath that he is personally acquainted with the facts stated in the bill. 2 High on Injunc., §§ 1567-1569; 2 Dan. Ch. Pr., 1619. See, *ante*, § 789.

<sup>5</sup> But the Judge, or Chancellor, may require notice to be given. See § 829, *post*.

<sup>6</sup> The exception is in reference to injunctions to stay the sale of realty under mortgage or deed of trust.

<sup>7</sup> Code, §§ 3946; 4434; Flippin v. Knaffle, 2 Tenn. Ch., 243.

<sup>8</sup> Rutherford v. Metcalf, 5 Hay, 64. Even though the Chancellor, or Judge, should be on the bench, he is deemed at Chambers, unless the bill has been filed, or unless some order in reference to it is to be made on the minutes.

<sup>9</sup> 2 High on Injunc., § 1566.

<sup>10</sup> Acts of 1873, ch. 10; Plowman v. Satterwhite, 3 Tenn. Ch., 1; Smith v. Republic Life Ins. Co., 2 Tenn. Ch., 631.

<sup>11</sup> 2 Dan. Ch. Pr., 1666.

further heard. At this hearing, the defendant may resist the granting of the injunction, for want of Equity on the face of the bill; or, he may apply for an adjournment of the hearing to give him time to answer the bill. If an adjournment is applied for, the defendant has the right to ten days' time during which he may file his answer before the same Judge, or Chancellor; and thereupon the motion for an injunction shall be heard upon the bill and answer.<sup>12</sup> At this hearing the Judge, or Chancellor, may (1) refuse any injunction; or (2) may grant an injunction as prayed in the bill, or (3) may refuse an injunction on condition that the defendant will execute a refunding bond; or (4) may grant an injunction on the complainant paying what he admits to be due;<sup>13</sup> or (5) may make such other order as Equity may require. The order of the Judge, or Chancellor, shall be reduced to writing and signed by him, and enclosed with the bill, answer and exhibits, in a sealed envelope, and transmitted to the Clerk of the Court in which the bill is to be filed.<sup>14</sup>

The defendant may voluntarily appear without notice, and present his answer, and resist the grant of the interlocutory injunction. He is under no obligation to wait for notice, or process;<sup>15</sup> and he may, in any case, anticipate an application for an injunction, and request the Chancellor, or Judge, to hear him before acting on the application, if one should be made.

§ 829. **When Notice of the Application May be Required.**—Ordinarily the Chancellor, or Judge, grants a temporary injunction, *ex parte*, on reading the bill and accompanying papers, if any, except as shown in the preceding section; but where (1) a delay of a few days will work the complainant no injury, and a bond by the defendant will abundantly protect and indemnify him, and (2) where an injunction, though warranted by the bill, will nevertheless affect innocent third parties, the Chancellor applied to, if the bill be addressed to him,<sup>16</sup> may refuse to act on the application until the defendant is notified thereof, and has opportunity to be heard.<sup>17</sup> For this purpose, the Judge, or Chancellor, may retain the bill until the day fixed in the notice. On such day, the defendants may present their sworn answer to the bill, and otherwise resist the application for an injunction. In such case, the Judge, or Chancellor, may (1) refuse to grant the injunction; or (2) may grant it on bond, or on bond and other terms; or (3) may grant it on condition that it stand dissolved, when the defendant files with the Master a bond in a given penalty with two good sureties conditioned to pay the complainant such sum as the Court may at any time award him as debt, damages, or otherwise, for the wrongs complained of; (4) or he may order an injunction to issue, unless the defendant give such a bond *instantcr*. The following would in such case be the form of the fiat:

#### FIAT FOR A LIMITED INJUNCTION.

To the Clerk and Master, at Clarksville:

Issue an injunction as prayed in the foregoing bill, on complainant giving a proper injunction bond in the penalty of one thousand dollars; but said injunction to stand dissolved when the defendant, E F, files with you a bond, in the penalty of one thousand dollars, with two good sureties, conditioned to pay the complainant such sum as the Court may at any time award him as debt, damages, or otherwise, for the wrongs complained of in his bill.

Aug. 7, 1890.

GEORGE E. SEAY, Chancellor.

The following is a form for the condition of the bond, in such a case:

#### CONDITION OF THE BOND.

The condition of the above obligation is such that, whereas an injunction was granted in the case of A B, *vs.* E F in the Chancery Court at Clarksville, on condition that it should stand dissolved when the said E F shall file with the Master of said Court the bond specified in said order, now if the said E F shall pay the complainant such sum as the Court may at

<sup>12</sup> Acts of 1873, ch. 10.

<sup>13</sup> Ch. Rule, VI, § 4. See, *post*, § 1195.

<sup>14</sup> Acts of 1873, ch. 10.

<sup>15</sup> *Plowman v. Satterwhite*, 3 Tenn. Ch., 3; 2 High on Injunc., § 1574.

<sup>16</sup> The suggestions of this section cannot well be

acted on by any other than the Chancellor of the Court in which the bill is to be filed.

<sup>17</sup> A little more care should, perhaps, be exercised by our Judges, and Chancellors, in acting on applications for injunctions. *Chadwell v. Jordan*, 2 Tenn., 637.

any time award him as debt, damages, or otherwise, for the wrongs complained of in the bill in said cause, then this obligation to be void, but otherwise to remain in full force.

If the bill be to stay proceedings to collect money in a Court of law, the fiat should require the bond to be conditioned that the defendant refund to the complainant any money the Court may so order on final hearing.<sup>18</sup>

When an injunction will operate harshly upon the defendants, and yet they are probably infringing the rights of the complainant, the Chancellor, instead of granting an unconditional injunction, may give the defendants the option of giving a bond to indemnify the complainant against the wrongs complained of. In such a case, the fiat would be as follows:

**CONDITIONAL FIAT.**

To the Clerk and Master, at Nashville:

Issue the writ of injunction prayed in the foregoing bill, on complainant giving a bond therefor in the penalty of ten thousand dollars, unless within five days the defendants file with you a bond in like penalty, conditioned to pay the complainant all damages the Court may award him for the wrongs and injuries alleged in the bill. If the defendants file said bond, it shall be deemed a waiver of all objections to the jurisdiction to the Court to award said damages, in case the defendants are legally liable therefor.

July 29, 1880.

A. G. MERRITT, Chancellor.

Such a fiat should not be granted, however, in any case of clear invasion of the complainant's rights, or in any case where damages would be inadequate compensation.

If the bill is to enjoin the sale of real estate under a mortgage or deed of trust to secure loaned money, notice must be given the defendant, in all cases, as shown in the preceding section.

§ 830. **Forms of Fiats for an Injunction.**<sup>19</sup>—If the Chancellor, or Judge, deem that a case for a temporary injunction is made out as prayed, he will endorse on the bill his

**FIAT FOR AN UNLIMITED INJUNCTION.**

To the Clerk and Master of the Chancery Court, at Nashville:

Issue a writ of injunction as prayed in the foregoing bill, on complainant giving bond<sup>20</sup> and security in the penalty of [*naming the sum,*] condition as required by law.

Aug. 6, 1890.

A. B, Chancellor [*or, Judge.*]

If the complainant is entitled to an injunction, but not to the extent prayed in his bill, the fiat will show to what extent an injunction is allowed, or to what extent it is disallowed;<sup>21</sup> thus:

**FIATS FOR LIMITED INJUNCTIONS.**

Issue a writ of injunction as prayed in the foregoing bill, except in so far as the bill prays [*stating the particular prayer, or part of prayer, as to which no injunction is allowed,*] on complainant giving bond [*&c., as in the preceding fiat.*]

Or thus:

Issue a writ of injunction so as to enjoin the defendant from [*stating the particular prayer allowed;*] but no further or otherwise, on complainant giving bond [*&c., as in the preceding fiat.*]

On application to enjoin a suit at law to recover a debt, especially if such debt is evidenced by writing, the fiat should require the complainant to confess judgment at law, or withdraw his plea and allow judgment by default,<sup>21a</sup> the

<sup>18</sup> Code, § 4448.

<sup>19</sup> Some forms of fiats have already been given. See, *ante*, § 174; § 283.

<sup>20</sup> For pauper cases, see, *post*, § 831.

<sup>21</sup> If the complainant admits any money to be due the defendant, or fails to allege any sufficient Equity against any part of the matter sought to be enjoined, the Judge, or Chancellor, must either (1) order the issuance of an injunction as to that part of the matter only for which sufficient Equity is alleged, or (2) enjoin the whole matter on condition that the complainant, besides giving the usual injunction bond, pay into Court the amount admitted to be due, or otherwise perform the fiat as to any part of the matter sought to be enjoined and as to which an injunc-

tion is ordered. Ch. Rule, VI, § 4; § 1195, sub-sec. 4, *post*. This rule is declaratory of the pre-existing practice.

<sup>21a</sup> But if this is not done, and the bill is dismissed, the Court on dismissing the bill and dissolving the injunction, should dispose of the matters in controversy, and render a decree against the complainant for the amount due from him, and against his sureties on the injunction bond for interest and costs. *Haynes v. Bank*, 22 Pick., 425, citing § 796 and note of this book; now § 814, note 29. Or the plaintiff in the suit at law, on the dissolution of the injunction and dismissal of the bill, may file the record of dismissal as *res adjudicata* and have judgment thereon at law. *Hartman v. Hartman*, 2 Shan. Cas., 486.

plaintiff in the law Court being enjoined from proceeding at law further than judgment, without the consent of the Chancery Court. The following are forms of conditions to fiats:

#### CONDITIONS OF FIATS FOR LIMITED INJUNCTIONS AGAINST SUITS AT LAW.

This fiat is granted on condition that the complainant withdraw his plea in the Circuit Court, and allow a judgment by default to be entered against him, and the defendant is allowed to take said judgment, by default,<sup>22</sup> but will be enjoined from taking any further step whatever in said Circuit Court suit, and especially from suing out any final process, or otherwise in any way attempting to enforce said judgment by default, without leave of the Chancery Court in this cause.

Or thus:

This fiat is granted on condition that the complainant agrees that all the matters in controversy between him and the defendant in the Circuit Court, may be fully and finally adjudicated in this suit, and that a decree may be rendered herein against him for any sum found at the hearing thereof, to be due from him to the defendant. The filing of said injunction bond will be deemed as a conclusive acceptance of this condition.

Mandatory injunctions usually prohibit the reverse of what is required to be done. The following is a form of a

#### FIAT FOR A MANDATORY INTERLOCUTORY INJUNCTION.

To the Clerk and Master, at Dresden:

Issue a writ of injunction as prayed in the foregoing bill, on complainant giving bond therefor in the penalty of one thousand dollars, conditioned to pay the defendant all damages that he may be entitled to by reason of said injunction. Let the injunction inhibit and restrain the defendant from continuing the obstructions in the road mentioned, and from keeping the gate across said road locked.<sup>23</sup> [Or, Let the injunction inhibit and restrain the defendant from keeping the partnership books in his exclusive possession, and from keeping them away from the office of the firm, and from in any way interfering with their use and examination by any of the complainants or their attorneys.]<sup>24</sup> January 30, 1885.

J. SOMERS, Chancellor.

Upon endorsing his fiat on a bill, the officer granting the fiat must enclose the bill and fiat, and accompanying papers, in a sealed envelope, directed to the Clerk of the Court to whom the fiat is addressed, which envelope can be opened only by the Clerk, or his deputy.<sup>25</sup>

As soon as the complainant delivers to the Clerk the required bond,<sup>26</sup> if one be required, and otherwise complies with the requirements of the fiat, the Clerk will issue the injunction specified in the fiat.

§ 831. **Injunctions on the Pauper Oath.**<sup>27</sup>—The Chancellor, or Judge, granting the fiat may, in a proper case, order an unlimited injunction to issue, on the pauper oath; but this should rarely, if ever, be done, except, perhaps, in the following cases: (1) where a wife sues her husband, and makes a strong *prima facie* case; (2) where the defendant appears by the bill to have pauperized the complainant, or taken advantage of his poverty, or otherwise manifestly defrauded him; (3) where the suit is by an administrator, guardian, or next friend, and great merits are shown in the bill. An injunction is a tremendous

<sup>22</sup> See, *ante*, § 814, note 29. See preceding note.

<sup>23</sup> This fiat was granted in a case where the defendant had so obstructed complainant's right of way as to prevent his egress or ingress with vehicles, and had forbidden the removal of the obstructions. See, also, *Leake v. Cannon*, 2 Hum., 169.

<sup>24</sup> 3 Dan. Ch. Pr., 2323. Other forms of fiats for mandatory interlocutory injunctions: Issue [*&c.*, as above, down to *Let.*] Let the defendant be enjoined from allowing the obstruction complained of to remain in the road referred to. [*Or, in another case:* Let the defendant be enjoined from continuing in possession of the house and lot described in the bill, and from in any way interfering with the complainant's assumption of exclusive possession and use thereof.] [*Or, in a third case:* Let the defendant be enjoined from allowing the nuisance complained of to continue.]

<sup>25</sup> Code, §§ 3947; 4438.

<sup>26</sup> For the character of this bond, see, *post*, § 860.

<sup>27</sup> It seems to be considered by some Circuit

Judges that an injunction may issue on the pauper oath, whenever it may issue on a bond; and the result has been a multiplication of pauper oath injunctions, intended sometimes to harass defendants, and sometimes to release levies, or gain time or other inequitable advantages, all tending to bring both this process and the Court itself into disrepute. While the granting of temporary injunctions is confided to the discretion of the Judges, and Chancellors, it is a legal discretion to be controlled by well settled rules. The power, while necessary to the protection of the citizen, is a tremendous one, and may easily be misused. Its exercise involves the most delicate responsibility, and requires the greatest wisdom and caution. *M. & M. R. R. v. Huggins*, 7 Cold., 217; *Chadwell v. Jordan*, 2 Tenn. Ch., 637. Extraordinary, indeed, should be the case to justify an unlimited injunction under the pauper oath, where the injunction will work grievous injury to the defendant, or deprive him of a lien, or other right.

exercise of judicial power, and operates on the defendant without giving him a hearing, and he who asks it ought to give some more substantial evidence of his good faith, and of his confidence in his cause, than a pauper oath.

When an injunction is applied for, on the pauper oath, exceptional care is required in order to prevent gross injustice being done in the name of justice. The Chancellor must have regard to the rights and interests of the defendant as well as to those of the complainant; and to grant an injunction under the pauper oath, in the same way and to the same extent as if an injunction bond were given, would often be manifestly inequitable, and sometimes grossly unjust. The writ should, in pauper cases, be rigidly confined to what is absolutely necessary to the complainant's protection. All that he can equitably demand is ultimate safety, if his claim be found to be just; and the defendant should not be required to do more, or to forego more, or to incur more risks, or disadvantages, than are unavoidable in securing the complainant against loss. As a general rule, therefore, if an injunction is sought, under the pauper oath, to stay a suit at law before judgment, the plaintiff at law should be allowed to proceed to judgment, but no further; and if a judgment is sought to be enjoined, he should be allowed to have execution, and a levy, but no sale. If personal property has already been levied on, or should be levied on by permission given in the fiat and injunction, the sheriff should be required to retain possession of it, until further order, unless the complainant will give a replevy bond as in attachment suits.<sup>28</sup> If the answer is sworn to and meets the Equity of the bill, the injunction will, on motion, be dissolved upon the defendant giving a refunding bond. If the injunction be retained, the property levied on would remain impounded in the Sheriff's hands, subject to the orders of the Court, or to be replevied, if so allowed. If the property levied on is perishable, it should be sold, and the proceeds paid into Court, subject to the final orders in the cause.<sup>29</sup> In this way, the rights of both parties may be well guarded, and no grievous wrong inflicted upon either.<sup>30</sup> The following forms of fiats in pauper cases are suggested:

#### FIATS FOR INJUNCTION ON PAUPER OATH.

To the Clerk and Master, at Nashville:

Issue a writ of injunction as prayed in the foregoing bill, on bond therefor being given in the penalty of five hundred dollars, or on the pauper oath being taken. If the pauper oath is taken, let the injunction be so limited as to allow the defendant to proceed in his suit at law as far as judgment; but no further; [*or, if judgment has already been taken, then say: to proceed as far as to have his execution issued and levied, but no further; or, if execution has already been levied on personalty, then say:* If the pauper oath is taken, let a limited injunction issue to restrain the Sheriff from making the sale of the property levied on, but, requiring him to retain it in his custody until the further order of the Court, unless the property be replevied by the complainant as in attachment suits,<sup>31</sup> which he is hereby authorized to do. *But if the property is of a perishable nature, or expensive to keep,<sup>32</sup> then add:* but if not replevied, then such and so much of the property levied on as is of so perishable a nature, or so expensive to keep, as to render a sale thereof necessary for the interest of the parties, the Sheriff will proceed to sell, at the time and place by him advertised, and will pay the entire proceeds of such sale into the office of the Clerk and Master of the said Chancery Court, to be disposed of as said Court may order.]

At Chambers, March 12, 1877.

W. F. COOPER, Chancellor.

§ 832. **Second Applications for Injunctions.**—No injunction can be granted by any Judge, or Chancellor; at Chambers, unless the complainant states in his bill that it is the first application for such process.<sup>33</sup> If an injunction is

<sup>28</sup> Code, §§ 3509-3511. An injunction has the effect of releasing a levy on personal property, unless otherwise ordered by the fiat. See § 846. This fact is often a temptation to a defendant at law, to obtain an injunction under the pauper oath expressly to get property released, so that he may put it forever out of the reach of the plaintiff. Judges should not allow one who claims to seek Equity to perpetuate such an iniquity.

<sup>29</sup> Equity, when having no rule of its own, follows the law, and the attachment law is a good guide in such a case. See Code, §§ 3501-3506.

<sup>30</sup> *Bridges v. Robinson*, 2 Tenn. Ch., 720; same case, 3 Tenn. Ch., 352. The author knows of several cases where plaintiffs in executions at law lost their debts in consequence of personal property subject to execution, being released by injunctions issued under the pauper oath, and the bills of complaint ultimately dismissed for want of Equity, or because not sustained by the proof.

<sup>31</sup> Code, §§ 3509-3510.

<sup>32</sup> Code, § 3505.

<sup>33</sup> Code, § 4435.



applied for and refused, at Chambers, no other application can be granted, except by the Court in which the bill is filed.<sup>34</sup> If such Court deem the complainant entitled to an injunction on his original bill, or on his bill as amended, if amended, an injunction may be granted him. When, therefore, an injunction has been refused at Chambers, and such refusal endorsed on the bill, the complainant may, notwithstanding such refusal, file his bill in the proper Court, and there renew his application for an injunction.

It is within the discretion of a Court of Equity to revive an injunction after it has been dissolved; and, upon proper showing of complainant's right to relief, the injunction will be reinstated, the Court being regarded as always open for this purpose. And where sufficient facts are stated in a supplemental bill to warrant an injunction, it will be granted, although the injunction granted on the original bill has been dissolved. And when an interlocutory injunction is allowed, but the bill is afterwards dismissed, for want of prosecution, the final order of dismissal does not operate as *res judicata* upon the questions involved. But when a second bill is filed to obtain a second injunction in relation to the same subject-matter and between the same parties, it is not enough to allege new grounds of Equity not suggested in the former bill; it must be shown that the new Equity alleged did not exist at the time the original bill was filed, or, if it existed, that it was unknown to the complainant. Nor will an injunction once dissolved be reinstated simply upon new evidence, no new ground of Equity being stated which was not alleged in the original bill.<sup>35</sup>

While the right of the party complaining to amend his bill, and renew the application, even after a dissolution upon the merits, clearly exists, yet the exercise of the right is guarded with much caution. And where an injunction has been dissolved for want of Equity in the bill, an *ex parte* injunction will not be granted upon an amended bill, or upon a new one supplying the Equity of the old, but the Court will require notice to the opposite party.<sup>36</sup>

**§ 833. Discretion of the Chancellor in Granting Injunctions.**—In granting temporary relief by interlocutory injunctions, Courts of Equity in no manner anticipate the ultimate determination of the question of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property, or rights, in issue, *in statu quo*, until a hearing upon the merits.<sup>37</sup> In order to sustain an injunction for the protection of property *pendente lite*, it is not necessary to decide in favor of the complainant upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree, upon the final hearing. The Court will, however, upon an application for an interlocutory injunction, consider the probability of the complainant ultimately establishing his demand.<sup>38</sup>

<sup>34</sup> Code, §§ 4434-4436. When a bill is presented to a Judge, or Chancellor, at Chambers, he may allow it to be then and there amended, if complainant so desires. But the practice of some Judges of allowing the complainant to retain his bill upon an injunction being denied is reprehensible: it results in giving the complainant an opportunity to experiment with other Judges in hopes of finally finding one whose discretion has been emasculated by indifference, or diluted by an excess of amiability.

The Code requires the Judge or Chancellor refusing an injunction to endorse such refusal on the bill, and sign his name thereto. Code, § 4437. The object of this is to notify all other Judges, and Chancellors, of the fact of such refusal. In such case, if the complainant desires to further prosecute his suit, he may file his bill in the proper Court, and there make a second application for an injunction. Code, § 4436.

<sup>35</sup> High on Injunc., § 39; 1586.

<sup>36</sup> *Ibid.*, § 41.

<sup>37</sup> It is frequently said that the grant or refusal of an injunction is a matter of discretion. This is true if such discretion arises from a consideration of the fixed rules of law and Equity, and is governed by an impartial purpose to rigidly apply those rules to the case at hand. In this State no man's rights

should be dependent on a Judge's whim, or mood, or favor. If the complainant is entitled to the injunction, it is his right, and the Chancellor is in duty bound to grant it; and it would be tyranny and usurpation to withhold the grant. On the other hand, if the complainant is not entitled to an injunction, it would equally be tyranny and usurpation to bestow the grant. Where, however, it is doubtful whether an injunction should be granted, after duly considering the equities alleged, and the relative advantages and disadvantages which would result to the parties from granting or refusing the writ, in such a case an injunction should be denied. A Judge has discretion to do what in law he is in duty bound to do; but no discretion to deny any man any of his rights, or to give any man more than his rights; nor has he any discretion to withhold from any one what the law gives him, or to give to any one what the law withholds from him. *Discretio est scire per legem quid sit justum.* (Discretion is to know by means of the law what is just.) See preface to Lube's Eq. Pl., (Wheeler's Ed.), XII-XIII; M. & M. R. Co. v. Huggins, 7 Cold., 226; Flippin v. Knaffle, 2 Tenn. Ch., 238; ante, § 583, note 4; post, §§ 857; 902.

<sup>38</sup> High on Injunc., § 5.

Where the legal right is not sufficiently clear to enable a Court of Equity to form an opinion, it will generally be governed, in deciding an application for a preliminary injunction, by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. And where, upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to the complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. But where, on the other hand, it appears that greater danger is likely to result from granting than from withholding the relief, or, where the inconvenience seems to be equally divided as between the parties, the injunction will be refused, and the parties left as they are.<sup>39</sup> And if the complainant's rights may be as well secured by a final injunction, and are not prejudiced by a refusal of the temporary injunction, the Court may refuse the interlocutory application, especially when the injuries which would result to the defendant, if the relief were improperly granted, would greatly exceed the benefits which might result to the complainant, if the injunction were properly granted. If, however, a clear case of irreparable injury is shown as likely to result to complainant, unless the injunction is granted, and it does not appear that the issuing of the writ will work any such injury to defendant, the relief will be granted.<sup>40</sup>

An injunction will not ordinarily be granted, even in cases where the complainant would otherwise be entitled to the writ, if it appears (1) that he has consented to, acquiesced in, or otherwise waived, the wrong complained of; or (2) that he has been negligent or guilty of *laches* in making his application; or (3) that damages will be adequate compensation; or (4) that his own misconduct, or negligence, occasioned or contributed to the wrong or injury complained of; or (5) that by reasonable diligence such wrong or injury could have been avoided; or (6) that he has been guilty of participation in the iniquity complained of, so that his hands are not clean; or (7) that the injunction would be injurious to innocent third parties, who should be heard before hurt; or (8) that the writ would be contrary to some statute, or to public policy; or (9) that, for any other reason, the injunction would be contrary to Equity and good conscience.

§ 834. **Form of a Writ of Injunction.**—The form of the writ is unimportant, provided it contains enough to give the defendant notice of the fact that he is enjoined from doing the acts complained of in the bill. The writ should state (1) the fact of the bill being filed by the complainant against the defendant, (2) in what Court filed, (3) a brief statement of the allegations showing the wrong complained of, (4) the prayer for an injunction, (5) the granting of a fiat for an injunction, (6) the command to the Sheriff to make known to the defendant what he is enjoined from doing, (7) the direction to the Sheriff when to return the writ, and (8) should be duly tested and signed by the Clerk and Master. The writ should be sufficiently explicit upon its face to apprise the defendant what he is restrained from doing, without compelling him to resort to the bill to ascertain what the injunction means.<sup>41</sup>

If the object of the suit is to restrain proceedings in another Court, the injunction will be awarded against the defendant, his attorneys, and agents. If the object of the suit is to restrain the commission of waste, or other inequitable

<sup>39</sup> *Flippin v. Knaffle*, 2 Tenn. Ch., 238; 2 Dan. Ch. Pr., 1640; 1664; 1 High on Injunc., § 13.

<sup>40</sup> 1 High on Injunc., § 13. An injunction, being "the strong arm of Equity," should never be granted except on a clear case of irreparable injury, and with a full conviction on the part of the Chancellor of its urgent necessity. To justify the Chancellor in granting the relief he must be reasonably satisfied that there is an actual intention on the part of the defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done.

And it is not a sufficient ground for interfering that, if there be no such intention on the part of the defendant, the injunction can do no harm. The Chancellor will not interfere when the evidence shows that there is no probability of defendant doing the act which is sought to be restrained. So, if it is apparent upon an application for an injunction that the relief sought is disproportioned to the nature and extent of the injury sustained, or likely to be sustained, the Chancellor will decline to interfere. 1 High on Injunc., § 22.

<sup>41</sup> 2 Dan. Ch. Pr., 1674; 1 Barb. Ch. Pr., 620.

act, the injunction is awarded against the defendant, his servants, workmen, and agents.<sup>42</sup> The following is a form of

#### A TEMPORARY INJUNCTION AGAINST A SUIT AT LAW.

State of Tennessee, }  
Gibson County. }

To the Sheriff<sup>43</sup> of Gibson county:

Whereas, A B has filed a bill in the Chancery Court at Trenton against E F, alleging among other things, that E F has fraudulently obtained a judgment against him for five hundred dollars, before Charles Smith, a Justice of the Peace of Gibson county, and praying, among other things, for a writ of injunction to restrain said E F from taking any steps to enforce or collect said judgment;

And whereas, the Hon. Albert G. Hawkins, Chancellor, has directed me to issue an injunction as prayed in said bill.

You are, therefore, hereby commanded to make known to the said E F, that he is strictly enjoined and commanded to take no step in person, or by agent, to enforce or collect said judgment, and that he desist and refrain from any action to that end, until the further order of said Court. Herein fail not, and make due return of this writ to said Court, on the first Monday of October next.

Witness R. Z. Taylor, Clerk and Master of said Court, at office, the first Monday in April, 1890. R. Z. TAYLOR, C. & M.

#### GENERAL FORM OF A WRIT OF INJUNCTION.

State of Tennessee, }  
— County. } To the Sheriff of — county:

Whereas, — [insert the name of the complainant,] has filed his bill of complaint in our Chancery Court at — [insert the name of town where the Court is held,] against — [insert the name of the defendant,] charging among other things, that, [here insert the substance of the charges in the bill on which the injunction is sought,<sup>44</sup>] and praying, among other things, the issue of a writ of injunction to restrain the said — [here insert the name of the defendant,] his agents and servants, from [doing the act, or acts, complained of, specifying them.<sup>45</sup>]

And whereas, the Hon. —, Chancellor, [giving his name,] has directed me to issue a writ of injunction as prayed in said bill:

You are, therefore, hereby commanded to make known to the said — [here insert the name of the defendant,] his agents and servants, that he and they are strictly enjoined and commanded to take no step and proceed no further in [doing the act or acts complained of, specifying them,<sup>46</sup>] but that he and they absolutely desist and refrain therefrom until the further order of our said Court. Herein fail not, and make due return of this writ to our said Court on—Monday of— [insert the date of the next term of said Court.]

Witness —, Clerk and Master of our said Court, at office, in — [insert the name of the town where the Court is held,] the...Monday of..., 19... [insert the date of the previous term of said Court.] DAVID HART, C. & M.

§ 835. **The Issuance and Service of an Injunction.**—As soon as the bill has been filed, and the proper prosecution and injunction bonds given, or pauper oath taken, the Clerk and Master will issue a copy of the bill, a subpoena to answer, and a writ of injunction.<sup>47</sup> If there is urgency, the Master may issue the injunction first, and put it in the hands of the Sheriff for service; but in such case, the copy of the bill and subpoena should be made out and served with all possible diligence.<sup>48</sup>

The ordinary mode of serving an injunction is by reading it to the defendant; but if he evade, or attempts to evade, the service of the writ, the officer must leave a copy at the usual residence of the defendant, and state the fact on his return, which will be deemed a sufficient service.<sup>49</sup>

§ 836. **When a Prayer for an Injunction is not Necessary.**—As a rule, an

<sup>42</sup> 2 Dan. Ch. Pr., 1673; 1 Barb. Ch. Pr., 620. The injunction is generally issued in all cases against the defendant, his attorneys, servants and agents. *Speak v. Ransom*, 2 Tenn. Ch., 213.

<sup>43</sup> The writ was formerly addressed, not to the Sheriff, but to the defendant, and to his counsellors, attorneys and agents. 1 Barb. Ch. Pr., 620.

<sup>44</sup> For instance: the defendant is cutting valuable trees on the tract of land on which he is living, and removing them therefrom.

<sup>45</sup> For instance: cutting any more trees on said tract and from removing those already cut.

<sup>46</sup> For instance: in cutting valuable trees on said tract and in removing those already cut.

<sup>47</sup> Code, §§ 4339, 4439.

<sup>48</sup> In matters of great urgency, and at the request of the complainant, the Chancellor or Judge granting the fiat may address a notice of the fact to the defendant, and may authorize any person to serve it. Code, § 4415; or the fact that a fiat has been granted may be communicated to the defendant, verbally, or in writing, by the complainant, or his agent; or may be telegraphed to him. 2 Dan. Ch. Pr., 1674. See, *post*, § 845.

<sup>49</sup> Code, §§ 4346; 4443.

interlocutory injunction will not be granted unless prayed for in the bill,<sup>50</sup> but where the Court has taken property into its custody, it will interfere by injunction to prevent any injury to it, or intermeddling with it, either by litigants or others. So, where a Court is administering a fund for the benefit of creditors generally, it will enjoin a creditor from bringing a separate suit against the debtor, or his representative, when such creditor has the right to come in and prove his debt under the general bill.<sup>51</sup>

An injunction will, also, be issued without a prayer therefor in the bill when the complainant is proceeding against the defendant both in Chancery and in some other Court, at the same time and for the same matter. In such cases, as already stated,<sup>52</sup> the defendant may require the complainant to elect in which Court he will proceed, and if he elects to proceed in Chancery, he will be enjoined from further proceeding in the other Court, unless, under special circumstances, he is allowed to sue in both Courts.

The Court will, likewise, without a prayer for that purpose, enjoin persons from interfering with the process or officers of the Court, or suing the latter in another tribunal.<sup>53</sup> An injunction will issue in any such case, on motion in open Court, or before the Chancellor of the Court at Chambers; such motion to be supported by a sworn petition detailing the necessary facts.

The interlocutory injunctions granted in the foregoing and similar cases are generally called "restraining orders."

An injunction may, also, be moved for and obtained, on sufficient grounds, at any time during the pendency of the suit; and, if at the hearing, a mandatory or perpetual injunction is necessary for the purposes of complete justice, it will then be granted, although not prayed for in the bill.<sup>54</sup>

§ 837. **When Injunctions will be Continued, or made Perpetual.**—Often an interlocutory injunction is the only exercise of the injunctive power necessary for the purposes of justice, the final decree settling the rights of the parties in such a manner that a continuation of the interlocutory injunction is unnecessary; but there are, also, many cases where the rights and interests of the complainant require that the temporary injunction be continued, or made perpetual, in the final decree. This is especially true in cases where the principal relief sought by the bill is injunctive, as in suits (1) to abate nuisances, (2) to enjoin a fraudulent, or satisfied, or void judgment, (3) to remove a cloud, (4) to enjoin the use or transfer of a forged, fraudulent, or void deed, note, or other paper,<sup>55</sup> (5) to stay waste, or trespass, or other tortious invasions of complainant's rights, or (6) to quiet titles and prevent a multiplicity of suits.

An interlocutory injunction is superseded by the decree made at the hearing of the cause, and, if such injunction is intended to remain in force, it must be properly continued by the final decree. An injunction may be had at the hearing, even when not prayed for in the bill, or when the interlocutory injunction was dissolved. An injunction can only be made perpetual at the hearing of the cause; and when made perpetual it continues in force notwithstanding some of the parties to the suit may marry or die.<sup>56</sup> The phraseology used in making the temporary injunction perpetual is as follows:

#### DECREE OF PERPETUAL INJUNCTION.

*[After adjudicating the merits of the controversy, but before the adjudication of costs, or a reference to the Master, or other subordinate matter, add:]*

And the temporary injunction heretofore granted in this cause prohibiting and restraining the defendant from *[doing so and so, specifying what,]* is hereby continued and made perpetual.

<sup>50</sup> 2 Dan. Ch. Pr. 1614.  
<sup>51</sup> 2 Dan. Ch. Pr., 1615; *Smith v. St. Louis M. L. Ins. Co.*, 3 Tenn. Ch., 502; *Macey v. Childress*, 2 Tenn. Ch., 26.  
<sup>52</sup> See, *ante*, § 328.  
<sup>53</sup> 2 Dan. Ch. Pr., 1618.

<sup>54</sup> 2 Dan. Ch. Pr., 1683. See, *ante*, §§ 651; 824.  
<sup>55</sup> But, ordinarily, the Court will order such paper to be delivered up and cancelled. 2 Dan. Ch. Pr., 1681.  
<sup>56</sup> *Justice v. McBroom*, 1 Lea, 555; 2 Dan. Ch. Pr., 1680-1683; 1 Barb. Ch. Pr., 613-615.

## ARTICLE IV.

## PLEADINGS IN INJUNCTION SUITS, AND RELIEFS GRANTED.

§ 838. The Frame of the Bill in an Injunction Suit.

§ 839. General Form of an Injunction Bill.

§ 840. Special Form of Injunction Bill.

§ 841. Frame and Form of a Bill for a Mandatory Injunction.

§ 842. Frame of an Answer to an Injunction Bill.

§ 843. Form of an Answer to an Injunction Bill.

§ 844. Reliefs Granted in Injunction Suits.

§ 838. **The Frame of the Bill in an Injunction Suit.**—The character of the averments in a bill for an injunction has been heretofore considered,<sup>1</sup> but the importance of the subject may justify further observations.

1. **The Frame of an Injunction Bill Generally Considered.** As a preliminary injunction is an extraordinary exercise of judicial authority, so the party invoking such exercise should present a bill therefor cogent enough to justify the Chancellor in awarding such powerful process, *ex parte*. In a bill that seeks no preliminary order, such as an order for a receiver, an injunction, or an attachment, all that is ordinarily necessary is a plain, direct, and positive averment of the facts out of which the complainant's rights arise, and on which the relief he seeks depends. Such a bill is a mere pleading, and ordinarily need not be sworn to. When, however, a preliminary order is sought, and especially an injunction, the bill partakes of the nature both of a pleading, and of an affidavit in support of that pleading. As a pleading, it should show a clear right to the relief against the wrongs complained of; and, as an affidavit, it should set forth in detail, clearly, directly, and positively, the facts and circumstances of the case, the aggravating and inequitable conduct of the defendant, and how the injury threatened if allowed to happen, or the injury being perpetrated if allowed to continue, will not only work irreparable injury to the complainant's rights or property, but be, also, manifestly contrary to Equity and good conscience.

An injunction being a harsh remedy, will not be granted, in the first instance, except upon a clear *prima facie* case, and upon positive averments of the equities upon which the application for relief is based. And while it is not essential that complainant should establish his case, upon an application for an interlocutory injunction, with the same degree of certainty that would be required upon the final hearing, he must nevertheless allege positively the facts constituting his grounds for relief. Thus, the mere allegation of irreparable injury will not suffice to warrant an injunction, but the facts must appear on which the allegation is predicated in order that the Court may be satisfied as to the nature of the injury. Nor will merely argumentative allegations, or inferences from the facts stated, suffice to meet the requirements of the rule. The relief will not ordinarily be allowed where the facts upon which complainant's equities rest, are stated only upon information and belief; but they should be made to appear by positive averments founded on complainant's own knowledge or that of some person cognizant of the facts. Nor will it suffice that the averments of the bill are made upon the information of the party complaining, without stating his sources of information. And an injunction granted *ex parte*, where some of the material allegations of the bill are stated on information and belief, can not be sustained in the absence of proof of their correctness. Nor do the mere apprehensions and fears of complainant unsustained by facts establishing their

<sup>1</sup> See, *ante*, § 142, sub-sec. 2.

probability, constitute a sufficient ground to warrant interference by injunction, since such fears may exist without any substantial reason. Therefore, before injunctive relief will be granted, not the complainant, but the Court, must be satisfied that a wrong is about to be committed which will be irreparable in its nature.<sup>2</sup>

The bill must contain all the definiteness of detail, the particularity of fact, and circumstance, the fullness and precision of statement essential to a special affidavit in the gravest of matters. The grounds on which the preliminary injunction is sought must be set forth specifically and positively, and on personal knowledge. If any averments are based on information at all, the source of the information should be stated, and the complainant should aver his belief in its credibility. The bill should show definitely, on its face, what allegations are made on complainant's own knowledge, and what on information and belief. The bill should be sworn to positively, and the affidavit should so show. If an agent or Solicitor swear to it, his affidavit should show that he is the agent, or Solicitor, and has personal knowledge of the facts set forth in the bill, and he must swear that they are true of his own knowledge, and his affidavit should so show.<sup>3</sup>

If the facts and circumstances of the case are not within the personal knowledge of the complainant, he should state them on his information and belief, and annex the affidavit of the person from whom he obtained the information, or the affidavit of some other person having knowledge of the facts alleged, that the material allegations of the bill are true on his own personal knowledge of the facts.<sup>4</sup>

The bill should contain a specific prayer for an injunction, both as a process and as a part of the relief prayed. An interlocutory injunction will not be granted unless prayed for, either in the original bill, or in a subsequent supplemental pleading.<sup>5</sup> The Court will, however, readily allow the prayer of the bill to be amended so as to pray for injunctive relief, when the facts alleged warrant such relief.

And, finally, the bill must state that it is the first application for an injunction in the case.<sup>6</sup>

**2. The Frame of a Bill to Enjoin Proceedings at Law.** It is an extraordinary exercise of power on the part of one Court to interfere even indirectly with the proceedings or process of another Court, and the party who asks the Court of Chancery so to do should present all the particulars of the case on which he bases such a request, so that the Chancellor may clearly see from the facts and circumstances detailed in the bill that the inequitable conduct of the defendant justifies injunctive interposition.

The bill for an injunction to stay proceedings at law should show: (1) the nature of the suit at law; (2) the Court in which it is pending; (3) the date of its commencement; (4) the steps taken in it, such as the filing of the declaration, demurrer, plea, etc.; (5) the defences made to the suit, if any, particularizing the nature and matter of the defence, if any has been made, (6) and all the facts which demonstrate that some injustice would be done to the complainant, or that he would be deprived of some legal or equitable right, or of some equitable defence, if his adversary were admitted to proceed to judgment, in the suit at law. If the bill fails to give these details, the injunction ought to be refused.<sup>7</sup>

If the bill be filed after judgment, the complainant should, in addition to the

<sup>2</sup> 1 High on Injunc., §§ 34-36.

<sup>3</sup> Furnace Co. v. Railroad, 5 Cates, 711, citing the above section, then § 785, of this book.

<sup>4</sup> 2 Dan. Ch. Pr., 1619, note; 2 High on Injunc., §§ 1567-1569. A bill sworn to by the complainant, or by his Solicitor, or agent, on knowledge, information and belief, without showing clearly how much is on the knowledge of the affiant, is not sufficient either

(1) to obtain a temporary injunction in any, except ordinary cases, where it can not do the defendant any harm; or (2) to prevent an injunction granted on

such a bill being dissolved on the incoming of an answer fully meeting and denying the equities of the bill, especially if such an answer be on the personal knowledge of the defendant, and the affidavit thereto so shows. See, *ante*, 788.

<sup>5</sup> 1 Dan. Ch. Pr., 388; 2 *Ibid*, 1619; 2 High on Injunc., § 1573.

<sup>6</sup> Code, § 4435.

<sup>7</sup> Chadwell v. Jordan, 2 Tenn. Ch., 639; Levan v. Patton, 2 Heisk., 108; 1 High on Injunc., § 56.

foregoing facts, show: (1) the facts constituting his defence to the suit at law; (2) in what way he was prevented from making that defence, giving the particulars in full; and (3) showing and averring that neither he nor his attorneys were guilty of any negligence or fault in not making the defence.<sup>8</sup> If the ground of injunction be that the defence is an equitable one, or one embarrassed by difficulties and complications, the complainant must show particularly and in detail, (1) wherein the defence is an equitable one, or (2) wherein and how it was embarrassed by difficulties and complications.<sup>9</sup> General and indefinite charges in such cases will not avail; the Court requires specifications of the particular facts relied on.<sup>10</sup>

3. **The Frame of a Bill to Stay the Enforcement of a Written Instrument.** There is no more solemn act in business dealings between men than a contract duly agreed upon, reduced to writing, and signed; and when a party to such an instrument, especially if it be a deed, mortgage, note of hand, or account stated, is seeking to enforce it, cogent indeed must be the case that will justify a Court or Chancellor in requiring the owner of such instrument to stay his hand. Hence it is that great particularity is required in the frame of a bill praying an injunction in such a case. If fraud be alleged as vitiating the instrument, all the facts and circumstances constituting such fraud must be particularly and fully set forth. If some mistake or accident is alleged as the ground of relief, all the particulars of the mistake or accident must be circumstantially detailed, and it should be further shown that the complainant has been guilty of no neglect or delay in the matter. General allegations of fraud, accident, or mistake amount to nothing in such a case.<sup>11</sup> In hearing parole testimony to reform or rescind deeds, mortgages, notes of hand, accounts stated, and other written instruments, the Chancery Court is violating one of the most sacred rules of the common law,<sup>12</sup> and acting contrary to the presumptions of evidence. Therefore, clear, cogent, particular, precise, and circumstantial should be the allegations of a bill for reformation or rescission; and complainant's hands must be clean and his feet swift, and any apparent delay in filing his bill must be fully explained.

§ 839. **General Form of an Injunction Bill.**—An injunction bill frequently has more objects than the obtaining of an injunction, as hereafter shown. An injunction is often only the primary or preliminary object; other relief is desired. A study of the doctrine of relations and the following general form will enable the Solicitor to draw an injunction bill in a precise, lucid and logical manner, and to exhibit his equities and the defendant's iniquities in bold relief.

#### GENERAL FORM OF AN INJUNCTION BILL.

[For address and caption, see, ante, §§ 155-164.]

The complainant respectfully shows to the Court:

##### I.

That [If relations exist between the complainant and defendant, so state and give the particulars.<sup>13</sup> If no relations exist, begin the bill by alleging complainant's interest in or title to the property, franchise or right in controversy, describing it with particularity.<sup>14</sup>]

##### II.

That [If relations have been alleged, state what rights accrued to complainant as the result thereof, or what duties were imposed on the defendant. If no relations have been alleged, show how and wherein complainant has been using or enjoying the particular property, franchise or right, in controversy.]

##### III.

That [If relations exist, show in what way the defendant has violated, is violating or threatens to violate the rights of complainant, or the duties of the defendant, arising from such relations, giving the circumstances with particularity, and the times and places of such violation, and show wherein complainant has been or will be damaged by such violations. If no relations exist, show how, when and where the defendant is interfering with complain-

<sup>8</sup> Greenfield v. Frierson, 7 Heisk., 636.

<sup>9</sup> Fort v. Orndorff, 7 Heisk., 167; Borches & Co.

v. Arbuckle Bros., 3 Cates, 498.

<sup>10</sup> *Ibid.*

<sup>11</sup> Borches & Co. v. Arbuckle Bros., 3 Cates, 498.

<sup>12</sup> See, ante, § 442.

<sup>13</sup> See, ante, §§ 165-169.

<sup>14</sup> See, ante, § 172.

*ant's title, possession or interest, to or in the property, right or franchise in controversy, and specify wherein and how much such interference has injured or will injure the complainant, stating the facts and circumstances with particularity.]*

IV.

That [If there be any other matter material to the controversy here set it out. If a decree for money is sought and there be any ground to attach the defendant's property, specify such ground, and describe the property if known; and be sure to describe it if complainant has any lien on it, or if it is an equitable estate.<sup>15</sup>]

V.

The premises considered, complainant prays:

- 1st. That subpoena to answer issue [*&c.*, as in § 164.]
  - 2d. That your Honor declare and enforce complainant's rights and equities in the premises, [*specifying what sort of relief complainant desires, consistent with the facts he has alleged.*]
  - 3d. That [If a reference to the Master is necessary to take and state an account between the parties, so pray, [see § 600] or if an attachment is desired, pray that an attachment issue [see §§ 871-873]; or if a receiver is desired, pray for the appointment of one [see secs. 905-906], if any other action is desired prior to the hearing, such as an order on the defendant to file certain documents, or the like, so pray, having first laid grounds therefor in the body of the bill.]
  - 4th. That an injunction issue by order of your Honor, to enjoin and restrain the defendant from [*doing what complainant does not wish him to do, specifying the inequitable conduct or actions of which complainant specifically complains*], and that at the hearing said injunction be made perpetual.
  - 5th. That complainant may be awarded damages for the injuries done to him as hereinbefore set out. [*If complainant has not been materially damaged, this prayer will be omitted.*]
- This is the first application for an injunction [*or attachment, or receiver,*] in this case. [*Annex affidavit; see, ante, § 789.*]

WALTER COCKE, Solicitor.

An injunction bill should be verified by the oath of the complainant, unless the facts in it are better known to his agent or Solicitor, and then by the one best acquainted with the facts.<sup>16</sup> Where the facts are within the knowledge of another person, and the complainant desires to strengthen his bill against a motion to dissolve the injunction on answer, he may annex the affidavit of such other person to his bill, as follows:

**CORROBORATING AFFIDAVIT TO AN INJUNCTION BILL.<sup>17</sup>**

State of Tennessee, }  
County of Roane. }

John Jones makes oath that he is familiar with all the material matters stated in the foregoing bill, and has actual knowledge thereof, and from such knowledge knows that the matters of fact therein stated are true. And he further swears that he has no interest whatever in the event of this suit.

JOHN JONES.

[*Annex jurat; see, ante, § 789, and note.*]

**§ 840. Special Form of Injunction Bill.**—As further aids to inexperienced draughtsmen the following special form of an injunction bill is given. Other forms of special injunction bills are given in other sections of this book, and may be found by consulting the Index of Forms.

**BILL TO ENJOIN SALE UNDER TRUST DEED, HAVE ABSOLUTE DEED DECLARED A MORTGAGE, AND IMPEACH NOTE FOR USURY.<sup>18</sup>**

[*For address and caption, see, ante, §§ 155-164.*]

Complainants respectfully show to the Court:

I.

That they are husband and wife, and in March, 1903, while in financial distress, he borrowed four hundred dollars from the defendant, for which he gave his note for four hundred and fifty dollars, due in six months, and secured its payment by a deed of trust on their homestead, being the house and lot [*or farm*] where they live, situated, [*locating and describing it; see, ante, § 172.*] Complainant, Dove Doe, joined in said note and deed of trust.

II.

That complainants not being able to pay said note at maturity, the defendant advertised said house and lot [*or farm*] for sale for cash, such being the provision in said deed. There-

<sup>15</sup> See, § 871.  
<sup>16</sup> See, *ante*, §§ 788; 838, note, 4.  
<sup>17</sup> 1 Barb. Ch. Pr., 47-48; 2 *Ibid*, 362-363.  
<sup>18</sup> A bill to recover usury paid must state such facts as will show the amount borrowed, the amount of usury in the transaction, and when paid. Mc-

Ferrin v. Woods, 3 Bax., 242. The Chancery Court will relieve against a judgment at law containing usury when the defence as to usury was complicated. Chester v. Apperson, 4 Heisk., 639; but not when the defence was adequate. Parham v. Pulliam, 5 Cold., 497.



upon complainants went to him, and on September 5, 1903, gave him a new note for five hundred and fifty dollars, due in three months, and secured its payment by a new deed of trust on said house and lot, [or farm] authorizing him to sell the said property for cash if said note was not paid when due.

## III.

That complainants again failing to pay the defendant what said new note called for, said house and lot [or farm] were [or was] again advertised for sale for cash in hand. Complainants again went to see the defendant, and after the defendant had made many threats to force the sale if the note was not paid before the day of sale, and after complainants had secured a reliable prospect to obtain the money, and so informed the defendant, the latter became very friendly and confidential, and told complainants that he would not sell the house and lot, [or farm] but would give them a year's more time to pay said note, if they would deed said house and lot [or farm] to him as security.

## IV.

Complainants being in great distress, and not knowing what better to do, but hoping for the best, accepted said offer, and on January 13, 1904, by deed duly acknowledged, conveyed said house and lot, [or farm] absolutely to the defendant; and the defendant has had said deed registered, notwithstanding his positive promise not to have it registered within said year, but to return it to complainant unregistered if said debt was paid within said year.

## V.

That said house and lot, [or farm] have [or has] become far more valuable in consequence of the building of a railroad in the neighborhood, and complainants were offered fifteen hundred dollars cash for it by a solvent and reliable would-be purchaser, and he and they on March 5, 1904, went to the defendant and tendered him the sum of five hundred and thirty dollars, the full amount of said note, principal and interest, and called for said deed. Thereupon the defendant said the house and lot [or farm] were [or was] his, and exhibited his said absolute deed therefor. After considerable altercation, the defendant offered to deed said house and lot, [or farm] to said would-be purchaser for said fifteen hundred dollars, and give complainants one-half thereof, less the principal and interest of said five hundred dollar note; that is to say, said note was to be deducted from complainants' said half.

## VI.

That complainants refused to accept said proposition, and the defendant was very much enraged in consequence, and swore he "would have satisfaction yet;" and accordingly on the 28th of this month, March, 1904, he advertised said house and lot [or farm,] for sale under said trust deed, dated September 5, 1903; and such is his litigious reputation, and such the complications in the title from the facts aforesaid, that complainants verily believe and so charge that would-be bidders will be deterred from bidding. On the day said sale was advertised the defendant offered complainants two hundred dollars to surrender to him the possession of said house and lot [or farm,] which offer they rejected.

Complainants continue their said tender of five hundred and thirty dollars, and file said money with this bill.

## VII.

The premises considered, complainants pray:

1st. That subpoena to answer issue [*&c.*, see, ante, §§ 158-164.]

2d. That an injunction issue to restrain and enjoin the defendant from selling or offering to sell, or in any way encumbering, said house and lot, [or farm,] or any part thereof, either under said trust deeds or under said absolute deed.

3d. That all of said deeds be declared null and void, and clouds on their title, and cancelled; but if complainants are not so entitled as to said absolute deed, then that it be declared a mortgage and ordered to be delivered up and cancelled.

4th. That said note for five hundred and fifty dollars be declared usurious, and be abated to the extent of the usury, and that complainants be not held bound or estopped by the amount of their tender, they tendering said amount out of abundant caution, not that they considered that amount honestly and lawfully due, but being in distress tendered all the defendant could claim, hoping he would accept it, and thus terminate their thralldom.

5th. That complainants may have such further and other relief as they may be entitled.

This is the first application for an injunction in this case.

WRIGHT & WRIGHT, Solicitors.

State of Tennessee, }  
Roane County. }

John Doe makes oath that the statements in his foregoing bill are true of his own knowledge, except the matters therein stated to be on information and belief, and these matters he believes to be true.

JOHN DOE.

Sworn to and subscribed before me, }  
this March 30, 1904. }

JAMES G. CRUMBLISS, C. & M. }

§ 841. **Frame and Form of a Bill for a Mandatory Injunction.**—The frame and form of a bill for a mandatory injunction in no respect differ from the frame and form of a bill for a prohibitory injunction, except in the form of the prayer. In fact, ordinarily, the prayers are of the same nature, as it is customary for a writ of mandatory injunction not to command the defendant to do or undo what is desired, but to prohibit him from allowing it to remain undone or done.<sup>18a</sup> All the particularity, and positiveness, and directness of allegation, and detail of circumstances, and affidavit of knowledge, required in a prohibitory injunction bill must be observed when a mandatory injunction is sought, for a mandatory injunction is a more stringent remedy, and the bill must present a specially strong case.

#### BILL FOR MANDATORY INJUNCTION.

[For address and caption, see, ante, §§ 155-164]

Complainant respectfully shows to the Court:

##### I.

That he is the owner and in possession of the following tract of land: [*Here describe it; see, ante, § 172.*] This tract he purchased from the vendor of the defendant, November 13, 1894.

##### II.

Complainant first took possession of said tract, under a lease from his vendor, and while holding under said lease, built a substantial fence around the entire tract. Said tract is cut off from any public road, the land of the defendant intervening. When complainant purchased said tract his vendor owned and was in possession of all the land now owned by both complainant and defendant. While complainant was his vendor's tenant he used a roadway through his vendor's land leading to the public road, and also used the water from a spring and small creek on his vendor's land; and when complainant took his deed he requested that his right to use said roadway, spring and creek should be recognized, but he was told by his vendor that the word "appurtenances" in the deed was sufficient, and that satisfied him.

##### III.

That about three months ago, and after complainant and his family had been in free and uninterrupted possession, use and enjoyment of said roadway, spring and creek for more than ten years under his said deed, defendant purchased from complainant's vendor the balance of the latter's land, including the part intervening between complainant's tract and the public highway, on which part are said roadway, spring and creek; and very soon after his purchase he notified complainant that he, complainant, must stop using said roadway, spring and creek, asserting that complainant had no right thereto, and that his, defendant's, deed excepted nothing, and made no mention of complainant's right or liberty to use said roadway, spring and creek.

##### IV.

That as complainant disregarded said notice, defendant, with a force of hands, erected a very high and strong fence that completely shuts complainant off from said roadway, spring and creek, and thus totally deprives him of water for his family and stock, and of a road by which he and his family can reach the mill, the church, school house, stores, blacksmith shop, and other places of barter, bargain and sale. Complainant has three children of school age, who are thus shut off from school.

##### V.

That said roadway, spring and creek are so situated that their use by complainant in no way damages the defendant, being in and through a piece of woods half a mile from defendant's house, spring and road; and during the ten years complainant has used said roadway, spring and creek, he has done so exclusively and adversely, under a claim of right, and such right was never questioned by his vendor or any other person, and complainant never supposed that his use of said roadway, spring and creek, was liable to be interrupted or defeated. Complainant paid four hundred dollars for his said tract, and has put valuable improvements thereon since his purchase, hauling the lumber over said roadway, so that the tract is now worth one thousand dollars including said roadway, spring and creek; but is of very little value if said roadway, spring and creek are permanently cut off from it.

##### VI.

The premises considered, complainant prays:

1st. That subpoena to answer issue, [*&c.*, see, ante, §§ 158; 164.]

2d. That a mandatory injunction issue by order of your Honor, requiring and commanding the defendant forthwith to remove said fence and any and all other obstructions to complain-

<sup>18a</sup> See preceding section. As Courts of Chancery regard substance rather than form, and directness rather than indirectness, there is an increasing disposition on the part of Chancellors to directly com-

mand the defendant to do or undo what is necessary for immediate affirmative relief. *Circutius est evitandus.* (Indirect action should be avoided.)

ant's full and free use of said roadway, spring and creek, for himself, his family, servants, visitors, and stock as before said fence was built; and that defendant be enjoined and prohibited from allowing said obstructions to remain where they now are, and enjoined and prohibited from in any way interfering with or obstructing the full and free use of said roadway, spring and creek by complainant, his family, servants, visitors, and stock.

3d. That complainant be allowed damages for the injury done him by the construction of said fence, and by being shut off from the use of said roadway, spring and creek, as aforesaid.

4th. That complainant have such other and further relief as he may be entitled to.

This is the first application for an injunction in this case.

WILL A. McTEER, Solicitor.

[*Annex affidavit; see, ante, § 789.*]

#### FIAT FOR A MANDATORY INJUNCTION.

To the Clerk and Master at Maryville:

On this bill being filed, issue a writ of injunction, as prayed therein, on complainant giving bond therefor, as required by law. Let the writ inhibit and restrain the defendant, his agents and servants from continuing the obstructions mentioned, and from allowing them to remain as such, and from in any way obstructing or interfering with the full and free use and enjoyment of the roadway, spring and creek by the complainant, his family, servants, visitors, and stock.

November 13, 1905.

HUGH G. KYLE, Chancellor.

Or the fiat may be in the following form, which, while not so usual, is more consistent with the principles of Equity, and is growing in favor:

#### FIAT FOR A MANDATORY INJUNCTION.

To the Clerk and Master at Maryville:

File this bill, and, on a proper injunction bond being given, issue a writ of injunction as prayed, commanding the defendant, his agents and servants, forthwith to remove the fence complained of, and prohibiting him and them from in any way obstructing or interfering with the full and free use and enjoyment of the said roadway, spring and creek by the complainant, his family, servants, visitors, and stock.

November 13, 1905.

HUGH G. KYLE, Chancellor.

§ 842. **Frame of an Answer to an Injunction Bill.**—If the defendant is content to submit to the injunction, he may answer so much of the bill as is a pleading; but, if he wishes to have the injunction dissolved or modified, he must, also, answer so much of the bill as is an affidavit. In such a case, the answer becomes both a pleading and a counter affidavit; and, in its character as a counter affidavit, it must specifically, directly, fully, and cogently meet and deny the particular facts and pertinent details averred in the bill. If there be explanatory or exculpatory facts and circumstances, suppressed in the bill, they should be fully set forth. If there be writings throwing light on the controversy they must be exhibited. Every matter in the knowledge of the defendant, relating to the wrongs alleged in the bill, must be fully and frankly disclosed. The allegations and denials must be on the personal knowledge of the defendant, and the answer should so show on its face. Every Equity set up in the bill must be squarely and unhesitatingly met, and overwhelmed; not by general averments or by sweeping denials, but by taking up each material allegation in the bill and showing its falsity, or reconciling it with the defendant's innocence, or showing that the complainant has misconstrued it, or distorted it, or garbled it. And when the affidavit portion of the bill has been thus completely met, the defendant must swear to the answer positively, and on his own knowledge, and the affidavit to his answer must so show.

§ 843. **Form of an Answer to an Injunction Bill.**—The following is the form of an answer to an injunction bill. The student, however, is cautioned that the forms of both bills and answers in this book have been made as concise as possible in order to economize space. The pleader must keep in mind that in equitable matters the Chancery Court acts on *circumstances*; so all bills and answers setting up equitable matters, and especially in injunction suits, must set forth the circumstances.

**ANSWER<sup>19</sup> AND CROSS BILL IN AN INJUNCTION SUIT.<sup>20</sup>**

[For title and commencement, see, ante, § 405.]

John Doe and wife, Dove Doe, }  
*vs.* } In Chancery at Kingston.  
 Richard Roe. }

The defendant, Richard Roe, for answer and cross-bill to the bill filed against him in said cause, says:

I.

That he admits that complainant borrowed the four hundred dollars from him as alleged in the 1st paragraph of their bill, and gave him the note and trust deed as alleged, to secure its repayment; but they neglect to state that the other fifty dollars was a fee paid him for examining the title to the land, drawing the trust deed, and attending to the discharge of a prior trust deed and note given to another party, and also as a bonus for said loan, all of which defendant avers are the real facts, and complainants willingly and cheerfully agreed thereto, and gave said four hundred and fifty dollar note and said trust deed understandingly, willingly and gladly, for it enabled them to save their home.

II.

Further answering, defendant admits the 2d paragraph of the bill to be true, but complainants fail to state that said five hundred dollar note includes the interest on the prior note, the defendant's fee for drawing the new trust deed, and a note for twenty dollars and accrued interest held by defendant on complainant John Doe, and ten dollars cash advanced to complainants at the time, which defendant says are the real facts of the transaction; and he says that said five hundred dollar note and new trust deed were executed willingly, freely and understandingly, and complainant, Dove Doe, was privily examined as to said deed; all of which will more fully appear by reference to said deed, which is made an exhibit to this answer, and marked A.

III.

Further answering, the defendant denies the whole of the 3d and 4th paragraphs of the bill, except so much thereof as alleges the advertisement of said property for cash, and the subsequent delivery of an absolute deed for said house and lot, [*or farm,*] to defendant. The facts are that complainants were completely at the mercy of defendant, and instead of foreclosing the trust deed, and buying in the property, as would most probably have been the result, the defendant without any extra charge for drawing the deed and without requiring a new note for principal and interest, gave complainants further time to pay the debt. But he denies that there was any definite contract as to withholding said deed from registration, or giving them a year's time to pay the debt, defendant's understanding being that they might pay the debt any time before the deed was registered.

IV.

Further answering, defendant denies the statements in the 5th paragraph of the bill in manner and form as charged, and says the real facts are that defendant obtained a purchaser for said house and lot, [*or farm,*] which he admits has increased in value, but when said would-be purchaser found complainants in possession thereof, and setting up a claim thereto, he proposed to trade with them for a much less sum, and he offered defendant the sum of five hundred and thirty dollars in payment of said five hundred dollar note and demanded a deed to him for the land, all of which defendant refused, as he believed he had the right to do. Defendant did offer to sell said property to said proposing purchaser for fifteen hundred dollars, and to divide the money as alleged in the bill, but this they refused to accept. Defendant made said offer out of compassion for the complainants, and not because he recognized any right on their part to any portion thereof.

V.

Further answering, defendant denies the charges in the 6th paragraph of the bill in the manner and form as charged, but he admits that he is offering to sell said property under said second trust deed, and that he, through a third person, offered complainants two hundred dollars to surrender the possession of said property to him, and he did this to quiet his title and prevent a law suit, and he is advised he had a right so to do.

VI.

Further answering, defendant denies all and singular the allegations in said bill not hereinbefore specifically admitted, and says they are not true. And now having fully answered said bill, the defendant files this, his answer, as a cross-bill, and the premises considered, prays:

1st. That subpoena to answer issue, requiring the complainants in the original bill to answer this cross-bill; but their oath to their answer is waived.

2d. That in the event said deed be declared a mortgage, it or said second trust deed, be foreclosed, and said house and lot, [*or farm,*] sold on a credit of six months, in bar of redemption, to satisfy said five hundred dollar note and the accrued interest;<sup>21</sup> and

3d. That he be given such other and further relief as he may be entitled to.

SAM C. BROWN, Solicitor.

<sup>19</sup> This answer is under oath, defendant's oath not having been waived by the bill.

<sup>20</sup> This answer and cross bill is the defence set up to the bill in § 840, ante.

<sup>21</sup> This relief could, probably, be had on the answer, but a cross bill is safer. See, ante, §§ 400; 728-729; 732-733.

State of Tennessee, }  
 County of Roane. }

Richard Roe makes oath that the statements in his foregoing answer and cross-bill, made as of his own knowledge are true, and those made as on information and belief he believes to be true.

RICHARD ROE.

Sworn to and subscribed  
 before me, this April 10, 1904.  
 JAMES G. CRUMBLISS, C. & M. }

§ 844. **Reliefs Granted in an Injunction Suit.**—The primary object of a bill of injunction is to stay the hand of the defendant, and the ordinary aim of the defendant is to shake the injunction loose, but there are often other reliefs obtainable.

1. **Reliefs Granted the Complainant.** The complainant by his bill obtains, ordinarily, various reliefs: 1st, He obtains a temporary injunction against the acts of the defendant complained of; 2d, Whatever legal or equitable claims, if any, he has against the defendant, he can have adjudicated, and a proper decree therefor; 3d, If he has been injured by the trespasses, or other wrongs enjoined, he can obtain compensation or damages<sup>22</sup> therefor; and 4th, If a perpetual injunction is necessary he can have his temporary injunction made perpetual at the hearing.

2. **Reliefs Granted the Defendant.** Equity delights in putting an end to litigation, and strives in one and the same suit to determine all the matters involved in the controversy, so that no other or second suit, either at law or in Chancery, may be necessary.<sup>23</sup> If, therefore, the bill enjoins the enforcement of an execution, judgment, lien, mortgage, or deed of trust, or the collection of a note, account, or other claim or equity, or the assertion of rights or claims to specific property, the defendant on setting forth his claims and equities fully, clearly and particularly, either in an answer filed as a cross bill, or in a separate cross bill, may have a cross decree against the complainant for whatever may be due him, and have his lien, if any, enforced by the sale of the property bound thereby, or may have his rights to the specific property declared and enforced. If the defendant has been injured by the injunction he may obtain damages therefor, without a cross bill, on motion and reference to the Master, at the final hearing.<sup>24</sup>

Supposing the allegations in the foregoing bill to enjoin a sale under a trust deed have been substantiated by the proof, and having regard to the prayer of the answer and cross bill to said bill, the decree in the cause would be as follows:

**DECREE GRANTING RELIEF AND COUNTER RELIEF.**

John Doe and wife, Dove Doe, }  
*vs.* } Decree.  
 Richard Roe. }

This cause was heard this December 14, 1904, before Chancellor Hugh G. Kyle, on the original bill, the answer and cross-bill, the proof in the cause, including the various notes and deeds referred to in the pleadings, the *instanter* report of the Master and the exceptions thereto, and upon argument of counsel, from all which, the Chancellor being of opinion that the absolute deed executed and delivered on January 13, 1904, superseded the two deeds of trust and was intended as a mortgage, doth so declare and decree; and the Chancellor being further of opinion that the five hundred dollar note, referred to in the pleadings, is usurious, and that the lawful amount due thereon, according to the *instanter* report of the Master, which is confirmed and all exceptions thereto overruled, is the sum of four hundred and sixty dollars, principal and legal interest, doth so declare and decree; and the Chancellor being further of opinion that Richard Roe, the complainant in the cross-bill, is entitled to have said absolute deed enforced as a mortgage, doth so declare and decree.

It is therefore ordered, adjudged and decreed, that unless said sum of four hundred and sixty dollars, and accruing interest, and one-half of the costs of this cause are paid into Court by the complainants within sixty days from this day, the Clerk and Master will sell to the

<sup>22</sup> Where the defendant has damaged the complainant, even if such damages be to property, the Chancery Court will award damages therefor, the bill so praying. See, *ante*, § 36.

<sup>23</sup> See Maxims: He who seeks equity must do

equity, *ante*, § 39. Equity delights to do complete justice and not by halves, *ante*, § 38. When Chancery has jurisdiction for one purpose, it will take jurisdiction for all purposes, *ante*, § 36.

<sup>24</sup> See, *post*, § 862.

highest and best bidder the house and lot, [or farm,] described in the bill, and in said deed, which description is as follows: [*Here insert the description.*] Said sale will be at the Court House door, and on application of said Richard Roe, will be on a credit of six months and in bar of redemption. The Master will take a note from the purchaser for the purchase money, with good sureties, and will retain a lien on the land for additional security; and will report his action to the next term, or to the Chancellor at Chambers, if so ordered.

The complainant John Doe, along with Henry Doe, his prosecution surety, and the defendant, Richard Roe, will each pay one-half of the costs of the cause, for which executions will issue, respectively, after the next term, if not paid out of the proceeds of said sale.

ARTICLE V.

VIOLATIONS OF INJUNCTIONS, AND REMEDIES THEREFOR.

§ 845. When an Injunction Becomes Effective.

§ 846. The Effect of an Injunction.

§ 847. What Constitutes a Violation of an Injunction.

§ 848. How a Violation of an Injunction is Punished.

§ 845. **When an Injunction Becomes Effective.**—An injunction becomes effective as to the party enjoined only from the time of actual notice. But to render an injunction binding and operative upon a defendant, it is not necessary that he should have been officially apprised of its existence, or actually served with the writ. If the defendant has heard the order of the Court granting an injunction, or has in any manner received actual notice of its existence, he is as effectually bound by its provisions as if actually served with process. So, if an injunction has been properly granted, it will be effective if served upon defendants beyond the jurisdiction of the Court, or the limits of the State, it only being necessary that they should be apprised of the order of the Court to render it binding.<sup>1</sup>

§ 846. **The Effect of an Injunction.**—An injunction operates *in personam*, and binds the defendant, his Solicitors, attorneys, agents and servants, and renders it unlawful for them to do the act therein prohibited,<sup>2</sup> or to fail to do the act therein commanded. If the act prohibited be nevertheless done, the Court will deal with it as though not done, unless the rights of innocent third persons prevent, and then the defendant is liable to make indemnity for his unlawful act.<sup>3</sup> A judgment taken in violation of an injunction will be perpetually enjoined on petition in the cause wherein the injunction was granted.<sup>4</sup>

If an injunction be issued on a misstatement of facts, or without the requisite conditions precedent, the defendant must, nevertheless, obey it until he can obtain its dissolution, or discharge; or he will be punished for his contempt.<sup>5</sup> The inadvertent grant of an injunction neither makes it void, nor impairs its efficacy.<sup>6</sup>

If the injunction stays proceedings at law, no further step can be taken, unless the fiat or a subsequent decree so allow.<sup>7</sup> But the suing out of an injunction against a judgment at law is a release of errors;<sup>8</sup> and if the complainant's

<sup>1</sup> 1 High on Injunc., § 17; Farnsworth v. Fowler, 1 Swan, 1; Boils v. Boils, 1 Cold., 284; Baxter v. Washburn, 8 Lea, 21; 2 Dan. Ch. Pr., 1685, note.

<sup>2</sup> The prohibition includes all acts, whether direct or indirect. What cannot be done directly cannot be done indirectly. *Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud.*

<sup>3</sup> Farnsworth v. Fowler, 1 Swan, 1; Boils v. Boils,

1 Cold., 284; Greenwald v. Roberts, 4 Heisk., 494; Wilhoit v. Castell, 3 Bax., 423.

<sup>4</sup> Patterson v. Gordon, 3 Tenn. Ch., 18.

<sup>5</sup> Rutherford v. Metcalf, 5 Hay, 58; 2 Dan. Ch. Pr., 1684.

<sup>6</sup> Graham v. Merrill, 5 Cold., 638.

<sup>7</sup> See, ante, § 830.

<sup>8</sup> Code, § 3107.

bill is dismissed, he cannot further contest the judgment at law by prosecuting an appeal from such judgment, or by writ of error, or otherwise.<sup>9</sup>

An injunction, restraining a sale of personalty levied on under an execution, has the effect of releasing the levy, and restoring the property to the defendant's possession.<sup>10</sup> If the officer sells notwithstanding the injunction, he may be held liable for the value of the property, and is punishable for contempt.<sup>11</sup>

A perpetual injunction, granted at the hearing, is a decree, and it continues operative notwithstanding the death of the parties to the suit, and its violation is punishable whenever committed.<sup>12</sup>

**§ 847. What Constitutes a Violation of an Injunction.**—The Chancery Court exacts the most implicit obedience from those against whom its mandates are directed. It matters not what irregularities may affect the proceedings, nor what error the Court, or Judge, may have committed in granting the injunction, nor what the hardship obedience thereto will impose on the defendant; so long as the injunction is in force it must be scrupulously observed, and implicitly obeyed. And the defendant is not allowed to sit in judgment on the equity of the bill, or on the rightfulness of the writ, or upon the jurisdiction of the Court; his one duty is to obey. If the writ has been improvidently granted, instead of complaining of it, or violating it in any way, the defendant should at once apply for its modification, or dissolution. It matters not what the intent of the defendant was, in case of any violation of the injunction; nor what honest motives may have prompted his conduct; if the command of the writ has been violated, disregarded, or evaded, the defendant is guilty of contempt, and will be punished accordingly. Even the advice of counsel is no protection or excuse; it only makes another contemner.<sup>13</sup>

The defendant is bound to obey the injunction in both its letter and its spirit, even in the smallest matters; he is not allowed to judge whether this or that is immaterial or unimportant. Nor is he allowed to permit another to violate the injunction without remonstrance; he must not only obey the writ himself, but he must restrain his employees, servants, tenants, agents, and attorneys, if in his power so to do. An officer executing final process for the defendant's benefit is deemed his agent.<sup>14</sup>

A defendant is bound by the injunction from the moment he learns of its existence, regardless of the means of information. Notice by letter, telegram, word of mouth, or other means, will be sufficient to bind him. If, after such notice, he does any act violative of the spirit of the injunction, he is as guilty as though he had been previously notified by the Sheriff. He cannot shield himself, in such a case, under the pretext that the writ had not been served on him, or had been defectively served.<sup>15</sup>

**§ 848. How a Violation of an Injunction is Punished.**—Violations of injunctions are punished by process of contempt. The mode of proceeding is elsewhere described.<sup>17</sup> The object of the proceeding for contempt is twofold; first, to punish the guilty parties; secondly, to compel restitution to the party injured.<sup>18</sup> The person violating an injunction may be imprisoned until the wrong done is rectified, by placing matters and persons *in statu quo*, or by the payment of damages;<sup>19</sup> and, in estimating these damages, regard may be had to any circumstances of aggravation or mitigation, attending the disobedience of the

<sup>9</sup> Perkins v. Woodfolk, 8 Bax., 411. The effect of the injunction is equivalent to a solemn agreement of record, that whatever errors exist in the judgment at law shall go for naught. Overton v. Perkins, Mart. & Yerg., 369; Henly v. Robertson, 4 Yerg., 172.

<sup>10</sup> Overton v. Perkins, Mart. & Yerg., 373; McCaney v. Lawson, 3 Head, 257; Telford v. Cox, 15 Lea, 298. This is the reason why such an injunction in such a case should never be granted on the pauper's oath. Conway v. Jett, 3 Yerg., 481; Chester v. Apperson, 4 Heisk., 654.

<sup>11</sup> Stinson v. McMurray, 6 Hum., 339. The officer

having a writ whose execution had been enjoined must stay his hand as soon as he learns that an injunction has been granted.

<sup>12</sup> Justice v. McBroom, 1 Lea, 555.  
<sup>13</sup> Blair v. Nelson, 8 Bax., 1; 2 High on Injunc., §§ 1417-1418.

<sup>14</sup> 2 High on Injunc., § 1551.  
<sup>15</sup> Baxter v. Washburn, 8 Lea, 21; Farnsworth v. Fowler, 1 Swan, 1; Boils v. Boils, 1 Cold., 284; 2 High on Injunc., §§ 1420-1424; 1444.

<sup>17</sup> See, post, §§ 918-922.  
<sup>18</sup> 2 Dan. Ch. Pr., 1684.  
<sup>19</sup> Code, § 4109.

injunction. Where the violation of the injunction is wilful, and results in serious injury to the complainant, the defendant will be ocrated with all losses, and the damages allowed may be such as to combine punishment for the violation with compensation to the party injured.<sup>20</sup> The damages should be assessed by a jury if requested by either party; but in the absence of such request, they may be assessed by the Master on a reference.<sup>21</sup>

If a perpetual injunction by the Supreme Court, on final decree, is violated after the death of the complainant, it would be necessary for his heirs to file a bill of revivor and supplement in the Chancery Court wherein the cause originated; the Supreme Court would have no jurisdiction of such bill.<sup>22</sup>

ARTICLE VI.

THE DISSOLUTION OF INJUNCTIONS.

- § 849. Dissolution of Injunctions Generally Considered.
- § 850. Dissolution for Want of Equity on the Face of the Bill.
- § 851. Dissolution on Bill and Answer.
- § 852. When an Injunction Will Not be Dissolved on Bill and Answer.
- § 853. Dissolution for Want of Diligence in Prosecuting the Suit.

- § 854. When, Where, and How Injunctions are Dissolved.
- § 855. Proceedings on the Hearing of a Motion to Dissolve.
- § 856. When Affidavits May be Read on a Motion to Dissolve.
- § 857. The Discretion of the Court, How Exercised on Motions to Dissolve.
- § 858. Effect of a Dissolution, and of a Refusal to Dissolve.

§ 849. **Dissolution of Injunctions generally Considered.**—An interlocutory injunction will be dissolved: 1, Where there is a want of equity on the face of the bill to support the injunction; 2, Where the statements in the bill on which its Equity rests are fully met, and wholly overcome, by the positive denials of the answer; or 3, Where there has been a want of diligence on the part of the complainant in the prosecution of his suit.

If an injunction was granted (1) on an unsworn bill, or (2) on a bill that did not state it was the first application for an injunction; or (3) if the writ was issued after the time fixed by the fiat, or the rules of the Court, for filing a bond had expired, such an injunction may be discharged, on motion, for irregularity.<sup>1</sup>

If a defendant deem the injunction oppressive for any reason, he should at once make proper application for its dissolution, or modification;<sup>2</sup> and so, if a person, not a party to the suit, be injuriously affected by the injunction, he may apply by petition to have it set aside, or modified so as not to affect him.<sup>3</sup>

An injunction will not be dissolved because of a defect or deficiency in the injunction bond, or any mere technical errors that can be amended.<sup>4</sup>

The dismissal of the bill operates *ipso facto* as a dissolution of the interlocutory injunction based upon it. And if, at the hearing on the merits, a permanent injunction is denied, the preliminary injunction is necessarily terminated; although the better practice is to have it expressly dissolved in the final decree.<sup>5</sup> When, on a final decree, an injunction is dissolved, an appeal from such decree reinstates the injunction.<sup>6</sup>

<sup>20</sup> Robins v. Frazier, 5 Heisk., 100. In this case, three hundred dollars were allowed the complainant as damages, the defendant having turned him and his family out of doors, on a cold rainy night in the winter, in violation of an injunction.  
<sup>21</sup> Code, § 4442; Robins v. Frazier, 5 Heisk., 100.  
<sup>22</sup> Justice v. McBroom, 1 Lea, 555.  
<sup>1</sup> Barb. Ch. Pr., 646; 2 High on Injunc., § 1469; 1615.

2 Rutherford v. Metcalf, 5 Hay., 58.  
<sup>3</sup> 2 Dan. Ch. Pr., 1676, note; 2 High on Injunc., § 1617; Speak v. Ransom, 2 Tenn. Ch., 210; 1 Barb. Ch. Pr., 646.  
<sup>4</sup> 1 Barb. Ch. Pr., 640; 2 High on Injunc., § 1622; 2 Dan. Ch. Pr., 1678, note.  
<sup>5</sup> 2 High on Injunc., § 1476; Perkins v. Woodfolk, 8 Bax., 413; 2 Dan. Ch. Pr., 1675.  
<sup>6</sup> Foley v. Leath, 3 Shan. Cas., 353.



The three principal grounds of motions to dissolve are: (1) want of equity, (2) denial of the equity alleged, and (3) want of diligence in prosecuting the suit; they will be separately considered.

§ 850. **Dissolution for Want of Equity on the Face of the Bill.**—If the bill be so devoid of equity that, if admitted by the answer to be true, all injunctive relief would be denied at the hearing, the Court will, on motion and without any answer, dissolve the injunction granted on such a bill. A motion to dissolve an injunction, for want of equity on the face of the bill, is in the nature of a demurrer, and all the material allegations of the bill relied on, as ground for an injunction, are taken as true,<sup>7</sup> and will be given a construction favorable to the relief prayed for. And an injunction will not be dissolved for want of equity on the face of the bill, if the bill disclose merits, even though its allegations be obscure, and the frame of the bill be inartificial. If the bill be devoid of equity on its face, the injunction will be dissolved on motion, and the defendant need not wait for service of subpoena on him before making the motion.<sup>8</sup>

§ 851. **Dissolution on Bill and Answer.**—As heretofore shown, an injunction bill is both a pleading and an affidavit; and a sworn answer is, also, both a pleading and an affidavit. The affidavit part of the bill is in the nature of evidence on which to obtain *ex parte* interlocutory relief; and the affidavit part of the answer is in the nature of a deposition for all the purposes of the suit.

When, therefore, a motion is made to dissolve an interlocutory injunction on bill and answer, there comes a struggle for mastery between the affidavit of the complainant and the affidavit of the defendant; it is oath against oath. In such a contest, every allegation of fact in the bill not met and denied in the answer is deemed to be true; and every allegation on the complainant's own knowledge is deemed to be true, when not substantially denied on the defendant's own knowledge.<sup>9</sup> Positive affirmative averments, made on complainant's own knowledge, cannot be overcome either (1) by silence, or (2) by evasion, or (3) by feeble denials on personal knowledge, or (4) by positive denials on information and belief, or (5) by setting up new matters by way of avoidance.<sup>10</sup> On the other hand, an answer, made on the defendant's own personal knowledge, will overcome the allegations of a bill made or sworn to on information and belief.<sup>11</sup>

On the hearing of a motion to dissolve an injunction on bill and answer, the answer must be sworn to; for an answer not sworn to will not sustain a motion to dissolve, however strong its denials.<sup>12</sup> If the oath of the defendant to his answer is waived, he may, nevertheless, swear to it for the purpose of having the injunction dissolved; and this he may do without leave of the Court.<sup>13</sup> If the defendant is a corporation, and has answered under its corporate seal, such answer will not sustain the motion; the answer must be sworn to by some officer, agent, or member, of the corporation personally acquainted with the facts set

<sup>7</sup> High on Injunc., § 1469.

<sup>8</sup> 2 Dan. Ch. Pr., 1676, note.

<sup>9</sup> Tyne v. Dougherty, 3 Tenn. Ch., 52; Yale v. Moore, 3 Tenn. Ch., 76; 2 High on Injunc., §§ 1470-1472.

<sup>10</sup> 2 High on Injunc., §§ 1472; 1475; 1481; 1505. But where, from the nature of the case, the defendant can have no personal knowledge of the facts, the Court sometimes acts upon an answer sworn to on information and belief; as where the transaction was with the intestate, and his administrator answers on information and belief. But as a rule, such an answer, even from an administrator, will not warrant a dissolution. 2 High on Injunc., § 1507.

<sup>11</sup> 2 High on Injunc., 1525; 1567-1569.

<sup>12</sup> 2 Dan. Ch. Pr., 1677; Smith v. Republic L. Ins. Co., 2 Tenn. Ch. 631; Ch. Rule, VI, § 1. The bill being sworn to must of course be met by a sworn answer. On motion to dissolve, much depends on the frame of the pleadings and the character of the affidavits thereto. A bill sworn to on information

and belief will have but little weight on a motion to dissolve, when its material allegations are directly and positively denied by an answer based on the personal knowledge of the defendant, and so sworn to; and on the other hand, a bill based on the personal knowledge of the complainant, or the person swearing to it, will not be overcome by an answer, however direct and emphatic its denials, if sworn to on information and belief. And a bill or answer sworn to on "knowledge, information and belief" is no stronger than if sworn to on information and belief alone, unless it affirmatively show on its face what allegations are based on personal knowledge, and what on information and belief. See Chapter on Affidavits, *ante*, § 788.

<sup>13</sup> Ch. Rule, VI, § 1; § 1195, *post*. It must be remembered that a bill on which an injunction is sought, and an answer on which a motion to dissolve an injunction is to be based, are both pleadings and affidavits conjoined. See, *ante*, §§ 838; 842.

up in the answer; and his affidavit to the truth of the bill must show this personal acquaintance, and should not be on information and belief.<sup>14</sup>

To sustain a motion to dissolve an injunction on bill and answer, the answer must not only be sworn to, but it must also be positive, direct, and full, and based on the personal knowledge of the defendant, and must broadly confront and wholly deny all the material facts upon which the equity of the bill is founded. On such an answer, the injunction will ordinarily be dissolved;<sup>15</sup> for positive and full denials, based on personal knowledge of the facts, will neutralize positive allegations.<sup>16</sup>

If the allegations of the bill are based wholly, or in part, on information and belief, such allegations cannot stand against the positive denial of the defendant on his own personal knowledge. On the other hand, if the statements of the bill are made on the personal knowledge of the complainant, and sworn to as such, ineffective will be the denials of the defendant, made on information and belief.<sup>17</sup>

It is a general rule that the answers of all the material defendants must be in and perfected, before an injunction will be dissolved on bill and answer; but if the defendant, on whom the gravamen of the charge rests, has fully answered, that may be sufficient. It is settled, also, that if the complainant has been negligent in having the subpoena served on a part of the defendants, or in compelling them to answer, those who have answered may have the injunction dissolved on their answers alone, if otherwise entitled.<sup>18</sup>

The burden of disproving the equities of the bill rests upon the defendant; and if, upon the hearing, a reasonable doubt exists in the mind of the Court as to whether the Equity of the bill is overcome by the answer, the injunction will not be dissolved, but will be continued until the hearing.<sup>19</sup>

The fact that a sworn answer has been excepted to for insufficiency will not prevent a dissolution of the injunction, on bill and answer, if in fact the answer is sufficient. But the Chancellor may look at the exceptions on the hearing of the motion to dissolve.<sup>20</sup>

**§ 852. When an Injunction will not be Dissolved on Bill and Answer.**—An answer will not sustain a motion to dissolve (1) if it be weak in its denials, or (2) be on information and belief, or (3) be evasive, or (4) contradictory, or (5) if its statements are extremely improbable, or (6) if any material allegation of the bill is not denied, or (7) if the answer to any essential part of the bill is unsatisfactory, or (8) if the answer is insufficient in important particulars; or (9) where the answer admits the Equity of the bill, and sets up new matter in avoidance; or (10) where fraud is the gravamen of the bill;<sup>21</sup> or (11) where the dissolution of the injunction would work very great mischief to the complainant; or (12) where the injunction is the real remedial part of the bill; or (13) where the dissolution of the injunction involves a decision of the cause on its merits, or (14) where a dissolution would be equivalent to a decision of the case against the complainant.<sup>22</sup>

<sup>14</sup> *Fulton Bank v. N. Y. & S. Canal Co.*, 1 Paige, (N. Y.) 311; 1 Dan. Ch. Pr., 735, notes. See, *ante*, § § 384, note; 788-789.

<sup>15</sup> 2 Dan. Ch. Pr., 1677, note; 1 Barb. Ch. Pr., 641.

<sup>16</sup> Much depends on the frame of the pleadings. If the bill be weak, indirect, or alternative in its allegations; or if its statements are indefinite, general, or limited by qualifications, it will be overcome by an answer that has the opposite characteristics; and so, an answer that is deficient in positiveness, directness, clearness, frankness, and precision, will be ineffectual to overcome a bill whose allegations are strong, positive, direct and precise. Before the injunction will be dissolved, the answer must swear away the equity which is its life.

On a struggle between the bill and the answer, the victory depends on the fullness, frankness, and savor of the truth, manifest in one rather than in the other. A literal, formal, technical denial of the charges, especially if made seriatim, lacks the flavor

of that earnest candor which is an essential of truth. The answer must do more than deny the facts of the bill in manner and form as alleged; the substance of the charge must be met and traversed.

<sup>17</sup> *Tyne v. Dougherty*, 3 Tenn. Ch., 52; 2 High on Injunc., §§ 1505-1525; 2 Dan. Ch. Pr., 1677-1678, notes; 1 Barb. Ch. Pr., 640.

<sup>18</sup> 1 Barb. Ch. Pr., 639; 2 Dan. Ch. Pr., 1676-1677; 2 High on Injunc., §§ 1528-1535. Where fraud is charged, all of the defendants implicated must answer before a dissolution will be granted. 2 High on Injunc., § 1532.

<sup>19</sup> 2 High on Injunc., § 1470; 1 Barb. Ch. Pr., 643.  
<sup>20</sup> 2 High on Injunc., § 1602; 2 Dan. Ch. Pr., 1676, note.

<sup>21</sup> 2 Dan. Ch. Pr., 1676-1678, notes; 2 High on Injunc., § 1512.

<sup>22</sup> *Owen v. O'Brien*, 2 Tenn. Ch., 295; 2 High on Injunc., §§ 1508-1524. As to the admissibility of affidavits at the hearing of a motion to dissolve, see, § *post*, 856.

§ 853. **Dissolution for Want of Diligence in Prosecuting the Suit.**—He who invokes and obtains the aid of so tremendous a power as the writ of injunction, is bound to exercise the greatest possible diligence in doing all that is required of him in the prosecution of his suit; and if he fail so to do, the injunction will, on motion, be dissolved, unless there be specially strong reasons to the contrary. The principal instances of want of diligence are the following (1) where the complainant, after fiat granted, fails in a reasonable time to give bond, or otherwise comply with the conditions precedent contained in the fiat; (2) where the injunction bond is, or becomes, for any reason insufficient, and the defect is not remedied in a reasonable time after order made; (3) when the complainant fails to prepare his case for hearing with due speed, either by failing to bring the defendants before the Court, or by failing to make the necessary parties, or by failing to take or file his proof in due season, or by failing to keep the suit properly revived.<sup>23</sup>

§ 854. **When, and Where, and How, Injunctions are Dissolved.**—An injunction may be dissolved or modified on motion, at any time after the granting of the fiat, such motion being based either upon a want of equity on the face of the bill, or upon the bill and answer.<sup>24</sup> The motion to dissolve or modify may be made in term time, in open Court; or, if the Court be not in session, it may be made before the Chancellor of the Division in which the bill is filed, at Chambers.<sup>25</sup> If the motion is in open Court, one day's notice thereof would be sufficient;<sup>26</sup> if the motion is in vacation, five days' notice thereof must be given to the complainant, or his Solicitor.<sup>27</sup> The notice must, in all cases, state upon what the motion is based, whether for want of equity on the face of the bill, or upon bill and answer.<sup>28</sup> The following is a form of

**NOTICE OF MOTION TO DISSOLVE.**

A B, }  
vs. } In the Chancery Court, at Trenton.  
C. D. }

Mr. A B:

At 10 a. m., on the 9th day of this month, (August,) before the Hon. H. J. Livingston, Chancellor, at his Chambers, in the Court House at Trenton, Tenn., I will move that the injunction in said cause be dissolved, [or, modified;] which motion will be based on the want of equity on the face of the bill, [or, on bill and answer.<sup>29</sup>]

August 4, 1890.

C D.

A final decree dismissing the bill operates, *ipso facto*, as a complete dissolution of the injunction; and a formal order of dissolution is unnecessary.<sup>30</sup>

§ 855. **Proceedings on the Hearing of the Motion to Dissolve.**—At the time and place specified in the notice of the motion, when to be made at Chambers, the defendant appears with a certified copy of the bill, or of the bill and answer, according as the motion is based on the want of equity in the bill, or on bill and answer. If the complainant be present he reads the bill, if not present the defendant reads both bill and answer, and makes his argument in support of his motion. If both sides be present, the defendant will open and conclude the argument.<sup>31</sup> The Chancellor endorses his decision ordinarily on the notice, or writes it upon a separate sheet of paper, in substance as follows:

<sup>23</sup> A want of diligence on complainant's part is always a cause for dissolving an injunction. 2 Dan. Ch. Pr., 1667; 1675, notes; 2 Barb. Ch. Pr., 639; 1 High on Injunc., §§ 1490; 1504. A complainant in an injunction suit should be held to a degree of diligence proportionate to the stringency of the injunction; and no continuance should be allowed him after he has had reasonable time to get in his proof, except on a dissolution of the injunction. Much should be required by the Court of those who require much of the Court.

<sup>24</sup> Ch. Rule, VI, § 2; *post*, 1195; Code, §§ 4444-4445.

<sup>25</sup> Code, § 4444.

<sup>26</sup> No notice is absolutely required if the motion be made in open Court. *Renfroe v. Dickinson*, 1

Tenn., (Overt.), 196. *James County v. Hamilton County*, 5 Pick, 237. The Chancery Rules of 1858, required one day's notice of the motion in open Court; but these rules have been repealed.

<sup>27</sup> Code, § 4444.

<sup>28</sup> Ch. Rule, VI, § 2.

<sup>29</sup> Ch. Rule, VI, § 2. The notice should be served, and service proved, as in case of notice to take proof; *ante*, § 482.

<sup>30</sup> *Perkins v. Woodfolk*, 8 Bax., 413; 2 Dan. Ch. Pr., 1675; 2 High on Injunc., § 1476.

<sup>31</sup> 2 Dan. Ch. Pr., 1599. Upon the hearing of a motion to dissolve an injunction, the burden of disproving the equities of the bill rests upon the defendant. 2 High on Injunc., § 1470.

ORDER ON MOTION TO DISSOLVE.

A B,  
vs. }  
C, D. }

In Chancery, at Trenton.

The motion to dissolve the injunction in this cause, coming on to be heard before me this day, at Chambers, on consideration thereof, it is ordered by me that said motion be overruled; [or, that said motion be allowed, and the injunction is hereby accordingly dissolved; or, is dissolved on condition that the defendant shall give a bond, with two good sureties, in the penalty of one thousand dollars, conditioned to pay complainant such sum as the Court may at any time award as debt, damages, or otherwise, for the wrongs complained of in the bill; or, is dissolved on the defendant executing a refunding bond in the penalty of—dollars;<sup>32</sup> or, such other order as may be proper.] August 9, 1890 H. J. LIVINGSTON, Chancellor.

This order is transmitted to the Clerk and Master, who should enter it in full on his rule docket, or at least note it thereon.

Instead of dissolving the injunction, the Chancellor may modify it, and adjust it to the equities of the situation; or may order the injunction bond to be increased in penalty. Where the injunction ties up property, and is therefore in the nature of an attachment, the Chancellor may allow a refunding bond to be given, and order that, upon such bond being filed, the injunction stand dissolved. This refunding bond may be conditioned like a replevy bond in an attachment suit.<sup>33</sup> On the dissolution of an injunction the rule is to require a refunding bond from the defendant where there is a reasonable probability that the parties may not be *in statu quo* at the final hearing of the cause.<sup>34</sup>

An order dissolving an injunction does not prevent the Court from reviving it for sufficient reasons, either before or at the hearing; nor does such an order authorize the defendant to do what he had been enjoined from doing. On the dissolution of an injunction the defendant may act, but he acts at his own peril;<sup>35</sup> unless the order of dissolution expressly adjudge otherwise.<sup>36</sup>

Upon the hearing of a motion to dissolve an injunction upon bill and answer, the fact that the answer has been excepted to, or that the time to file exceptions has not elapsed, will not postpone the hearing of the motion to dissolve, but the Chancellor may dispose of the motion, without passing upon the exception.<sup>37</sup>

**§ 856. When Affidavits may be Read on a Motion to Dissolve.**—On the hearing of a motion to dissolve an injunction, the complainant will, ordinarily, be allowed to read affidavits,<sup>38</sup> to corroborate his bill and rebut the answer, in the following cases: (1) where the dissolution of the injunction would work very great mischief to the complainant; or (2) where the injunction is the real remedial part of the bill; or (3) where the dissolution of the injunction involves a decision of the cause on its merits.<sup>39</sup> In such cases, the hearing of the motion is equivalent in effect to a hearing of the cause; and the dissolution of the injunction, on such a hearing, would be more injurious to the complainant than the dismissal of his bill, and consequent dissolution of the injunction, at the final hearing, for then he could appeal, and thus continue the injunction until final decree in the Supreme Court.

**§ 857. The Discretion of the Court, how Exercised on Motions to Dissolve.** Upon an application to dissolve an injunction, the Court or Chancellor will

<sup>32</sup> Code, § 4448; see, *post*, § 861.  
<sup>33</sup> Code, § 3509.  
<sup>34</sup> *Scruggs v. Myers*, 2 Shan. Cas., 353.  
<sup>35</sup> *M. & M. R. R. v. Huggins*, 7 Cold., 217.  
<sup>36</sup> But any adjudication must be made in Court, and not at Chambers. Code, § 4413.  
<sup>37</sup> Ch. Rule, VI, § 3.  
<sup>38</sup> 2 Dan. Ch. Pr., 1668; 1676, notes; 2 High on Injunc., §§ 1576; 1603; *Davis v. Fulton*, 1 Tenn., (Overt.), 132; *Moredock v. Williams*, 1 Tenn., (Overt.), 325. Whether, and by whom, affidavits may be read on the hearing of a motion to dissolve on the bill and answer, are questions not definitely settled; but, on principle, the true rule would seem to be this: if an answer on oath has been called for, and a discovery is sought, no affidavits should be allowed to be read by either party; but, if the defendant's oath to his answer is waived, the complain-

ant should be allowed to rebut his answer by affidavits; and counter-affidavits should not be heard, unless perhaps, to bring forward facts not known to the defendant when he filed his answer. The reason of this rule is, that if the complainant elects to make a witness of the defendant, he should be bound by his answer; whereas, if the defendant voluntarily swears to his answer when his oath has been waived, the complainant should have the right to contradict him. If affidavits and counter-affidavits may be read, in any case, the hearing of the motion expands into a hearing of the cause, and this would not be proper or expedient, unless the parties agree that the decision of the motion may be equivalent to the decision of the cause.  
<sup>39</sup> 2 Dan. Ch. Pr., 1668; 1676, note; 2 High on Injunc., § 1603.

weigh the relative convenience and inconvenience which would arise from its continuance, or its dissolution; and if upon such weighing, it appears that the continuance of the injunction is likely to work less mischief than would result from its dissolution, the motion to dissolve will be overruled.<sup>40</sup> If there is a probable right, and a probable danger to that right without the intervention of the Court through its injunctive process, the injunction ought not to be interfered with.<sup>41</sup> A dissolution sought upon a pure question of law should not be granted, unless the question is plain beyond a reasonable doubt.<sup>42</sup> After all, the true rule in deciding motions to dissolve seems to be to do what a sound discretion requires.<sup>43</sup>

In continuing an injunction, the Chancellor may require of the complainant additional security, or a bond with new and enlarged conditions;<sup>44</sup> or may dissolve the injunction on the defendant giving a bond to indemnify the complainant in case the latter obtains a decree. Whenever the ground of the injunction is mainly the insolvency of the defendant or the failure of the defendant to pay a price, or a debt, the Chancellor will ordinarily dissolve the injunction on the defendant, giving a bond to satisfy the final decree in the cause, if against him. And, in general, it may be stated that when there is a reasonable doubt whether the injunction is necessary to protect the rights of the complainant, the injunction will be continued, for the burden rests on the defendant of satisfying the Court that the injunction should be dissolved.<sup>45</sup>

**§ 858. The Effect of a Dissolution, and of a Refusal to Dissolve.**—If the injunction is the substantive relief sought, then its dissolution may operate as practically a decision of the cause; although the final decree may not be pronounced until a subsequent day or term. Nevertheless, if the defendant has answered, and an injunction at the hearing will be of any benefit, the complainant may proceed to prove his case; and, if, at the hearing, he shows himself entitled to an injunction, it will then be granted.

On the other hand, if the injunction is merely collateral to the main object of the suit, or merely ancillary to the relief sought, the dissolution of the injunction does not affect the merits, and the suit proceeds as though no injunction had ever been granted and dissolved; and if, at the hearing, the complainant shows himself entitled to an injunction, the Court will then award the writ.

And if, in either of the foregoing cases, a new and sufficient cause of injunction arises before the hearing, a new interlocutory injunction may be obtained on application by petition, setting up in detail the facts constituting the new ground of injunction.<sup>46</sup> But the injunction will not be reinstated on the old ground, simply because the complainant alleges in his petition that he has lately discovered new evidence in support of his bill.<sup>47</sup>

If a dissolution of the injunction is refused, the suit proceeds as though the motion to dissolve had not been made.<sup>48</sup> If a new and sufficient ground of dissolution subsequently arises, a new motion to dissolve may be made on such ground. The refusal to dissolve does not in any way prejudice the defendant's rights at the hearing.

The effect of a total dissolution on the defendant is to restore him to every right of which the injunction deprived him; and he may proceed as though no injunction had been granted.<sup>49</sup> If the injunction, however, is dissolved in part only, the defendant is restored to such rights only as the dissolution gives; the balance of the injunction remaining in full force.

<sup>40</sup> 2 High on Injunc., § 1495.

<sup>41</sup> Owen v. Brien, 2 Tenn. Ch., 295.

<sup>42</sup> Nashville S. Bank v. Mayor, 3 Tenn. Ch., 333.

<sup>43</sup> 2 Dan. Ch. Pr., 1677-1678, notes; 2 High on Injunc., § 1516. As to the proper exercise of discretion, see, *ante*, §§ 583, note 4; 833, note 37; and *post*, § 902.

<sup>44</sup> 2 High on Injunc., § 1626.

<sup>45</sup> Owen v. Brien, 2 Tenn. Ch., 295; 2 High on Injunc., §§ 1470; 1510.

<sup>46</sup> 1 Barb. Ch. Pr., 644-645.

<sup>47</sup> Lowry v. McGee, 5 Yerg., 238.

<sup>48</sup> 2 High on Injunc., § 1536.

<sup>49</sup> But he will proceed at his own peril. The dissolution of the injunction is no adjudication that his

ARTICLE VII.

INJUNCTION AND REFUNDING BONDS, AND THEIR BREACH.

§ 859. Injunction Bonds Generally Considered.

§ 860. Form of Injunction Bonds.

§ 861. Refunding Bonds.

§ 862. Remedies on Injunction and Refunding Bonds.

§ 863. The Measure of Damages on Injunction Bonds.

§ 859. **Injunction Bonds generally Considered.**—Before issuing the writ of injunction, it is the duty of the Clerk and Master to take from the complainant both a prosecution and an injunction bond, unless the suit is prosecuted on the pauper oath, in which case an injunction bond may, also, be dispensed with, if the fiat so allow. If the suit be to enjoin a judgment at law, the penalty of the bond shall be double the judgment or sum sought to be enjoined, and in all other cases the penalty will be five hundred dollars, unless the fiat designate some other amount.<sup>1</sup> In cases where the statute does not prescribe the conditions of the bond, the Judge may, in his fiat specify those conditions.<sup>2</sup>

In taking an injunction bond in obedience to a fiat, the Master is doing a judicial act; and the bond, when accepted, even though not acknowledged before him, becomes invested with the verity and force of a record.<sup>3</sup>

Whenever the security on any injunction bond is to be taken in any county other than that in which the Court is held, the Clerk and Master may appoint a commissioner in the county where the security is to be taken to judge of the sufficiency of the bond and security, and to take the same as he himself might do.<sup>4</sup>

§ 860. **Form of Injunction Bonds.**—All injunction bonds are made payable to the defendant, and should be in the penalty prescribed by law, or the fiat of the Chancellor. The following are the statutory forms:

AN INJUNCTION BOND.

[After judgment at Law.]

We, A B, [*the complainant,*] C D and E F, [*his sureties,*] acknowledge ourselves indebted to G H, [*the defendant,*] in the penal sum of one thousand dollars;<sup>5</sup> but this obligation shall be void, if the said A B shall pay the amount of the judgment at law sought to be enjoined in the Chancery Court at Memphis, in the case of said A B against said G H, with interest, damages, and costs, or shall perform the decree of the said Court, in case the injunction is dissolved, and shall also pay such damages as may be sustained by the wrongful suing out of the injunction.<sup>6</sup>

[*To be duly dated, signed, and witnessed.*]

INJUNCTION BOND.

[Before judgment at Law.<sup>7</sup>]

We, A B, [*the complainant,*] C D and E F, [*his sureties,*] acknowledge ourselves indebted

conduct is lawful. *M. & M. R. R. v. Huggins*, 7 Cold., 217; 225.

<sup>1</sup> Code, §§ 4439-4440.

<sup>2</sup> *Hubbard v. Fravell*, 12 Lea, 313-315; *Ranning v. Reeves*, 2 Tenn. Ch., 267; and cases there cited.

<sup>3</sup> *Ward v. Cullom*, 2 Cold., 353. But a bond taken by the Master which is broader in its conditions, or greater in its penalty, than the law or the fiat required, will be good only to the extent required. *Hubbard v. Fravell*, 12 Lea, 304; and cases there cited.

<sup>4</sup> Code, § 4441. As to the justification of sureties on bonds, see, *ante*, § 181.

<sup>5</sup> The penalty of the bond must be double the amount of the judgment or sum sought to be enjoined. Code, § 4440.

<sup>6</sup> Code, § 4439, sub-sec. 1.

<sup>7</sup> There is no statutory provision in reference to the condition of bonds, except where proceedings in a Court of law are sought to be enjoined. *Hubbard v. Fravell*, 12 Lea, 319. Where such proceedings are not involved, the conditions should be to pay the costs and damages awarded by the Court on dismissing the bill; unless there be special conditions prescribed in the fiat. *Ragan v. Aiken*, 9 Lea, 623. The Judge may, in his fiat, specify the conditions. *Ranning v. Reeves*, 2 Tenn. Ch., 267, and cases there cited. A proper condition for a bond where no suit at law is involved would seem to be this: To be void on condition the complainant shall pay to the defendant all such costs and damages as the Court may award the defendant on dissolving the injunction, or dismissing the bill.

to G H, [*the defendant,*] in the penal sum of five hundred dollars;<sup>8</sup> but this obligation shall be void, if the said A B shall pay all costs and damages awarded by the Chancery Court, on dismissing the bill filed by said A B against said G H, in said Court, if the same should be dismissed.<sup>9</sup>

[*To be duly dated, signed, and witnessed.*]

This bond will be appropriate for all injunction suits, except those brought to enjoin a judgment at law already rendered.<sup>10</sup> Either of the foregoing bonds can also be made a prosecution bond by adding to its conditions the following or similar words: *and shall, also, pay any and all costs that may at any time be adjudged against the said A B, in said suit.*<sup>11</sup>

§ 861. **Refunding Bonds.**—Where a refunding bond will fully indemnify the complainant, and where the defendant's answer fully meets and denies the equities alleged in the bill, the Court will, as a rule, dissolve the injunction, on the defendant executing such a bond. Such a bond should be required in every case, where an injunction is dissolved before the hearing, and there is reason to believe the parties will not be *in statu quo* at the hearing.<sup>12</sup>

If an interlocutory injunction to stay proceedings on a judgment at law for money be dissolved, the Code makes it the duty of the Chancellor to require of the defendant a refunding bond, in a penalty double the amount of the sum allowed to be collected, payable to the complainant, and conditioned to refund the amount collected, if so ordered on final hearing; and the Court may render a decree upon such bond against any or all of the parties executing the same.<sup>13</sup> In such a case the form of the order dissolving the injunction may be as follows:

**ORDER DISSOLVING AN INJUNCTION ON A REFUNDING BOND.**

A B, }  
*vs.* }  
 C D. }

In this cause, the motion of the defendant to dissolve the injunction on bill and answer having been heard, this Aug. 16, 1890, on consideration thereof, and it appearing that the answer fully meets and denies the whole equity of the bill, it is ordered by the Court that said injunction be dissolved, upon the defendant giving a refunding bond in the penal sum of nine hundred dollars, with at least two good sureties.

The following is a form of refunding bond proper to be executed in such a case:

**A REFUNDING BOND.**

We, C D, [*the defendant,*] E F and G H, [*his sureties,*] acknowledge ourselves indebted to A B, [*the complainant,*] in the penal sum of nine hundred dollars;<sup>14</sup> but this obligation to be void if the said C D refund to said A B the amount collected on the judgment mentioned in the bill of said A B against said C D, in the Chancery Court at Memphis, with interest, if so ordered by said Court on final hearing, or otherwise comply with the final decree of said Court, in reference to the money so collected.

[*To be duly dated, signed, and witnessed.*]

<sup>8</sup> The penalty will be such sum as the Chancellor, Judge, or Court, granting the injunction shall order, and if no sum be named, then the penalty shall be five hundred dollars. Code, § 4440.

<sup>9</sup> Code, § 4439, sub-sec. 2; *Rogan v. Aiken*, 9 Lea, 623. In neither of the foregoing bonds is it any part of the condition that the injunction suits be prosecuted with effect. The statute does not recognize any such condition, and it is, besides, mere useless verbiage, the payment of costs in Chancery not depending on the successful prosecution of a suit. See, *ante*, § 181.

<sup>10</sup> *Ragan v. Aiken*, 9 Lea, 623.

<sup>11</sup> The following short form of a bond would seem to be fully sufficient in all injunction or attachment suits, to cover all possible cases, costs included.

**SHORT FORM OF BOND.**

A B, }  
*vs.* } In the Chancery Court, at Memphis.  
 C D. }

We acknowledge ourselves the sureties of the com-

plainant in the above named suit, and agree to pay all costs, damages, interest, and other sums, that may at any time be lawfully adjudged against said complainant, in said cause, either for wrongfully suing out the injunction, [*or, attachment*] prayed for, or for any other cause. [Dated, signed by the sureties, and witnessed as in § 181, *ante*.]

<sup>12</sup> *Davis v. Fulton*, 1 Tenn., (Overt.), 121; *Moore-dock v. Williams*, 1 Tenn., (Overt.), 325.

<sup>13</sup> Code, § 4448.

<sup>14</sup> The penalty must be in double the sum allowed to be collected. The sum to be collected is generally the whole judgment, but the order sometimes allows only a part of the judgment to be collected. The following is

**ANOTHER FORM OF A REFUNDING BOND:**  
 We, C D, [*the defendant,*] E F and G H [*the sureties,*], acknowledge ourselves indebted, and firmly bound, unto A B, [*the complainant,*] in the sum of one thousand dollars.

The condition of the above obligation is such that;

§ 862. **Remedies on Injunction and Refunding Bonds.**—When proceedings on a judgment at law for money is enjoined in whole or in part, the object of the law in requiring the complainant to give a bond to pay said judgment if the injunction is dissolved is, to secure the speedy payment of the judgment, in case of such dissolution.<sup>15</sup> When, therefore, such an injunction is dissolved, whether by an interlocutory order, or by a final decree, such order or decree is required to contain a judgment on said bond against the complainant and his sureties for such amount as the Court may order,<sup>16</sup> being generally the amount of the judgment enjoined, and the interest thereon.

In cases other than injunctions to stay proceedings on a judgment for money, if the injunction be dissolved either by an interlocutory order or by the final decree, the defendant may, in the final decree, or in a subsequent order at the same term, have a reference to the Master, or a trial by jury, to ascertain the damages suffered by the defendant in consequence of the wrongful suing out of the injunction.<sup>17</sup> Such a reference may be in the final decree immediately following the adjudication upon the merits, thus:

#### REFERENCE TO THE MASTER.

[After giving the style of the cause, and the final decree in full, then add:] And it appearing to the Court that an injunction bond was given in this case by the complainant A B, with C D and E F as his sureties, in the penal sum of one thousand dollars, conditioned to pay such costs and damages as this Court may award on dismissing the bill, and the defendant suggesting that he has suffered damages by reason of the injunction sued out in this case, on his motion, the Master is directed to hear proof, including the proof on file, and report to the present [*or, next*] term:

1st. The amount of damages, if any, sustained by the defendant by reason of the suing out of the injunction in this case.<sup>18</sup>

In like manner, if it should turn out at the hearing that the bill to enjoin a judgment was properly filed, and if a refunding bond was given on dissolving the injunction, the Court may, in the final decree, render a judgment on such bond against any or all the parties executing it, for the amount of the judgment collected from the complainant, and interest thereon.<sup>19</sup> Such judgment may follow the decree on the merits sustaining the bill, thus:

#### JUDGMENT ON REFUNDING BOND.

[After giving the style of the cause, and the final decree in full, then add:] And it appearing to the Court that the sum of four hundred dollars was collected from the complainant on said judgment, after the interlocutory injunction was dissolved; and that the defendant gave a bond, with E F and G H as his sureties, to refund the amount collected if so ordered by the Court on final hearing; it is therefore adjudged and decreed that the defendant and his said sureties pay into Court said sum of four hundred dollars, and the further sum of twenty-one dollars, the interest thereon since collected, in all, four hundred and twenty-one dollars, within thirty days, and in default thereof an execution will issue against the defendant and said C D and E F, for said sum of four hundred and twenty-one dollars, and the costs incident to said execution, they being each and all adjudged liable to complainant for said sums, which, when paid in, will be paid over to the complainant, or to his Solicitor of record.

whereas, on the 5th day of February, 1891, in the case of said A B against the said C D, pending in the Chancery Court at Jamestown, it was ordered that the injunction previously granted in said cause, restraining said C D from proceeding further in the collection of a certain judgment which he recovered against said A B, in the Circuit Court of Fentress County, on the 10th day of September, 1890, for five hundred dollars and the costs of suit, should be dissolved, upon the said C D executing a refunding bond with good and sufficient security in the sum of one thousand dollars. Now, if the said C D shall, in case said Chancery suit be decided against him on the final hearing thereof, refund the amount with interest, which he shall, in the meantime, have collected upon said Circuit Court judgment, and shall otherwise comply with the decree of said Chancery Court, then this obligation to be void; otherwise, to remain in full force and effect.

[To be duly dated, signed and witnessed.]

<sup>15</sup> The injunction bond is taken in lieu of the deposit of the money with the Master, under the previous practice. *Black v. Caruthers*, 6 Hum., 90; *Chester v. Apperson*, 4 Heisk. 654.

<sup>16</sup> Code, § 4447; *Black v. Caruthers*, 6 Hum., 87. <sup>17</sup> Code, § 4442. The ordinary practice is to have a reference to the Master.

<sup>18</sup> This is the usual form of the reference; but it would be well to have the Master's report more nearly resemble a special verdict, in which case the reference would be as follows:

1st. What damages, if any, the defendant suffered by reason of the injunction sued out in this cause, specifying the kind and degree of such damages.

2d. What would be reasonable compensation to the defendant for such damages.

3d. What, if any, exemplary damages should be allowed, and for what reason.

<sup>19</sup> Code, § 4448.



§ 863. **The Measure of Damages on Injunction Bonds.**—No damages will be allowed which are not the actual, natural, and proximate, result of the injury arising from the suspension or violation of the defendant's vested legal rights by the injunction. Damages that are remote, speculative, or contingent, will not be allowed. In the absence of malice in suing out the injunction, vindictive or punitive damages will not be allowed; but simple compensation for the loss sustained, will be the measure of the damages.<sup>20</sup> Interest is allowable, however, as a part of the damages. And if losses happen in consequence of complainant's failure to have a receiver appointed in a partnership suit, or loss happen because the receiver failed to do his duty, the complainant may be held liable therefor, on his injunction bond; for it was his duty to have a receiver promptly appointed, and then to see that the receiver did his duty in the premises.<sup>21</sup>

In ascertaining the damages resulting from an injunction, the following matters may be regarded: (1) loss of rents and profits, or damage to crops or property, by being prevented from taking possession; (2) injury to business, reputation, and credit, by being prevented from properly attending thereto; (3) depreciation in the value of the property while subject to an injunction prohibiting its sale; (4) the loss of the debt whose collection was enjoined by reason of the debtor becoming insolvent during the progress of the suit, and (5) any other loss or injury, naturally or directly referable to the injunction, and flowing therefrom as an immediate consequence.<sup>22</sup>

In estimating the damages, regard may be also had (1) to the presence or absence of probable cause for resorting to the writ; (2) to the good or bad faith of the complainant in bringing the suit; (3) to the presence or absence of any circumstance of fraud, malice, or oppression, in the proceedings. If good faith and probable cause appear, compensatory damages only will be allowed; if, on the other hand, there appears bad faith, fraud, malice, or oppression as a motive for the suit, or a reckless disregard of the defendant's rights and interests, or an utter absence of probable cause for bringing the suit, vindictive damages may be allowed.<sup>23</sup>

In estimating the amount of damages the opinions of witnesses, unsupported by facts or reasons, are entitled to no consideration. Opinions are not evidence, except in cases of experts.<sup>24</sup>

<sup>20</sup> *Ross v. Scott*, 15 *Lea*, 479; 2 *High on Injunc.*, §§ 1663-1666.

<sup>21</sup> *Terrell v. Ingersoll*, 10 *Lea*, 77; *Downs v. Allen*, 10 *Lea*, 670.

<sup>22</sup> 2 *High on Injunc.*, §§ 1663-1675.

<sup>23</sup> *Doll v. Cooper*, 9 *Lea*, 576, and cases there cited.

<sup>24</sup> On the worthlessness of opinions as proof, see *Davidson v. Bowden*, 5 *Sneed*, 129; *Bush v. Jones*, 2 *Tenn. Ch.*, 190; *Stretch v. Gowdey*, 3 *Tenn. Ch.*, 569; *Woodfolk v. N. & C. R. R. Co.*, 2 *Swan*, 429; 1 *Greenl. Ev.*, § 440. See, *post*, § 1068, note.

## CHAPTER XLII.

SUITS PRAYING *NE EXEATS*; AND PROCEEDINGS THEREIN.

§ 864. *Ne Exeats* Generally Considered.

§ 865. In What Cases a *Ne Exeat* Will be Granted.

§ 866. How a *Ne Exeat* is Obtained.

§ 867. Frame of a Bill for a *Ne Exeat*.

§ 868. Proceedings in Execution of a *Ne Exeat*.

§ 864. **Ne Exeats Generally Considered.**—The writ of *ne exeat*,<sup>1</sup> although fallen into almost total disuse, is, nevertheless, directly recognized by our statutes, and indirectly recognized by our Constitution.<sup>2</sup> It is one of the extraordinary processes of a Court of Chancery, and is as much a writ of right as any other process used in the administration of justice, and must, therefore, be granted whenever a proper case is presented.<sup>3</sup> The abolition of imprisonment for debt has not deprived the Court of the power to issue a writ of *ne exeat* in cases of equitable cognizance; but the writ will not be granted upon a mere legal demand sued on in Chancery.<sup>4</sup> The object of the writ is to detain the person of the defendant in order to compel him to perform the decree of the Court, in cases where his departure would endanger the rights of the complainant, or their effectual enforcement.<sup>5</sup>

A *ne exeat* will issue only upon an equitable demand: suits for alimony, and for an account, are, however, deemed equitable demands. This equitable demand, when for money, must be certain in its nature, not contingent, and must be due, except in suits for alimony and an accounting.<sup>6</sup> The amount of the indebtedness must be stated; the indebtedness must be alleged to be just, and its payment or collection must be alleged to be endangered by the departure of the defendant from the State. There need, however, be no allegation that the defendant is going out of the State for the purpose of avoiding the payment of the debt.<sup>7</sup>

An injunction may be granted at the same time a *ne exeat* is ordered, and on the same bill, and in the same fiat, if prayed for, and a proper case made out.<sup>8</sup>

<sup>1</sup> In the Kingdom of Great Britain and Ireland, the full name of this writ is *ne exeat regno*; but in the State of Tennessee, its full name is *ne exeat republica*.

<sup>2</sup> For its direct recognition, see Code, § 4434. It is indirectly recognized in the Constitution by the establishment of the Chancery Court, and by the continuance of existing laws, the writ of *ne exeat* being one of the powers of the Chancery Court. Const., Art. VI, § 8; Art. XI, § 1; 2 Dan. Ch. Pr., 1698, note 1; 1 Barb. Ch. Pr., 647; *Smith v. Kootz*, 4 Hay, 189; *Edwards v. Massey*, 1 Hawks, (N. C.), 352.

<sup>3</sup> 2 Dan. Ch. Pr., 1698, note; 1 Barb. Ch. Pr., 647.

<sup>4</sup> 1 Barb. Ch. Pr., 653; 2 Dan. Ch. Pr., 1700, note. The imprisonment for debt prohibited by our Constitution is imprisonment under legal process for failing to pay an adjudicated debt. This sort of imprisonment is quite a different thing from imprisoning a man for endeavoring to evade the jurisdiction of the Court, the latter no more being an imprisonment for debt than is an imprisonment for failing to give a bail bond, or for failing to perform the decree of the Court. Code, §§ 3392; 4478-4481; 2528. The last section (2528) authorizes the arrest and commitment of a guardian who fails to account. The only object of a *ne exeat* is to prevent the defendant from going out of the State, and thus escaping the jurisdiction of the Court over his person; and the only condition of the bond he is required to give, is that he will not depart from, or leave, the State, without the permission of the Court. 1 Barb.

Ch. Pr., 654; 2 Barb. Ch. Pr., 520; 2 Dan. Ch. Pr., 1711. Where a money recovery is sought, proceedings by attachment of property have, in practice, superseded *ne exeats*. Indeed, our attachment laws are in the nature of a substitute for writs of *ne exeat*, when a judgment in *personam* is not sought, or is not necessary. Instead of attaching the body of the defendant the practice now is to attach his property. *Cox v. Breedlove*, 2 Yerg., 516.

<sup>5</sup> 1 Barb. Ch. Pr., 647; 2 Dan. Ch. Pr., 1698. The decrees of the Chancery Court were formerly in *personam*, and enforced by process of contempt, and imprisonment. The result was that if the person of the defendant could not be reached, the decree could not be enforced, when the payment of money was ordered. Hence, the necessity of keeping the defendant within reach of the process of the Court. But now that the Chancery Court can issue an attachment against a defendant's property, the writ of *ne exeat* is no longer necessary, in ordinary cases. 6 12 Ency. of Forms, 1033.

<sup>7</sup> 1 Barb. Ch. Pr., 650-653; 2 Dan. Ch. Pr., 1702-1708. It is sufficient if the complainant swears to the amount to the best of his belief; but it is not sufficient to make oath that the complainant is informed, or fears, or apprehends, that the defendant may leave the State. *Ibid.* See, also, *Nelson v. Fuld*, 5 Pick., 466, which holds that an affidavit for an attachment on "information and belief" is insufficient.

<sup>8</sup> 1 Barb. Ch. Pr., 648.

§ 865. **In What Cases a Ne Exeat Will be Granted.**—The Court will issue the writ whenever one party has a claim against another which can be enforced only in a Court of Equity, and the enforcement of which will be endangered if the defendant is allowed to leave the State.<sup>9</sup> The one great object of the writ is to secure the jurisdiction of the Court over the person of the defendant, to the end that, by process of contempt, he may be compelled to perform the decree of the Court.<sup>10</sup>

§ 866. **How a Ne Exeat is Obtained.**—A writ of *ne exeat* is obtained in precisely the same way an injunction is obtained, that is, upon a prayer therefor in a bill, or upon an application therefor in Court, based on a petition or affidavit, in the cause.<sup>11</sup> The writ may be applied for at any time during the progress of the suit. No notice of the application need be given to the defendant, the writ being granted *ex parte*, at Chambers, by any Judge, or Chancellor, or in open Court by the Chancellor, or Judge, presiding.

§ 867. **Frame of a Bill for a Ne Exeat.**—A *ne exeat* is in the nature of an attachment of the body of the defendant, and its object is to detain his body until he gives security for the debt alleged in the bill. What is said elsewhere<sup>12</sup> as to the frame of an injunction bill applies with full force to a *ne exeat* bill, and, therefore, need not be repeated.

The bill, petition, or affidavit, on which the prayer for a *ne exeat* is based, must allege (1) the amount<sup>13</sup> and nature of the indebtedness, when a debt is sought to be recovered; (2) that it is due and justly owing to the complainant; (3) that the defendant intends to leave the State; and (4) that complainant's debt, or his remedies to enforce his rights, would be endangered by the defendant's departure from the State.

The following forms of material allegations in a bill, petition, or affidavit for this writ, will serve as illustrations :

#### MATERIAL ALLEGATIONS FOR A NE EXEAT IN DIVORCE SUIT.

That the defendant has no property subject to attachment, known to complainant, but has a large amount of money, and evidences of debt, in his possession, the proceeds of property sold by him to defeat complainant's claim for alimony; and he has declared that he intends at once to leave the State and take with him every dollar he owns, and would never pay her a cent.<sup>14</sup>

<sup>9</sup> 2 Dan. Ch. Pr., 1699. *Ne exeats* have issued from the Supreme Court pending suits there to prevent the defendant from removing property. *Cox v. Breedlove*, 2 Yerg., 516.

<sup>10</sup> It would seem that a *ne exeat* is a writ necessary for the purposes of justice when the defendant, by leaving the State, can defeat the power of the Court to grant effectual relief, or evade the relief granted; especially when the relief consists in compelling the defendant (1) to execute to the complainant a deed for land, or other property, situated in another State, or (2) to release a lien or mortgage on property in another State; or (3) to give a receipt against, or acknowledge satisfaction of a judgment, or decree, or bond, or other obligation, in another State; or (4) to do some other act which the Court could not effectually do by the direct and inherent operation of its own decree. The object of the writ is to enable the Court to act upon the person of the defendant in such cases. 1 Barb. Ch. Pr., 647; 651-652; 2 Dan. Ch. Pr., 1698, note; 2 Sto. Eq. Jur., §§ 1471-1472, note.

A writ of *ne exeat* would, also, be essential to justice (1) where, in a divorce suit, the defendant is threatening to take the children and his exempt property out of the State; or (2) where a trustee intends to leave the State with trust property in his possession or (3) where, under the Code, §§ 4283-4285, a discovery is sought; or (4) in any other case where the Court could not do complete justice without having the person of the defendant within its jurisdiction. See, *Smith v. Koontz*, 4 Hay., 189; *Cox v. Breedlove*, 2 Yerg., 516; *Denton v. Denton*, 1 Johns. Ch., 364.

Writs of *ne exeat* have issued in the following

cases: 1. Against a guardian to compel him to account. 14 Ency. Pl. & Pr., 321; and see, Code, § 2528; 2. Against a husband who has his goods packed, and is about to leave the State with another woman without making any provision for his wife, the complainant. 12 Ency. of Forms, 1054; 3. Against a defendant about to leave the State taking with him slaves, or other property of peculiar value. *Ibid*; 4. Against a defendant who has converted his property into money and is about to leave the State to avoid paying alimony or a trust debt. 16 A. & P. Ency. of Law, 378.

In these days of rapid transit, this writ may prove more efficacious, in many cases, than an injunction, or an attachment of property. Justice is dearer than the right to go abroad, and this writ should be awakened from its slumbers when it is necessary to prevent justice from being wrecked. And it is worth remarking in this connection, that neither our Constitution nor our statutes in any way lessen, limit, or impair, any of the powers, privileges, or jurisdiction, rightfully incident to a Court of Equity; Code, §§ 4279; 4481; 4488; but, on the contrary, its powers and jurisdiction have been greatly enlarged, and made more extensive and efficacious. See, *ante*, §§ 14-21.

<sup>11</sup> The entire practice relative to obtaining a writ of *ne exeat* is identical with that of obtaining a writ of injunction, and its repetition here is, therefore, unnecessary.

<sup>12</sup> See, *ante*, §§ 142, sub-sec. 2; 838-840.

<sup>13</sup> The amount need not be stated in a suit for alimony, or for an accounting. 12 Ency. of Forms, 1053.

<sup>14</sup> *Ibid*, 1056.

**MATERIAL ALLEGATIONS FOR A NE EXEAT IN SUIT AGAINST ADMINISTRATOR, GUARDIAN, OR OTHER TRUSTEE.**

That the defendant is largely indebted to complainant by reason of complainant's estate having gone into his hands, as guardian, [or executor, or administrator, or trustee,] but the exact amount he owes complainant can only be ascertained on a discovery from him and an accounting, but that defendant has not only refused to acquaint complainant with the amount of the estate he has received belonging to complainant, and account therefor, but has lately declared his intention to leave the State. Complainant avers that the defendant is justly indebted to him by reason of the premises in the sum of one thousand dollars, a large part, if not all of which, is in his possession, so complainant is informed and believes and so charges. The defendant has no property, known to complainant, subject to attachment.

It will be sufficient to allege that the defendant is threatening to leave, or to allege facts and circumstances evincing an intention to leave. The bill or petition must be sworn to, on personal knowledge of the party or person swearing to it, and not on mere information and belief. The affidavit as to the intent, threats, or circumstances showing an intent, to leave the State, may be made by a third person who personally knows the facts. The bill must pray expressly for the writ, if it is desired before the bill is filed; but, after the bill is filed, the writ may be applied for and obtained by a sworn petition, or by motion supported by affidavit.<sup>15</sup> The bill, petition, or affidavit, must state that it is the first application for a *ne exeat* in the case.<sup>16</sup> The following is the form of a

**PRAYER FOR A NE EXEAT.**

That the writ of *ne exeat republica* issue, to stay the said Richard Roe, [defendant,] from departing from or leaving the State without the express permission of your Honor's Court.

Upon a bill laying sufficient grounds for a *ne exeat*, and praying therefor, and duly verified by the complainant, or by some third person<sup>17</sup> having personal knowledge of the facts alleged, the Chancellor will, at Chambers, endorse his fiat for the writ, in the same manner as in case of an application for an injunction. If he refuses the writ, he will so endorse the bill. In either event, he will seal up the bill, and transmit it to the Clerk and Master, as in case of injunction bills.

**FIAT FOR A NE EXEAT.**

To the Clerk and Master, at Cleveland:

Issue a writ of *ne exeat* as prayed in the foregoing bill, upon the complainant giving bond therefor in the penalty of [naming the sum.<sup>18</sup>] The Sheriff will take a bail bond in the penalty of [double the debt claimed in the bill,] conditioned as required by law.

Aug. 13, 1890.

D. C. TREWHITT, Judge.

On receipt of the bill containing a fiat, and the execution of bond therefor by the complainant, the Clerk and Master will, at once, issue a

**WRIT OF NE EXEAT.**

State of Tennessee,

To the Sheriff of Bradley county:

Whereas, John Doe has filed a bill in the Chancery Court at Cleveland against Richard Roe, alleging among other things that said Richard Roe is justly indebted to him in the sum of [naming the amount. If the bill alleges any other ground of suit, state it briefly,] and that said Richard Roe designs quickly to leave the State, as by oath appears; and said John Doe praying for a writ of *ne exeat* to stay the departure of said Richard Roe.

Now, therefore, by the fiat of Hon. D. C. Trehwitt, Judge, to me directed, you are hereby commanded without delay to cause said Richard Roe to give a good and sufficient bail bond in the penalty of [amount named in the fiat,] conditioned not to leave the State of Tennessee, without the permission of said Court; and if said Richard Roe fail, or refuse, to give such bond, then you will commit him to the common jail of your county, there safely to be kept until he give such bond, or until the further order of said Court.

<sup>15</sup> 1 Barb. Ch. Pr., 648-650; 2 Dan. Ch. Pr., 1706-1709.

<sup>16</sup> Code, §§4434-4435.

<sup>17</sup> † Barb. Ch. Pr., 649-650.

<sup>18</sup> No bond seems to be required by the statute; but the Chancellor should require one similar to an attachment bond. 2 Dan. Ch. Pr., 1714.

You will report your action on this writ as soon as executed, and return with the writ said bond, if given.

Witness, [*&c.*, as in case of other writs.]

W. H. MCKAMY, C. & M.

§ 868. **Proceedings in Execution of a Ne Exeat.**—If the defendant fails to give the bond, he will be arrested, and committed to jail, as on a *capias*. Indeed, the writ of *ne exeat* is executed in all respects like a *capias*, and bond taken in the same way. The following is the form of a

#### NE EXEAT BAIL BOND.

We, Richard Roe, [*the defendant*,] and Robert Roe and Roland Roe, [*his sureties*,] acknowledge ourselves indebted to the State of Tennessee for the use of those entitled, in the sum of [*amount named in the writ*.]

But this obligation to be void if the said Richard Roe, who has been arrested upon a writ of *ne exeat* issued in the case of John Doe vs. Richard Roe, in the Chancery Court at Cleveland, shall not leave the said State without the permission of said Court.

As witness our hands [*&c.*, as in other bonds.]

The defendant may, if arrested, give bond at any time thereafter to the Sheriff, and be discharged; or, if the Court be in session, he may, by leave of the Court, give his bond to the Clerk and Master, or enter into a recognizance on the minutes, as in a criminal case.

The defendant may have the *ne exeat* discharged (1) for want of equity on the face of the bill, or (2) on a denial of the equity by a sworn answer, or (3) for want of a diligent prosecution of the suit, or (4) by paying into Court, or giving bond to pay, the amount sued for.<sup>19</sup> It may be stated, generally, that whatever would justify a dissolution of an injunction, or the discharge of an attachment of property, will justify the discharge of a *ne exeat*.

If the defendant has given bond, he must not leave the State without leave of the Court, or without having the writ discharged, or the Court will render judgment against him and the sureties on his bond for the penalty thereof, or for the debt, if it be less than the penalty. When the *ne exeat* is discharged, the Court orders the bond given by the defendant to be cancelled;<sup>20</sup> and if the Court considers that the writ was improperly obtained, it may direct an inquiry to the Master as to the damages sustained by the defendant, and may render judgment therefor upon the bond given by the complainant for the *ne exeat*.<sup>21</sup>

<sup>19</sup> 1 Barb. Ch. Pr., 655-657.  
<sup>20</sup> 2 Dan. Ch. Pr., 1712, note.

| <sup>21</sup> 2 Dan. Ch. Pr., 1714.

CHAPTER XLIII.

SUITS IN CHANCERY FOR ATTACHMENT OF PROPERTY.

ARTICLE I. Attachment Bills, and Proceedings Thereon.

ARTICLE II. Defences, Decrees, and Subsequent Proceedings.

ARTICLE I.

ATTACHMENT BILLS, AND PROCEEDINGS THEREON.

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| <p>§ 869. Office of an Attachment Bill.</p> <p>§ 870. When an Attachment Bill Will Lie.</p> <p>§ 871. Frame of an Attachment Bill.</p> <p>§ 872. What Bills Must Allege: "This is the First Application for an Attachment."</p> <p>§ 873. Form of an Attachment Bill.</p> <p>§ 874. Attachment Bond.</p> <p>§ 875. Who May Issue the Writ of Attachment.</p> <p>§ 876. Forms of Writs of Attachment.</p> | <p>§ 877. How the Defendant is Brought Into Court.</p> <p>§ 878. Amendment of Attachment Proceedings.</p> <p>§ 879. When an Amended, or an Ancillary, Attachment Bill Will Lie.</p> <p>§ 880. Ancillary Attachments.</p> <p>§ 881. A Garnishment Bill.</p> <p>§ 882. Property Attachable in Equity, but Not at Law.</p> <p>§ 883. Judicial Attachments.</p> |
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§ 869. **Office of an Attachment Bill.**—Ordinarily, a debtor must be brought before the Court by service of subpœna, and a judgment pronounced against him, before his property can be seized, or an execution issued against him. But when service of process is impossible, or difficult, or when the debtor is endeavoring to put his property beyond the reach of the creditor, the law not only dispenses with personal service of process upon the debtor, but, also, authorizes the seizure of his property before any decree adjudging him to be liable. The office of an attachment bill is to set forth such a state of facts as will entitle the complainant creditor to have the property of the defendant debtor seized, or otherwise impounded, at the very beginning of the suit, and held subject to the satisfaction of the complainant's demand, when ascertained by the Court, and fixed by its decree.

§ 870. **When an Attachment Bill Will Lie.**—Whenever any person<sup>1</sup> has a debt or demand due,<sup>2</sup> or a claim for damages, cognizable in the Chancery Court, he may file an original attachment bill, to have the property of the defendant debtor attached, in the following cases:

1. Where the debtor, or defendant, resides out of the State.<sup>3</sup>
2. Where he is about to remove, or has removed himself, or property, from the State.
3. Where he has removed, or is removing himself, out of the country privately.
4. Where he conceals himself, so that the ordinary process of law cannot be served upon him.

<sup>1</sup> The term, "person," in the statute includes not only natural persons, but also, officers, partnerships, corporations, counties, and the State. Code, § 50.

<sup>2</sup> An attachment may, in like manner, be sued out upon debts or demands not due, in any of the cases mentioned in this section, except in the case of a debtor or defendant residing out of the State. Code, § 3456.

Any accommodation endorser or surety may, in like manner, sue out an attachment against the prop-

erty of his principal, as a security for his liability, whether the debt on which he is bound be due or not. Code, § 3457.

<sup>3</sup> If the debtor and creditor are both non-residents, and residents of the same State, the creditor is not entitled to an attachment, unless the bill alleges that the property of the debtor has been fraudulently removed to this State to evade the process of the law in the State of their residence. Acts of 1871-2; Code, § 3455 a.

5. Where he absconds, or is absconding, or concealing himself or property.  
 6. Where he has fraudulently disposed of, or is about fraudulently to dispose of, his property.

7. Where any person, liable for any debt or demand, residing out of the State, dies, leaving property in the State.<sup>4</sup>

8. Where any non-resident, having choses in action or other property in this State, is indebted to another non-resident, who is himself indebted to a person resident or non-resident, such person, without having first recovered a judgment at law, may file a bill to have such choses in action or other property attached, making said non-resident debtors and the person in possession of the property defendants.<sup>5</sup>

9. Where a bill has been filed, and the subpoena has been returned "Not to be found in my county," as to all or any one of the defendants, residents of the county, the complainant may have an *alias* and *pluries* subpoena for the defendant, or, at his election, sue out attachment against the estate of such defendant. This attachment is called a *judicial* attachment; and, upon the return of the attachment levied on any property of the defendant, the cause proceeds against such defendant in all respects, as if originally commenced by attachment.<sup>6</sup>

10. What is termed an equitable attachment may be had, on the fiat of a Judge or Chancellor, against property described in the bill as in danger of being transferred or being removed from the jurisdiction of the Court, when (1) the complainant has a lien upon it, or (2) has a beneficial interest in it, or (3) has been deprived of it by fraud,<sup>7</sup> or (4) when it cannot be reached by execution,<sup>8</sup> or (5) when the party is indebted to the Court.<sup>9</sup>

§ 871. **Frame of an Attachment Bill.**—Inasmuch as a proceeding by an original attachment of property is purely statutory, and is, also, in derogation of the ordinary rights of the defendant under the law, the complainant is bound to substantially comply with the requirements of the statute, and to take the steps prescribed as a condition precedent to a valid decree. The bill must contain:

1. **A Statement of the Nature of the Debt or Demand Claimed.**<sup>10</sup> The bill should show what the debt or demand is based on, as that it is, (1) an account for goods, or for chattels, or for labor, or for professional services, or for board, or for rent; or (2) for money loaned, had, or received; or (3) that it is based on a note of hand, due bill, bill of exchange, stated account, insurance policy, or other written evidence of debt; or (4) that it is founded on a breach of contract, specifying the breach.

2. **The Amount of the Debt or Demand.** The precise amount of the debt or demand sued for should be stated. An attachment will not lie for an indefinite amount of indebtedness. The officer executing the writ cannot determine the amount of the defendant's property to seize, unless the writ specifies the exact amount of the complainant's claim. If, from the nature of the case, or the complication of accounts and dealings, the complainant is unable to state the exact amount due, it will be sufficient for him to state in his bill that the amount is *about* the sum named, or is such an amount, more or less.<sup>11</sup>

3. **An Averment that the Claim is Just.** While it is the safer rule to specifically aver that the claim sued on is just, using the very words of the statute, nevertheless, if the other averments of the bill clearly show that the claim is

<sup>4</sup> Code, §§ 3455; 3461.

<sup>5</sup> Code, § 3461 *a*. Attachments in all the foregoing cases are called original attachments.

<sup>6</sup> Code, §§ 3466-3467. A return, "The defendant not found in my county," will not authorize this writ. The return must be, "The defendant not to be found in my county." *Welsh v. Robinson*, 10 Hum., 264. The publication cannot be made until after the return day specified in the subpoena. *Grewer v. Henderson*, 1 Tenn. Ch., 76.

<sup>7</sup> *McKeldin v. Gouddy*, 7 Pick., 677; *August v. Seeskind*, 6 Cold., 166.

<sup>8</sup> See, *post*, §§ 1005-1035.

<sup>9</sup> *Rutland v. Cummings*, 7 Hum., 279.

<sup>10</sup> Code, § 3469; *Sullivan v. Fugate*, 1 Heisk., 20. This is a leading case. 1 Meigs' Dig., § 251.

<sup>11</sup> *Dougherty v. Kellum*, 3 Lea, 646.

a just one, the failure to state that the debt or demand sued on is a just one will not affect the validity of the proceeding.<sup>12</sup>

4. **An Allegation of One or More of the Statutory Grounds of Attachment.** If the bill fails to show a statutory cause of attachment, the whole proceeding will be void, unless there be grounds outside of the attachment on which to sustain the jurisdiction of the Court. The bill may, however, state in the alternative, or otherwise, more than one of the causes for which an attachment may be sued out.<sup>13</sup> But a cause of attachment cannot be joined in the alternative with a fact that is not a cause for an attachment.<sup>14</sup>

5. **An Allegation That the Bill is the First Application for an Attachment in the Case.** This is necessary, if the bill seeks to attach the equitable property of the defendant. Whether it is necessary, in a bill to attach property attachable at law, will be hereafter considered;<sup>15</sup> but, until the Supreme Court decides otherwise, it is prudent to make such allegation in all attachment bills.

6. **The Owners of Both the Legal and the Equitable Titles Must be Made Parties, When.** If the bill seeks to attach the equitable property of the defendant, the owner of the legal title must be made a party.<sup>16</sup> On the other hand, if the bill seeks to attach the legal property of the defendant, and this property is encumbered by any Equity such as a vendor's lien, mechanics' lien, or other statutory lien, the owner of such encumbrance must be made a party.<sup>17</sup>

7. **The Property Sought to be Attached Must be Described, When.** In all cases of equitable attachment the property must be described; and it is well to describe it, where known, in a bill for a legal attachment: in either case the bill will be a lien on the described property by *lis pendens* from the filing of the bill.<sup>18</sup>

8. **The Bill Must be Sworn to.** The affidavit to the bill is an indispensable pre-requisite to the issuance of an attachment: Until the affidavit is made, there is no authority for the issuance of an original attachment: and if it is issued without the affidavit, it is a nullity.<sup>19</sup> But if the defendant appears and answers, without taking proper steps to have the bill dismissed, or the attachment discharged, it would seem to be a waiver of the affidavit;<sup>20</sup> and the absence of an affidavit, in such a case, would not affect the validity of the decree.<sup>21</sup> If the bill is not sworn to before the issuance of the attachment, the subsequent verification of the bill will not so retroact as to validate the invalid writ.<sup>22</sup>

The affidavit to the bill may be made by the complainant's agent or attorney, and the authority of the latter to act will be presumed in the absence of evidence that he was not authorized to swear to the bill.<sup>23</sup> The ground of attachment must be positively averred in the bill. An allegation that "complainant is informed and believes that" a particular ground exists, without a positive averment that such ground does, in fact, exist, would tender an immaterial issue, and would be insufficient.<sup>24</sup> The ground of attachment must be directly and positively averred, so as to tender an issue of *fact*, and not an issue as to whether complainant had *information*, or *believed*, that the fact was so and so. But, when the bill directly avers one or more causes of attachment, it may be sworn to "on information and belief."

An attachment bill is both an affidavit and a pleading; as an affidavit, it must contain the necessary statutory statements specified in the Code, § 3469; and as a pleading, it must specify a cause of action cognizable in the Court where filed.

12 *Alston v. Sharp*, 2 Lea, 523; *Boyd v. Gentry*, 12 Heisk., 628; *Lowenstine v. Gillespie*, 6 Lea, 643; *Hart v. Dixon*, 5 Lea, 336.

13 Code, § 3470.

14 *Haynes v. Powell*, 1 Lea, 352; *Jackson v. Burke*, 4 Heisk., 610.

15 See, *post*, § 872.

16 See, *ante*, § 127.

17 *Ibid.*; *Jackson v. Coffman*, 2 Cates, 271.

18 See note 43, *infra*.

19 *Watt v. Carnes*, 4 Heisk., 532; *Maples v. Tunis*, 11 Hum., 108.

20 *Johnson v. Luckadoo*, 12 Heisk., 270.

21 The object of the attachment proceedings is to get jurisdiction of the defendant; and, if he appears and answers, he cannot afterwards have the suit dismissed because the attachment was a nullity; he may, however, have a void attachment discharged.

22 *Watt v. Carnes*, 4 Heisk., 532.

23 Code, § 3469; *Baker v. Huddleston*, 3 Bax., 1.

24 *Nelson v. Fuld*, 5 Pick., 466. This case holds that the allegations must be of a fact susceptible of issue and proof; and overrules *Bank v. Berry*, 2 Hum., 443.

There must be an act already performed, or one to be performed, the preliminary steps or circum-



§ 872. **What Bills must Allege** "This is the First Application for an Attachment."—Code, sections 4434-4435 require the party applying for an attachment to state in his bill or petition that it is the first application for such process.

These sections are substantially the Act of 1821, ch. 7, Sec. 1, and the Act of 1835, ch. 4, Sec. 9, with the word "attachment" interlined in the Act of 1821; and while, out of abundant caution, Solicitors have construed the word to include ordinary statutory attachments of property, it is very doubtful whether this construction is supported by the context.

1st. Attachments of property in the Circuit and Justices' Courts require no statement as to "first application."<sup>24a</sup> Besides, in these Courts *alias* or *second* writs of attachment of property are granted, on mere motion, without new bond or affidavit;<sup>25</sup> and judicial attachments of property also issue without new bond, or any affidavit.<sup>26</sup>

2d. But if these Code sections (4434-4435), apply to ordinary attachments of property in the Chancery Courts, then they equally apply to attachments of property in both the Circuit and Justices' Courts by the express requirement of the Code;<sup>27</sup> and as they are not construed to apply to the latter Courts they should not be applied to the Chancery Courts. Code, section 4435, requires the statement as to the "first application" to be made in the *bill*, or *petition*, whereas, in attachments of property in the Circuit Courts, and in suits before Justices of the Peace, there is neither bill nor petition but a mere affidavit whose substance is prescribed,<sup>28</sup> thus showing conclusively that the section (4435), does not refer to ordinary attachments of property in any Court. Again, in attachments of property in the Circuit Court, and before Justices of the Peace, the Clerk of the Court, or the Justices of the Peace, respectively, grant the attachments, and the fiat of a Judge, or Chancellor, is not necessary.<sup>29</sup> Why then the necessity of such a fiat in Chancery? Indeed, in ordinary statutory cases of attachment of property in Chancery, the Clerk and Master can grant the writ without the fiat of the Chancellor, another reason why ordinary attachments of property are not meant by said Code sections.<sup>30</sup>

On the other hand, there are some good reasons why the word "attachments" does not mean attachments of the *person*.

1st. The practice is to issue such attachments without any bill, petition or fiat.

2d. Attachments of the person to compel an answer to a bill are issued on mere motion supported by the return on the subpoena, and not on a bill or petition.<sup>31</sup>

3d. A second attachment of the person to compel an answer is granted, as of course, on forfeiture of bail,<sup>32</sup> without bill, or petition, or fiat.

4th. An attachment of the person to enforce a decree issues without bill, petition or fiat, upon the officer's return, or upon affidavit.<sup>33</sup>

But there are attachments that satisfy all the requirements of the sections under consideration, to-wit, *equitable* attachments of property.

stances of which have already been developed and become capable of proof. *McHaney v. Cawthorne*, 4 Heisk., 508; *Jackson v. Burke*, 4 Heisk., 610.

<sup>24a</sup> Code, §§ 3469-3477. No good reason occurs why this statement should be required in the Chancery Courts and not in the Circuit and Justices' Courts.

<sup>25</sup> Code, § 3517. This is in direct contradiction of § 3435, if the latter refers to ordinary statutory attachments of property.

<sup>26</sup> See, *ante*, § 870, sub-sec. 9; *post*, § 883.

<sup>27</sup> Code, §§ 3766, 4454. The latter section says, "The provisions of this article, [Article VIII, which includes said sections 4434-4435] will apply to all includes said sections 4434-4435] will apply to all cases in any of the Courts in which the extraordinary process herein provided for may be resorted

to;" and § 3766 is to the same effect. Besides *ordinary* attachments of property are not "herein provided for," but are provided for in a preceding Chapter, devoted to the subject, and wholly foreign to Chancery practice. Code, §§ 3455-3538.

<sup>28</sup> Code, § 3469.

<sup>29</sup> Code, § 3474. In *Green v. Lanier* the failure to allege that the bill was the first application for an attachment was considered a mere irregularity. 5 Heisk., 662.

<sup>30</sup> Code, §§ 4434-4435.

<sup>31</sup> Code, § 4361; *Ch. Rule*, VII, § 8. See, *ante*, § 201.

<sup>32</sup> Code, § 4363. See, *ante*, § 203.

<sup>33</sup> Code, § 4479. See, *ante*, § 652.

1st. Equitable attachments of property can issue only on the fiat of a Chancellor, or Judge.<sup>34</sup>

2d. Such attachments are technically "extraordinary" process in the meaning of said sections.<sup>35</sup>

3d. They are issued exclusively by the Chancery Courts.<sup>36</sup>

4th. They are leviable on equitable interests, whereas ordinary attachments are not leviable on any but legal interests.<sup>37</sup>

5th. They are issuable under the inherent jurisdiction of the Chancery Court, where property is in danger of being transferred, or removed beyond the jurisdiction of the Court, and complainant (1) has a lien on it, or (2) has a beneficial interest in it, or (3) has been deprived of it by fraud.<sup>38</sup> Process, in a case like this, is eminently and technically "extraordinary," within every intent and requirement of the sections in question.<sup>39</sup>

6th. Inasmuch as Code, sections 4283-4291, authorize equitable attachments of property by *lis pendens*, such attachments may well have been included in the sections in question (4434-5) so as to require the fiat of the Chancellor, and thereby attain more force and dignity.

But in view of the present practice<sup>40</sup> and the uncertainty as to the requirement of the statute, the only safe course for Solicitors is to put said allegation in all bills and petitions praying an attachment of property, whether of a legal or equitable nature.

§ 873. **Form of an Attachment Bill.**—An attachment bill should be as full, particular, and specific, in its averments of the nature, origin and history of the cause of suit, as an ordinary original bill; but, inasmuch as it is generally drawn in haste, it is, for that reason, frequently more brief and pointed than an ordinary bill. The frame and form of the bill may be easily understood by the following:

**GENERAL FORM OF AN ATTACHMENT BILL.**

To the Hon. John P. Smith, Chancellor, holding the Chancery Court at Morristown:  
John Doe, a resident of Hamblen county, complainant,

*vs.*

Richard Roe, a non-resident of the State.

The complainant respectfully shows to the Court:

I.

That the defendant is justly indebted to him in the sum of [*stating the amount, and specifying the nature and character of the debt or demand, whether it is based on a note, account for work and labor done, goods sold, services rendered, breach of contract, or other matter.*]

II.

The defendant resides out of the State, [*or has done, or is doing, some other act that entitles the complainant to an original attachment. In setting out the ground of attachment, use the very language of the Code.*]

III.

That the defendant is the owner of the following property situated in the County of Hamblen: [*Here specify the property particularly, and give its locality. This will give you a lien on it from the filing of the bill.*] The defendant may be the owner of other property in the State, which is not now known to complainant.

IV.

The premises considered, complainant prays:

1st. That an attachment issue and be levied on the property of the defendant above described, and on any other property that may be found, belonging to him, of value sufficient to satisfy complainant's said debt, and the costs of the cause.

<sup>34</sup> See, *post*, § 875.

<sup>35</sup> An ordinary attachment under the general attachment laws cannot, technically, be considered "extraordinary" process, from the standpoint of Equity practice, but is, technically, a statutory process in ordinary use both at law and in Chancery.

<sup>36</sup> See, *post*, § 875.

<sup>37</sup> Lane v. Marshall, 1 Heisk., 34; Rice v. O'Keefe, 6 Heisk., 646; Lyle v. Langley, 6 Bax., 287; Hillman v. Werner, 9 Heisk., 587; and see, *post*, § 875.

<sup>38</sup> McKeldin v. Gouldy, 7 Pick., 677; Rutland v. Cummins, 7 Hum., 279; *post*, § 875: In ordinary cases of attachment of property a seizure of the property is essential to the jurisdiction of the Court, but in cases of equitable attachment such is not the case. August v. Seaskind, 6 Cold., 165; Avery v.

Warren, 12 Heisk., 562; and this explains Code, §§ 4345-4346, where it is said that "the mode of service of an attachment ["in the practice of Chancery Courts"] shall be by reading the same to each defendant named therein." This creates a lien by *lis pendens*.

<sup>39</sup> Graham v. Merrill, 5 Cold., 622; August v. Seaskind, 6 Cold., 166. The Code provides that such an attachment shall be served, not necessarily by a levy, but by reading it to the defendant, or if he evade service by leaving a copy at his usual residence; §§ 4345-4346. The lien in such a case would arise from the *lis pendens*. See, *ante*, § 66.

<sup>40</sup> The maxim, *communis error facit jus*, will hardly apply in such a case.

2d. That on such levy being made, publication be made for the defendant according to law in attachment cases, requiring him to answer the bill, but his oath to his answer is waived.

3d. That, if the defendant at any time comes into this State, a subpoena to answer be issued, and served on him.

4th. That complainant be granted a decree for the amount due him on said note, [account, or other ground of indebtedness, stating it,] principal and interest, and that the property attached be sold in satisfaction of the decree.

5th. That complainant have such further and other relief as he may be entitled to.

This is the first application for an attachment in this case.<sup>41</sup>

NAT B. JONES, Solicitor.

[Annex affidavit and jurat, as in the following form.]

The following is an illustration of an attachment and garnishment bill, combined with a bill for discovery and relief:

#### ATTACHMENT AND GARNISHMENT BILL.<sup>42</sup>

To the Honorable Thomas M. McConnell, Chancellor, holding the Chancery Court at Chattanooga:

John Doe, a resident of Hamilton county, complainant,

*vs.*

Richard Roe, a non-resident of the State, and John Smith and Sarah Smith, his wife, both residents of Hamilton county, George Jones, a resident of Polk county, and John Brown, a resident of Meigs county, defendants. }

The complainant respectfully shows to the Court:

I.

That the defendant, Richard Roe, is justly indebted to him in the sum of ten thousand dollars, being the amount of a promissory note, this day paid by complainant as surety for said Roe, on a note of hand executed by him, and by complainant as his surety, to the First National Bank of Chattanooga. Said note is herewith filed as an exhibit, and marked A, and made a part of the bill; and will be read at the hearing.

II.

That said defendant, Richard Roe, resides out of the State of Tennessee, and is a citizen and resident of the State of Georgia; [or, that he is about to remove, or has removed himself or property, from the State; or, that he has removed, or is removing himself out of the county privately; or, that he conceals himself so that the ordinary process of law cannot be served upon him; or, that he absconds, or is absconding, or concealing himself or property; or, that he has fraudulently disposed of, or is about to fraudulently dispose of, his property. *More than one cause of attachment may be alleged, in the alternative, or otherwise.*]

III.

That said defendant, Roe, is the legal owner of the house and lot, No. 816, Seventh street, Chattanooga, worth about one thousand dollars, being the lot purchased by him from William Jones, by deed registered in the Register's office of Hamilton county, June 10, 1890, in book K, on pages 561-562.<sup>43</sup>

IV.

That said Richard Roe has an equitable interest in the house and lot, No. 963 Eighth street, Chattanooga, which he sold to his co-defendant, John Smith, and being the lot whereon the latter now resides. The legal title to said lot was, however, vested by the deed in the defendant, Sarah Smith, who is the wife of said John Smith; and he, the said John Smith, executed to said Roe a note for one thousand dollars, the balance of the purchase-money due for said house and lot, to secure the payment of which balance the said Roe retained an express lien in the deed he made said Sarah Smith for said property. Said note by said Smith to said Roe is overdue; and complainant charges that it is in the possession of said Roe, and is the property of said Roe.

V.

That the defendant, John Smith, is otherwise largely indebted to said Roe, as complainant is informed and verily believes, and has in his possession various evidences of debt, choses in action, and other property, and assets of the said Richard Roe.

VI.

That the defendant, George Jones, who is a citizen and resident of Polk county, has in his hands various choses in action, and claims, and other property and assets belonging to defendant Roe, and is, also, as complainant is informed, believes, and charges, largely indebted to said Roe, who left his business in the hands of said Jones when he, Roe, left this

<sup>41</sup> See preceding section as to this allegation.

<sup>42</sup> See Judgment Creditors' Bills, §§ 1005-1027.

<sup>43</sup> Any transfer, sale, or assignment, made after the filing of an attachment bill in Chancery, or after the suing out of an attachment at law, of property mentioned in the bill, or attachment, as against the complainant shall be inoperative and void. Code, § 3507. The filing of the bill does not, however, create a lien; it operates rather as a *lis pendens*,

during which all transfers are void. *Sharpe v. Hunter*, 7 Cold., 389. But, practically, the filing of the bill is equivalent to a lien upon the property mentioned in it. *Lacey v. Moore*, 6 Cold., 348; *Vance v. Cooper*, 2 Heisk., 93. This lien, however, does not apply to a contest between creditors: it is confined to sales or transfers by the debtor. *Bank v. Mitchell*, 2 Shan. Cas., 58.

State and moved to Georgia. The said Jones has a schedule of the debts due the defendant Roe, in Tennessee, as complainant is informed and verily believes; and said Jones is fully conversant with said Roe's business.

## VII.

That the defendant, John Brown, sold to the defendant, Roe, the house and lot, No. 83 Fifth street, Chattanooga, worth about three thousand dollars, and gave him a bond for title. The defendant, Roe, has fully paid for said house and lot, but has not received from said Brown any deed therefor. The said Brown resides in Meigs county, and is made a party for the purpose of having the legal title to said house and lot divested out of him, and vested in the purchaser at the sale hereinafter prayed,<sup>44</sup> and for the other purposes herein set forth.

## VIII.

Therefore, the premises considered, complainant prays:

1st. That all those named as defendants in the caption of this bill be made such by service of subpoena on the residents, and by publication as to Richard Roe, who is a non-resident, and that they all be required to answer the bill.

2d. That an attachment be issued and levied on all the right, title, and interest, legal and equitable, the defendant, Richard Roe, has in and to each of the three houses and lots described in the bill, and any other attachable property belonging to him that may be found; and that, after the levy of such attachment, publication be made notifying him thereof, and requiring him to appear and defend this suit at the first rule day coming seven or more days after the last publication; but his oath to his answer is waived. If said Roe at any time comes into the State, let a subpoena be served upon him.

3d. That the defendant, George Jones, answer fully and particularly, on oath, what notes, accounts, claims, or other evidences of debt, or other property, were left with him, or in any way put into his possession, or under his control, by the defendant, Richard Roe, at or about the time the latter left Chattanooga, or since; and what has become of them, specifying all such property belonging to said Richard Roe, or in which he has any interest whatever, giving full particulars, the kind, and amount, and where now deposited. He will, also, answer fully and particularly how much he has collected for said Roe, since the latter left Chattanooga, from whom the several amounts have been collected, and how much was in his hands when the writ in this cause was served on him, and from whom collected, or from what source received, belonging in whole, or in part, to said Roe. And the defendant, Jones, will make a full, detailed, and specific, exhibit of the state of his accounts with, and of his indebtedness to, said Roe, at the day of the filing of this bill.

4th. That all the other defendants be required to answer as garnishees, on oath, and fully discover: (1) Wherein, and in what amounts, they, or any of them, were indebted to their co-defendant, Richard Roe, at the time the subpoena was served upon them in this cause. (2) What property, debts, and effects of said Roe were in the possession, or under the control, of either of them at said time, or at any time since; and they will specify the kind and amount of each and all of said items of property. (3) What property, debts and effects of said Roe are to their knowledge and belief in the possession or under the control of any other, and what person or persons, specifying the kind and amount. Each of said defendants will answer separately for himself, or herself, and will specify every debt, note of hand, or other chose in action, every account, claim, or other asset, and the kind and character of any other property in the possession or under the control of either of them belonging to said Richard Roe, or in which he has any interest whatever, giving full particulars.

5th. That all the property, choses in action, and effects of the defendant Roe, in the hands of the defendants John and Sarah Smith, Jones, and Brown, and all of the debts due from said John and Sarah Smith, Jones, and Brown, to said Roe, be attached in their hands as garnishees; and that said John and Sarah Smith, Jones, and Brown, be required and enjoined not to pay any debt due by either of them, or that may hereafter become due, to said Roe, or to any one for him; and to retain in their possession all the property of the said Roe now or hereafter in their custody, or under the control of either of them.<sup>45</sup>

6th. That a decree be pronounced in complainant's favor against said Roe for the full amount due from him to complainant by reason of the premises; that all of the property attached, and all of the amounts due from the defendants, John and Sarah Smith, Jones, and Brown, to said Roe, or so much thereof as may be necessary, be subjected to the satisfaction of such decree.

7th. That the said lot belonging to the defendant Roe in fee, and the said lot whereon he has a vendor's lien, and the said lot for which he has a title-bond, be sold to satisfy said decree; that said sales be on a credit of not less than six months, nor more than two years, and in bar of all right of redemption.

8th. That, if necessary, a receiver be appointed to collect, or convert into money, any debts, notes, or other choses in action, or property, belonging to the defendant Roe, in the hands or under the control of the other defendants.

9th. That all necessary orders be made, and all necessary accounts be taken, to ascertain

<sup>44</sup> When equitable property is sought to be reached by an attachment, the bill should proceed against it as such, and make the holder of the legal title a party. *Lane v. Marshal*, 1 Heisk., 34; *Rice v.*

*O'Keefe*, 6 Heisk., 646; *Lyle v. Longley*, 6 Bax., 287; *Hillman v. Werner*, 9 Heisk., 587.

<sup>45</sup> Code, §§ 3478-3480.

the true amount due complainant, and to adjust any and all equities between the defendant Roe and any of his co-defendants.

10th. And that complainant have such other, further, and general relief as he may be entitled to under the pleadings and proof in the cause.

This is the first application for either an attachment, or an injunction, in this cause.

W. M. H. DEWITT, Solicitor.

State of Tennessee, }  
Hamilton county. }

W. H. DeWitt makes oath that he is the Solicitor<sup>46</sup> of John Doe, the complainant in the foregoing bill, and that the statements in said bill are true, of his own knowledge, except those made as on information and belief, and those he believes to be true.

W. M. H. DEWITT.

Sworn to and subscribed }  
before me July 14, 1890. }

J. B. RAGON, C. & M.

To the Clerk and Master at Chattanooga:

Issue writs of attachment and injunction<sup>47</sup> as above prayed, on proper bonds being given therefor.

July 14, 1890.

S. A. KEY, Chancellor.

To the Clerk and Master:

The defendant, Richard Roe, may be in Hamilton county in a few days, and you will issue a subpoena for him to the Sheriff of said county, framed according to the statute.<sup>48</sup>

W. H. DEWITT, Solicitor.

§ 874. **Attachment Bond.**—It is the duty of the officer to whom application for an attachment is made, to require the complainant, his agent or attorney, to execute a bond in double the amount claimed to be due, with sufficient security, payable to the defendant, and conditioned that the complainant will prosecute the attachment with effect, or, in case of failure, pay the defendant all costs that may be adjudged against him, and also, all such damages as he may sustain by the wrongful suing out of the attachment. The affidavit and bond must be filed, by the officer taking them, in the Court to which the attachment is returnable, and shall constitute a part of the record in the cause.<sup>49</sup> The following is the form of an

#### ATTACHMENT BOND.

We, A, [*the complainant,*] B and C [*his sureties,*] acknowledge ourselves indebted to D & E, [*the defendants,*] in the sum of [*double the amount claimed to be due*] dollars. But this obligation to be void if the said A shall prosecute with effect an attachment this day obtained by him in the Chancery Court at Kingston, against the property of said D and E, or in case of failure shall pay all costs that may be adjudged against him, and, also, all such damages as the defendants may sustain by the wrongful suing out of said attachment. [*To be dated, signed, and witnessed.*]

An attachment suit may be prosecuted under the pauper oath.<sup>50</sup> If the bond be defective, or even if there be no bond, the Court will allow the complainant to give a sufficient bond;<sup>51</sup> and, on such bond being given, it relates back to the date of the writ, and validates the levy made under it.<sup>52</sup>

§ 875. **Who may Issue the Writ of Attachment.**—The writ of attachment may be granted, signed, and issued, by any Judge of a Circuit, Criminal, or Special Court, by any Chancellor, or Justice of the Peace,<sup>53</sup> or by the Clerk

<sup>46</sup> This affidavit may be made by the agent or Solicitor of the complainant. Code, § 3469.

<sup>47</sup> Attachments may be granted by any Chancellor, or by any Judge of a Circuit, Criminal, or Special Court. Code, §§ 4434; 3463. Where one or more of the statutory grounds for an original attachment is alleged, the Clerk and Master may issue an attachment without a fiat; but where the bill seeks to set aside a fraudulent conveyance, or other devices to hinder and delay creditors; August *v.* Seeskind, 6 Cold., 172; or where the attachment is not original or ancillary, but merely incidental to the enforcement of some right, as in foreclosing a deed of trust, the attachment can be granted only by the Court, or a Judge, or Chancellor; and if issued by the Clerk and Master, on his own fiat, it is void. Dillin *v.* O'Donnell, 4 Bax., 213. See, *post*, § 875.

<sup>48</sup> Code (M. & V.), § 4203. Upon application of the complainant the Clerk will issue a subpoena against the defendant; and, if it is executed, no publication shall be made. The original attachment becomes merely ancillary as soon as the subpoena is served.

<sup>49</sup> Code, §§ 3471-3472.

<sup>50</sup> Barber *v.* Denning, 4 Sneed, 267. In this case, the Court refers to the hardship that "might result to those who are unable to bear the expenses of a lawsuit, or give security for the necessary process, if the doors of the Courts were shut against them for want of ability to give the required security for costs and damages." It would seem from this that it would be prudent for a complainant, who seeks an attachment under the pauper oath, to make oath that owing to his poverty he is not able to bear the expense of the action, or give security for the attachment prayed, and that he is justly entitled to the redress sought.

<sup>51</sup> Code, § 3477; Lillard *v.* Carter, 7 Heisk., 604. The bond should be allowed to be given even after a motion has been made to dismiss the suit, or discharge the attachment, for want of a sufficient bond.

<sup>52</sup> Brooks *v.* Hartmann, 1 Heisk., 36. In a suit by a firm the bond may be signed in the firm name. *Ibid.*

<sup>53</sup> Thompson *v.* Carper, 11 Hum., 543.

and Master of the Court in which the bill is filed.<sup>54</sup> There is no need of the fiat of a Judge to authorize the Clerk and Master to issue an original or ancillary attachment in any case where, had the suit been brought in the Circuit Court, the writ could have been issued by the Clerk of that Court.<sup>55</sup> The only cases where a fiat of a Judge or Chancellor is necessary are: 1, Where the bill is filed to set aside a fraudulent conveyance of property, or other devices resorted to for the purpose of hindering and delaying creditors;<sup>56</sup> and 2, Where the writ is not authorized by the attachment law, but is issued under the inherent powers of the Court,<sup>57</sup> or in pursuance of authority conferred on the Court by some statute other than the one authorizing original attachments.<sup>58</sup> Where the bill seeks to reach the equitable estate of the debtor, and makes the holder of the legal title a party merely in order to divest him of that title, it is prudent, if not necessary, to have a fiat for the attachment prayed.<sup>59</sup>

§ 876. **Forms of Writs of Attachment.**—The writ must be adapted to the state of facts on which it is based, and the character of the officer by whom it is granted, issued, and signed. The form of the writ,<sup>60</sup> when issued by the Clerk and Master, without a fiat, is as follows:

**WRIT OF ATTACHMENT BY THE CLERK AND MASTER.**

State of Tennessee, }  
Knox county. }

To the Sheriff of Knox county:

Whereas, A B has filed a sworn bill of complaint, in the Chancery Court at Knoxville, against C D, stating therein that said C D is justly indebted to him in the sum of four hundred dollars, and alleging a cause of attachment against the estate of said C D, and said A B, having given bond as required by law in attachment cases, and having prayed an attachment against said estate, you are therefore hereby commanded to attach so much of the estate of the said C D as will be of value sufficient to satisfy said debt, and the costs of the suit; and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon at the next term of said Chancery Court, to be held on the fourth Monday of November next; when and where you will make known how you have executed this writ.

Witness, W. L. Trent, Clerk and Master of said Court, this August 2, 1891.

W. L. TRENT, C. & M.

If the attachment is granted, signed, and issued by any officer other than the Clerk and Master, without a fiat, its recital and termination should be as follows:

**FORM OF WRIT WHEN ISSUED BY A JUDGE, CHANCELLOR, OR JUSTICE OF THE PEACE.**

State of Tennessee, }  
Knox county. }

To the Sheriff of Knox county:

Whereas, A B has presented to me, E F, Judge, [Chancellor, *or*, Justice of the Peace,] his bill of complaint duly sworn to, stating therein that C D is justly indebted to him in the sum of four hundred dollars, and alleging a cause of attachment against the estate of said

<sup>54</sup> Code, § 3463; *August v. Seeskind*, 6 Cold., 178.  
<sup>55</sup> *Allen v. Gilliland*, 6 Lea, 529.

<sup>56</sup> Code, § 4288-4289; *August v. Seeskind*, 6 Cold., 166. An attachment, on the ground that the defendant has fraudulently disposed of his property, (Code, § 3455, sub-sec. 6), is quite a different sort of attachment from that granted on a bill to set aside a fraudulent conveyance, under Code, § 4288. *Tarbox v. Tonder*, 1 Tenn. Ch., 166.

<sup>57</sup> *Dillin v. O'Donnell*, 4 Bax., 213. The attachment in this case was to impound trust property. See, *post*, § 882.

<sup>58</sup> As where the writ is necessary to secure the property in a replevin suit; Code, § 3392; or is necessary to impound property in aid of a creditor, under Code, §§ 4282-4287; *Graham v. Merrill*, 5 Co'd., 622; 638; or is issued under some statute giving a lien on property to secure mechanics, laborers, furnishers and others. *Brooks v. Gibson*, 7 Lea, 271; *Lane v. Wood*, 1 Shan. Cas., 648; *Lumber Company v. Loeb*, 2 Cates, 251. For statutory liens, see, *post*, § 1037.

<sup>59</sup> See *Lane v. Marshall*, 1 Heisk., 30. See, *ante*, § 872; and *post*, § 876.

<sup>60</sup> The following is the statutory form of the writ of attachment:

State of Tennessee, \_\_\_\_\_ County }

To the Sheriff \_\_\_\_\_ County, Greeting:

Whereas, A B, (or C D, as the agent or attorney of A B), hath complained on oath to me, E F, Judge, (Chancellor, Justice of the Peace, or Clerk,) that G H is justly indebted (or liable) to the said A B in the sum of \_\_\_\_\_ dollars; and affidavit having also been made in writing, and bond given, as required by law in attachment cases, you are hereby commanded to attach so much of the estate of the said G H as will be of value sufficient to satisfy the debt and costs according to the complaint; and such estate, unless replevied, so as to secure that the same may be liable to further proceedings thereon, to be held at the \_\_\_\_\_ Court, to be held for the County of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ next (or before a Justice of the Peace of \_\_\_\_\_ County, on the \_\_\_\_\_ day of \_\_\_\_\_), when and where you will make known how you have executed this writ.

Witness, E F, Judge of the \_\_\_\_\_ Court, (Chan-

C D, and bond<sup>61</sup> having been given as required by law in attachment cases, you are, therefore, hereby commanded [etc., as in the preceding form, down to]

Witness, E F, Judge of the Circuit Court, [Chancellor, or, Justice of the Peace,] this September 23, 1890.  
E F, Judge, [Chancellor, or, Justice of the Peace.]

If the writ is granted, signed and issued by a Judge, Chancellor, or Justice of the Peace, he should endorse that fact<sup>62</sup> on the bill, and forthwith file the bill, and the attachment bond, in the Court to which the attachment is returnable.<sup>63</sup> If the Judge or Chancellor merely endorses the fiat on the bill to the Clerk and Master to issue the writ, then the latter will take the bond. The following is the form of a

#### FIAT FOR AN ATTACHMENT.

To the Clerk and Master of the Chancery Court at Knoxville:

Issue a writ of attachment, as prayed in the foregoing bill, on complainant giving a bond therefor as required by law, [or, taking the pauper oath.]

Sept. 23, 1890.

S. T. LOGAN, Judge.

The following is the

#### FORM OF WRIT WHEN BASED ON A FIAT.

State of Tennessee, }  
Knox county. }

To the Sheriff of Knox county:

Whereas, A B has filed a sworn bill of complaint, in the Chancery Court at Knoxville, against C D, stating therein that said C D is justly indebted to him in the sum of four hundred dollars, and alleging a cause of attachment against the estate of C D, and [that said C D owns the following property in your county: *here copy the description in the bill*] and praying that [said property and] the [other] property of said C D be attached:

And whereas, the said A B has obtained a fiat from the Hon. S. T. Logan, Judge, directing me to issue the attachment as prayed, on bond being given, [or pauper oath being taken,] as required by law in attachment cases:

Now, therefore, you are hereby commanded to attach [the above described property and] so much of the [other] estate of the said C D as will be of value sufficient to satisfy said debt and the costs of the suit [*&c., as in the preceding form.*]

If the bill does not describe any particular property, and specially pray that it may be attached, the attachment will issue against the defendant's property generally, omitting the words in parenthesis in the foregoing form.

The officer granting the attachment may direct counterpart writs of attachment to issue to any county where property of the defendant may be found.<sup>64</sup> It would be well to pray for such counterparts in the bill.

§ 877. **How the Defendant is Brought into Court.**—In original attachment suits, when no subpoena is served on the defendant, he must be brought before the Court, both by a levy of the attachment upon his property and by publication duly made. As soon as the writ of attachment is returned, with a levy endorsed thereon, the Clerk will enter on his rule docket an order of publication,<sup>65</sup> in substance, as follows:

cellor, Justice of the Peace, or Clerk) this — day of —, 18—.

The Code says the writ shall be substantially in this form, thus showing that its *substance* is more to be considered than its *phraseology*. If the essentials are in the writ, it is sufficient. Code, §§ 3473-3477. These essentials are: 1, The style of the writ, "State of Tennessee;" 2, The address, "To the Sheriff of (the proper county);" 3, The fact that a sworn complaint has been made in writing against the defendant, alleging that a just indebtedness exists; 4, The amount of such indebtedness; 5, The command to attach the defendant's estate; 6, The statement where and when the writ is to be returned; and 7, the signature of an officer authorized to issue it. It is probable that the third and fourth of the foregoing are not essentials, and may be inserted on return of the writ, by leave of the Court. In *Lyle v. Longley*, 6 Bax., 286, the fact that the writ did not bear any date showing when it was signed or issued, did not vitiate it. And see *Swan v. Roberts*, 2 Cold., 162.

<sup>61</sup> The officer granting and issuing the attachment must take an attachment bond before issuing the writ. Code, § 3471. In *Lyle v. Longley*, 6 Bax., 286, the writ was issued by the Chancellor.

<sup>62</sup> In *Lyle v. Longley*, 6 Bax., 289, the Chancellor endorsed on the bill when presented to him the fact that he had issued the attachment. The word, "*assumed*," in the opinion of the Court, should be *issued*. This endorsement might be thus: "This bill having been presented to me by the complainant, and an attachment writ prayed from me, and the enclosed attachment bond having been given, I therefore granted and issued an attachment to the Sheriff of Carter county, returnable to the next term of the Chancery Court for said county. April 17, 1865, Seth J. W. Lucky, Chancellor." It would be well, also, for the Chancellor (Judge, or Justice of the Peace,) to endorse the attachment bond as follows: "Taken by me, April 17, 1865, Seth J. W. Lucky, Chancellor." The Clerk and Master should endorse on both bill and bond the date they were filed in his Court.

<sup>63</sup> Code, §§ 3471-3472.

<sup>64</sup> Code, § 3465. Counterparts may be subsequently obtained upon good cause shown. *Ibid.* As to what is "good cause," see, *ante*, § 62, sub-sec. 8.

<sup>65</sup> Code, §§ 3518-3524. Great care should be taken to have the order of publication, and the publication itself, in strict conformance with the statute; for, if the publication omit any essential, the whole pro-

ORDER OF PUBLICATION.

John Doe, }  
*vs.* } In the Chancery Court, at Knoxville.  
 Richard Roe. }

It appearing from the bill in this case, which is sworn to, that Richard Roe is justly indebted to John Doe, the complainant, and that he resides out of the State, [or, as the case may be, setting out the cause alleged in the bill for the attachment;] and an attachment having been issued and levied on the defendant's property,<sup>66</sup> it is ordered that publication be made for four consecutive weeks in the Knoxville Journal, requiring the said defendant to appear before said Chancery Court on the fourth Monday of November next, and make his defence to the bill filed against him in this cause, otherwise said bill will be taken for confessed, and the cause proceeded with *ex parte*. This Sept. 22, 1890.

W. L. TRENT, C. & M.

This notice must be published for four consecutive weeks in the newspaper designated in the order, the last publication to be at least one week before the time fixed for the defendant's appearance.<sup>67</sup> This notice, when published, instead of being headed "Order of Publication," or "Non-resident Notice," should be headed in bold type, thus:

To Richard Roe,

so that he, or his friends, may the more readily see it.<sup>68</sup>

If, however, the defendant can be personally served with process, the Clerk, upon application of the complainant, will issue a subpoena, and if it is executed, no publication will be made. The subpoena will be in the usual form except that it will contain on its face a notification to the defendant that an original attachment suit has been commenced against him.<sup>69</sup>

If the defendant appears in person, or by Solicitor, before publication is made, publication is unnecessary.<sup>70</sup> But while appearance in an attachment suit gives the Court jurisdiction of the person of the defendant, it does not give jurisdiction of the property sought to be attached: that depends on the validity of the attachment proceedings.<sup>71</sup>

§ 878. Amendment of Attachment Proceedings.—The attachment laws were formerly strictly construed, and serious defects in proceedings by attachment were not curable by amendment; but now, by positive statutory requirements, the attachment law is liberally construed; and the complainant may, at any time before a final decree, amend any defect of form in the bill, the affidavit thereto, the bond, attachment writ, or other proceeding;<sup>72</sup> and no attachment bill will be dismissed, or writ of attachment abated, or levy of attachment dis-

ceeding founded upon it is an utter nullity. *Bains v. Perry*, 1 Lea, 37. The essentials of the published notice are: 1, The names of the parties to the suit; 2, The style of the Court to which the attachment is made returnable; 3, The cause alleged for suing out the attachment; 4, The fact that the attachment has been levied on the defendant's property; 5, The time and place at which the defendant is required to appear, and defend the suit; and 6, The name of the Clerk and Master of the Court testing the notice. Code, § 3522; *Riley v. Nichols*, 1 Heisk., 19; *Bains v. Perry*, 1 Lea, 37. The order for publication need not be as precise as the published notice. *Allen v. Gilliland*, 6 Lea, 531.

<sup>66</sup> The property need not be described, but if described the description should be very short.

<sup>67</sup> Code, § 3523. Twenty-eight days will be sufficient in which to make this publication. Thus, a notice published on the 19th and 26th of August, and on the 2d and 9th of September, respectively, would be sufficient if the day fixed for the defendant's appearance was September 16th. *Lowenstein v. Gillespie*, 6 Lea, 641. The law requiring the last publication to be at least one week before the time fixed for the defendant's appearance does not apply to any but attachment suits. See, *ante*, § 198.

<sup>68</sup> See, *ante*, § 198. The method many Clerks pursue of heading their non-resident notices with the name of the notice is as absurd as though the editor of a newspaper should head his paper thus: "A Newspaper;" or, as though an artist should write above his painting: "A Picture." Books giving

forms necessarily state the name of the form, not intending that this name should be published, but intending to specify the particular form given. All publication notices should begin with the name of the person to be notified just as a letter is addressed to the person to whom it is written. The publication notices are, as a rule, much too long, thus making the publication fees too large; they have entirely too much beginning and too much ending. Some of them, also, describe the land levied on by metes and bounds: this is but little short of downright oppression to the party who has the costs to pay, and causes a suspicion that the Master's office is run in the interest of the newspaper making the publication.

<sup>69</sup> Acts of 1871, ch. 134; M. & V.'s Code, § 4203. The body of this subpoena would be as follows: "Summon Richard Roe to appear, on or before the fourth Monday of November, next, before the Chancery Court at Knoxville, to answer the bill of John Doe; and, also, notify the said Richard Roe that said suit is commenced against him by an original attachment. And have you, then and there, this writ."

If this subpoena is served on the defendant it becomes the leading process, and brings the defendant into Court; and the original attachment, thereupon, becomes an ancillary attachment.

<sup>70</sup> *Allen v. Iron Co.*, 2 Shan. Cas., 388.

<sup>71</sup> *Stewart v. Smith*, 3 Shan. Cas., 686.

<sup>72</sup> Code, §§ 3475; 3477; 4335. A motion to amend an attachment affidavit is too late after verdict and judgment. *Dickinson v. Redmon*, 3 Shan. Cas., 620.



charged, because of any defect in, or want of, bond, if the complainant, or his agent or Solicitor, will substitute a sufficient bond.<sup>73</sup>

While, however, amendments will be liberally allowed in attachment suits, nevertheless, ordinarily there must be something on which to engraft the amendment. Hence, where there is no statement of the nature or amount of the debt or demand, or no writ of attachment, or no affidavit to the bill, or no ground of attachment alleged, or no bond, there can be no amendment as to these several matters, for there is no root of substance on which to engraft the amendment.<sup>74</sup> The statute, however, allows a bond to be given after the issuance of the writ, even when no bond at all has been given.<sup>75</sup>

**§ 879. When an Amended, or an Ancillary Attachment Bill will Lie.**—If, after an ordinary bill has been filed, there exists or arises any ground for the attachment of the property of the defendant, an amended bill<sup>76</sup> may be filed, stating briefly the fact that the original bill has been filed, the parties thereto, the Court where pending, the nature and amount of the debt or demand sued for, and the fact that the claim is a just one, and alleging, in addition, some statutory cause of attachment, and praying that an ancillary writ of attachment issue.<sup>77</sup>

An ancillary attachment bill may be filed at any time between the filing of the original bill and the final decree. Its only office is to hold the property of the defendant attached for the satisfaction of the decree which may be rendered; the attachment issued upon it is not a leading process, and does not bring the defendant into Court.<sup>78</sup>

The procedure in case of an ancillary attachment bill is precisely the same as in case of an original attachment bill: the bill must be sworn to, bond must be given, and a writ of attachment must issue. The attachment writ must follow the bill or affidavit, as the case may be; and recite the filing of the original and amended bills, the nature of the suit, in what Court pending,<sup>79</sup> the amount of the debt or demand, and that the cause of action is just; and must command the Sheriff to attach enough of the defendant's estate to satisfy the debt claimed, and the costs of the suit, and conclude like an original writ of attachment.<sup>80</sup>

#### FORM OF AN ANCILLARY ATTACHMENT.

State of Tennessee,

To the Sheriff of Hamilton county:

Whereas, John Doe has filed an original bill of complaint in the Chancery Court at Chattanooga, against Richard Roe, to collect a debt of one thousand dollars due from him, on a note of hand; and whereas the said John Doe has, also, filed in said Court, against said Richard Roe, an amended bill of complaint, duly sworn to, alleging the pendency and contents of said original bill, and that the said debt is due by note of hand, and amounts to one thousand dollars, and is a just debt, and that the said Richard Roe owns the stock of goods, wares, and merchandise, in the building, No. 46 Main Street, Chattanooga, and having alleged a cause of attachment against the estate of said Richard Roe, and praying for an ancillary writ of attachment to be levied on said property, and on all other attachable property of said Roe: and affidavit having been made to said amended bill, and bond given as required by law in attachment cases; [and a fiat<sup>81</sup> for an attachment having been granted by Hon. S. A. Key, Chancellor, *if such be the case,*] you are, therefore, hereby commanded to attach said stock of goods, wares, and merchandise, and so much of the other attachable estate of the

<sup>73</sup> Code, § 3477. See, also, Code, §§ 2863-2872.

<sup>74</sup> *McReynolds v. Neal*, 8 Hum., 12; *Maples v. Tunis*, 11 Hum., 108; *Lillard v. Carter*, 7 Heisk., 604; *Watt v. Carnes*, 4 Heisk., 534. Where the affidavit has not been made at all, it cannot be made as an amendment. *McReynolds v. Neil*, 8 Hum., 13; *Watt v. Carnes*, 4 Heisk., 534; but where it was actually made, but by accident was not signed by the Clerk, such defects may be amended. *Scott v. White*, 1 Thomp. Cas., 38; *Wiley v. Bennett*, 9 Bax., 581.

<sup>75</sup> Code, § 3477.

<sup>76</sup> This amended bill should contain all the essentials of the affidavit required for an ancillary attachment in the Circuit Court. Such a bill must be sworn to, and an attachment bond must be given. 1 *Meigs' Dig.*, § 284; *Thompson v. Carper*, 11 Hum., 542. This is the leading case as to the requirements

of an ancillary attachment. See, also, *Robb v. Parker*, 4 Heisk., 58.

<sup>77</sup> An ancillary writ of attachment would probably be authorized, upon an affidavit thereof being filed, and bond given, in the original cause, in the same way as in the Circuit Court; and without any amended bill being filed.

<sup>78</sup> *Ingle v. McCurry*, 1 Heisk., 26; *Walker v. Cottrell*, 6 Bax., 266; *Maxwell v. Lea*, 6 Heisk., 249.

<sup>79</sup> An ancillary attachment is void unless the suit to be aided is properly described. *Dickinson v. Redmond*, 3 Shan. Cas., 620.

<sup>80</sup> *Thompson v. Carper*, 11 Hum., 542. This is a leading case. *Robb v. Parker*, 4 Heisk., 58.

<sup>81</sup> No fiat is necessary, except where it would be necessary, in case of an original attachment. See, *ante*, § 875.

said Richard Roe as will be of value sufficient to satisfy the debt and costs, according to the complaint; and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon in the Chancery Court at Chattanooga on the 1st Monday<sup>82</sup> of August next, when and where you will make known how you have executed this writ.

Witness, J. B. Ragon, Clerk and Master<sup>83</sup> of said Court, this 4th day of June, 1890.

J. B. RAGON, C. & M.

Or, instead of filing an amended bill, the complainant may file an affidavit with the Clerk and Master, containing the substance of an ancillary attachment bill, and have an ancillary attachment issued, as is done in the Circuit Court.

§ 880. **Ancillary Attachments.**—An ancillary attachment may be issued on a sworn bill, original or amended, laying proper grounds, and praying therefor; or, after an original bill has been filed an ancillary attachment may issue, on affidavit alone, therefor. In either case an attachment bond must be given. The substance of the bill or affidavit, and of the ancillary writ, have already been given.<sup>84</sup>

An ancillary attachment may be granted, signed and issued, by the same officers who are authorized to issue an original attachment, upon a sworn bill, or upon affidavit, laying grounds, and upon bond being given. The writ may issue simultaneously with the original subpoena.<sup>85</sup> An ancillary attachment does not bring the defendant into Court, or give the Court jurisdiction over him.<sup>86</sup> There must be service of a subpoena on the defendant to bring him before the Court, in such a case. The only office of the ancillary writ is to hold the defendant's property for the satisfaction of the decree which may be rendered against him.<sup>87</sup> If a subpoena and an original attachment issue at the same time, and the subpoena is served, it becomes the leading process, and the original attachment becomes, in effect, an ancillary attachment.<sup>88</sup>

The defendant may have the ancillary writ dismissed, on motion, for want of any of the prerequisites to its issuance; or he may, by plea in abatement, deny the cause alleged for suing out the writ.<sup>89</sup> If the motion or plea is sustained, the attachment is discharged; but this will not prevent the complainant from prosecuting his suit to a final decree.<sup>90</sup> The Court may hear the cause upon the merits, and upon the plea in abatement to the ancillary writ, at the same time,<sup>91</sup> or the plea in abatement may be tried previous to the hearing on the merits.<sup>92</sup> The following is the form for an ancillary attachment, issued on an original bill so praying:

#### AN ANCILLARY ATTACHMENT.

The State of Tennessee,

To the Sheriff of Campbell county:

Whereas, A B has filed a sworn bill of complaint in the Chancery Court at Jacksboro against C D, stating therein that said C D is justly indebted to him in the sum of four hundred dollars, due by account [note, breach of contract, *or, as the case may be;*] and said A B having alleged in his said bill a cause of attachment against the estate of said C D, and having given bond for said attachment,

You are, therefore, hereby commanded [*&c., as in an original attachment.*]

If an affidavit is filed for an ancillary attachment, the above form will be modified as follows:

#### ANCILLARY ATTACHMENT.

The State of Tennessee,

To the Sheriff of Campbell county:

Whereas, A B has complained on oath to me, that C D is justly indebted to him in the sum of four hundred dollars, due by account, [*or, as the case may be,*] and that he has filed

<sup>82</sup> The writ may be made returnable to a rule day. Code, §§ 4348-4349; 4354; *Fellows v. Cook*, 10 Heisk., 81.

<sup>83</sup> This ancillary writ may, also, be issued by any Chancellor, or by any Judge of a Circuit, Criminal, or Special Court, in the same manner as an original writ.

<sup>84</sup> See, *ante*, § 879.

<sup>85</sup> *Walker v. Cottrell*, 6 Bax., 257.

<sup>86</sup> *Maxwell v. Lea*, 6 Heisk., 247.

<sup>87</sup> *Ingle v. McCurry*, 1 Heisk., 26.

<sup>88</sup> *Bivins v. Matthews*, 7 Bax., 256; *Templeton v. Mason*, 23 Pick., 625.

<sup>89</sup> *Robb v. Parker*, 4 Heisk., 58.

<sup>90</sup> *Price v. Bescher*, 12 Heisk., 372.

<sup>91</sup> *Lite v. Overton*, 12 Heisk., 675.

<sup>92</sup> *Robb v. Parker*, 4 Heisk., 58; *Price v. Bescher*, 12 Heisk., 372. The better practice, however, is to have but one hearing, at which all the issues may be determined.

The filing of a plea in abatement to the ancillary writ in no way affects the merits of the suit, or the answer; and, on the other hand, the filing of a demurrer, plea in bar or answer to the bill, in no way affects a plea in abatement to an ancillary writ, and does not overrule it. The office of such a plea in abatement is to discharge the ancillary writ of attachment, and release the property attached, and not to discharge the defendant, or to end the suit. The result is, a plea in abatement to the ancillary writ

a bill in the Chancery Court at Jacksboro against said C D, to recover said sum, which suit is still pending, and affidavit having been made in writing, and bond given, as required by law in attachment cases; and said A B having prayed an ancillary attachment in aid of his said suit against the estate of said C D;

You are, therefore, hereby commanded [*&c.*, as in an original attachment writ.]

If the ancillary attachment is issued in obedience to a fiat of a Judge, or Chancellor, the writ should also so state, as will be seen by reference to the form in case of an original attachment.<sup>93</sup>

**§ 881. A Garnishment Bill.**—When a debtor is liable to be proceeded against by original or ancillary attachment, and a third person has property, or choses in action, or effects, of the debtor in his possession, or is indebted to the debtor, such third person may be made a co-defendant to the original attachment bill, or to an amended bill ancillary thereto, and may be required to answer on oath;<sup>94</sup>

1. Whether he is, or was at the time of the garnishment, indebted to the defendant; if so, how, and to what amount.

2. Whether he had in his possession, or under his control, any property, debts, or effects, belonging to the defendant, at the time of serving the subpoena, or has at the time of answering, or has had at any time between the date of service of the subpoena and the time of answering; and if so, the kind and amount.

3. Whether there are, to his knowledge or belief, any and what property, debts, and effects, in the possession or under the control of any other, and what, person.

4. Such other questions as may tend to elicit the information sought.<sup>95</sup>

The bill, whether original or amended, may pray that all the effects, property, choses in action, and debts, in the hands of the garnishee defendant belonging or owing to the debtor defendant, be attached, and that the garnishee defendant be enjoined from paying such debts, or disposing of, or in any way transferring such property, choses in action, and effects. If, after service upon him of a copy of the bill, the garnishee defendant shall pay the debt attached, or secrete the effects of the debtor defendant, or buy in any other claim against the latter, he will be liable to the same extent as before the payment, secreting, or purchase.<sup>96</sup>

In a garnishment bill, the person owing the debt, or the defendant to the judgment, or the owner of the legal title to the property, sought to be attached must be made a party.<sup>97</sup>

**§ 882. Property Attachable in Equity, but Not at Law.**—There are various properties subject to attachment in a suit in Chancery which are not so subject in an action in a Court of law. These properties are divisible into two classes: (1) those that are so equitable in their nature as not to be cognizable at law, and (2) those cognizable at law, but whereon or whereto the complainant has some claim of such a nature that under certain circumstances the Chancery Court will impound them to await the event of the suit.

1. Properties Strictly Equitable, and Not Cognizable at Common Law include: (1) the interest of a mortgagor in the property mortgaged;<sup>98</sup> (2) property in one man's name and hands for the use of another; (3) the interest of a man in property bought with his money by another and title taken in the latter's name;

and an answer to the bill may both be proceeded in at the same time, *pari passu*; and there is no inconsistency or conflict between them. See, *ante*, §§ 260-261.

<sup>93</sup> See, *ante*, § 876.

<sup>94</sup> The oath of the garnishee may be waived in Chancery. Code, § 4317. If, however, the oath be waived, the answer of the garnishee cannot be expected to for insufficiency. See, *ante*, §§ 460; 422.

<sup>95</sup> Code, §§ 3088-3089; 3478-3482.

<sup>96</sup> Code, § 3508. A garnishment bill in the Chancery Court is a very effective method of reaching debts, assets, or property of any kind in possession of, or owing by, a third person, and belonging to the debtor. The answer of the garnishee defendant to

the bill may be freely and fully contested in Chancery. *McCrae v. Bank*, 6 Cold., 474; *Mayor v. Potomac Ins. Co.*, 2 Bax., 296; and the garnishee defendant may there he held liable in spite of his denials; and he may be compelled, by process of contempt, to disgorge the estate of the debtor defendant in his possession. Code, §§ 4284; 4478-4481. For a form of garnishment bill, see *ante*, § 873; see also, the form of a judgment creditor's bill, *post* § 1018.

<sup>97</sup> *Railroad v. Todd*, 11 Tieisk., 556; *A. & F. Ency. of Law*, 1116-1128; *ante*, §§ 91; 127.

<sup>98</sup> So, the interest of the grantor in land absolutely

(4) the equity of redemption in property sold subject to redemption; (5) property of one man held by another in pledge or as security, or in trust; (6) property given away, sold, conveyed or devised to defraud creditors; (7) the assets of an insolvent partnership, corporation, or decedent; (8) a legatee's or heir's estate in the hands of an executor or administrator before final settlement; (9) vendor's liens, express or implied; (10) liens of mechanics, laborers, and material men; (11) liens of contractors, and laborers, on railroads; (12) liens on boats for building, repairing and equipping; (13) all other statutory or equitable liens; (14) *choses in action*; (15) money in the hands of a Court; (16) a debt due the defendant but the amount whereof can only be ascertained by an accounting, and adjusting of mutual accounts and conflicting equities; (17) money due on a contingency necessary to be adjudicated between the defendant and other claimants; (18) land held under an agreement to convey; (19) property conveyed in trust for the benefit of creditors; (20) the residue after such trust is satisfied, if any; (21) interests in a corporation or joint stock company, not represented by certificates, or other paper evidences; (22) a wife's separate estate; (23) all property of such a character that the creditor cannot reach the debtor's interest in it without bringing both the debtor and the holder of the legal title before the Court; (24) resulting trusts; and (25) generally, all other property which, in Equity, is liable for the debts of its owner or beneficiary, and which cannot be reached by execution at law.

2. **Properties Cognizable at Law, but Whereon or Where to the Complainant Has Some Claim** of such a nature, that, under certain circumstances the Chancery Court will impound them by attachment, or injunction, including: (1) property of which complainant has been deprived by fraud or tort; (2) property on which complainant or his debtor, has a lien; (3) property in which complainant has a beneficial interest: but in each of these cases it should appear that the property is in danger of being transferred to an innocent purchaser, or removed beyond the jurisdiction of the Court,<sup>100</sup> and the circumstances are not such as to justify a statutory attachment.<sup>101</sup>

In suits to subject equitable property to the satisfaction of its owner's debts the Chancery Court requires that the holder of the legal title thereto be, also, brought before the Court, to the end, 1st, that he may assert his rights in the premises, and 2d, that the purchaser at the Court sale may get a full title, and 3d, that the property may bring the better price.<sup>102</sup>

§ 883. **Judicial Attachments.**—If a subpoena to answer is returned, "*Not to be found in my county,*" as to any defendant who is a resident of the county, the complainant may have either an *alias* or a *pluries* subpoena for such defendant; or may, at his election, have a judicial attachment against the estate of such defendant.<sup>103</sup> But a *bona fide* temporary absence from the State will not justify a return of "*non est inventus,*" and a judicial attachment. The following is the form of

**A JUDICIAL ATTACHMENT.**

The State of Tennessee,

To the Sheriff of Davidson county:

Whereas, a subpoena was issued from the Chancery Court of Davidson county, on the 10th day of May last, directing you to summon C D to appear before said Court on the 1st Monday of June last, to answer the bill filed against him in said Court by A B, who alleges that said C D is justly liable to him in the sum of four hundred dollars, which subpoena was returned by you, "*Not to be found in my county,*" whereupon it was ordered by the Court that a judicial attachment issue against the estate of said C D;

You are, therefore, hereby commanded [*&c., as in § 876, ante.*]

conveyed on the face of the deed when such deed is intended for a mortgage.

<sup>100</sup> The Chancery Court has inherent jurisdiction to attach or impound such property under such circumstances. *McKeldin v. Gouldy*, 7 Pick., 677.

<sup>101</sup> An equitable attachment will lie, at the suit of the owner of the land, to impound waste, such as timber cut, coal mined, or marble, stone or slate

quarried, especially if the defendant is insolvent. In such cases an injunction is often granted, and a receiver appointed, which two processes are little more than the equivalent of an attachment.

<sup>102</sup> See, *ante*, §§ 91, 127.

<sup>103</sup> Code, § 3466. Section 3468 of the Code, which Mr. Hicks, in his Manual, terms "a regular misap-

This writ is ordered to issue by the Court, upon motion therefor, supported by a subpoena with the return, "Not to be found in my county." This return implies that the defendant was a resident of the county to which the subpoena issued, at the time of the institution of the suit, and that after diligent search for him, he is not to be found, being either actually absent from the county or evading the service of process.<sup>104</sup>

No affidavit is required, and no attachment bond need be given, to entitle the complainant to this writ; the Sheriff's return, if in the language of the statute, is all-sufficient. The following is the form of an

#### ORDER AWARDING A JUDICIAL ATTACHMENT.

A B, }  
vs. } No. 892.  
C D. }

In this cause, the complainant moved the Court for a judicial attachment against C D, the defendant; and it appearing that a subpoena to answer issued to the Sheriff of this county, who has duly returned the same to the present term, "*The defendant not to be found in my county,*" it is ordered that said motion be allowed; and a judicial attachment is awarded against the estate of C D. Upon the return of said attachment levied upon the property of the defendant, the Clerk and Master will make publication as to said defendant, notifying him to appear as required by law.<sup>105</sup>

### ARTICLE II.

#### DEFENCES, DECREES, AND SUBSEQUENT PROCEEDINGS.\*

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| <p>§ 884. Defences in Attachment Suits.</p> <p>§ 885. Pleas in Abatement in Attachment Suits Not Overruled by Defences to the Merits.</p> <p>§ 886. Disposition of the Property Attached.</p> <p>§ 887. Decrees in Attachment Suits.</p> | <p>§ 888. When Attachment Decrees May be Set Aside.</p> <p>§ 889. How Attachment Decrees are Set Aside.</p> <p>§ 890. Petition to Set Aside a Decree, and Proceedings Thereon.</p> |
|--|--|

§ 884. **Defences in Attachment Suits.**—There are some defences peculiar to suits commenced by original attachment.<sup>1</sup> If there be, on the face of the record, a want of any of the prerequisites to the issuance of a writ of original attachment, the bill may be dismissed on motion;<sup>2</sup> and if any of said prerequisites are wanting, in fact, but do not so appear on the face of the record, the fact may be made to appear by a plea in abatement.<sup>3</sup> If an original attachment bill show on its face no cause for an original attachment, it will be dismissed on demurrer.<sup>4</sup>

If the ground alleged for an attachment be false, the defendant may put such ground in issue by a negative plea in abatement;<sup>5</sup> but such plea must traverse all the grounds of attachment alleged in the bill.<sup>6</sup>

prehension," and Milliken & Vertrees say is "meaningless," does not follow the original statute, as will be seen in *James v. Hall*, 1 Swan, 297, and 1 Scott's Rev., 467. The original act says "No judicial process," &c.; and a scrutinious comparison of sections 22 and 23 of the original act will show that the process referred to in the original act was (1) a judicial attachment against a garnishee, allowed by section 22, (Code, § 3489), "grounded on an original attachment;" and (2) an execution when the defendant was personally served with subpoena. The term "judicial process" in the original act is not synonymous with judicial attachment, but includes judicial attachment, garnishment, and execution; and section 3468 of the Code means, in the light of the original Act, that a defendant's estate shall not be subjected to sale by order of Court unless the defendant has been brought into Court by an original attachment proceeding, or by service of subpoena. *James v. Hall*, 1 Swan, 297.

<sup>104</sup> *Welch v. Robinson*, 10 Hum., 264; *James v. Hall*, 1 Swan, 297; *Grewar v. Henderson*, 1 Tenn. Ch., 76. A return, "The defendant not found in my

county," will not sustain a judicial attachment: the return must be, "The defendant not to be found in my county." *Welch v. Robinson*, 10 Hum., 264.

<sup>105</sup> The Clerk must make the same order of publication on his rule docket, and publish the same sort of notice, as in cases originally commenced by attachment. Code, § 3467; *Lyle v. McCurry*, 1 Heisk., 26.

<sup>1</sup> See, *ante*, §§ 246; 255-259.

<sup>2</sup> Code, § 4386; sub-sec. 4; see, *ante*, § 271.

<sup>3</sup> For instance, if the bill was in fact subsequently sworn to, or was subsequently amended so as to allege a statutory cause of attachment, the fact of such subsequent and unauthorized interpolations, not otherwise appearing, may be made to appear by a plea in abatement; and, if such plea be found true, the bill will be dismissed, if the jurisdiction of the Court is founded on the original attachment. See Code, §§ 3471; 3476.

<sup>4</sup> *Fay v. Jones*, 1 Head, 443.

<sup>5</sup> *Tarbox v. Tonder*, 1 Tenn. Ch., 163; *Pigue v. Young*, 1 Pick., 263.

<sup>6</sup> *Cooke v. Richards*, 11 Heisk., 713. For forms of pleas in abatement, see, *ante*, § 259.

The defences, predicated on the absence, insufficiency, or falsity, of the prerequisites to the issuance of the writ of attachment, must all be made before or when an answer or plea in bar is filed; they cannot be made in the answer. But the omission to make any of these defences does not in any way preclude the defendant from demurring to the bill as a pleading,<sup>7</sup> or from filing a plea in bar to the bill, or an answer contesting the equities set up in the bill. After a plea in bar, or an answer, it is too late to object to any irregularities, or deficiencies, in the attachment proceedings.<sup>8</sup>

If the defendant intends to dispute any of the grounds alleged for an original attachment, he must do so by a plea in abatement; he cannot put any of them in issue by denying them in his answer. If he files an answer, without, at the same time, or previously, filing a plea in abatement, he is deemed to waive any defence to the jurisdiction of his person he might have made based on the falsity of the grounds alleged for the attachment.<sup>9</sup> But, under the Act of 1897, the defendant can plead in abatement to the attachment, and plead in bar or answer at the same time, the old rule that a plea in bar, or answer, waived a plea in abatement previously filed, being thereby abrogated.<sup>10</sup> By the same Act, it is further provided that when a plea in abatement, and a plea in bar or answer, are filed at the same time, they shall both be heard at the same time, and judgment rendered on each. If, at such hearing, the plea in abatement be found true the suit will be dismissed without any adjudication on the merits of the bill; and if found false, the suit will be decided on its merits in favor of the complainant or defendant as Equity may require.<sup>10a</sup>

In case of an ancillary attachment, however, the defendant may, without the aid of the Act of 1897, plead in abatement to it, and at the same time answer the bill on the merits.<sup>14</sup> The reason of the distinction is: that an original attachment is a means of enforcing the personal attendance of the defendant; whereas, an ancillary attachment is a mere means of impounding the defendant's property, and in no way affects the jurisdiction of the Court over the person of the defendant, and in no way affects the merits of the controversy.<sup>15</sup>

Ordinarily a plea in abatement brings forward new matter,<sup>16</sup> that is to say, it alleges matter not contained in the bill, and not otherwise appearing elsewhere in the record of the cause. But a plea in abatement to an original, or an ancillary writ of attachment, does not usually bring forward any new matter, but denies the ground or grounds of attachment alleged in the bill. If there be more than one ground of attachment alleged, whether alleged in the alternative or otherwise, the plea must traverse all of them.<sup>17</sup> The following forms will serve as guides:

#### PLEAS IN ABATEMENT TO AN ORIGINAL ATTACHMENT.

[For title, commencement, and conclusion, see, ante, § 254.]

The defendant, Richard Roe, for plea in abatement to the original attachment sued out and levied in this cause, says,

That he did not reside out of the State, when the bill in this cause was filed; but that he

<sup>7</sup> An attachment bill is an affidavit and pleading combined.

<sup>8</sup> Johnson v. Luckadoo, 12 Heisk., 270; see, ante, § 232. The defences to an ancillary attachment writ are not, however, overruled by a plea in bar, or answer. Bank v. Foster, 6 Pick., 735.

<sup>9</sup> Foster v. Hall, 4 Hum., 346; Boyd v. Martin, 9 Heisk., 386.

<sup>10</sup> Acts of 1897, ch. 121; Railroad v. McCollum, 21 Pick., 623; Sewell v. Tuthill & Pattison, 4 Cates, 271. It had been previously held by the Supreme Court, after much vacillation, that a defendant brought into Court by attachment of his property might plead in abatement to the attachment and answer to the merits; and that the general Equity rule that an answer overrules a plea in abatement has no application in attachment suits under our practice. Bank v. Foster, 6 Pick., 735. See Battelle & Co. v. Youngblood, 16 Lea, 355; Simpson v. Railway Co., 5 Pick., 304; Bivins v. Mathews, 7 Bax., 256; Wilson v. Eifer, 7 Cold., 31.

<sup>10a</sup> Railroad v. McCollum, 21 Pick., 623. At the hearing of the suit on the plea in abatement and at the same time on bill and answer, if the plea be found true the bill must be dismissed even though complainant has proved his case on the merits, unless the defendant makes a tender, in which case the complainant may accept what is tendered. *Ibid.* But such acceptance would be in the nature of an accord and satisfaction, and would bar any further recovery in another suit.

<sup>14</sup> Price v. Bescher, 12 Heisk., 373; Robb v. Parker, 4 Heisk., 58; Bank v. Foster, 6 Pick., 735.

<sup>15</sup> The pleader must keep in mind, that a defence to the attachment is one thing, and a defence to the merits is another, and wholly different, thing: he may succeed in one and fail in the other.

<sup>16</sup> *Ante*, § 253.

<sup>17</sup> Cooke v. Richards, 11 Heisk., 713.

then was, and ever since has been, a citizen of the State, and a resident of Claiborne county.

That he was not about to remove, nor had he removed, himself or property from the State, when the bill in this cause was filed; but he then was, and has ever since continued to be, a citizen of the State, and a resident of Claiborne county.

That the property levied on under the original attachment sued out in this cause was not, at the time of said levy, and has never since been, the property of this defendant.

Wherefore, he prays that said attachment be abated and quashed, the property released, and the suit dismissed.

[*Annex affidavit*,<sup>18</sup> as in § 254, *ante*.]

JOHN P. DAVIS, Solicitor.

### PLEAS IN ABATEMENT TO AN ANCILLARY ATTACHMENT.

[*For title, commencement, and conclusion, see, ante, § 254.*]

The defendant, Richard Roe, for plea in abatement to the ancillary writ of attachment sued out and levied in this cause, says, That he had not removed, nor was he removing, himself out of the county [*naming the county specified in the bill,*] privately, at the time the bill in this cause was filed; but that he then was living openly in said county, attending openly to his business, and has so continued to do ever since. That he had not absconded, nor was he absconding or concealing himself or property, at the time the bill in this cause was filed; but that he was then living openly in the county of Claiborne, the county of his usual residence, attending openly to his ordinary business, and that he and his property have been in said county ever since, openly and unconcealed.

Wherefore, he prays that said ancillary writ of attachment be abated and quashed, and that the property levied on thereunder be released and discharged.

[*Annex affidavit as in § 254, ante.*]

P. G. FULKERSON, Solicitor.

It will be seen by an examination of the foregoing pleas, that they mainly consist of an emphatic and absolute denial of the ground of attachment alleged in the bill.<sup>19</sup>

On a plea in abatement being filed in an attachment case, the same proceedings take place as in other cases of pleas in abatement, as already shown.<sup>20</sup> The issues of fact raised by a replication may be determined by the Chancellor, or, on proper demand, by a jury; and, where the plea is negative in its nature, and consists of a denial of the ground of attachment alleged in the bill, the burden of proof is on the complainant.<sup>21</sup>

If the plea in abatement to an original attachment is sustained, the attachment is quashed, the property discharged, and the bill dismissed at the complainant's cost. But the effect of sustaining a plea in abatement to an ancillary attachment is merely to abate the writ, and discharge and release the property; the suit as to the merits of the controversy is, in no way, affected by the decision of the plea in abatement, in such a case. If the defendant fails in his plea in abatement to the original attachment writ, either on a motion to strike it out, or upon argument as to its sufficiency, or upon an issue of fact as to its merits, he may plead in bar to the bill or answer it, and rely upon any defences he might have made had he not pleaded in abatement.<sup>22</sup> But when a plea in abatement is overruled, after a trial on the facts, if the defendant has no plea in bar or answer on file, and makes no application for leave to make further defense, a *pro confesso* and final decree may be rendered against him.<sup>23</sup>

When the defendant pleads in abatement to the attachment and at the same time answers the bill on the merits, as he may now do, at the hearing he may win on his plea but fail on his answer, or *vice versa*, or may win on both or lose on both.

**§ 885. Pleas in Abatement in Attachment Suits Not Overruled by Defences to the Merits.**—In Equity pleading, the plea in abatement is to the *bill*, and a demurrer, plea in bar, or answer will overrule the plea in abatement, because all of these latter defenses are, also, to the *bill*; and the plea in abatement is

<sup>18</sup> This affidavit must be positive, and not on "knowledge, information and belief." *Wrompelmier v. Moses*, 3 Bax., 467.

<sup>19</sup> See *Wilson v. Eifer*, 7 Cold., 33.

<sup>20</sup> *Ante*, §§ 262-264.

<sup>21</sup> *Wrompelmier v. Moses*, 3 Bax., 472; *Jackson v. Burke*, 4 Heisk., 614.

<sup>22</sup> Acts of 1897, ch. 121; *Railroad v. McCollum*, 21 Pick., 623; *Sewell v. Tuthill & Pattison*, 4 Cates, 271.

<sup>23</sup> *Sewell v. Tuthill & Pattison*, 4 Cates, 271; *Bivins v. Mathews*, 7 Bax., 256; *Wilson v. Eifer*, 7 Cold., 31. For forms of decrees, see, *ante*, §§ 264-265.

least favored and is deemed to be waived by a subsequent pleading. But in an attachment suit the plea in abatement is not to the bill but to the *attachment*; hence, a demurrer, or plea in bar, or answer to the bill, will not overrule the plea in abatement to the attachment, for they are not aimed at the attachment but at the bill, and there is no conflict or inconsistency in the two defenses being simultaneously made in an attachment suit, the plea in abatement being intended to defeat the attachment and release the property, while the demurrer, plea in bar, and answer are intended to defeat the bill, and prevent an adverse decree on the merits.<sup>23a</sup>

§ 886. **Disposition of the Property Attached.**—The defendant may replevy the property attached, upon giving the bond required by the statute. This bond may be taken by the officer levying the attachment, if tendered before he returns the writ; and may be taken by the Clerk, after such return.<sup>24</sup> If the property be not replevied, and the exigency require it, the Court may at any time appoint a receiver to collect, manage, and control, the property, or sell the same.<sup>25</sup> The following is the form of

**A REPLEVY BOND.**

We, A, [*the defendant,*] B, and C, [*his sureties,*] acknowledge ourselves indebted to D, [*the complainant,*] in the sum of [*double the amount of the complainant's demand, or at the defendant's option, double the value of the property attached,*] dollars. But if, in the event the said A is cast in the suit with said D, in the Chancery Court at Knoxville, wherein the property of said A has been attached, he, the said A, shall pay the debt, interest, and costs, sued for, [*or (if the bond is in double the value of the property)*] shall pay the value of the property attached, then this bond, which is given to replevy said property, is to become void.<sup>26</sup>

[To be duly dated, signed, and witnessed.]

The bond, if given to the Sheriff, must be returned by him with the attachment. The bond, whether taken by the Sheriff or Clerk, constitutes a part of the record in the cause, and a decree may be entered upon it, in case the defendant is cast in the suit.<sup>27</sup>

**REFERENCE TO THE MASTER ON A REPLEVY BOND.**

John Doe, }  
*vs.* } No. 914.  
 Richard Roe. }

[*Follow form of decree in § 887, post, down to paragraph 11., and then insert the following:*

And it appearing that an attachment issued in this cause and was on the 26th day of January, 1900, levied upon the following property of the defendant, Richard Roe, [*describing it*], and that on the 27th day of January, 1900, the defendant, Richard Roe, replevied said property by executing a replevy bond with Roland Roe as his surety, conditioned to "pay the debt, interest and costs sued for, or the value of the property attached," and the value of said property not sufficiently appearing, the Master is directed to hear proof and report *instanter* what was the reasonable value of said property at the time it was replevied.

§ 887. **Decrees in Attachment Suits.**—The attachment and publication are in lieu of personal service upon the defendant; and, after the levy of the attachment, and expiration of the time specified in the published notice for the defendant to make defence, the complainant may proceed as though the defendant had been brought into Court by personal service of subpoena.<sup>27a</sup> The defendant must, also, make his defences as though he had actual notice of the suit. If he fail to make any defence, the complainant may not only have a decree *pro confesso*, but a final decree, at the appearance term, without further proof,<sup>28</sup> except in certain cases;<sup>29</sup> for, on such a *pro confesso*, the allegations in the bill are to be taken as admitted, except in the cases referred to.<sup>30</sup>

In the final decree, the property levied on should be specifically described, and the Clerk and Master ordered to sell it; or, if it be personalty in possession of the levying officer, he may be ordered to sell it. And if the property attached

23a Bank v. Foster, 6 Pick., 735. But now see Acts of 1897, ch. 12; ante, § 258.

24 Code, §§ 3509-3513.

25 Code, § 3503.

26 Code, § 3509.

27 Code, §§ 3513-3514.

27a Code, § 3524; Walker v. Cottrell, 6 Bax., 258.  
 28 Code, §§ 3526, 4371; Claybrook v. Wade, 7 Cold., 555; ante, § 209.  
 29 For these excepted cases, see, ante, 206.  
 30 For *pro confesso*, and proceedings thereon, see, ante, §§ 205-213.



is not sufficient to satisfy the decree, execution may be awarded for the residue.<sup>31</sup> If, however, execution is awarded, in the first instance, by the decree, and no order of sale awarded at all, this is a waiver of the attachment lien, and in such case the Clerk has no authority to issue an order of sale.<sup>32</sup>

But, where the defendant is brought into Court by attachment of his property and publication thereon, a judgment against him is *quasi in rem*, and valid only to the extent of the money realized from the property attached. A personal judgment and award of execution in such a case becomes *coram non judice*, and is null and void.<sup>33</sup>

Where the defendant, in an original attachment suit, does not appear, the Court may stay final judgment not more than twelve and not less than six months from the return of the writ of attachment, unless the attachment is sued out because the defendant is a non-resident, and then the stay must be allowed, unless sufficient cause appear to the contrary.<sup>34</sup> The stay may be allowed by providing that if the decree is not satisfied by a day named, which must be six months or more from the return of the writ, the decree should be enforced by sale of the property attached, and by other necessary process.<sup>35</sup> The full limit of the stay should be allowed in all cases where the complainant sues under the pauper oath.<sup>36</sup>

#### DECREE IN AN ATTACHMENT SUIT.<sup>37</sup>

John Doe, }  
vs. } No. 914.  
Richard Roe. }

This cause came on this 25th day of August, 1900, to be finally heard before the Hon. Joseph W. Sneed, sitting by interchange with the Chancellor, upon the original bill, the writ of attachment and the return thereon, the answer of the defendant, and the proof, and upon argument of counsel, on consideration whereof the Court decrees as follows:

##### I.

That the complainant have and recover of the defendant, Richard Roe, the sum of twelve hundred dollars, the amount due on the note sued on; and, also, all the costs of the cause.

##### II.

That the property attached in this cause, consisting of the following: [*Here set it out, as described in the bill, or in the Sheriff's return on the attachment,*] be subjected to the satisfaction of this decree, and be sold by the Clerk and Master, [*or, by the Sheriff,*] in the manner prescribed by law, [*or, if land be attached, the Court may order the Clerk and Master to sell it on a credit as in other cases of land sales. See, ante, § 626.*]

##### III.

If the proceeds of said sale shall not satisfy this decree, an execution<sup>38</sup> will issue for the balance that may be due hereon.

#### DECREE ON AN ATTACHMENT BILL.

John Den, }  
vs. } 654.  
Richard Fen. }

This cause came on to be heard before the Hon. W. B. Staley, Chancellor, on this 7th day of June, 1885, on the bill, the exhibit thereto, the writ of attachment and return thereon, the judgment *pro confesso* heretofore regularly taken and entered against the defendant, [and the proof in the cause, *if there be any proof other than the exhibit, and the pro confesso.*]

##### I.

And it appearing to the Court from an inspection of the note, filed as exhibit A to the complainant's bill, that there is due thereon to the complainant from the defendant the sum of one thousand two hundred and thirty dollars, principal and interest to this day, it is so decreed. And more than six months having elapsed since the return of the attachment, it is, therefore, ordered and adjudged that the complainant have and recover of the defendant, said sum of one thousand two hundred and thirty dollars, and all the costs of this cause.

<sup>31</sup> Code, § 3536; 3538.

<sup>32</sup> If the decree awards an execution only, this is an abandonment of the attachment lien. *Staunton v. Harris*, 9 Heisk., 579; *Hurst v. Liford*, 11 Heisk., 622. Hence, to continue the attachment lien, the decree must award an order of sale. *Mullendore v. Hall*, 2 Ch. Apps., 273.

<sup>33</sup> *Paper Co. v. Shyer*, 24 Pick., 444. An execution, however, can issue on all other judgments in attachment suits.

<sup>34</sup> Code, §§ 3527-3528. This stay is discretionary, except in case of non-residents. *Swan v. Roberts*, 2

Cold., 154; *Boggs v. Gamble*, 3 Cold., 148. The stay runs not from the decree, but from the return of the writ; hence, if the decree is pronounced six months after the return of the writ, no stay need be allowed. *Claybrook v. Wade*, 7 Cold., 562; *Mulloy v. White*, 3 Tenn. Ch., 9.

<sup>35</sup> *Claybrook v. Wade*, 7 Cold., 562.

<sup>36</sup> The reason of this appears in *Mulloy v. White*, 3 Tenn. Ch., 9.

<sup>37</sup> For a form of a decree on a plea in abatement, see, *ante*, §§ 264-265.

<sup>38</sup> But no execution can issue when the defendant

II.

And it appearing that a certain tract of land, lying in the 7th civil district of Knox county, adjoining the lands of A, B, C, and D, containing 100 acres, has been attached in this cause, it is decreed by the Court that, unless the defendant, within three months from this date, shall pay and satisfy this decree, the Master, after advertising according to law, shall proceed to sell the said tract of land, or so much thereof as necessary, at public sale, to the highest and best bidder, at the Court House door in Knoxville, to satisfy this decree. And on special application of the complainant, both in his bill and at the bar, it is decreed that said land be sold on a credit of twelve months, and that when said sale is reported and confirmed, no right of redemption or repurchase shall exist in the defendant, or his creditors, but that such sale shall be absolute.

The Master will take a note with approved security, bearing interest from its date, for the purchase-money, and retain a lien on the land as further security. He will report to next term of the Court his action in the premises, until which time all further and other matters are reserved.

**FINAL DECREE ON REPLEVY BOND IN ATTACHMENT SUIT.**

John Doe, }  
 vs. } No. 914.—Final Decree.  
 Richard Roe. }

This cause came on to be further and finally heard this 27th day of January, 1906, upon the pleadings and proof, the writ of attachment and the return thereon, and the report of the Master, which report being unexcepted to is confirmed, on consideration of all which it is ordered and decreed that the complainant have and recover of the defendant, Richard Roe, the sum of two hundred and sixty dollars, the amount due on the note sued, and all the costs of the cause.

And it appearing from the said return that the property attached in this cause was replevied by the defendant giving bond therefor in the penalty of six hundred dollars, with John Friend and Frank Jones as sureties thereon, conditioned to pay the debt, interest and costs sued for, or the value of the property attached, if the defendant was cast in the suit; and it appearing from said report that the value of said property when replevied was three hundred dollars, it is further ordered and decreed that execution issue against the defendant Richard Roe, and his said sureties, John Friend and Frank Jones, for said sum of two hundred and sixty dollars, and costs.

And on his motion, a lien is declared on this recovery to secure the reasonable fee of Charles H. Brown, complainant's Solicitor.

§ 888. **When Attachment Decrees May be Set Aside.**—In all cases of attachment, sued out because the defendant resides out of the State, or has merely removed himself or property from the State, the judgment or decree by default may be set aside, upon application of the defendant and good cause shown, within twelve months thereafter; and defence permitted, upon such terms as the Court may impose. In all other cases of judgment or decree by default in attachment suits, the defendant cannot deny or put in issue the ground upon which the attachment was issued, but may, at any time thereafter, and within one year after the suing out of the attachment, commence an action on the attachment bond, and may recover such damages as he has actually sustained for wrongfully suing out the attachment; and, if sued out maliciously, as well as wrongfully, the jury may, on trial of such action, give vindictive damages.<sup>39</sup>

Persons laboring under the disability of coverture, infancy or unsoundness of mind, at the rendition of the judgment or decree by default, have six months, after the removal of such disability, to appear and show cause against such judgment or decree.<sup>40</sup>

The death of the defendant proceeded against by attachment, without personal service, whether the death occur before or after the commencement of the action, does not render the proceedings void, but his heirs or representatives, as the case may be, have the right within three years from the rendition of final judgment or decree, to make themselves parties, by petition showing merits, verified by affidavit, and contest the complainant's demand.<sup>41</sup>

The judgment or decree, if executed before it is set aside, under any of the foregoing provisions, will be a protection to all persons acting under it, and will confer a good title to all property sold by virtue thereof.<sup>42</sup>

is brought into Court by attachment of his property and publication thereon. Paper Co. v. Shyer, 24 Pick., 444. See, <i>supra</i> , note 33. 39 Code, §§ 3529-3531.	40 Code, § 3532. 41 Code, § 3533. 42 Code, § 3534.
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§ 889. **How Attachment Decrees are Set Aside.**—The statute does not prescribe *how* attachment decrees may be set aside, further than that it is done “upon application” of the defendant, and good cause shown.<sup>43</sup> In some of the reported cases, the application has been by motion, supported by affidavit;<sup>44</sup> in others, by motion supported by a petition;<sup>45</sup> and in one case by an original bill.<sup>46</sup> If the application is supported by a sworn statement of the necessary facts, the applicant will not be denied relief because of the form of that statement.<sup>47</sup> Nevertheless, the proper method of making the application is by a sworn petition,<sup>48</sup> and this petition may, in order to save the bar of the statute, be filed in vacation, provided, of course, the motion is made at the term next following.<sup>49</sup> The petition may, also, pray to have the decree superseded.<sup>50</sup> The petition should clearly set forth the following:

1. That a decree has been rendered against the petitioner; stating in the petition when, and in what Court, rendered, and in whose favor.

2. That the decree was rendered in a suit begun by an original attachment.

3. That the attachment was sued out, because either the petitioner resided out of the State, or had merely removed himself or property from the State, as the case may be.<sup>51</sup>

4. And the petition must, in addition to the foregoing statements, show “good cause” for setting the decree aside. Good cause means such a state of facts as, if true, would rebut or destroy the equity, or cause of action, alleged in the bill, and show that, on the merits of the case, the petitioner has a good defence, and the decree is unjust.<sup>52</sup>

5. The petition must be sworn to, and the verification should be on the petitioner’s own knowledge, and not on information and belief.<sup>53</sup>

The complainant in the suit is entitled to notice of the filing of the petition, but a regular subpoena need not issue for this purpose. If the complainant seeks to resist the petition, the proper practice is to test its sufficiency by a motion to dismiss the petition, because insufficient. No defence to the petition, by answer or other denial of its allegation, is permissible; and, on the hearing of a motion to dismiss, the Court cannot look at anything outside the petition, unless there be some matter of record that invalidates it. If, upon its face, the petition shows sufficient facts and merits, and is not fatally contradicted by the record, no facts *aliunde* can be set up to defeat the petitioner’s right to have the decree set aside, and to make defence to the bill, upon such terms as the Court may impose. The petition need not be accompanied by an answer to the bill;<sup>54</sup> its office is to open the door for an answer; and this done, it has served its purpose and becomes *functus officio*.<sup>55</sup> But if the petition contains all the matters of defence the petitioner desires to set up, it may be allowed to stand as an answer to the bill.<sup>56</sup>

§ 890. **Petition to Set Aside a Decree, and Proceedings Thereon.**—In order

<sup>43</sup> Code, § 3529.

<sup>44</sup> *Cain v. Jennings*, 3 Tenn. Ch., 131.

<sup>45</sup> *Bledsoe v. Wright*, 2 Bax., 471; *Smith v. Foster*, 3 Cold., 139.

<sup>46</sup> *Gill v. Wyatt*, 6 Heisk., 88.

<sup>47</sup> *Ante*, §§ 43; 269; 681; 719.

<sup>48</sup> This application when made in the Circuit Court is in the nature of an application for a new trial; *Smith v. Foster*, 3 Cold., 139; and may there well be made by motion, supported by affidavit; but when made in the Chancery Court it is in the nature of a petition for a rehearing. The practice in setting aside decrees, in other than attachment cases, is by petition. Code, §§ 4380-4381. See, *ante*, § 212.

<sup>49</sup> *Bledsoe v. Wright*, 2 Bax., 471. In this case, Judge Turney says that “in contemplation of the organic law, the Courts are always open.”

<sup>50</sup> *Metcalf v. Landers*, 3 Bax., 35.

<sup>51</sup> If there are several other causes of attachment alleged in the bill, the petitioner must allege that he was, in fact, a non-resident at the time the bill was filed, if this be one of the causes, or had merely removed himself or property from the State, if this be

one of the causes. In other words, where the bill alleges one of said two causes, along with others, the petitioner must aver that one of said two causes was in fact true, and hence the real cause for the attachment. *Smith v. Foster*, 3 Cold., 139; *Gill v. Wyatt*, 6 Heisk., 88.

It would be well for the petitioner to aver, also, that he had no notice whatever of said suit, or of said decree, until after the decree was rendered, and the term ended at which it was made.

<sup>52</sup> “Good cause” means merits. *Cain v. Jennings*, 3 Tenn. Ch., 131; *Gill v. Wyatt*, 6 Heisk., 88. See section on Good Cause, *ante*, § 62, sub-sec. 8.

<sup>53</sup> Affidavits may be filed in support of the petition, but they are not necessary. See *Smith v. Foster*, 3 Cold., 139; *Sneed v. Hall*, 3 Cold., 255; *Brown v. Brown*, 2 Pick., 277.

<sup>54</sup> *Metcalf v. Landers*, 3 Bax., 35.

<sup>55</sup> *Brown v. Brown*, 2 Pick., 277.

<sup>56</sup> *Metcalf v. Landers*, 3 Bax., 35. The words, in the opinion in this case, on p. 37, “allowed to stand on an answer,” should no doubt read, allowed to stand as an answer.

more fully to show the nature of a petition to set aside a decree in an attachment suit, the following form is given:<sup>57</sup>

**PETITION TO SET ASIDE A DECREE.**

John Doe, }  
*vs.* } No. 683.— In the Chancery Court, at Smithville.  
 Richard Roe. }

To Hon. B. M. Webb, Chancellor:

Your petitioner, Richard Roe, respectfully shows to the Court:

I.

That on the 2d day of June, 1891, a decree by default was rendered against him in said cause and Court in favor of the said complainant, John Doe, for one thousand dollars, and costs of suit, which decree is still in full force, and unappealed from.

II.

Said decree is based upon a proceeding by original attachment levied upon petitioner's property, upon the ground that he resided out of the State. Petitioner avers that he was a non-resident when said attachment writ was issued, and that he had no knowledge or notice whatever of the said suit, or of any of the proceedings therein, until after the said decree had been pronounced, and the term closed at which it was rendered.

III.

Said decree is wholly unjust. The allegation in the bill, on which it is based, that the petitioner owed the complainant Doe the sum of one thousand dollars, on account, was utterly false. Petitioner did not, when the bill in this case was filed, or when said decree was rendered, owe the complainant anything. Before petitioner left Tennessee, he and the complainant had a full and final settlement, and the latter gave your petitioner a receipt in full, which is made a part of this petition, and marked A. Said pretended account on which said bill is based is utterly unfounded, and was abandoned by complainant, when said settlement was made.

IV.

Said decree ordered the Clerk and Master to sell the property of petitioner therein described, and said property has been advertised for sale, and will be sold unless said sale is superseded,<sup>58</sup> or restrained.

V.

The premises considered, your petitioner prays:

1st. That notice of this petition be issued by order of your honor, and served on said complainant;

2d. That this petition be considered, also, an answer to said bill, and that, on the hearing of this petition, said decree, and also the decree *pro confesso*, be set aside, and vacated, and this petition allowed to stand as an answer<sup>59</sup> to said bill.

3d. That, in the meantime, a restraining order be granted and issued to stay all further proceedings under said decree, and on said advertisement of sale.<sup>60</sup>

4th. And that petitioner have such other, further and general relief, as he may be entitled to.

This is the first application for a restraining order in this case.

W. V. WHITSON, Solicitor.

State of Tennessee, }  
 DeKalb county. }

Richard Roe makes oath that the statements in his foregoing petition are true.

[*Jurat, as in § 797, ante.*]

RICHARD ROE.

**RESTRAINING ORDER.**

To the Clerk and Master at Smithville:

You are hereby restrained from proceeding further under the decree and advertisement of sale referred to in the foregoing petition.

You will also file this petition,<sup>61</sup> and issue the notice to the complainant prayed for therein.  
 July 5, 1891. B. M. WEBB, Chancellor.

If, at the hearing, the prayer of the petition is granted, the following order would be entered on the minutes:

**ORDER SETTING ASIDE THE DECREES.**

John Doe, }  
*vs.* } No. 683.  
 Richard Roe. }

The petition filed in this cause by the defendant, Richard Roe, praying that the decrees

<sup>57</sup> For another form, see, *ante*, § 212.

<sup>58</sup> *Metcalf v. Landers*, 3 Bax., 37.

<sup>59</sup> *Metcalf v. Landers*, 3 Bax., 37.

<sup>60</sup> If an order of sale has issued, a supersedeas

would be necessary; if the Master is enforcing the decree, a restraining order is sufficient.

<sup>61</sup> The petition may be filed in vacation. *Bledsøe v. Wright*, 2 Bax., 471.

pronounced herein, at the last term may be set aside, coming on to be heard this day, the Chancellor is of opinion that petitioner is entitled to the relief by him prayed.

It is, therefore, ordered and decreed by the Court that the decrees pronounced in this cause at the last term, both the decree *pro confesso* and the final decree based thereon, be vacated, set aside, and for nothing held; that the cause be reinstated on the trial docket, and the petition be allowed to stand as an answer to the bill, and be refiled as such, accordingly.

And thereupon this cause was remanded to the rules for proof generally.

## CHAPTER XLIV.

## SUITS FOR RECEIVERS; AND PROCEEDINGS THEREIN.

ARTICLE I. Receivers Generally Considered.

ARTICLE II. In What Cases a Receiver will be Appointed.

ARTICLE III. Time and Manner of Appointing Receivers.

ARTICLE IV. Powers, Duties, and Liabilities, of Receivers.

ARTICLE V. Settlements, Removal, and Discharge, of Receivers.

## ARTICLE I.

## RECEIVERS GENERALLY CONSIDERED.

§ 891. Office of a Receiver.

§ 893. Of What a Receiver May be Appointed.

§ 892. Who May be Appointed Receiver.

§ 894. Effect of a Receivership.

§ 891. **Office of a Receiver.**—The Courts of this State are all vested with power to appoint receivers for the safe-keeping, collection, management, and disposition, of property in litigation in such Court, whenever necessary to the ends of substantial justice.<sup>1</sup>

A receiver is a person appointed by the Court (1) to receive the rents and profits of land, or other property, (2) to sell property in the custody of the Court when so ordered, (3) to collect notes, accounts, and other choses in action belonging to a suit, (4) to care for property which is the subject-matter of the litigation, and (5) to do any other acts in reference to property in the custody of the Court, that the Court may direct. He is an officer of the Court; and is regarded as truly and properly the *hand* of the Court.<sup>2</sup>

A receiver is appointed for the benefit of the interested party who makes the application, and for the benefit of all others who may eventually be found to have an interest in the property, or its proceeds; and the object of his appointment is to preserve the subject-matter of the litigation, or its rents and profits, from waste, loss or destruction, so that there may be some harvest after the labors of the controversy are over.<sup>3</sup>

The appointment of a receiver, however, does not involve the determination of any right, or affect the legal title of either party; and is, by no means, to be construed as deciding any of the issues involved in the controversy. The appointment is made for the benefit of the party who may ultimately appear to be entitled to the property or its proceeds.<sup>4</sup>

Where it would be difficult, inconvenient or perplexing, for one receiver to take charge of two or more separate estates, or stocks of goods, or sets of accounts, the Court will appoint more than one receiver.

§ 892. **Who May be Appointed Receiver.**—Any person may be appointed receiver; the rule, however, is to appoint a person who is not only wholly disinterested in the subject-matter of the litigation, but has, also, especial fitness for the particular duties he will be required to discharge. A person whose duty it would be to watch, check, and control, the receiver should never himself be appointed receiver; nor should the person be appointed whose neglect, misconduct, or fraud, has occasioned the litigation.<sup>5</sup>

<sup>1</sup> Code, § 3768. Such interlocutory appointment cannot be appealed from, suspended by a supersedeas, or revised upon a bill of review. High on Rec., § 26; Baird v. Turnpike Co., 1 Lea, 394; Bramley v. Tyree, 1 Lea, 531; Roberson v. Roberson, 3 Lea, 50.

<sup>2</sup> 1 Barb. Ch. Pr., 658; High on Rec., §§ 1-2.

<sup>3</sup> 1 Barb. Ch. Pr., 658.

<sup>4</sup> 2 Dan. Ch. Pr., 1741; *post*, § 894.

<sup>5</sup> 2 Dan. Ch. Pr., 1732.

The Judge, or Chancellor, may, however, appoint a partner willing to act without salary, or may appoint one of the parties with the consent of the others, or if no one else can readily be obtained to accept, may appoint the Clerk and Master, or his deputy.<sup>6</sup>

§ 893. **Of What a Receiver May be Appointed.**—The property a receiver is most commonly appointed to take charge of is: (1) property levied on by attachment, or execution, and liable to perish or deteriorate, pending the suit; (2) goods, wares, and merchandise, involved in the litigation; (3) judgments, notes, accounts, and other claims, attached or impounded by garnishment; (4) partnership property of all kinds; (5) corporation property of all kinds; (6) real estate belonging to tenants in common, or encumbered by liens belonging to other parties, and by them sought to be enforced; (7) assets of a deceased person; (8) trust property of all kinds; (9) proceeds of waste committed on real estate; (10) rents and profits of real estate, or of coal, iron, or other mines, or of quarries, or of turnpikes and railroads. Indeed, it may be stated, generally, that a receiver may be appointed of any kind of property, or of the proceeds of any kind of property, real, personal or mixed, legal or equitable, that may be disposed of by the decree of the Court in the cause. And, on the other hand, the Court has no right to appoint a receiver of property that is not subject to execution or attachment, except in a suit by a wife for divorce and alimony, and except in cases where the purpose of the receivership is to protect or preserve the exempt property for the benefit of the owner thereof.

§ 894. **Effect of a Receivership.**—A receiver is appointed on behalf of all parties, and not of any one; and the appointment alters no right, and adjudges no question. The appointment is merely to hold the property for the benefit of the party who may ultimately appear to be entitled to it; and when such party is ascertained, the receiver will be considered his receiver.<sup>7</sup> As the result of these principles, if any loss happens by the destruction, or deterioration of the property, or by the misconduct of the receiver, such loss must be borne by the estate in his hands, as between the parties to the suit.<sup>8</sup>

As soon as his bond has been accepted by the Clerk and Master, the receiver's appointment is complete, and the title and right of possession to the property committed to him, instantly vests in him as of the date of his appointment;<sup>9</sup> and it is the duty of all the parties to the suit to surrender to the receiver any of the property in their possession, or under their control. The tenants of the parties will also attorn to the receiver and pay their rents to him, including all rents in arrears;<sup>10</sup> and if any of the property has been levied on, between the date of the receiver's appointment and the execution of his bond, the Sheriff must surrender it to the receiver.<sup>11</sup>

If any party refuse to surrender to the receiver the property in his possession, or any tenant refuse to attorn to him, such party or tenant may be attached for contempt, or a writ of possession may be awarded to put the receiver in possession.<sup>12</sup>

A receiver is an officer of the Court, and is considered as truly and properly the hand of the Court.<sup>13</sup> For this reason, the possession of a receiver is deemed the possession of the Court; and any attempt to disturb it, in any way, without the leave of the Court first obtained, will be a contempt of Court; and the

<sup>6</sup> Under the English practice, the Master often appointed the receiver, and therefore could not act as receiver himself. In this State, however, he never does, and is therefore eligible; indeed, he is often the best possible man to be appointed, especially in small matters. The statute contemplates the appointment of the Master as receiver, and provides that he shall give a special bond to cover his liability as such. Code, §§ 328; 329; 4553; Williams v. Bowman, 3 Head, 679; State v. Cole, 13 Lea, 367.

<sup>7</sup> 1 Barb. Ch. Pr., 658; High on Rec., §§ 2; 134-135; 2 Dan. Ch. Pr., 1741; Fulton v. Davidson, 3 Heisk., 623; Wall v. Pulliam, 5 Heisk., 369; Ross

v. Williams, 11 Heisk., 412; Brien v. Paul, 3 Tenn. Ch., 360; Johnson v. Hanner, 2 Lea, 11.

<sup>8</sup> 2 Dan. Ch. Pr., 1741. *Res perit suo domino*. See, ante, § 64.

<sup>9</sup> High on Rec., §§ 136; 152.

<sup>10</sup> 2 Dan. Ch. Pr., 1742.

<sup>11</sup> High on Rec., § 136.

<sup>12</sup> 2 Dan. Ch. Pr., 1742.

<sup>13</sup> 1 Barb. Ch. Pr., 658; Berry v. Jones, 11 Heisk., 210; Ross v. Williams, 11 Heisk., 412; Payne v. Baxter, 2 Tenn. Ch., 517.

person making it will be restrained by injunction, or committed for his contempt.<sup>14</sup> It is the duty of the Court to protect its receiver not only against violence, but against suits at law.<sup>15</sup> A receiver is not liable to be sued without leave of the Court appointing him, and if any person claims property in possession of a receiver, or any interest therein by a title superior to that of the parties to the suit, he must, even when his right is clear, file a petition in the cause and obtain an order from the Court for a reference to the Master as to his title or interest;<sup>16</sup> or the Chancellor may determine the question summarily, when there is no complication in the claim; or, if the matter be of sufficient importance, may allow the claimant to bring suit to determine the controversy.<sup>17</sup>

ARTICLE II.

IN WHAT CASES A RECEIVER WILL BE APPOINTED.

- § 895. The Appointment of Receivers Generally Considered.
- § 896. Receivers in Suits by, or against, Partners.
- § 897. Receivers in Suits against Debtors.
- § 898. Receivers in Suits against Corporations.

- § 899. Receivers in Suits to Recover Realty.
- § 900. Receivers in Suits to Protect Trust Property and Liens.
- § 901. Receivers to Protect Rights in Property Where no Trusts Exist.
- § 902. The Chancellor's Discretion, How Exercised.

§ 895. **The Appointment of Receivers generally Considered.**—The Chancery Court has power to appoint receivers for the safe keeping, collection, management, and disposition, of property in litigation in such Court, whenever necessary to the ends of substantial justice;<sup>1</sup> and it may be laid down, as a general rule, that a receiver will be appointed whenever there is good ground to believe that the property itself, or its proceeds, belong, in whole or in part, to the complainants, or that they are entitled to its use, or to have it or its proceeds, or both, applied to the satisfaction of their claims, and the defendant in possession is so misusing the property or proceeds, or so acting with reference thereto, as to jeopardize the complainant's rights or interests.<sup>2</sup> To give the Court jurisdiction, however, to appoint a receiver there must be a cause pending.<sup>3</sup>

Where at the hearing, the Court decrees that the defendant is not entitled to the possession of the property, and the defendant is insolvent, or appeals on the pauper oath, the Court may appoint a receiver before granting the appeal, if an appeal is prayed, and may refuse an appeal from the order appointing a receiver.<sup>4</sup>

14 *Payne v. Baxter*, 2 Tenn. Ch., 517; *Conley v. Deere*, 11 Lea, 274.  
 15 See, *ante*, § 40; and, *post*, § 910.  
 16 *Conley v. Deere*, 11 Lea, 276.  
 17 2 Dan. Ch. Pr., 1743-1744; *Payne v. Baxter*, 2 Tenn. Ch., 517; *Brien v. Paul*, 3 Tenn. Ch., 357; *High on Rec.*, § 139; *Sto. Eq. Jur.*, § 833 a.  
 1 Code, §§ 3768; 4452. The appointment of a receiver is in the nature of extraordinary process. *Hamilton v. Wyne*, 3 Shan., 34. See *Cole*, § 3766, and the title of the Chapter containing the section. See, also, the title of the Article containing Code, §§ 4434 and 4452.  
 2 2 Dan. Ch. Pr., 1715-1729, and notes. The immediate moving cause of the appointment of a receiver is the preservation of the subject of litigation, or the rents and profits of it, from waste, spoliation, loss, destruction, or removal, during the litigation, so that there may be some harvest, some fruits to gather, after the labors of the controversy are over.  
 1 Barb. Ch. Pr., 658; *High on Rec.*, § 4. All the

cases agree that a receiver is proper, if the fund or property, or its proceeds or profits, are in danger; and the most usual cases for a receiver are (1) either to prevent fraud, or (2) to secure the rents or profits, or (3) to save the subject of litigation from waste or material injury, or (4) to rescue it from probable deterioration, spoliation or destruction, or (5) to prevent its removal from the jurisdiction of the Court. And the appointment can only be made at the instance of a party who has an acknowledged interest, or a strong presumption of title in himself alone, or in common with others. 2 Dan. Ch. Pr., 1715-1716, notes; *High on Rec.*, §§ 1-39.  
 3 1 Barb. Ch. Pr., 659.  
 4 It would seem that if the Court desires to have the receiver, appointed by a final decree, act pending an appeal from that decree, the proper course to pursue is to set aside the final decree and the consequent appeal, and by an interlocutory order appoint a receiver, and put him in possession; and, on this being done, to pronounce a final decree on the



§ 896. **Receivers in Suits by, or against, Partners.**—In suits between partners, or between partners and their privies in estate, a receiver will ordinarily be appointed: 1, When the defendant is wilfully mismanaging the partnership property; 2, When the defendant has been guilty of fraud in partnership matters; 3, When the defendant has assumed exclusive control of the business and assets of the firm; 4, When the conduct of the defendant is in gross violation of the articles of the partnership; 5, When irreconcilable dissensions and disagreements exist between the partners as to the management of the firm business, and loss is a probable result thereof; 6, When the mutual confidence has been destroyed by the conduct of the defendant; 7, When, in any other case, a dissolution has actually taken place by the death of all the partners, or by efflux of time, or is sought upon sufficient grounds; or 8, When the partner in possession of the assets is enjoined from selling or collecting them.<sup>5</sup>

In suits against a firm by creditors or other third parties, a receiver will ordinarily be appointed: 1, When the firm is insolvent and there is a contest between rival creditors over its assets; 2, When the assets of the firm, or of some member of the firm, have been attached or levied on by conflicting executions at law; 3, When some member of the firm has become a bankrupt; and 4, When, in any case, it becomes necessary to ascertain the net interest of any member of the firm, either to subject it to the payment of his debt, or to deliver it to his administrator, executor, legatee, or assignee.<sup>6</sup>

§ 897. **Receivers in Suits against Debtors.**—A receiver will be appointed on behalf of a creditor, in the following cases:

1. Where a Debtor is Enjoined from collecting his debts, or from disposing of property liable to waste, or expensive to keep.<sup>7</sup>

2. Where a Debtor Has Made an Assignment, which is assailed as fraudulent, on strong grounds, or which the assignee fails or refuses to properly enforce, or when the trustee is acting fraudulently, and in either event the property is liable to deteriorate, or debts or other assets are liable to be lost.<sup>8</sup>

3. Where Personal Property Has Been Levied on, or garnished, in an attachment suit, and is perishable, or expensive to keep, or liable to deteriorate in quality or price, or consists of merchandise, or notes, or accounts.<sup>9</sup>

4. Where Many Executions or Attachments Have Been Levied on the Same Property, and the cost of a multiplicity of suits will greatly lessen the net fund to be paid to the various creditors, the Court will, on a proper bill for that purpose, appoint a receiver, settle the priorities of the parties, and distribute the fund accordingly.

5. Where a Judgment Creditor Seeks to Subject Property, Held in Trust for the debtor upon a bill filed after an execution has been returned, unsatisfied in whole or in part.<sup>10</sup>

§ 898. **Receivers in Suits against Corporations.**—A receiver will be put in charge of the property, assets and franchises of a corporation, on application of a creditor or stockholder: 1, When it becomes insolvent;<sup>11</sup> or 2, When its

merits, and grant an appeal from such final decree, but refuse an appeal from the interlocutory order appointing a receiver. See *Merrill v. Elam*, 2 Tenn. Ch., 513; *Payne v. Baxter*, 2 Tenn. Ch., 519; *Brien v. Paul*, 3 Tenn. Ch., 360; *Hoge v. Hollister*, 8 Bax., 533; *Enochs v. Wilson*, 11 Lea, 228; *High on Rec.*, §§ 25-29.

No appeal will lie from an interlocutory order appointing a receiver, nor will such an order be superseded by the Supreme Court when it was discretionary. *Enochs v. Wilson*, 11 Lea, 228; *Johnson v. Hanner*, 2 Lea, 8.

<sup>5</sup> See, generally, *High on Rec.*, §§ 472-529; *Pars. on Part.*, 312-321; 2 *Dan. Ch., Fr.*, 1727-1729. The general rule is, that if the complainant shows such a state of facts as, if proved at the hearing will entitle him to a dissolution, the Court will appoint a

receiver. *High on Rec.*, § 509; 2 *Dan. Ch. Pr.*, 1727.

A partner who enjoins his co-partner from collecting partnership assets, is bound to see that a receiver is promptly appointed; and is liable for all loss occasioned by the neglect of the receiver to collect the assets, or to account for those collected. *Terrell v. Ingersoll*, 10 Lea, 77.

<sup>6</sup> See, generally, *High on Rec.*, §§ 526-537; 507; 512.

<sup>7</sup> *Terrell v. Ingersoll*, 10 Lea, 85.

<sup>8</sup> *High on Rec.*, § 412.

<sup>9</sup> *Code*, § 3503; *Spradlin v. Bratton*, 6 Lea, 685.

<sup>10</sup> *Code*, §§ 4283-4286; *Johnson v. Tucker*, 2 Tenn. Ch., 398. See, generally, *High on Rec.*, §§ 400-404.

<sup>11</sup> *Code*, § 3431.

franchises are not used, or have been granted to others, in whole or in part;<sup>12</sup> or 3, When its choses in action have been levied on.<sup>13</sup>

A receiver of a corporation will be appointed on a bill filed in the name of the State against a corporation: 1, When a corporation does or omits acts which amount to a surrender or forfeiture of its rights and privileges as a corporation; or 2, When it exercises powers not conferred by law; or 3, When it fails to exercise lawful powers essential to its corporate existence;<sup>14</sup> or 4, When in any case its dissolution has been decreed, and the collection and distribution of its assets becomes necessary.<sup>15</sup>

**§ 899. Receivers in Suits to Recover Realty.**—Although as a rule the Chancery Court is reluctant to appoint a receiver on a bill to recover the possession of realty, nevertheless, one will be appointed when the complainant clearly shows that the legal title and the immediate right of possession and enjoyment are both in him, and (1) that he has been deprived of the possession by fraud, or (2) that there is imminent danger of irreparable injury to the property if left in the defendant's possession; or (3) that there is a strong probability arising from the fraud, mismanagement, or insolvency, of the defendant that the complainant will lose the rents and profits of the land, unless a receiver is appointed.<sup>16</sup> Where, however, the contest between the parties grows exclusively out of conflict of legal titles without any equitable circumstances affecting the conscience of the defendant, a receiver will not ordinarily be appointed.<sup>17</sup> But after a decree in favor of the complainant, the Court, will consider that as evidence of his right, and will appoint a receiver when necessary to preserve the rents and profits of the land from loss, pending a motion for a new trial, or a rehearing, or an appeal.<sup>18</sup>

If, however, on an application for the appointment of a receiver to collect rents of real property, the defendant in possession will agree to pay the rents and profits into Court, and will give bond and security so to do, the application for a receiver will be denied.<sup>19</sup>

**§ 900. Receivers in Suits to Protect Trust Property and Liens.**—Courts of Chancery exercise all powers deemed necessary to protect property charged with a trust, and will appoint receivers:

1. Where an Executor, Administrator, Guardian or Other Trustee, is so acting as to endanger the safety of the trust property, whatever its character; or is misapplying the property, or its proceeds; or is otherwise violating his trust duties to the detriment of the beneficiaries, especially if he is insolvent, or has left the State,<sup>20</sup> or is dead, or *non compos*, or has resigned.<sup>21</sup>

2. Where the Trusteeship is in Dispute, as in a contest over a will, or over the appointment of an administrator,<sup>22</sup> guardian, or trustee, and the estate of the decedent, or the trust property, real or personal, is liable to deteriorate, or the

<sup>12</sup> Code, §§ 4294-4295; *Marr v. Union Bank*, 4 Cold. 482.

<sup>13</sup> Code, § 3000.

<sup>14</sup> Code, §§ 3409; 3417; 3426.

<sup>15</sup> As to receivers of corporate property, see, generally, *High on Rec.*, §§ 287-312.

<sup>16</sup> *High on Rec.*, §§ 553-575.

<sup>17</sup> *Richmond v. Yeates*, 3 Bax. 204; *State v. Allen*, 1 Tenn. Ch., 512; *Davis v. Reaves*, 2 Lea, 649. Formerly, a Court of Equity had, ordinarily, no jurisdiction to try the legal title to land, and when it exercised the power to appoint a receiver, pending an action of ejectment in the Circuit Court, the equities of the complainant had to be very strong to justify this interposition of the Chancery Court. But now, that, under the Act of 1877, the Chancery Court has full jurisdiction to try the legal title, it will appoint a receiver in cases where formerly such power would not have been exercised, especially where there is any waste, or where the defendant is insolvent. The Code enlarges the powers of the Courts in granting injunctions and appointing receivers; and provides that in real actions, and in ac-

tions for the recovery of personal property in specie, the Court in which the suit is pending may restrain the injury, removal, or destruction, of the property by process of injunction, until the cause is finally disposed of; and the Courts are vested with power to appoint receivers for the safe keeping, collection, management, and disposition of property in litigation in such Courts, whenever necessary to the ends of substantial justice. Code, §§ 3767-3768. These two sections have more significance than is usually attributed to them.

<sup>18</sup> *High on Rec.*, § 577; *Merrill v. Elam*, 2 Tenn. Ch., 513; *Payne v. Baxter*, 2 Tenn. Ch., 517; *Enochs v. Wilson*, 11 Lea, 228.

<sup>19</sup> *High on Rec.*, § 595; *Johnson v. Tucker*, 2 Tenn. Ch., 398.

<sup>20</sup> *Roberson v. Roberson*, 3 Lea, 50; *Bowling v. Scales*, 2 Tenn. Ch., 63.

<sup>21</sup> See, generally, *High on Rec.*, §§ 692-718; 2 *Dan. Ch. Pr.*, 1723.

<sup>22</sup> *Smiley v. Bell*, *Mart. & Yerg.*, 380; *High on Rec.*, § 46; 2 *Dan. Ch. Pr.*, 1725-1726.

rents or profits are liable to be lost, or the assets are liable to be wasted, by reason whereof complainant's rights or interests are imperilled.

3. Where a Mortgage, Trust Deed or Other Express Lien on property, real or personal, is sought to be enforced, and such property is being so misused, or wasted, or neglected, by the defendant that the security is greatly endangered, and likely to be lost, or rendered inadequate, especially if the debtor fails to keep the taxes paid, or has abandoned the property, or is insolvent, or if the mortgage debt is overdue, and the land mortgaged is inadequate security.<sup>23</sup>

§ 901. Receivers to Protect Rights in Property where No Trusts Exist. Receivers will be appointed wherever imperatively necessary to protect the complainant's rights to property, real or personal, in cases where there are no trust relations or duties:

1. Where Complainant is a Tenant in Common, or otherwise interested beneficially with the defendant in the proceeds, profits, uses, or enjoyment, of property, real or personal, and the defendant wholly excludes him therefrom, and refuses to accord to him his rights, and especially if he is insolvent.<sup>24</sup>

2. Where the Property Belongs to an Infant, or to a person of unsound mind, or has escheated to the State,<sup>25</sup> and there is no guardian, or personal representative, or other person lawfully entitled to take the same into possession, and properly care and account for it, until those entitled are able to do so.<sup>26</sup>

3. Where a Tenant for Life, or Vendee Under a Title Bond, or Other Party in Possession of Property, real or personal, not having absolute title thereto, fails to keep down the taxes,<sup>27</sup> or to discharge encumbrances, or to keep inflammable property insured, or to keep up the repairs, whereby the rights of those entitled to the remainder, or to other interest in, or liens on, the property, are in danger of being lost or greatly injured.

4. Where, in a Suit for Alimony or Maintenance, the defendant fails to provide for complainant, or to pay the instalments of alimony or maintenance ordered by the Court, and especially in suits for maintenance where the land is charged with the complainant's support.<sup>28</sup>

5. Where, in Any Case, it is Necessary to the Ends of Substantial Justice to safely keep, manage, collect, sell, rent or otherwise dispose of, property in litigation.<sup>29</sup>

§ 902. The Chancellor's Discretion, How Exercised.—The appointment of a receiver, when any sort of case is made out, is purely a matter of discretion. This discretion, however, acts according to equitable rules, and is the discretion of a sworn officer, anxious to do his duty impartially, and is not the whim or caprice of an irresponsible or indifferent person.<sup>30</sup> In exercising this discretion on an application to appoint a receiver,

1. The Following Considerations Will Weigh in Favor of the Application:

1. That the defendant has been guilty of fraudulent or other inequitable conduct, jeopardizing complainant's rights.

2. That the defendant is insolvent, and is enjoying the property or its proceeds.

3. That the defendant has not properly cared for the property, or has mismanaged or misused it, or has displayed incapacity or indifference, jeopardizing complainant's rights.

4. That the defendant has failed to pay the taxes, or to keep the property duly insured when insurance is expedient, or stipulated.

<sup>23</sup> Williams v. Noland, 2 Tenn. Ch., 151; Johnson v. Tucker, 2 Tenn. Ch., 401; Cone v. Pante, 12 Heisk., 506; Bidwell v. Paul, 5 Bax., 693; High on Rec., § 643; 2 Dan. Ch. Pr., 1719, note. See Fulghum v. Cotton, 6 Lea, 591.

If the defendant will give bond and security to account for the rents and profits, if required to pay the debt, a receiver will not be appointed. Williams v. Noland, 2 Tenn. Ch., 151; Johnson v. Tucker, 2 Tenn. Ch., 401.

<sup>24</sup> Cassaty v. Capps, 3 Tenn. Ch., 524; High on Rec., § 604.

<sup>25</sup> State v. Allen, 1 Tenn. Ch., 512; High on Rec., § 594.

<sup>26</sup> High on Rec., §§ 725-736.

<sup>27</sup> Darnsmont v. Patton, 4 Lea, 597; High on Rec., §§ 609-613; 2 Dan. Ch. Pr., 1716, note; 2 Sto. Eq. Jur., § 838.

<sup>28</sup> Code, § 2470; 2 Dan. Ch. Pr., 1724, note.

<sup>29</sup> Code, § 3767-3768.

<sup>30</sup> See, ante, §§ 583, note 4; 857; 833, note 37. *Judex bonus nihil ex arbitrio suo faciat, nec propositione domestica voluntatis, sed juxta leges et jura pronunciat.* (A good judge does nothing according to his own arbitrary will, nor from the prompting of social pleasure, but decides in accordance with law and justice.)

5. That the parties interested are numerous, and no one of them has any particular right to the possession of the property.

6. That the property is charged with a trust, and the trustee's conduct is questionable.

7. That a receivership can do no one any particular harm, and may be of great benefit to those entitled to the property, or its proceeds. On the other hand,

2. The Following Considerations Will Weigh Against the Application for a Receiver:

1. That the complainant has been guilty of *laches*, or inequitable conduct.  
 2. That the complainant is not clear and emphatic in the allegation of his equities, or his bill is sworn to on information and belief.

3. That the appointment is likely to greatly injure the defendant, while the advantages to the complainant will be comparatively small.

4. That the benefits of a receiver are likely to be counterbalanced by the trouble, confusion, expenses, or losses that will probably result from the appointment.

5. That there is no urgency, and an appointment would produce no benefits, even if the defendant would not be particularly injured thereby.

6. That the defendant is willing to comply with all orders necessary to secure the rights of the complainant, and to preserve the property, or fund, or its proceeds; and is willing to give bond therefor.

The Chancellor will, also, in exercising his discretion, consider whether upon a view of the whole case there is a probability (1) that the complainant will be entitled to recover; and (2) that he will be injured if the defendant is allowed to retain the possession of the property.<sup>31</sup>

If the answer is on oath, and it fully and fairly denies the equities of the bill, and the evidence adduced in support of the bill fails to overcome the denials of the answer, a receiver will not be appointed.<sup>32</sup> Nor will the Court appoint a receiver if it will injuriously affect a person not a party to the suit.<sup>33</sup>

ARTICLE III.

TIME AND MANNER OF APPOINTING RECEIVERS.

§ 903. When and by Whom Receivers are Appointed.	§ 907. Notice of the Application for a Receiver.
§ 904. How the Application for a Receiver is Made.	§ 908. Form of the Order Appointing a Receiver.
§ 905. Frame of a Bill for a Receiver.	§ 909. The Receiver's Bond.
§ 906. Form of a Petition for a Receiver.	

§ 903. **When and by Whom Receivers are Appointed.**—Before a receiver can be appointed, there must be a cause pending in the Court, proper for such appointment. The application for a receiver may, however, be made the very day the bill is filed, or on any day thereafter, during the progress of the cause, or on final decree.<sup>1</sup> The appointment may be made before the defendant has answered, or even been served with process, or been notified of the application, when sufficient grounds are shown, and the necessity of immediate action is

<sup>31</sup> See, *ante*, §§ 583, note 4; 857; 833, note 37.  
<sup>32</sup> High on Rec., § 24. The complainant will be allowed to read affidavits in support of his motion. High on Rec., § 85.  
<sup>33</sup> High on Rec., § 33; 84; Mays v. Wherry, 3 Tenn. Ch., 34.  
<sup>1</sup> Henshaw v. Wells, 9 Hum., 568; Merrill v. Elam, 2 Tenn. Ch., 513; High on Rec., §§ 103-110.

apparent.<sup>2</sup> A prayer in the bill for a receiver is not necessary, if a case proper for a receiver is made out.<sup>3</sup>

When a defendant is entitled to relief against a co-defendant, the Court may, in a proper case, appoint a receiver upon the application of the defendant entitled to relief;<sup>4</sup> for Courts of Equity have regard to the rights of the parties, rather than to their situation as complainants or defendants.

Receivers may be appointed by any Chancellor, or Circuit Judge, in vacation,<sup>5</sup> and by the Chancellor alone during term time. If the application for the appointment of a receiver is made in vacation, reasonable notice<sup>6</sup> of the time and place of such application, and of the person before whom it will be made, must be given to the opposite party,<sup>7</sup> or good cause shown why such notice should not be given.<sup>8</sup>

**§ 904. How the Application for a Receiver is Made.**—The application for a receiver is usually made by a prayer therefor in a bill, or in an amended or supplemental bill, or in a petition. Such a prayer, however, is unnecessary; if the bill lays a foundation for the appointment of a receiver by stating facts showing the propriety of such an appointment, the Court, looking at substance and not form, will, on motion, appoint a receiver, although there is no prayer therefor in the bill.<sup>9</sup> Indeed, the necessity for the appointment of a receiver frequently occurs after the bill has been filed. If new facts arise pending the litigation, making necessary the appointment of a receiver, they may be brought before the Court by a supplemental bill, or by petition.

**§ 905. Frame of a Bill for a Receiver.**—The bill that seeks the appointment of a receiver should be both a pleading and an affidavit:

1. **As a Pleading**, it should show complainant's cause of action clearly, and his right to, or interest in, the particular property or fund in litigation, and how he is entitled to its possession or proceeds, in whole or in part.

2. **As an Affidavit**, it should set forth fully the particular facts that show the danger the property, or fund, or the proceeds are in, and the necessity for a receiver to rescue the property, proceeds, or fund, from danger, loss, or destruction; and if there be any special acts of neglect, mismanagement, fraud, or wilful disregard of complainant's rights, such acts should be specified and detailed.<sup>10</sup> The facts set forth should be on the complainant's own knowledge, or on the personal knowledge of the person swearing to the bill or petition, an affidavit on information and belief being insufficient.<sup>11</sup>

The bill must not only lay a proper foundation for the appointment of a receiver, but if the application for a receiver is to be made before answer, or before the hearing, it should, also, pray for such appointment. If, however, an immediate appointment is not wanted, such a prayer is not indispensable.<sup>12</sup>

<sup>2</sup> Code, § 4452; High on Rec., §§ 103-107; 2 Dan. Ch. Pr., 1734-1736. Our practice is more liberal than the former English practice in granting injunctions and receiverships on *ex parte* proceedings and at Chambers; and receivers are often appointed by a Judge, or Chancellor, at Chambers, even before the bill is filed, but to take effect when the bill is filed. In counties remote from a Judge, or Chancellor, such a procedure is often absolutely necessary to prevent a failure of justice. Sometimes, the same fiat contains an order for an injunction and attachment and a receivership, a receivership being often the necessary consequence of an attachment of notes and accounts, or of goods, wares and merchandise, or of property perishable by nature, or expensive to keep. But to justify such action, the bill must make out a case of great urgency. High on Rec., §§ 103-106.

<sup>3</sup> Merrill v. Elam, 2 Tenn. Ch., 515; High on Rec., § 83.

<sup>4</sup> Henshaw v. Wells, 9 Hum., 584.

<sup>5</sup> Code, §§ 3948; 4452.

<sup>6</sup> What is reasonable notice must be determined by the Judge, or Chancellor, hearing the motion. Much depends on the urgency of the application and the necessity for immediate action. Instant notice may be reasonable in one case, and five days in another.

<sup>7</sup> A defendant may move for the appointment of a

receiver, against a co-defendant, when clearly entitled to such relief. Henshaw v. Wells, 9 Hum., 584.

<sup>8</sup> Code, § 4452. Good cause would be (1) the non-residence of the defendant, (2) inability to find him after reasonable effort, (3) where notice would possibly result in the defendants wasting the property, or removing it out of the Court's jurisdiction, or transferring it or assigning it, (4) where the property is likely to perish, or greatly deteriorate, before notice could be given, or (5) any other fact showing that notice itself, or the delay necessary for notice, would result in irreparable injury. 2 Dan. Ch. Pr., 1735, notes; High on Rec., §§ 111-117. See, *ante*, § 62, sub-sec. 8, as to "good cause."

<sup>9</sup> Merrill v. Elam, 2 Tenn. Ch., 515; High on Rec., § 83; Trougher v. Akin, 1 Cates, 451, citing the above section, then § 855.

<sup>10</sup> See the form of a petition in the following section.

<sup>11</sup> Davis v. Reaves, 2 Lea, 649.

<sup>12</sup> The necessity for the appointment frequently occurs after the bill has been filed, in which case the Court will make the appointment on motion, supported by petition or affidavit, without requiring the bill to be amended, or a supplemental bill to be filed, unless new parties must be brought before the Court before a receiver can be appointed. Henshaw v. Wells, 9 Hum., 568; 2 Dan. Ch. Pr., 1734.

The bill or petition should also show upon its face that it is the first application for a receiver.<sup>13</sup>

§ 906. **Form of a Petition for a Receiver.**—When the necessity for a receiver arises during the progress of a litigation, the proper mode of making the application is by a petition, or by motion supported by affidavit, where new parties are not necessary. The following is a form of a

**PETITION FOR A RECEIVER.**<sup>14</sup>

William L. Bramley, *et al.*,  
*vs.*  
 Thomas J. Tyree, *et al.* } No. 683.— In the Chancery Court, at Lawrenceburg, Tenn.

To the Hon. George H. Nixon, Chancellor :

Your petitioners, the complainants in the above named cause, respectfully show to your Honor :

I.

That on the 3d day of January, 1878, they filed their original bill in said cause, alleging (1) that the defendants had executed to petitioner Bramley, as trustee, for the benefit of the other petitioners, a deed of trust on certain lands in said bill and deed described, said lands to be sold by said trustee if the debts by said deed secured were not paid by March 30, 1878; and alleging (2) that said defendants were in possession of said lands, and were stripping the same of all its valuable timber, and committing other waste thereon, thereby greatly impairing the value of said land, and impairing the security given petitioners by said deed of trust; and (3) praying that the commission of waste be enjoined, and after the period fixed therefore in the deed, (March 30, 1878,) that said trust be executed by a sale of said lands, and the distribution of the proceeds among those thereunto entitled. Reference is here made to said original bill, and said deed now on file in this cause, for a fuller statement of their contents, and we pray your Honor to consider them as a part of this petition, on the hearing thereof.

II.

Petitioners, in addition to what is stated in their said bill, now state to your Honor, that on January 26, 1878, Eliza P. Tyree, wife of said Thomas J. Tyree, by her next friend, filed her original bill in your Honor's said Court against petitioner and her husband, to have said trust deed set aside, and have a resulting trust in said lands declared in her favor. All of the defendants to her said bill, except her husband, have answered the same, denying all of its equities; but the pendency of her said suit throws such a cloud on the trustee's title to said lands that a sale thereof, before the removal of such cloud, would result in their being sacrificed.

III.

Petitioners would further state that it will probably be many months before the said suit by said Eliza P. Tyree is terminated; that the object of said suit is to embarrass petitioners in enforcing said trust; that said defendants are both insolvent, and nothing can be made out of them by legal process, outside of said lands; that said lands will fall far short of paying the debts secured by said trust deed, and that the rents and profits of said lands will be required to pay the residue of said debts.

IV.

Petitioners believe and charge that the object of the defendants in committing said waste, and in bringing the said suit of said Eliza, is to obtain all they can out of said lands by stripping it of its timber, and by holding the possession and enjoying the rents as long as possible, relying on their utter insolvency to shield them from the just claims and redress of petitioners, whose said security is becoming less and less every day, while said debts are becoming more and more every day by the accumulation of interest. The time fixed in said trust deed for its enforcement has now expired, and the trustee has now the right to proceed with the sale of said lands; but such sale is not now desirable for the reasons already stated.

V.

The premises considered, petitioners pray :

1. That your Honor will forthwith appoint a receiver to take charge of all of said lands, and collect the rents and profits thereof, and hold them subject to your Honor's orders in this cause.

<sup>13</sup> Code, § 4435. The Code seems to regard a receivership as in the nature of extraordinary process. See title of Chapter 20, preceding § 3766, and title to Article VIII, preceding § 4434, where receiverships are termed "extraordinary process," as they, also, are in §§ 3869 and 4454. When one considers that the order appointing a receiver, not only puts him into immediate possession of the property, requires the parties to surrender the property, and their tenants to attorn to him, but also, sometimes awards a writ of possession or assistance, the extraordinary character of the proceeding becomes manifest. *Roberson v. Roberson*, 3 Lea, 50; *Baird v.*

*Turnpike Co.*, 1 Lea, 307. Besides, if more than one application is made, there may be more than one receiver appointed, one by one Judge, and another by another Judge, and thus unseemly conflict might arise. In case of two receivers for the same property being appointed, the one first appointed will be deemed the rightful one, and the subsequent appointment will be deemed invalid, and will be revoked. High on Rec., §§ 152; 173.

<sup>14</sup> This petition is based on the case of *Bramley v. Tyree*, 1 Lea, 531.

2. That at the hearing, said rents and profits be applied to the satisfaction of the debts secured by said trust deed.

3. That your Honor will make all such other and further orders as may be necessary to protect, secure, and enforce petitioners' rights and equities in the premises.

This is the first application for a receiver in this cause.

JOHN H. FUZZELL, Solicitor.

[*Annex affidavit by the trustee, or one of the other petitioners: see, § 789, ante.*]

The application may also be made by motion, when all the necessary parties are before the Court. If the facts supporting such a motion do not otherwise appear, they must be made to appear by affidavit. These affidavits, however, should be as full, particular, and precise, as a bill or petition filed for the same purpose.<sup>15</sup>

At the hearing of an application for a receiver on bill and answer, it is proper for the Court to hear affidavits on behalf of the complainant.<sup>16</sup>

§ 907. **Notice of the Application for a Receiver.**—Reasonable notice of the time and place of the application for the appointment of a receiver, and of the Judge or Chancellor to whom the application will be made, must be given the defendant, or good cause shown why such notice should not be given.<sup>17</sup> The following is a form of a

#### NOTICE OF MOTION FOR A RECEIVER.

A B, }  
vs. } In Chancery, at Tazewell.  
C D. }

Mr. C D:

Take notice, that I will, at 10 a. m. on August 20, 1890, before Chancellor John P. Smith, at the office of the Clerk and Master, in Jonesboro, move for the appointment of a receiver in said cause, as prayed in the bill, [*or, in the amended or supplemental bill.*]

Aug. 14, 1890.

A B, by JOHN P. DAVIS, Solicitor.

This notice should be served in the same manner as a notice to take depositions, and the complainant should have the original notice with the officer's return thereon, or affidavit of service, at the time he makes his motion.

If no notice can be given, because of the extreme urgency of the matter, or because the defendant is a non-resident, or cannot be found, or for other good cause, affidavit should be made showing the fact, unless it appears in the bill, or otherwise.

§ 908. **Form of an Order Appointing a Receiver.**—If on the reading of the bill, or the bill and affidavit, the Judge, or Chancellor, should be of opinion that a case for the instant appointment of a receiver is made out, he will make the appointment in writing, substantially as follows:

#### ORDER APPOINTING A RECEIVER, AT CHAMBERS.

A B, }  
vs. } In Chancery, at Tazewell.  
C D. }

The motion in this cause for the appointment of a receiver coming on this day to be heard before me, at Chambers, on consideration thereof it is allowed: and E F is hereby appointed receiver of all the property described in the bill, and on his giving a receiver's bond, with two sufficient sureties in the penalty of two thousand dollars,<sup>18</sup> he will enter upon the discharge of his duties as such receiver, and will at once proceed at public or private sale, as he may deem best, to convert into money all the personal property and choses in action mentioned in the bill; the real estate he will rent out for the term of one year from expiration of the present lease; the rents of the current year he will collect and account for. The Clerk and Master will give him a copy of this order as his evidence of authority, and if possession of any of said personal property is refused him, or if the tenants of the said real estate refuse to attorn to him, the Master will issue a writ of possession to the Sheriff to put the receiver into the full and peaceable possession of all the property so withheld. The receiver will report his action in the premises to the next term of said Court. The Clerk and Master will file this order in the cause, and note it on his Rule docket.

Aug. 20, 1890.

JOHN P. SMITH, Chancellor.

<sup>15</sup> High on Rec., §§ 84-89.

<sup>16</sup> High on Rec., § 85.

<sup>17</sup> Code, § 4452. What would be good cause has heretofore been shown. See, *ante*, § 904, note 8.

<sup>18</sup> The penalty should be double the probable amount of money, or personal property, committed to the receiver. 2 Dan. Ch. Pr., 1736.

This order may be endorsed on the notice, or on the bill or copy of the bill, or may be written on a separate sheet of paper. When written and signed, it will be delivered or mailed to the Clerk and Master.

If the Court be in session, the motion for the appointment of a receiver may be made, at any time after the appearance of the defendant, on the bill, or on the bill and petition, or on the bill and affidavits, or on an amended or a supplemental bill; and the order for the appointment will be substantially the same as the order at Chambers above given, and the proceedings consequent on the order are the same.

Sometimes the same bill prays and makes out a case for an injunction, attachment, and the instanter *ex parte* appointment of a receiver. The following is a form for a

**FIAT FOR AN INJUNCTION AND AN ATTACHMENT; AND AN ORDER APPOINTING A RECEIVER.**

To the Clerk and Master of the Chancery Court at Crossville:

Upon this bill being filed and prosecution bond given, issue (1) the injunction as prayed, upon an injunction bond in the penalty of five thousand dollars being given; (2) the attachment as prayed, upon a proper bond therefor being given, and (3) on said bill being filed and bonds given, and said process issued, George W. Jones, of Cumberland county, is appointed receiver to take charge of all the property described in the bill, and also of all such property as may be found by the Sheriff in executing said attachment. The receiver will, before entering upon the discharge of his duties, execute a receiver's bond in the penalty of five thousand dollars, properly conditioned, the sureties to be approved by the Master. The receiver will at once sell all the personal property that is of a perishable nature, or expensive to keep; the notes of hand and accounts he will at once collect and convert into money; the stock of goods, wares, and merchandise, the fixtures, and the balance of the personal property, he will sell at private sale, provided he can get a satisfactory bid within thirty days, and if not he will then sell at auction. He may take notes with two good personal sureties, payable with interest from date, and due the first day of the next term of said Court, for all sales over fifty dollars. Before selling said stock of goods he will make a complete inventory thereof. He will require the tenants of the defendant to attorn to him, and pay over to him all rents, including any in arrears. He may pay any back taxes on said property, and may insure the same if expedient. All the defendants to this suit are enjoined to deliver to the receiver all the property in their possession, or under their control, hereby committed to him. If the receiver is denied possession of any of said property, or if any tenant refuses to attorn, the Clerk and Master will issue a writ of assistance,<sup>19</sup> directed to the Sheriff of the county where the property is situated, to put the receiver into possession thereof. The receiver is empowered to bring all suits by him deemed necessary to fully execute this trust; and all persons are enjoined from suing him without permission of said Court.<sup>20</sup> The receiver will report his action in the premises to the next term, and will file with it an itemized statement, showing every piece of property by him received, and the price for which sold, and all sums by him expended, and on what account, and the money and property in his hands.

Ordered at Chambers, August 16, 1891.

THOS. M. McCONNELL,  
Chancellor of 3d Division.

The Chancellor will, instead of appointing a receiver, sometimes give the defendant the option of giving a bond to pay the complainant what the Court may decree him, thus:

**CONDITIONAL APPOINTMENT OF A RECEIVER.**

To the Clerk and Master: Unless the defendant give a five hundred dollar bond in this cause, with two good sureties, within five days after notice hereof, such bond conditioned to pay the complainant the value [*or, the rents,*] of said [*property, describing it briefly,*] John Smith is hereby appointed receiver to take possession of said property, and sell [*lease, secure, or otherwise deal with,*] the same on the best terms obtainable, on due public notice. The receiver will, before acting, give bond in the penalty of one thousand dollars. The Master will forthwith notify the defendant of this order, and the defendant is hereby enjoined from in any way removing, encumbering, or disposing of, said property, until and unless he shall give said bond; and on his giving said bond, this order in reference to a receiver will stand vacated and annulled. July 30, 1891.

A. J. ABERNATHY, Chancellor.

§ 909. **The Receiver's Bond.**—Upon the making of the order appointing a receiver, whether made at Chambers or in open Court, the Clerk and Master

<sup>19</sup> The writ of assistance ordered above is merely a writ of possession, under another name. *Ante*, § 655.

<sup>20</sup> See, *post*, § 911.



will at once notify the receiver, and take from him or from the complainant the required bond and security,<sup>21</sup> and give him a certified copy of the order of appointment. The following is a form for the

#### RECEIVER'S BOND.

Know all men by these Presents:

That we, E F [*the receiver,*] and G H and I J, [*his sureties,*] acknowledge ourselves indebted to the State of Tennessee, for the use of those entitled, in the sum of two thousand dollars.

But this obligation to be void if the said E F, who has been appointed receiver in the cause of A B *vs.* C D, in the Chancery Court at Nashville, shall promptly take charge of, and duly and faithfully account for, all the property of which he has been appointed receiver; and shall make and file all proper inventories and reports, and pay over or account for all moneys that may or should come into his hands, and obey all orders of the Court to him addressed, and otherwise faithfully discharge all the duties of his trust.<sup>22</sup>

As witness [*&c., duly dated, signed, and witnessed.*]

The Chancellor or Judge may require the complainant applicant to give the bond, instead of the receiver, in which case the condition of the bond will be substantially the same as given above.<sup>23</sup>

### ARTICLE IV.

#### POWERS, DUTIES, AND LIABILITIES OF RECEIVERS.

§ 910. Putting the Receiver Into Possession.

§ 912. The Duties of a Receiver.

§ 911. The Powers of a Receiver.

§ 913. The Liabilities of a Receiver.

§ 910. **Putting the Receiver into Possession; and Suits Resulting.**—The order appointing a receiver should clearly specify the property committed to his custody; and should enjoin all the parties to the suit, their agents and attorneys, to surrender to the receiver all of such property in their possession, or under their control, and all books and papers relative thereto. The Court will award a writ of possession, called in Chancery a writ of assistance, to put the receiver into possession of any property denied him; and to eject all tenants who refuse to attorn to the receiver. If any person, whether a party to the suit or not, in any way interferes with the property, or with the proper discharge of the receiver's duties, he will be enjoined or attached, according to the flagrancy of his conduct. All persons who claim rights as against the receiver should come before the Court by petition, setting forth their rights and praying relief.<sup>1</sup> No suit can be brought against a receiver without express leave of the Court appointing him, when all persons are enjoined from suing him; and it is a contempt of Court to bring such a suit without such leave. The possession of the receiver is the possession of the Court appointing him; and all the property in his hands is in the custody of the Court.<sup>2</sup> But if no order has been made forbidding suits against a receiver, he is subject to suit, especially if operating a railroad; but the plaintiff, if successful, must file his judgment in the case wherein the receiver was appointed. In case of a suit against a receiver he may petition the Court for instructions, or for an injunction, which latter may be granted or refused.<sup>3</sup> If a receiver is in possession of, or claiming, property belonging to one not a party to the suit, such person can file an original bill against the parties to the suit claiming the property, and enjoin them from interfering with

<sup>21</sup> Code, §§ 3948; 4453.

<sup>22</sup> The following condition would be sufficient. But this obligation to be void, if said E F, who has been appointed receiver in the cause of A B *vs.* C D, in the Chancery Court at Nashville, shall faithfully discharge all the duties imposed on him by law, or the said Court. Code, §§ 3948; 4453. It is well, however, to set out the principal duties of the

receiver in his bond, as a notice to him and his sureties of what they are.

<sup>23</sup> Code, §§ 3948; 4453.

<sup>1</sup> For practice in such a case, see, *ante*, §§ 794; 894.

<sup>2</sup> High on Rec., §§ 134-172; *Jones v. Moore*, 22 Pick., 188.

<sup>3</sup> *Burke v. Ellis*, 21 Pick., 702.

such property, or beclouding his title.<sup>4</sup> Such a suit is not against the receiver, in the ordinary sense, although he may be made a party defendant.

If any of the property described in the bill is in the possession of a person not a party to the suit, the proper practice is to amend the bill and make such person a party, and then extend the authority of the receiver over such party and property;<sup>5</sup> or the Court may authorize the receiver to bring suit for such property.<sup>6</sup>

**§ 911. The Powers of a Receiver.**—As a general rule, a receiver has no powers to exercise, and no duties to perform, other than those conferred and imposed by the order appointing him, and by the course and practice of the Court, in such cases.<sup>7</sup>

He has the power to take possession of all the unleased property, and obtain the attainments of all the tenants of the leased property, and to collect all the debts and claims committed to him. A receiver cannot sue to recover property never in his possession, nor to collect a claim or debt, nor to enforce any right, unless generally or specially empowered by the Court so to do; and when he sues he should aver, or show on the face of his bill, that he has been so empowered.<sup>8</sup> If empowered to collect notes, accounts, and other choses in action, he may bring suit<sup>9</sup> for that purpose, if necessary, in his own name. Where property is in the possession of a third person, who claims the right to retain it, the receiver must either sue him, or the complainant must make him a party to the bill, and have the receivership extended over him.<sup>10</sup> A receiver appointed in another State cannot sue in this State to recover property never in his possession.<sup>11</sup>

**§ 912. The Duties of Receiver.**—The receiver, as soon as he has been qualified to act, should set to work diligently to discharge every duty imposed on him by the order of the Court. If he has been given the custody or management of personal property, he will at once take it all into his possession, and will demand all the choses in action, books, papers, and writings, relative to the business or property put into his custody. All the parties to the suit are usually enjoined to deliver up to the receiver all securities, notes, account books, papers, and other property, in their possession belonging to the business, and in case of their refusal to obey the order, the receiver should bring the matter to the attention of the party at whose instance he was appointed.

He will, as soon as he takes possession, make a complete inventory of the property, including therein every item, sufficiently described to identify it. If authorized to sell, he will at once take all steps necessary to realize a fair price; and if authorized to collect notes, accounts, or other choses in action, will at once proceed to do so, bringing suit whenever necessary.

When real estate has been committed to his custody, management, control, and disposition, he must at once take possession of it; or if tenants be in possession, he must require them at once to attorn to him, and pay him the rent, including all that may be in arrears. If unable to obtain possession, or attornment, or the rents, he should report the fact to the Solicitor of the complainant in order that the necessary steps may be taken to obtain possession, or to procure the attornment; and if such Solicitor fail to take action, the receiver should apply to the Court for instruction and assistance.<sup>12</sup> He must rent out such real estate as is not under lease, and must be diligent in collecting all the rents and profits of the estate, including all back rents due the defendant. He

<sup>4</sup> *Haynes v. Rizer*, 14 Lea, 252. See proceedings by petition *pro interesse suo*, ante, §§ 794; 894.

<sup>5</sup> High on Rec., § 145; 2 Dan. Ch. Pr., 1750, note.

<sup>6</sup> 2 Sto. Eq. Jur., §§ 833a-833b. But when a receiver sues at law he must stand on his legal rights, like any other plaintiff; and recover on the strength of his legal title. A Court of law is not concerned in maintaining the dignity of the Chancery Court in such a suit. *Conley v. Deere*, 11 Lea, 274.

<sup>7</sup> 2 Dan. Ch. Pr., 1748, note.

<sup>8</sup> *Simmons v. Taylor*, 22 Pick., 729.

<sup>9</sup> *Wray v. Jameson*, 10 Hum., 186. But the receiver should be careful to institute no important suit without express leave of the Court.

<sup>10</sup> 2 Dan. Ch. Pr., 1750, note.

<sup>11</sup> *Bank v. Motherwell*, 11 Pick., 172.

<sup>12</sup> 2 Dan. Ch. Pr., 1749; 1752. He is not obliged to take property from a third person, or even from the defendant himself, by force, without an express order of the Court so to do. 2 Dan. Ch. Pr., 1749, note.

may expend small sums in making customary and necessary repairs, without previous order of the Court; and may pay back taxes, or any debt that, if left unpaid, would cause the title to the property to fail, provided it is manifestly to the interest of the parties that he pay such taxes or debt. If property, such as a mill, is deteriorating and expensive to keep, the receiver may be ordered to sell before the final hearing.<sup>13</sup>

It is the duty of the party, on whose application a receiver is appointed, to see that he discharges his duties, and that all necessary orders are made from time to time to compel him to act and account, according to law; and any loss, which may occur by the negligence of such party, must, as between him and the other parties to the cause, fall upon him.<sup>14</sup>

**§ 913. The Liabilities of a Receiver.**—A receiver must be careful to keep within his powers, and to fully, prudently, and faithfully, discharge all his duties. He will be responsible for all losses occasioned to the estate by his wilful default, or gross negligence. If he places money received by him in improper hands, he will be charged with all loss.<sup>15</sup> He must account for all the property and money that went into his hands, or that could have been obtained or collected by reasonable diligence.

Property in the hands of the receiver, being in the hands of the Court, any loss, depreciation, or destruction of it, without his fault, must fall upon the owners.<sup>16</sup> He is not liable for interest, unless he has received interest, or used the funds, or failed to pay over when required.<sup>17</sup>

If the receiver fail to report, or fail to pay over the balance in his hands, when ordered by the Court, he may be committed to jail until he complies with such order. The Master may, also, be required to report what amount the receiver is liable for, if it does not otherwise appear; and when the amount is ascertained, the Court may render a decree therefor against the receiver and the sureties on his bond.

When any question of difficulty arises in the discharge of his duties the receiver should bring it before the Court by petition in the cause, and pray the advice and direction of the Court in the matter.<sup>18</sup>

## ARTICLE V.

### SETTLEMENTS, REMOVAL, AND DISCHARGE OF RECEIVERS.

§ 914. Receivers' Allowances.

§ 915. Compensation of Receivers.

§ 916. Receivers' Accounts and Reports.

§ 917. Removal and Discharge of Receivers.

**§ 914. Receivers' Allowances.**—In passing upon his accounts a receiver will be allowed: (1) any expenditures authorized by the Court; (2) any expenses necessarily incurred for the benefit of the estate committed to his charge, and (3) all taxes, or other public charges by him paid. Among the expenditures ordinarily deemed necessary are included (1) expenses of caring for and guarding the property, when necessary; (2) indispensable repairs; (3) insurance, when prudent to insure.<sup>1</sup>

But a receiver will not ordinarily be allowed (1) expenses incurred for services which he could have rendered himself, or (2) compensation paid or promised a deputy when he was not absolutely necessary, or (3) fees paid attorneys

<sup>13</sup> *Gleaves v. Ferguson*, 2 Shan. Cas., 560.

<sup>14</sup> *Terrell v. Ingersoll*, 10 Lea, 77; *Downs v. Allen*, 10 Lea, 670.

<sup>15</sup> 2 Dan. Ch. Pr., 1751.

<sup>16</sup> *Wall v. Pulliam*, 5 Heisk., 365. *Res perit suo domino*. See, *ante*, § 64.

<sup>17</sup> *Fulton v. Davidson*, 3 Heisk., 647; High on Rec., § 804; 2 Dan. Ch. Pr., 1756.

<sup>18</sup> High on Rec., § 188.

<sup>1</sup> High on Rec., §§ 180; 797-798.

or Solicitors, or (4) improvements made to the property, or (5) unauthorized additions to the stock of goods, or business in his hands, or (6) for losses incurred by taking insufficient security, or (7) for costs or expenses of any kind which, by proper diligence or action, might have been avoided; or (8) any compensation for his services, when he fails to properly discharge his duties, or fails properly to make settlement, or account for moneys in his hands. The receiver should first obtain the consent of the Court, or of the parties, before taking any affirmative step, or assuming any responsibility.<sup>2</sup>

**§ 915. Compensation of Receivers.**—A receiver is entitled to such compensation as is usually allowed by law, or contract, for similar services. The usual commission is five per cent. of the amount collected and disbursed; but this amount may be increased in cases of special difficulty; and decreased where the amount is large, or the labor or responsibility inconsiderable. In all cases, the compensation should be such as is reasonable for the services of a person competent to perform the duty. A percentage of five per cent. is only a general guide, and not an invariable rule.<sup>3</sup> He may, also, have an allowance for extraordinary trouble or expense, and for counsel fees, if incurred with the approbation of the Chancellor, or Court.<sup>4</sup> His compensation is allowed and paid, usually, out of the proceeds of the property that went into his hands; but, if there were no proceeds, his compensation will be taxed as a part of the costs of the cause.<sup>5</sup>

A surviving partner who serves as receiver is, ordinarily, entitled to no compensation, especially when appointed at his own request.<sup>6</sup>

A receiver who fails to settle and pay over when so ordered, or who fails to make reports when so ordered, or who is guilty of fraudulent or negligent conduct causing loss or delay, forfeits all right to compensation.<sup>7</sup>

**§ 916. Receivers' Accounts and Reports.**—A receiver must make a full and true report to the Court whenever required,<sup>8</sup> showing what has come into his hands, what expenses he has incurred, and the condition of the estate. These reports should be minutely itemized, and accompanied with vouchers for every expenditure made. If the items are numerous, they may be put in an inventory, or schedule, and the sum total entered in the report, the inventory or schedule being filed therewith. The following is a form of a

**RECEIVER'S REPORT.**

A B, }  
vs. } In Chancery, at Crossville.  
C D. }

To the Chancellor:

I submit the following report as receiver in said cause:

I.

*The property that came into my hands:*

1. The stock of goods mentioned in the bill. (See inventory, exhibit A.)
2. Articles levied on by Sheriff O P, and delivered to me. (See inventory, exhibit B.)
3. Notes of hand, accounts, &c. (See inventory, exhibit C.)
4. The house and lot on the north-east corner of John and Fourth streets, occupied by James Brown as tenant.

II.

*The cash that has come into my hands:*

1. Proceeds of the sale of said stock of goods. (See said exhibit A.) - - \$1,683.40
2. Proceeds of the sale of the property turned over to me by Sheriff O P.  
(See sale list, exhibit D.)

213.10

<sup>2</sup> High on Rec., §§ 797-818; 180; Conley v. Deerc, 11 Lea, 274.

<sup>3</sup> Fulton v. Davidson, 3 Heisk., 643; Stretch v. Gowdey, 3 Tenn. Ch., 565; High on Rec., §§ 781-796.

<sup>4</sup> 2 Dan. Ch. Pr., 1745-1747; High on Rec., 790.

<sup>5</sup> 2 Dan. Ch. Pr., 1753; Stretch v. Gowdey, 3 Tenn. Ch., 565; Hayes v. Ferguson, 15 Lea, 13. But if the complainant was not entitled to the receiver, he may be taxed with the costs of the receivership. Lockhart v. Gee, 3 Tenn. Ch., 332.

<sup>6</sup> Piper v. Smith, 1 Head, 93; Berry v. Jones, 11 Heisk., 206; Brien v. Harriman, 1 Tenn. Ch., 467; Todd v. Rich, 2 Tenn. Ch., 107; High on Rec., § 795.

<sup>7</sup> Stretch v. Gowdey, 3 Tenn. Ch., 567; 2 Dan. Ch. Pr., 1155; High on Rec., § 818.

<sup>8</sup> If the report will include nothing but rents, he must make a full report and settlement at least once a year. Lowe v. Lowe, 1 Tenn. Ch., 515; Stretch v. Gowdy, 3 Tenn. Ch., 565.

Courts of Equity are disposed to hold receivers to great strictness in rendering their accounts; and no delays or negligence will be tolerated. High on Rec., § 797.

3. Proceeds of notes, accounts, &c. (See said exhibit C.)	- - - -	841.00
4. Rent of said house and lot, for 7 months, Jany. 1 to Aug. 1, 1890, at \$20.00 per month,	-	140.00
Total collections from all sources,		<u>\$2,877.50</u>

## III.

*Moneys expended by me:*

1. Advertising sale,	Voucher 1,	-	\$10.00
2. Auctioneer Smith's bill,	" 2,	-	18.00
3. Insurance on goods,	" 3,	-	26.00
4. Taxes on said lot,	" 4,	- -	19.50
5. George Nye, clerk,	" 5,	-	12.00
6. Miscellanies,	" 6,	-	1.20
Total expenditures,			<u>86.70</u>
Balance on hands,			<u>\$2,790.80</u>

## IV.

There are no more funds to be realized, except from the uncollected notes, accounts, and judgments, and from accruing rents on said house and lot. The uncollected notes are shown on exhibit C. I advise that said notes, accounts, and judgments be sold to the highest bidder, at public sale.

All of which is respectfully submitted. October 5, 1890.

GEORGE W. JONES, Receiver.

The following will serve as a form for the inventories:

**INVENTORY OF PROPERTY.**

[Exhibit A.]

The following is a full and true inventory of the stock of goods, wares, and merchandise, and other properties, in the store of C D, that came into my possession; to whom sold, and the price:

1 Iron safe	Sold to A, for	\$40.00
1 bolt sheeting	" " B, "	4.00

[And so on, giving each item.]

Total proceeds of sale, \$1,683.40

GEORGE W. JONES, Receiver.

**INVENTORY OF NOTES AND ACCOUNTS.**

[Exhibit C.]

The following is a full and true inventory of all the notes, accounts, and other money demands, belonging to C D, that came into my possession, and the amounts collected thereon:

1. Note on K L, for \$50.00, date Aug. 1, 1889, due one day after date. Paid Sept. 1, 1890,	- - - -	\$ 53.25
2. Account against M N, for \$314.00. Judgment taken Sept. 10, 1890, before O M, J. P., and stayed.	- - - -	
3. Judgment against Q R, before O M, J. P., for \$80.00, rendered Aug. 11, 1889. Paid Sept. 1, 1890,	- - - -	85.20

[And so on, giving each note, account, judgment, &c., their dates, and amounts, and when and how much collected.]

Total amount collected, \$841.00

The notes, accounts, and judgments numbered 2, 6, 8, 11, and 13 are considered good, the others are doubtful, or worthless.

GEORGE W. JONES, Receiver.

The inventory, exhibit B, is substantially the same as the inventory exhibit A. A schedule of moneys expended should be made when the items are very numerous, and only the sum total entered in the report; but in all cases the receipts for all moneys paid out should be filed, duly numbered.

§ 917. **Removal and Discharge of Receivers.**—There is a distinction between the removal of a receiver and his discharge. A removal ordinarily implies a mere change in the incumbency of the office, whereas a discharge ordinarily implies that the duties of the receiver are at an end.

1. **Removal of Receivers.** The Court has full and absolute power to remove a receiver at any time of the litigation, and to appoint another in his place. The exercise of this power is not governed by any fixed rules, but belongs to the discretionary jurisdiction of the Court.<sup>9</sup> The power may be exercised in term

<sup>9</sup> On the removal of receivers, see, generally, High on Rec., §§ 820-831 a.

time, or in vacation; and the application for a change in the receivership should be on notice to both the receiver and the opposite party. The ordinary causes for removal are: (1) that the receiver is a biased kinsman to one of the parties; (2) that his conduct or declarations show that he is a partisan of one of the parties; (3) that he is incompetent mentally or physically; (4) that he has abandoned or is otherwise grossly neglecting his duties; (5) that he fails to give a proper bond when required, and (6) that he has become a bankrupt.

If the Court is made certain that the appointment of a receiver was improvidently made, the appointment will be revoked on motion.

2. **Discharge of Receivers.** Ordinarily, before a receiver will be discharged, he is required to make a full settlement with the Master; and that settlement must be reported and confirmed, and the full balance found against him paid into Court. On the settlement with the Master, all parties in interest are entitled to notice in order to have the opportunity of being present, and examining or cross-examining the receiver on oath; and, also, of introducing any evidence they may have to show the incorrectness or deficiency of the receiver's report.

If all parties are satisfied with the correctness and sufficiency of his reports, the trouble and expense of a reference to, and settlement with, the Master is avoided, by a consent order confirming the receiver's report, fixing his compensation and ordering his discharge, and the cancelling of his bond, on his paying into Court the full balance due from him.

If a receiver is appointed before answer, and the answer fully and fairly denies the equities of the bill, and is not overcome by the proofs adduced by the complainant, the receiver will, on motion of the defendant, be discharged.<sup>10</sup>

When a receiver has accepted the office by giving bond, he cannot be discharged on his own application, without showing some reasonable cause; but if he becomes a bankrupt, or falls into bad health, he will be discharged. A receiver will, also, be discharged if the complainant's demand is satisfied, or if the receivership becomes unnecessary; but, as his appointment is for the benefit of all parties, he will not be discharged on the *ex parte* application of the party who had him appointed.<sup>11</sup>

<sup>10</sup> High on Rec., § 24.

<sup>11</sup> As to the discharge of receivers, see, generally, 2 Dan. Ch. Pr., 1765; High on Rec., §§ 832-848.

## CHAPTER XLV.

## ATTACHMENTS OF THE PERSON FOR CONTEMPT.

§ 918. Contempts Generally Considered.

§ 919. Nature and Kinds of Contempts.

§ 920. Proceedings in Contempts in the Presence of the Court.

§ 921. Proceedings in Contempts Out of the Presence of the Court.

§ 922. Punishment for Contempts.

§ 923. Proceedings in Contempts Before the Master.

§ 924. Effect of a Contempt.

§ 918. **Contempts Generally Considered.**—A court of law operates upon the property of parties to a suit, but a Court of Chancery often operates upon the *person* of the parties, commanding them to do certain specified acts. It is manifest that, if the Court had no power to enforce obedience to such decrees, they would be wholly ineffectual, and would be absolutely disregarded. The violation of the decree of a Court is termed a contempt, and the Court of Chancery, from the beginning of its existence, has exercised the power to punish such violations, by process of attachment.<sup>1</sup>

The power to punish for contempt is one of the highest prerogatives of a Court of Justice; and, upon its bold and prudent exercise, depend the respect, the dignity, and efficiency, of Courts as arbiters of human rights. The mandates of a Court of Chancery must in all cases be obeyed, according to the spirit of the decree, promptly, faithfully and without question, or evasion. The party, upon whom the order or command of the Court operates, is not allowed to speculate upon the Equity of the bill, or the legality or regularity of the order, or decree, or of the writ issued thereon; but his simple duty is to obey: and when he disobeys it is a duty the Court owes, to itself and to the public, to punish him at once.<sup>2</sup>

§ 919. **Nature and Kinds of Contempts.**—Under our statutes, the power of the several Courts to issue attachments, and inflict punishments for contempts of Court, is limited to the following cases:

1. The wilful misbehavior of any person in the presence of the Court, or so near thereto as to obstruct the administration of justice.
2. The wilful misbehavior of any of the officers of the Court, in their official transactions.
3. The wilful disobedience or resistance of any officer of the Court, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of the Court.
4. The abuse of, or unlawful interference with, the process or proceedings of the Court.
5. Wilfully conversing with jurors in relation to the merits of the cause, in the trial of which they are engaged, or otherwise tampering with them.<sup>3</sup>
6. The failure of a defendant to answer a bill in the time and manner required by law.<sup>4</sup>

<sup>1</sup> The power to punish contempts summarily, by process of attachment, has been coeval with the existence of Courts; and to Courts of Chancery it is indispensable. Their decrees are sometimes (1) affirmative, and require an act to be done, as that one party shall convey by deed, or shall surrender up an instrument to be cancelled; and sometimes (2) negative and restraining, as that a party shall refrain from doing a specified act. Without the power to enforce these decrees by punishing disobedience and

violation of them, a Court of Chancery would be useless. Underwood's case, 2 Hum., 46.

<sup>2</sup> Blair v. Nelson, 8 Bax., 1. See Article on enforcement of decrees by process of contempt., *ante*, §§ 32; 652.

<sup>3</sup> Code, § 4106. As to the enforcement of judgments and decrees by attachments for contempt in the nature of an execution, see Code, §§ 3104; 4478; 4483; and §§ 651-652, *ante*.

<sup>4</sup> Code, §§ 4360-4368.

7. The omission to perform an act required by an order or decree of the Court; or, the performance of an act, forbidden by such an order or decree.<sup>5</sup>

8. Any other act or omission expressly declared by law to be a contempt.<sup>6</sup>

Contempts for failing to answer a bill are termed *ordinary* contempts, and all other contempts are termed *extraordinary* contempts.<sup>7</sup> Ordinary contempts have already been considered.<sup>8</sup>

§ 920. **Proceedings in Contempts in the Presence of the Court.**—If any of the foregoing contempts are committed in the presence of the Court, the offending party may be arrested by the officer waiting upon the Court, upon the verbal order of the Chancellor, without process or notice, and the contemner shall not be bailable; but the Court may proceed at once to fine, or imprison, or both.<sup>9</sup> The proceedings in such a case are summary, but the power to so proceed is vital to the respectability, safety, and existence of the Court,<sup>10</sup> and should be exercised unhesitatingly, fearlessly, and vigorously.

But, inasmuch as there are no pleadings to show the grounds of the Court's jurisdiction and judgment, it is indispensable to the validity of such a summary proceeding that the judgment show on its face: (1) one or more of the statutory acts of contempt; (2) that such statutory act was committed in the presence of the Court; and (3) the penalty inflicted.<sup>11</sup> The following is the form of such a

**JUDGMENT FOR CONTEMPT.**

The State,  
vs.  
John Lawless.

On this August 16, 1891, Court being in session, the defendant, John Lawless, did so wilfully misbehave in the presence of the Court by loud talking as to obstruct the administration of justice; and, for such wilful act of contempt, it is ordered and adjudged that said defendant, he being present in Court, be fined the sum of twenty dollars; and be committed to the county jail for twenty-four hours, and that he pay all the costs of this proceeding. An execution will issue for said fine and costs, and a mittimus will issue for his commitment.

§ 921. **Proceedings in Contempts Out of the Presence of the Court.**—In all cases of contempts of Court committed out of the presence of the Court, except contempt by a defendant in failing to answer a bill,<sup>12</sup> or contempt by a witness in failing to appear or answering questions, the mode of proceeding is as follows: The party complaining of the alleged contempt, must file a petition in the cause wherein it was committed, stating the contempt complained of, and by whom committed. The petition must be sworn to, and must be supported by such affidavits, returns of officers, or certified copy thereof, or other papers, as will fully show how the contempt arose.<sup>13</sup>

If such petition show sufficient cause, the Chancellor will order the Clerk and Master to issue an attachment for the body of the contemner, fixing in the order the time and the place for his appearance, to answer the petition; and also, the amount and character of the bail-bond to be taken.<sup>14</sup> The following is a form of a

**PETITION FOR AN ATTACHMENT FOR CONTEMPT.**

A B, }  
vs. } In Chancery, at Carthage.  
C D. }

To the Chancellor of said Court:

A B, complainant in said cause, respectfully shows to your Honor, that the injunction awarded in the cause was duly issued by the Clerk and Master, and duly served on the defendant C D, prohibiting him from cutting trees upon the complainant's tract of land in said injunction described, and from removing therefrom any of the trees already cut thereon; but that said defendant since said service has cut other trees, and has removed all that had been cut

exclusively to extraordinary contempts, and not to contempts by a defendant for failing to answer a bill, or to contempts of a witness for failing to appear, or to testify. See sub-sections 6-8 of the Rule. Nor does said rule apply to contempts in not performing the decrees of the Court.

5 Code, §§ 4108-4109; 4106, sub-sec. 3; 3194.  
6 Code, § 4106, sub-sec. 6.  
7 2 Barb. Ch. Pr., 269-270.  
8 *Ante*, §§ 201-204.  
9 Ch. Rule, VII, § 1.  
10 *State v. Galloway*, 5 Cold., 338.  
11 Ch. Rule, VII, § 1; *post*, § 1195; *State v. Galloway*, 5 Cold., 337.  
12 Ch. Rule, VII, § 2 (§ 1196,) evidently applies

13 Ch. Rule, VII, § 2, sub-sec. 1; § 1196.

14 Ch. Rule, VII, § 2, sub-sec. 2. But if the con-



prior to said service. Complainant charges that said cutting and removal were in wilful disobedience of said injunction, and in contempt of Court; and he, therefore, prays for an attachment for the body of the defendant, and that he answer hereunto.

Complainant files herewith the affidavits<sup>15</sup> of William Jones and Henry Brown, marked exhibits A and B, respectively, to this petition, and will read them at the hearing in support of the petition; as he will, also, read the bill, writs of injunction, and return thereon.

This is the first application for an attachment in this case.<sup>16</sup>

E. L. GARDENHIRE, Solicitor.

The petition being duly sworn to, the Chancellor will endorse thereon his

**FIAT FOR AN ATTACHMENT FOR CONTEMPT.**

To the Clerk and Master at Carthage:

File this petition; and issue an attachment<sup>17</sup> for the body of C D, returnable to the first day of the next term of your Court. The Sheriff will take a bail-bond<sup>18</sup> from the defendant for his appearance at the next term, in the penalty of one thousand dollars,<sup>19</sup> with two good sureties, conditioned to be void if the defendant appear and file his answer to said petition, on the first day of the next term, and do not depart from the Court without its leave.

August 20, 1891.

B. M. WEBB, Chancellor.

If the petition is presented in open Court, the order for the attachment will be entered on the minutes, and will be substantially the same as the foregoing fiat. Neither a fiat nor an order should contain any adjudication, that the defendant has been guilty of the alleged contempt, but may allege that it appears to the Court that there is a probable cause for an attachment.<sup>20</sup>

Upon the appearance and answer of the contemner, or on the production of his body, and refusal to answer, at the time and place designated, the Chancellor will hear the case upon the petition, affidavits and exhibits, and the answer thereto, in case the contemner answers; and, if he fails to answer, then upon the case made by the petition. For good cause shown, the Chancellor may give the defendant further time to answer.<sup>21</sup> The answer of the defendant denying the contempt, is not conclusive; but evidence may be heard in support of the petition, and, also, in support of the answer.<sup>22</sup>

If the contemner fail to appear as required by his bond, judgment will be rendered thereon against him and his sureties, for the full amount thereof; and an *alias* attachment ordered to issue. In case an *alias* attachment is issued, and the contemner arrested thereon, no bail shall be taken, unless the contemner show good cause for his default, either before the Clerk and Master,<sup>23</sup> in vacation, or before the Chancellor in term time.<sup>24</sup> If the party charged with the contempt be in the custody of an officer, or in jail, the Court, or Chancellor, may award a writ of *habeas corpus* to bring him up to answer for his alleged misconduct.<sup>25</sup>

§ 922. **Punishment for Contempts.**—The punishment for extraordinary contempts is by fine or imprisonment, or both, such fine, however, not to exceed fifty dollars, and the imprisonment not to exceed ten days.<sup>26</sup> But if the contempt consist in an omission to perform an act ordered by the Court, which it is yet in the power of the contemner to perform, he may be imprisoned until he performs it. If the contempt consist in the performance of an act, forbidden by an order of the Court, the contemner may be imprisoned until the act is rectified by placing matters and person *in statu quo*, or by the payment of damages.<sup>27</sup> All attachments for the non-performance of decrees, are in the nature of an

tempt is for not performing a decree, no bail shall be taken. Code, §§ 4110; 4481.

<sup>15</sup> In proceedings for contempt against a party to the suit to compel the defendant to answer, or to enforce the performance of a decree, or order, the affidavits, both before and after the attachment, should be entitled in the original cause. In proceedings for contempt against witnesses, and others, who are not parties to the suit, the affidavits previous to the order for the attachment should be entitled in the original cause; but all subsequent affidavits should be entitled in the name of the State, on the relation of the party prosecuting the attachment, against the person prosecuted. 1 Barb. Ch. Pr., 600.

<sup>16</sup> Code, §§ 4434-4435. See, *ante*, § 872.

<sup>17</sup> For form of an attachment, see, § 202; *post*, § 923.

<sup>18</sup> But no bail will be taken, if the contempt is in not performing a decree. Code, §§ 4110; 4481.

<sup>19</sup> If no penalty is fixed, it will be two hundred and fifty dollars. Code, § 4111.

<sup>20</sup> 2 Barb. Ch. Pr., 276.

<sup>21</sup> Ch. Rule, VII, § 2, sub-sec. 3; *post*, 1196.

<sup>22</sup> See Underwood's case, 2 Hum., 46. It is a common practice to hear the testimony, orally, in open Court on the trial of a case of alleged contempt. The defendant is a competent witness.

<sup>23</sup> The statute reads "commissioner"; this is manifestly a typographical error. See Code, §§ 4368; 4375; 4420, sub-sec. 3.

<sup>24</sup> Ch. Rule, VII, § 2, sub-sec. 4. Sub-sec. 5 is not clear. It can hardly mean that the Master may enter judgment on the bond in vacation, and award execution thereon; and yet such is its language.

<sup>25</sup> 2 Barb. Ch. Pr., 278.

<sup>26</sup> Code, § 4107.

<sup>27</sup> Code, §§ 4108-4109. See Violation of Injunctions; *ante*, §§ 845-848.

execution, on the service of which no bail is taken, but the party will be committed to jail, there to remain until he performs the decree.<sup>28</sup> A witness who refuses to answer legal interrogatories, may be committed by the Court until he consents to give his testimony.<sup>29</sup>

**ORDER OF COMMITMENT FOR NOT PERFORMING A DECREE.**

A B, }  
 vs. }  
 C D. }

The petition filed in this cause, praying an attachment against the defendant, C D, for not performing the decree of the Court in this cause commanding him to execute to the complainant a deed for the tract of land<sup>30</sup> described in said decree, coming on to be heard, and the defendant being in Court, under arrest on the attachment heretofore issued against him on said petition, and his answer to said petition showing no sufficient excuse for not performing said decree, it is adjudged by the Court that the defendant is in contempt for not performing said decree; and it is, therefore, ordered and decreed that the defendant be committed to the jail of Smith county, there to remain until in presence of two proper witnesses he shall have duly executed and acknowledged the deed specified in said decree, and exhibited in said petition, and that a mittimus issue accordingly.

The order of the Court convicting a party of a contempt should recite the substance of the alleged misconduct, and that the defendant is guilty thereof. The mittimus should follow the decree, and command the Sheriff "to take the body of the said C D, and him safely and closely keep in the jail of Smith county, until he shall have duly executed and acknowledged the deed specified in the said decree."<sup>31</sup> The following is the form of a

**MITTIMUS.**

State of Tennessee, }  
 Smith county. }

To the Sheriff of said county:

Whereas, in a cause in the Chancery Court of said county, wherein A B is complainant and C D is defendant, it was ordered, at the May term, 1891, of said Court, that the said defendant, C D, be committed to the jail of Smith county, there to remain until [*he shall do what the decree requires of him, here inserting the language of the order or decree of commitment.*]

You are, therefore, hereby commanded to take the body of the said C D, and him safely and closely keep in the said jail, until he shall have duly [*complied with said order of commitment, specifying what is required of him.*]

As witness my hand, this May 20, 1891.

C. W. GARRETT, C. & M.

If any one is illegally committed for an alleged contempt, he may be discharged on a *habeas corpus*. If legally committed, he cannot be discharged until the time of his imprisonment has expired, if such time be limited by the order of commitment; but if he is imprisoned until he performs the decree, he cannot be discharged until he has so done. He may, however, obtain a *habeas corpus* from the Court, or the Chancellor in vacation, and be discharged upon purging his contempt, and upon such conditions in respect to his compliance with the decree as the Chancellor may think proper. In such a case, the adverse party, his agent or attorney, if in the State, is entitled to reasonable notice of the hearing of the writ of *habeas corpus*, and may interrogate the party in contempt upon his oath, and controvert the truth of his statements by other proof.<sup>32</sup>

An appeal to the Supreme Court will lie from a judgment imposing either a fine or imprisonment for a contempt committed not in the presence of the Court.<sup>33</sup> If the contempt is in the presence of the Court, the defendant's remedy in case of his conviction is by writ of error and supersedeas.<sup>34</sup>

**§ 923. Proceedings in Contempts Before the Master.**—If a witness, after having been duly summoned, fails to appear before the Master, he is guilty of a

<sup>28</sup> Code, § 4481. Chancery Rule VII, it would seem, does not apply to contempts for not obeying the decrees of the Court.

<sup>29</sup> Ch. Rule, VII, sub-sec. 7; *post*, 1196. Page *v.* State, 11 Lea, 202.

<sup>30</sup> The tract was situated in Kentucky, and the Court here could not divest and vest title, to land there, by the operation of its own decree, *proprio vigore*.

<sup>31</sup> 2 Barb. Ch. Pr., 279; 374. The order and mitt-

imus should specify particularly how long the contemner is to be imprisoned, or what he is to do to entitle him to his discharge. *Ibid*.

<sup>32</sup> Code, §§ 4482-4483.

<sup>33</sup> *Baxter v. Fleming*, 6 Bax., 331.

<sup>34</sup> *Hundhausen v. Insurance Co.*, 5 Heisk., 702; *State v. Warner*, 13 Lea, 52. In the latter case it is intimated that even an appeal will lie in such a case.

contempt; and, upon the return of an officer, or proof by affidavit, of such service, it is the duty of the Master to issue an instant attachment for such witness. The attachment should designate the penalty of the bail bond to be given by the witness, the bond to be conditioned for his appearance before the Chancellor, at a time and place to be specified, if practicable, or before the Court at the next succeeding term, if it be not then in session, to show cause why he should not be fined, or committed according to law for contempt.<sup>35</sup> The following is a form of such

#### AN ATTACHMENT FOR CONTEMPT.

State of Tennessee,

To the Sheriff of Anderson county:

We command you to attach John Reckless so as to have his body [before our Chancellor at the Clerk and Master's office, in Clinton, on September 2, 1890, at 10 a. m., *or*,] before our Chancery Court at Clinton, at its next term, then and there to show cause why he should not be fined or committed according to law, for a contempt by him committed against the State, in failing to appear before the Master, when summoned as a witness, in the case of *A B vs. C D*.

You will take a bail-bond from said John Reckless, with two good sureties, in the penalty of two hundred and fifty dollars, conditioned for his appearance at the time and place above designated to show cause as aforesaid. Herein fail not, and have you then and there this writ, with a return showing how you have executed the same.

Witness James C. Scruggs, Clerk and Master of said Court, at office in Clinton, August 18, 1891.

JAMES C. SCRUGGS, C. & M.

If a witness should appear before the Master, and refuse to answer legal questions, it is the duty of the Master to commit him to jail, until he consents to give his testimony.<sup>36</sup> In such cases, the mittimus should show on its face that the witness is committed for refusing to answer legal interrogatories, and shall require the Sheriff to safely and closely keep him in custody, in the county jail, until he consents to give his testimony.

The Master, while engaged in taking depositions, is vested with all the powers of the Court to preserve order, prevent interruption, and control the conduct of the parties in the examination of witnesses,<sup>37</sup> and may summarily impose a fine not exceeding ten dollars.<sup>38</sup>

The Master may, on application of the complainant, issue an attachment against a defendant for want of an answer, where the time for answering has expired, and the defendant has been served with subpoena.<sup>39</sup>

§ 924. **Effect of a Contempt.**—He who seeks Equity must do Equity, and he who has done iniquity shall not have Equity. Therefore, it is a general rule that a party who is in contempt will not be heard by the Court, when he wishes to make a motion or ask a favor; and, if the contempt consists in his failure to answer, he will not be allowed to file any other pleading, in the particular cause wherein the contempt arose. His first duty is to purge his contempt, and the only steps he can take are to apply to the Court (1) to set aside the proceedings against him because they are irregular, and (2) to be discharged on the ground that he has purged himself of his contempt, by doing the act for the non-performance of which the contempt was incurred, and confessing judgment for the costs occasioned by his contumacy. But a party in contempt in one cause, is not thereby in contempt in another cause, even though the parties in such other cause be the same; and he is free to make motions and to file pleadings in the cause wherein he is not in contempt.<sup>40</sup> Nor will the fact that a party is in contempt prevent him being heard in opposition to any special application or motion which the other side may make.<sup>41</sup>

<sup>35</sup> Ch. Rule, VII, sub-sec. 6; *post*, 1196.

<sup>36</sup> Ch. Rule, VII, sub-sec. 7; Code, § 3823.

<sup>37</sup> Code, §§ 3858; 4112.

<sup>38</sup> Code, § 4107. If the imposition of a fine should fail to preserve order, prevent interruption, or control the conduct of any party examining a witness, the Master should sue out a warrant for the arrest of the offender for obstructing the administration of justice. It would seem that the Master has no power to commit the offender. But the Master may report the offender to the Court, and he may there

be punished for his contempt, on proper proceedings. Code, § 4099, sub-sec. 2.

<sup>39</sup> Code, § 4360; Ch. Rule, VII, sub-sec. 8; *post*, § 1196. See, *ante*, § 201.

<sup>40</sup> 2 Barb. Ch. Pr., 281-282; 1 Dan. Ch. Pr., 505-508; *Gaut v. Gaut*, 10 Hum., 464; *Rutherford v. Metcalf*, 5 Hay., 58. If a party file a pleading while in contempt, it will be stricken from the file on motion. *Ibid*.

<sup>41</sup> 2 Barb. Ch. Pr., 282.

## PART VIII.

### PARTICULAR SUITS IN CHANCERY SPECIALLY CONSIDERED:

#### CHAPTER XLVI.

##### SUITS IN RELATION TO TRUSTS.

ARTICLE I. Suits in Relation to Express Trusts.

ARTICLE II. Suits in Relation to Resulting and Constructive Trusts.

#### ARTICLE I.

##### SUITS IN RELATION TO EXPRESS TRUSTS.

§ 925. Trusts Generally Considered.

§ 926. Cases of Express Trusts.

§ 927. Frame and Form of Bills in Cases of Express Trusts.

§ 928. Answer of an Executor to a Bill for an Accounting.

§ 929. Suits to Construe Wills, or Trusts.

§ 925. **Trusts Generally Considered.**—A trust, in the most enlarged sense in which that term is used in our jurisprudence, is a beneficial interest in property, real or personal, distinct from the legal possession and ownership thereof. In trusts, the legal title and possession of the property are in one person, called a trustee; the equitable title and beneficial use of the property are in another person, called a *cestui que trust*, or beneficiary. The trustee holds the direct and absolute dominion over the trust property, in the view of Courts at law; while, in the view of Courts of Equity, the trustee is a mere steward to hold, manage and account for the proceeds of, trust property for the exclusive benefit of the beneficiary. In the sight of a Court of law, the beneficiary has no interest in the trust property; while in the sight of a Court of Equity, the beneficiary has all the enjoyable interest. In short, the trustee holds the legal title and the possession of the trust property, but all the benefits arising from the property, its income or profits, belong wholly, or in part, to the beneficiary.<sup>1</sup>

As a general rule, property of every kind and form, real and personal, may be made the subject of a trust. Any person, who has the capacity to hold and dispose of property, can impress a trust upon it; and, generally, any person capable of holding property, may be made a trustee, or a beneficiary. Courts of Chancery have exclusive jurisdiction of all matters arising out of trusts of all kinds, express, resulting and constructive.<sup>2</sup>

§ 926. **Cases of Express Trusts.**—Express trusts are those directly and affirmatively created and declared (1) by the grantor; or (2) by a Court; or (3) by operation of law coupled with the assent of the person assuming the duties of the trust. The trusts devolved on special commissioners, receivers, Clerks and other persons appointed to do some act or series of acts for another's benefit, are instances where express trusts are created by a Court; and the duties devolved by the statutes upon administrators, executors, guardians and public officers, especially those who give official bonds, are instances of express trusts created by operation of law and the assent of the person assuming the

<sup>1</sup> 2 Sto. Eq. Jur., § 964. See, *ante*, § 46.

<sup>2</sup> Resulting and constructive trusts are often called

implied trusts, thus resolving all trusts into: (1) express trusts, and (2) implied trusts.

duties.<sup>3</sup> The most common cases wherein a Court of Chancery is called upon to act in relation to express trusts are suits: (1) to enforce marriage settlements, mortgages and trust deeds to secure debts; (2) to enforce assignments of property for the benefit of creditors; (3) to compel executors, administrators, guardians, receivers, Clerks and all other express trustees, to account for and pay over, to those entitled, the trust funds or other property that are, or should be, in their hands; (4) to compel all such persons to faithfully execute and carry out their trust duties of every character whatsoever, and, when necessary, to remove them and appoint other trustees; and (5) to advise and direct executors, administrators with the will annexed, and other trustees as to the construction or execution of a complicated or obscure will or other trust instrument, especially where there is contention among the beneficiaries as to its meaning.

§ 927. **Frame and Form of Bills in Cases of Express Trusts.**—All express trusts result from relations, and reference is made to the various preceding sections treating of relations in the framing of bills.<sup>4</sup> The draughtsman will (1) state the relation of the defendant to the complainant as shown in the preceding section, and state how it was created; (2) will show what equitable estate of the complainant the defendant is liable for; and (3) in what particular, or particulars, the defendant has failed to do his duty towards complainant in reference to said estate; and (4) will pray the Court to redress the wrongs complainant has suffered, to compel the defendant faithfully to discharge his trust, to order an account when necessary to ascertain the defendant's financial liability, and to render a money decree against him when he is liable thereto.

**BILL OF WARD AGAINST HIS GUARDIAN.**

David Doe, a resident of Clay County, complainant,

*vs.*

John Doe, Richard Roe and Peter Poe, residents of Clay County, defendants. }

[For address and caption, *see, ante*, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That he became entitled to a valuable estate as a distributee of the estate of his father, [*giving his father's name*], and being then a minor, the defendant, John Doe, became his guardian, giving bond as such in the County Court of Clay county, with the defendants, Richard Roe and Peter Poe, as his sureties thereon. A certified copy of said guardian bond and of the record of said guardian's appointment will be read at the hearing of this cause, if necessary.

II.

That the sums of money belonging to complainant that went, or should have gone, into the hands of the said guardian amounted to, at least, the sum of two thousand dollars; and complainant reserves the right to show that the amount was much larger. The said guardian not having made a full exhibit of his guardianship, and the facts being largely within his exclusive knowledge, complainant is consequently unable, at present, to state with more definiteness the exact amount received by his said guardian.

III.

That said guardian failed to make his settlements with the County Court Clerk of said County, as required by law; and when called on by complainant for a settlement, claimed to have in his hands "only a few hundred dollars, not exceeding four hundred, if that," to use his own language, and even this sum he has not paid, nor tendered to complainant.

IV.

Complainant being thus greatly wronged by the said John Doe, his guardian, and by the said Richard Roe and Peter Poe, said guardian's sureties, comes into your Honor's Court of Chancery, and prays:

1st. That subpoena to answer issue [*&c., see, ante*, §§ 158; 164].

2d. That said defendants answer this bill [*but not on oath*], and that the said John Doe, set out in his answer, or file as an exhibit thereto, a full, complete and detailed statement of each and every sum by him received as guardian of complainant, when and from whom received, and in what manner the same was invested or applied.

3d. That an account be taken and stated by the Master to show what estate of complainant said guardian received, and what balance he owes the complainant, and that complainant have a decree for such balance against all of the defendants.

<sup>3</sup> See cases cited in 3 King's Dig., § 5121, and 1 Meigs' Dig., § 553. | <sup>4</sup> See, *ante*, §§ 165; 167-169.

4th. That, if it turns out that said guardian has made any settlement with the County Court Clerk, said settlement be set aside and a new settlement or account be made in your Honor's Court, and that on such new settlement the guardian be charged compound interest.

5th. And that complainant may have such further and other relief as he may be entitled to  
Bob Cox, Solicitor.

#### BILL FOR DISTRIBUTIVE SHARE.

To the Hon. George E. Seay, Chancellor, holding the Chancery Court at Gallatin:  
John Doe and David Doe, residents of Sumner county, complainants,

vs.

Richard Roe, administrator of Daniel Doe, deceased, and Robert Roe and George Smith, all residents of Sumner county, defendants.

Complainants respectfully show to the Court:

I.

That Daniel Doe died, intestate, in Sumner county on March 10, 1888; and letters of administration on his estate were taken out in said county by the defendant, Richard Roe, on April 3, 1888. The defendants, Robert Roe and George Smith, are the sureties of said Richard Roe on his bond as said administrator.

II.

Complainants are the sole distributees of the estate of said Daniel Doe, deceased, and are entitled to the whole of said estate, after all lawful debts, charges, and other claims against the same have been paid. The assets of said estate are largely more than sufficient to pay said debts, charges, and claims; and there remains a large balance in the hands of said administrator, which he fails and refuses to pay over to complainants, said balance being about eight hundred dollars.

III.

The premises considered, complainants pray:

1st. That process issue to bring the defendants into Court and make them answer this bill, but their oaths to their answers are waived.

2d. That an account be taken to show how much said administrator is indebted to complainants; and that a decree be rendered against him, and his co-defendants as his said sureties, for the amount found to be due complainants; and

3d. For general relief.

JOHN DOE,  
DAVID DOE.

[The bill must be verified by affidavit, as in § 789, ante.]

§ 928. **Answer of an Executor to a Bill for an Accounting.**—When a bill is filed against an administrator, executor, guardian or other trustee, he should display no resentment in his answer, unless his integrity is assailed, and even then a dignified response is most proper. He should remember that he is handling other people's money, and knows all the facts relative thereto, while the beneficiaries may know little or nothing, and that a bill in Chancery is often the best method of obtaining the information they desire. The following is a form of an

#### ANSWER OF AN EXECUTOR TO BILL BY DISTRIBUTEES.<sup>5</sup>

[For title and commencement, see, ante, § 380].

I.

That he admits the death of George Doe, the father of complainants, and that he left a will which has been duly probated, and that this defendant has qualified as executor thereof, having been appointed in and by said will, and is now discharging his duties as such, and executing said will.

II.

This defendant also admits that complainants are the heirs and distributees of said testator, and that his co-defendants, Henry Roe and William Roe, are legatees under said will, and that his co-defendant, Mary Doe, is the widow and a legatee of said testator.

III.

Further answering, the defendant says that he duly filed with the County Court Clerk of Knox county a just, true, and perfect inventory<sup>6</sup> of all the goods and chattels of his testator, properly verified; and in due course of administration has made sale of the same to the highest bidder, and returned to said Clerk a true account of such sale duly sworn to, which the County Court ordered to be recorded.<sup>7</sup> This defendant is also collecting all notes, accounts and debts due or belonging to his testator, and is liquidating his testator's indebtedness as rapidly as possible; and defendant refers the complainants to said inventory and account for further and fuller information relative thereto; and says they show all the goods and chattels, rights and credits, accounts and choses in action that came into his hands as such executor.

<sup>5</sup> This is not intended as an answer to the foregoing bill.

<sup>6</sup> Code, § 2241.

<sup>7</sup> Code, §§ 2243-2244.

## IV.

Further answering, this defendant says that he is greatly delayed in his execution of said will, and in the settlement of said estate, by the pendency of several suits against him as executor, one of said suits pending in the Chancery Court at Knoxville, and the other in the Circuit Court at Clinton; the former suit seeks to recover an alleged debt of about four thousand dollars, and the latter suit is instituted to recover the testator's coal mine near Briceville, in Anderson county; and if either suit is successful the testator's estate will be insolvent, and there will be nothing due the complainants except such interest as they may have, if any, in the exempt property, real and personal.

## V.

Further answering, the defendant denies that he has wasted any of his testator's assets, or failed to take all necessary and proper steps to possess himself of all of his testator's estate; and he would be obliged to the complainants, if they or any of them, will point out to him any asset not reduced to possession by this defendant, or any claim against the estate as to which there is a good defence; and this defendant can but regard their failure so to do in the past, or failure to specify in their bill any act of waste, neglect, mispayment, or other breach of trust, as good evidence of his correct discharge of his duties as executor,

## VI.

Further answering, this defendant says that he admits there are serious complications in said will, and grave doubts as to the proper interpretation of parts thereof, and he believes that it will be necessary to have your Honor construe said will if it should turn out that said estate is solvent; but this defendant did not deem it wise and proper to file a bill for such construction and advice as long as there were doubts whether there would be any part of said estate left after said suits were ended, and all of testator's debts were paid, especially as the doubtful parts of said will applied to the residue of the estate after certain legacies and preferred bequests had been paid.

## VII.

In conclusion, this defendant says he is perfectly willing and really glad to have a chance to submit to your Honor what he has done and is doing as executor, and to have all accounts taken, by your Honor deemed necessary; but he is advised that complainant's bill is prematurely filed, and might have been demurred to on that ground, but this defendant deemed it his duty as executor to submit, at any time when called on, a statement of what he has done and is doing, and therefore he has answered.

And having fully answered, he prays to be dismissed with his costs.

JAS. C. FORD, Solicitor.

RICHARD ROE, Executor.

[*Annex affidavit; see, ante, § 789.*]

**§ 929. Suits to Construe Wills, or Trusts.**—An executor, or administrator with the will annexed, or a trustee, is not required to run risks arising from a reasonable doubt or doubts as to the meaning of the instrument he is required to execute, especially if antagonistic parties in interest are insisting upon antagonistic constructions; and he can file a bill in the Chancery Court, making all the parties interested in, or claiming under, the instrument parties defendant, and have the instrument construed, and his path blazed out for him. The Court will, also, in such a case, on his application, allow him to execute his trusts under the direction of the Court, in the same cause.

The bill, in such a case, is in the ordinary form, and the following statement of a case, and the consequent prayers, will show their special character:

**BILL TO CONSTRUE A WILL, OR A TRUST.**

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

## I.

That he is the executor of the will of A B, [*or the trustee of a trust created by the deed of A. B.*] Said will was duly probated [*or said deed was duly registered*] on April 4, 1905, and is exhibited hereto, marked A, and made a part hereof; and complainant has given bond and security and duly qualified to carry out and administer the trusts imposed on him by said will [*or deed.*]

## II.

That complainant hoped he would be able to execute said will [*or trust*] without any special trouble; but so it is grave doubts have sprung up in his mind as to the true meaning, intent, purport and construction of the following portion of said will [*or trust: Here set it out in full, giving its very words, spelling, punctuation, &c.*]

Complainant was of opinion that said paragraph meant [*so and so, giving his construction thereof.*] But so it is the defendant A insists that it means [*so and so, giving A's contention.*]; and he demands of complainant that [*complainant shall do so and so, stating what A's claim is under the will or trust.*] On the other hand, the defendant B insists that both complainant and said A are wrong in their construction of said will [*or trust*]; and insists that it means

[*so and so, stating B's contention in full.*] Complainant further shows to the Court that [*here state any other construction given by any other person interested in said paragraph. No one not interested can be heard.*]

III.

Complainant is advised that the following part of said will [*or deed*] is so indefinite that he cannot safely act on any construction he may give it, to-wit: [*Here set out the part referred to.*] Complainant is, also, advised that it is his duty to apply to your Honor for advice and direction, to the end that he may so discharge the trust created by said paragraph, and all the other doubtful paragraphs and provisions of said will [*or trust*], that none of the parties interested therein may suffer loss, and that he, himself, may not become liable as the result of an error of his judgment.

IV.

[*After stating all the various parts of the will (or trust) needing construction, and giving fairly and fully the contentions of those interested in the construction; and after the usual prayers for process, then add:*] 2d. Complainant further prays that said will, [*or trust*] be established, and the trusts therein performed, and the rights and interests of all parties under the same be declared. 3d. Complainant further prays the Court to construe the aforesaid portions of said will, [*or trust*]; and to state clearly what are complainant's duties thereunder, and what the rights of the contending defendants are, if any, thereunder; and, in order that complainant may be relieved from all risks and liabilities incident to the contentions, and conflicting rights and claims, of the defendants, he prays the Court to retain the cause in Court until said will [*or trust*] shall have been fully executed and performed, and all of complainant's duties and trusts fully executed and performed, to the end that complainant may, then, also, obtain his discharge as executor [administrator with the will annexed, *or trustee,*] and his release from all liability as such thereafter; and for such further and other relief as he may be entitled to.

HORACE MAYNARD, Solicitor.

[*Annex affidavit and jurat as in § 789, ante.*]

ARTICLE II.

SUITS IN RELATION TO RESULTING AND CONSTRUCTIVE TRUSTS.

§ 930. Cases of Resulting Trusts.

| § 931. Cases of Constructive Trusts.

§ 930. **Cases of Resulting Trusts.**—Resulting trusts are those which arise where the legal estate is disposed of, or acquired, without bad faith, and under such circumstances that equity infers or assumes that the beneficial interest in said estate is not to go with the legal title. These trusts are sometimes called *presumptive* trusts, because the law presumes them to be intended by the parties, from the nature and character of their transactions. They are, however, generally called *resulting* trusts, because the trust is the *result* which Equity attaches to the particular transaction.<sup>1</sup>

Resulting trusts arise: 1, When property is conveyed, or devised, on some trust which fails, in whole or in part; 2, When land is conveyed to a stranger without any consideration, and without any use, or trust, declared; 3, Where the property is purchased and the title taken in the name of one person, but the purchase price is paid by another; and 4, Where the purchaser pays for the land but takes the title, in whole or in part, in the name of another.<sup>2</sup>

**BILL TO ESTABLISH A RESULTING TRUST.**

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

I.

That, relying on the friendship and integrity of the defendant, he placed in his hands on

<sup>1</sup> 1 Perry on Trusts, § 124; 2 Pom. Eq. Jur., § 1030-1031. No one is presumed to intend to part with his property, and especially his land, without some consideration; and he who furnishes the consideration-money is presumed to intend to acquire a corresponding beneficial interest in the lands purchased therewith. So, when the consideration-money is trust funds, or belongs to another, the person buying property therewith is presumed to intend that the purchase shall enure to the benefit of the person who is beneficial owner of the purchase-money paid. Reason and conscience so determine his duty, and

Equity imputes to him an intention to discharge this duty. When the consideration, or purpose, for which a conveyance is made fails, or in any way becomes ineffectual, the bargainer is deemed in Equity to intend that the legal title shall revert to him. These general principles determine nearly all the questions arising in cases of resulting trusts. <sup>2</sup> 2 Sto. Eq. Jur. §§ 1196-1210; 2 Pom. Eq., Jur., §§ 1032-1043. Resulting trusts may be, and generally are, proved by parol. The following are some illustrations of trusts set up by parol in our Courts: 1,



the 10th day of April, 1905, the sum of one thousand dollars, [or whatever it was complainant gave defendant in money, or other property; if property, describe it particularly,] under an agreement that the defendant would invest the same in a tract of land for the sole use and benefit of complainant, and take the deed in complainant's name. [If any particular kind of land was to be bought, as land for farming, or coal mining, or manufacturing, or building-sites, so state.]

## II.

That it was a distinct part of said agreement, and an express condition of said deposit, that the defendant was to be merely the agent of complainant, was to take the title to the land when purchased, in complainant's name, and it was at no time contemplated by complainant that the defendant was to take the title in his own name, nor was there any suggestion, or talk, of that kind.

## III.

That the defendant, on the 15th of April, 1905, in pursuance of said agreement, purchased from one John Jones, the following tract of land. [Here, describe it by location, corners, courses and distances, as set out in the deed to the defendant, and give the location.] The complainant paid for said land, as appears from the face of the deed made to him for said land, the sum of one thousand dollars, but whether he paid that amount or less, complainant has no knowledge, and calls on the defendant to prove what was paid.

## IV.

That, in violation of his agreement with complainant, the defendant took the title of said tract of land to himself as though he was the real purchaser, the name and interest of complainant not appearing, nor being in any way mentioned in said deed. A certified copy of said deed is filed with the bill, marked Exhibit A.

## V.

That since said deed was executed and delivered to the defendant, said tract of land has greatly appreciated in value in consequence of the building of a railroad in its vicinity, [or in consequence of some other fact, stating what it is. But no claim of appreciation of value is essential to the bill, such an appreciation, if any, being alleged merely as complainant's explanation of defendant's bad faith in the matter.]

## VI.

That on complainant discovering that the defendant had taken to himself the title to said land, and had the deed made to himself, he called on the defendant to transfer the title and possession of said land to him, and offered to pay the costs of such transfer, and to pay the registration fee, and taxes, growing out of said conveyance to the defendant, but the defendant refused to make said transfer unless he was paid five hundred dollars for his services in buying said land; and he claimed that he had bought said land for himself, and said he would refund to complainant said sum of one thousand dollars, which he admitted he had paid said John Jones for the land.

## VII.

The premises considered complainant prays:

1st. That subpoena to answer issue [ &c. See, ante, §§ 158; 164.]

2d. That the complainant be adjudged to be the equitable owner of said tract, and to be entitled to the legal ownership and possession thereof; and that all the title and interest of the defendant in and to said land be divested out of him and vested in complainant in fee simple, and that he be given a deed therefor, and writ of possession.

3d. That complainant have such further and other relief as the nature of his case may require.

A. J. AGEE, Solicitor.

The bill need not be sworn to unless some extraordinary relief is prayed. If the defendant has received any rents, or profits, from the property, it should be alleged, and an account should be prayed, and, in a proper case, a receiver. If the defendant is trying to sell the property, that should be alleged, and an injunction prayed to prevent him.

#### DECREE ESTABLISHING A RESULTING TRUST.

[For title, commencement and recitals, see, ante, § 567.]

On consideration whereof the Court is of opinion and doth adjudge and decree that the tract of land described in the bill was purchased and paid for by the defendant with complainant's money, given him by complainant in trust, and that, therefore, an equitable title to said land results to complainant, and that he has the right to have the legal title to said land.

Where land was purchased with partnership funds, but title taken in the name of the purchasing partner; 2, Where a deed by father to son is shown to be for the benefit of the mother; 3, Where a devise to A, is proved to be for the benefit of B; 4, Where a husband sells his wife's property on an agreement to invest the proceeds for her benefit, but takes the title in his own name; 5, Where a judgment creditor buys in property at a judicial sale under a parol agreement to hold it as security for the debt; 6,

Where there is an agreement for the redemption of real estate sold at a judicial sale, or under a trust deed; and 7, Where a deed absolute on its face was intended as a mortgage. 3 King's Dig., § 5139. But, in such cases, the proof must be most convincing and irrefragable. *Hyden v. Hyden*, 6 Bax., 406. That is, the presumption in favor of the writing is strong, and it requires strong proof to overcome it. See, ante, §§ 445-447.

It is, therefore, ordered, adjudged and decreed that all the right, title and claim of the defendant in and to the tract of land described in the bill lying in the ——— civil district of ——— county, and bounded as follows: [*insert courses and distances.*] be, and the same is, hereby divested out of him and vested in complainant in fee simple; and the Clerk and Master will make to him, and acknowledge for registration, a deed conveying said land to him in fee simple.

The defendant will pay all the costs of the cause, for which an execution is awarded. A writ of possession will issue *instantiter* to put complainant in possession of said tract of land.

**§ 931. Cases of Constructive Trusts.**—Constructive trusts are so called because they are *constructed* by Courts of Equity in order to satisfy the demands of justice, without reference to any presumable intention of the parties;<sup>3</sup> they include cases: 1, Where a person procures the legal title to property in violation of some duty, express or implied, to the true owner; or, 2, Where title to property is obtained by fraud, duress, or other inequitable means; or, 3, Where a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; or, 4, Where a person acquires property with notice that another is entitled to its benefits. In all such cases, Equity, for the purpose of doing justice in the most efficient manner, constructs a trust out of the transaction, and makes a trustee out of the person thus acquiring the title.<sup>4</sup>

The most common illustrations of constructive trusts are the following: 1, Where another's property has been wrongfully, and with notice of his rights, converted into a different form; 2, Where one party has, with notice, obtained money or securities which equitably belong to another; 3, Where the legal title to property is held merely as a security, as when an absolute deed is really a mortgage; 4, Where an executor, administrator, guardian or other trustee, makes profits out of the trust fund or estate; 5, Where a partner or trustee obtains in his own name the renewal of a firm or trust lease; 6, Where a purchaser at a forced sale undertakes to buy in property for the debtor, or for his heirs, or for the benefit of a creditor; 7, Where an administrator, executor, guardian, or other trustee, wrongfully acquires the trust property, by purchase from himself, or otherwise; 8, Where a person acquires trust property with notice, or without consideration; 9, Where a personal representative pays legatees or distributees before creditors; 10, Where a corporation distributes its capital stock without paying its debts; 11, Where a vendee does not pay for the land; 12, Where an advantageous contract has been obtained from a person under age, intoxicated, or of weak mind; 13, Where an advantageous bargain has been obtained by means of a relation of trust, confidence, or undue influence; 14, Where property has been obtained by fraud, duress, or by means of an unconscientious bargain; 15, Where a devise or legacy has been prevented by fraud; and 16, Where, in any other case, a person fraudulently prevents an act from being done.<sup>5</sup>

**BILL TO ENFORCE A CONSTRUCTIVE TRUST, BY HAVING A DEED DECLARED A MORTGAGE.**

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

I.

That on the ——— day of ———, 19—, [*give the date the deed was made.*] he was the owner of the following tract [*or lot*] of land: [*describe it.*]

II.

That being greatly in debt, and harrassed by his creditors, and having no money, he applied

<sup>3</sup> Smith's Eq. Jur., 178.  
<sup>4</sup> 2 Pom. Eq. Jur., § 1044; 1 Perry on Trusts, § 166.

Whoever deals, in any way, with property which another owns, or has a beneficial interest in, with notice of such ownership or interest, impliedly contracts that he will do nothing prejudicial to the rights of such other person; and that he will, in all his dealings with such property and its profits and proceeds, do whatever good reason and good conscience require. Equity imputes to every person an intention to fulfil his obligations, and will not allow anyone to take an advantage of his own wrong, or to

extract a right therefrom. Whenever, therefore, a person takes the title to such property, or its profits or proceeds, in his own name, in violation of this implied contract, a Court of Equity will specifically execute the contract by dealing with him as a trustee, and treating him as one intending to do right, rather than as one intending to perpetrate a fraud. In other words, Equity puts a charitable construction upon his conduct, and thus converts his misconduct into what is called a constructive trust.  
<sup>5</sup> 2 Sto. Eq. Jur., §§ 1195-1294; 2 Pom. Eq. Jur., §§ 1044-1058; and see "Trusts" in our Digests.

to the defendant for counsel and assistance, which he pretended to be very willing to give; and after much conversation and the suggestion of various plans, it was agreed that the defendant would advance complainant enough money to satisfy his most urgent creditors, and that he would go complainant's security on notes of hand to his other creditors, and that defendant should be secured for the money actually advanced, and indemnified against loss on said notes by a mortgage on complainant's said tract [or lot] of land.

## III.

That on the day after said agreement had been made, but before any steps had been taken under it, defendant brought to complainant an absolute deed for said land, stating that it was a simpler way to settle their affairs, that he did not know how to draw a mortgage, and that as soon as he, defendant, was fully paid he would deed said tract [or lot] of land back to complainant.

## IV.

That complainant was dissatisfied with this change in the agreement, but being depressed by his circumstances, and comforted by the repeated assurances of the defendant that everything would come out all right, he executed said deed, and delivered it to defendant, and it has been duly registered.

## V.

That about three months after said transaction complainant, having some money, offered to pay one of said notes, when, to his surprise, he was informed that the defendant had paid it. Complainant, thereupon, went to the holders of said other notes, and learned from them that their notes had all been paid by the defendant. [*If any of said notes were discounted, state the fact, and the rates of such discount.*]

## VI.

That complainant, thereupon, went to see defendant in order to have an understanding as to the sum total he owed him, when, to his great surprise, the defendant insisted on being allowed, not only the benefit of said discount, but also, either two hundred dollars for his services, or fifteen per cent. interest on the money he had advanced. This insistence caused some angry words, and the conference was ended by defendant declaring complainant could do as he chose as he, the defendant, had the farm, [or lot,] and could do with it as he chose.

## VII.

That, much alarmed, complainant went to another friend, who agreed to pay defendant off, and take a deed of trust on said tract of land; but when they went to the defendant, he refused to take the principal and interest due him; said the title to said tract [or lot] was in him, and that he and complainant should settle their affairs by themselves, or they would not be settled at all.

## VIII.

Complainant therefore prays:

1st. That subpoena to answer issue, [*&c.* See, *ante*, §§ 158; 164.]

2d. That said deed to defendant be declared a mortgage, and the amount due the defendant ascertained, so complainant can pay it into Court.

3d. That defendant be enjoined from selling or encumbering said tract [or lot] of land.

4th. That complainant have such other, further and general relief as his case may justify, and to your Honor may seem meet.

This is the first application for an injunction in this case.

W. R. PETERS, Solicitor.

[*Annex affidavit.* See, *ante*, §§ 161; 164.]

The complainant may, in his bill, tender the amount due defendant, in which case he must bring the money into Court, and deliver it to the Clerk and Master when he files his bill, and take a receipt for the amount tendered and paid in; let the receipt show it is for money tendered in the cause.

If the decree is for complainant on the foregoing bill, it may be as follows:

**DECREE DECLARING A DEED TO BE A MORTGAGE.**

[*For title, commencement and recitals, see, ante, § 567.*]

## I.

On consideration whereof it is ordered, adjudged and decreed, that the deed referred to in the pleadings was intended as, and is, merely a security for the money advanced and notes signed by the defendant as surety, and is declared to be in equity a mortgage; that complainant is liable to the defendant only for the real sums paid by the defendant, in discharge of said notes, and for interest on the cash advanced by defendant, and on the sums actually paid on said notes, and it being agreed, without a reference,<sup>6</sup> that the sum total of said payments by the defendant, principal and interest, is sixteen hundred and seventy-one dollars, it is so adjudged and decreed.

## II.

It is further ordered and adjudged and decreed that said sum is a lien on said tract [or

<sup>6</sup> The usual course in such a case is to refer to | the Master the question as to the amount of the indebtedness.

lot] of land, and that, unless it, and accruing interest, are paid into Court, in sixty days, the Clerk and Master will sell said tract, [or lot] of land, on a credit of six, twelve, eighteen, and twenty-four months, [*&c.*, *see, ante*, § 626.]

## III

All further questions are reserved until the incoming of the Master's report of sale, or his report that complainant has paid said sum into Court.

At the next term, if the money has been paid into Court, it will be decreed to the defendant, and all the right, title and interest he has in and to said tract [or lot] of land will be divested out of him, and vested in complainant, and the Master directed to make complainant a deed therefor. If the money has not been paid, the sale of the land will be confirmed, and out of the proceeds, the amount due the defendant, less the costs of the cause, will be paid, and the balance, if any, paid to complainant. The costs of the cause will be adjudged against the defendant, if the Chancellor deems it proper.

## CHAPTER XLVI.

## SUITS ARISING FROM FRAUDS, ACCIDENTS AND MISTAKES.

ARTICLE I. Suits Arising from Actual Frauds.

ARTICLE II. Suits Arising from Constructive Frauds.

ARTICLE III. Suits Arising from Accidents and Mistakes.

## ARTICLE I.

## SUITS ARISING FROM ACTUAL FRAUDS.

§ 932. The Rationale of the Law as to Fraud, Accident and Mistake.

§ 934. Frame and Form of Bills in Suits to Undo Fraud.

§ 933. Suits in Cases Resulting From Actual Frauds.

§ 935. Frame and Form of Bills to Set Aside Judgments or Decrees for Fraud.

§ 932. **The Rational of the Law as to Fraud, Accident and Mistake.**—Every person who has business dealings with another has the right to expect that he will, in every matter connected with such dealings, do whatever good reason and good conscience require. Indeed, each party to a business transaction, before entering upon any negotiations relative thereto, impliedly contracts with the other or others that, in making and performing his engagements honestly, frankness and fidelity will characterize his conduct.<sup>1</sup>

In consequence of the mutual consciousness of this implied obligation, neither party to an express contract, ordinarily, deems it necessary to inquire of the others, whether such is the understanding. If such inquiry should be made, the party interrogated would almost invariably respond with an emphatic affirmative, accompanied with emotions or expressions of real or pretended indignation because of the implication of distrust contained in the question. This implied contract not only precedes and enters into every express contract, but every express contract is impliedly conditioned upon its faithful performance.

If this fundamental antecedent implied contract is analyzed it will be found to contain the following elements:

1. Neither party will make to the other any material representations concerning the subject-matter of the contract that are not true.<sup>2</sup>

2. Neither party will conceal from the other anything, within his knowledge, material to the subject-matter of the contract, that the other party ought to know, and cannot easily ascertain by himself.<sup>3</sup>

3. Neither party has done, nor will do, anything to hinder, delay or defeat a faithful compliance with the contract on his part.<sup>4</sup>

4. If one of the parties has trust or confidence specially reposed in him by

<sup>1</sup> The law requires good faith in all transactions between man and man. *Craddock v. Cabiness*, 1 Swann, 483, *ante*, § 58. Bad faith is treason to mankind, and if generally practiced would destroy human society. See, *ante*, § 48. *Fide obrogata, omnis humana societas tollitur.* (Good faith abolished, all human society is destroyed.)

<sup>2</sup> While at law before a misrepresentation can be fraudulent, it must be made with a guilty knowledge of its falsity, in Equity such knowledge is not necessary. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in Equity. 2 Pom. Eq. Jur., §§ 884-885. The injury to the other party is the same, whether there

was any intention to deceive or not, and where a loss must happen to one of two parties it must be borne by him whose conduct occasioned it. Hence it is a settled rule in Equity that where a person makes a statement of fact which is actually untrue, and he has at the time no knowledge of the matter, he is chargeable with fraud; and his claim that he believed in the truth of his statement is wholly immaterial. 2 Pom. Eq. Jur., § 887. A person, however, is allowed to fairly commend. *Simplex commendatio non obligat.*

<sup>3</sup> *Suppressio veri est suggestio falsi. Fraus est celare fraudem.*

<sup>4</sup> A fraudulent conveyance to defeat a creditor violates this implied contract.

the other, or has special power or influence over the person or property of the other, he will not avail himself of these advantages to the other's detriment.

5. The express contract when finally agreed on, if to be reduced to writing, shall be so worded as to express the real meaning of the contract; and shall be so executed, as to formalities, as to make the contract obligatory, and enforceable in Court.

6. If the contract has been reduced to writing, and by accident or mistake, fails to express correctly the contract really made, at the request of the party injured the other party will consent so to reform the writing as to make it conform to the contract.

7. After the contract has been consummated, each party will, in good faith, do all that the contract requires of him.

8. Neither party will take advantage of any material mistake by the other concerning the subject-matter of the contract, or his rights or duties relative thereto, such mistake having materially influenced his consent to the contract, and not being the result of any negligence or bad faith on his part.

9. Neither party will insist upon the other doing anything not fairly required of him by the contract.

10. If the contract is in writing and should be lost or destroyed, it will be re-executed, if required by either party having an existing interest in it.

11. If the performance of the contract is, or becomes, impossible by reason of its very nature, or of something wholly un contemplated by either, or wholly beyond the power of the performer to provide against, then performance, so far as impossible, is to be excused.

The first six elements of the implied contract above set forth are conditions precedent, and the last five are conditions subsequent. It is, also, an element of the implied antecedent contract, that

12. If any of the implied conditions precedent are violated, the party thereby injured shall have the right to rescind the contract; and that

13. If any of the implied conditions subsequent are violated, the party thereby injured will be compensated and made whole by the other.

Violations of the first four elements of the implied contract are frauds; violations of the other elements constitute inequitable conduct: all of such violations are redressible in the Chancery Court.

**§ 933. Suits in Cases Resulting From Actual Fraud.**—Fraud, in the sense of a Court of Equity, properly includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, or of trust or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another.<sup>5</sup>

Actual fraud is the intentional doing or saying of something, or the intentional concealment of something, material to a business transaction, by a party thereto, whereby the other party is induced to act or not to act, to his injury, the former party contemplating such a result, or such a result being the reasonable and natural consequence of his conduct. The following are illustrations of actual frauds, and of how they will be relieved against in Equity: 1, Deeds, mortgages, contracts, notes, bonds, wills, settlements, and other writings, obtained, or executed, or surrendered or cancelled, in whole or in part, as the result of fraud by the defendant upon the complainant, will be reformed, re-executed, cancelled, delivered up, enjoined, executed, or otherwise dealt with as may be necessary for the protection or enforcement of the complainant's rights; 2, Judgments, or decrees, or awards obtained, or cancelled, or discharged, as the result of fraud on the part of the defendant, will be enjoined

<sup>5</sup> 1 Sto. Eq. Jur., § 187; *Belcher v. Belcher*; 10 Yerg. 131, *Smith v. Harrison*, 2 Heisk., 243. Courts of Equity refuse to define fraud, preferring to be left unshackled by definition in their contests with this Protean adversary of good conscience and good faith.

The result is the term has an element of elasticity that enables the Court to adapt it to all the various exigencies resulting from the manifold devices resorted to in order to obtain some undue advantage. See *Smith v. Harrison*, 2 Heisk., 242.

or enforced as the complainant's rights may require; 3, Money, or other property, obtained by the defendant through fraud will be declared a trust fund for complainant's benefit, and the defendant, and all claiming under him, not *bona fide* purchasers, will be compelled to surrender it, or account for it; and 4, A deed, or other contract, obtained by the defendant at a shockingly inadequate consideration, especially if accompanied with circumstances showing imposition or undue advantage, will be set aside.<sup>6</sup>

§ 934. **Frame and Form of Bills in Suits to Undo Fraud.**—All frauds grow out of relations, and are those violations of the duties arising from relations,<sup>7</sup> caused by bad faith. Therefore, in drawing a bill in a suit based on the fraudulent conduct of the defendant:

1st. Specify the relations between him and the complainant, their nature and origin, whether imposed by kinship, law, or social duty, or arising from contract, express or implied.

2d. State particularly, and in circumstantial detail, in what way the defendant took advantage of those relations, and wherein he violated the confidence complainant reposed in him, and in what manner he deceived complainant, and by what misrepresentation, concealment, or other act or acts of bad faith obtained from him money, property, or a contract, or a release, or discharge from some contract or obligation, or deceitfully or treacherously engineered complainant into a situation wherein he has suffered, or must suffer, loss, and the defendant has obtained, or will obtain, a benefit.

3d. Show what action of the Court is necessary to neutralize the effects of the defendant's inequitable conduct, and restore complainant to his rights, and make him whole; and specify what extraordinary process, such as an injunction, attachment or receiver, is necessary the better to secure his rights and property, and stay the inequitable conduct of the defendant; and detail the facts and circumstances justifying such remedies.

4th. Then pray for all ordinary and extraordinary process needed, and for a decree undoing the defendant's acts of bad faith and giving complainant what he is entitled to, and requiring the defendant to do, or praying the Court to do, everything necessary to put complainant as nearly *in statu quo* as possible, under the circumstances; and when a money equivalent is necessary, ordering the defendant with the payment of as much money to the complainant as may be requisite to make complainant perfectly whole.

5th. And, finally, pray for general relief, and state that your bill is the first application for an injunction, attachment and receiver, or any one or more of those writs, in the case.

Be particular to give in full the facts and circumstances constituting the breaches of good faith, for the Court will pay no attention to general charges of fraud, misrepresentation, concealment, deceit, and imposition, when unaccompanied by the details and particulars thereof.<sup>8</sup>

A large proportion of the suits in Chancery considered under other heads in this book could well be considered under the head of fraud, actual or constructive; but are considered elsewhere for convenience of treatment and of reference.

#### BILL TO SET ASIDE A DEED, OR OTHER INSTRUMENT, FOR FRAUD.

[For address and caption, see ante, § 155-164.]

Complainant respectfully shows to the Court:

I.

That on the....day of....19.... [insert the date of the deed, or other instrument, was made,] he owned [in fee, and was in possession, if such be the fact,] the following house and lot [or farm, or other property], real or personal: describe it fully; see, ante, § 172.]

II.

That on said day he was induced by the defendant to sell and convey [or mortgage, or

<sup>6</sup> See 2 Sto. Eq. Jur., §§ 186-257; 2 Pom. Eq. Jur., §§ 872-909; and "Fraud" in our Digests.

<sup>7</sup> For the nature of relatives, see, ante, §§ 165-169.

An examination of these sections will be of benefit. See, also, ante, § 408.

<sup>8</sup> See, ante, §§ 142, sub-sec., 3; 838.

give a deed of trust on, or a bill of sale for] said house and lot [or farm, or other property described in paragraph 1.] to him for the consideration of [here specify the consideration.]

III.

That [Here show whereof the fraud consisted, such as (1), a consideration that was worthless; (2), a promise never performed and never intended to be performed; (3), other property to which he had no title; (4), note of hand on insolvent parties represented by him to be solvent; (5), bank notes, or other notes, worthless for any reason, stating the reason; (6), or that complainant was made drunk; or (7), put under duress by threats, or false representation of danger of arrest; or (8), that the consideration was a bet, or money lost in gambling; or (9), some other illegal or immoral consideration. Explain fully, and in detail, all the particulars and circumstances of the fraud alleged, and if any relations of trust or confidence existed between complainant and defendant be particular to set them forth.]<sup>9</sup>

IV.

That [If there be any facts or circumstances sufficient to awaken a reasonable apprehension that the property may be sold by the defendant, specify them as grounds for an injunction. Also specify any acts of waste committed, or being committed by him, especially sales or destruction of timber.]

Complainant therefore prays:

1st. That subpoena to answer issue, [ &c., see, ante, §§ 158; 164.]

2d. That said deed [bill of sale, mortgage, deed of trust, or other writing,] be declared void as having been obtained by the fraud of the defendant; that all right, title and interest of the defendant to said house and lot [or other property described in paragraph 1,] be divested out of the defendant and vested in complainant, and that complainant be put in possession thereof.

That [If the facts justify an injunction or receiver,] an injunction issue to restrain and inhibit the defendant from selling or encumbering said property, or committing any waste thereon, and that a receiver be appointed to take possession of said property, and of its rents or profits, pending this suit.

4th. That complainants recover of the defendant the rents and profits of said property while in his possession, or under his control, and the value of all timber cut [and any other profit made by him, specifying it.]

5th. That complainant have such other, further and general relief as he may be entitled to, and to your Honor may seem meet.

This is the first application for an injunction [and receiver] in this case.

HUGH L. McCLUNG, Solicitor.

[Annex affidavit, see, ante, §§ 161; 164.]

**§ 935. Frame and Form of Bills to Set Aside Judgments, or Decrees, for Fraud.**—A bill to impeach and set aside a judgment or decree for fraud, or imposition, must state the judgment or decree, and the proceedings which led to it, and then set out the fraud, or circumstances of imposition.<sup>11</sup> All of the parties to the original suit liable to be affected by the relief sought, are necessary parties to the bill, even though no fraud, or other misconduct, is alleged against them.<sup>12</sup> The prayer should be to have the judgment or decree set aside and annulled, and, if necessary to the rights of the complainant, that a new decree be made giving the relief he may be entitled to, and especially such relief as will avoid the effects of the judgment or decree annulled.

It may be said that, as a rule, to entitle a party to this relief, it must be made evident that, if a defendant, he had a defence on the merits, and, if a complainant, he had a right to the relief sought, and this loss of a defence, or failure to obtain relief, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any omission, neglect, or default on the part of himself or his agents.<sup>13</sup>

**BILL TO IMPEACH A DECREE FOR FRAUD.**<sup>14</sup>

To the Hon. A. J. Abernathy, Chancellor, holding the Chancery Court at Pulaski; William West, a resident of Maury county, complainant,

vs.

Edward East, a resident of Giles county, defendant.

The complainant respectfully shows to the Court:

I.

That he and the defendant, down to January 5, 1890, were partners in trade in Giles county,

<sup>9</sup> See, ante, §§ 46; 165-169.

<sup>11</sup> Jones v. Williamson, 5 Cold., 376; Maddox v. Apperson, 14 Lea, 604; Sto. Eq. Pl., § 428. A bill will not lie to impeach a decree for fraud, and at the same time review it. But such a bill may be dismissed as to one phase and maintained on another. Murphy v. Johnson, 23 Pick., 552.

<sup>12</sup> Paul v. Wiles, 1 Tenn. Ch., 519; Walker v. Day, 8 Bax., 83.

<sup>13</sup> Maddox v. Apperson, 14 Lea, 596.

<sup>14</sup> As to the character of the allegations, see, ante, §§ 142; 838; 934. The bill is not required to be



under the style of East & West; that on said day, in consequence of irreconcilable differences, the firm was dissolved; and on the same day the defendant filed a bill against complainant in this Court, alleging that the firm was largely indebted, that the assets were not sufficient to pay said indebtedness, that complainant was largely indebted to the firm, that he and the complainant could not agree upon a plan to wind up the firm's business, and praying, (1) for an account between them, (2) for the ascertainment of the indebtedness, (3) for the conversion of all assets into money, (4) for the payment of all debts, (5) for a decree against the complainant for what he might owe the firm, and (6) for an injunction, and a receiver, and general relief.

## II.

Complainant was in failing health when said bill was filed, and just ready to go to California for rest, and for the benefit to be derived from the climate; and not wishing to be delayed by any litigation he, on the day he was subpoenaed to answer said bill, entered into a compromise in writing with the defendant, wherein and whereby it was stipulated and agreed that said bill should be at once dismissed at the cost of the defendant, East, and in consideration thereof, complainant transferred to him all his interest in the firm's assets, and in addition paid him one thousand dollars in mules, in consideration whereof the defendant bound himself to assume and pay all the costs of said suit, and all the indebtedness of said firm. Said compromise agreement is now in complainant's possession, and will be filed and read at the hearing.

## III.

Relying on said agreement, which was in all respects fully complied with by the complainant, he at once proceeded to California, not doubting that his partnership troubles were all over. But so it is, the defendant in utter violation of said agreement, and in violation of good faith, proceeded with said suit, took on order *pro confesso* against complainant, an interlocutory decree for an account, and a final decree on the account as stated and reported by the Master. Said final decree adjudges that complainant was indebted to said firm in the sum of thirty-two hundred dollars, and adjudges one-half of the costs of the said suit against complainant.

## IV.

Said *pro confesso*, account, report, and decrees were all taken at the term recently adjourned; and complainant was put on inquiry relative thereto by seeing a two-line notice of the case, in the proceedings of said term, published in a Pulaski newspaper, sent him by a friend, containing an obituary notice of complainant's father, who died a short time before the last term of this Court. Complainant at once opened correspondence with friends, and ascertained the foregoing facts in reference to said suit.

## V.

Complainant further shows to the Court, that he at once returned to Giles county, and demanded of the defendant an explanation of his said conduct. Defendant pretended that the indebtedness of the firm was larger than he supposed when he made said written agreement, that the said mules were not worth one thousand dollars, and that by the death of complainant's father, complainant had become possessed of abundant means and ought to pay him for his trouble and expense in winding up the partnership business. Complainant charges that said judgment was obtained as a means of black-mailing him, and in order to fraudulently coerce money out of him; and that the defendant is thereby endeavoring to convert the machinery of your Honor's Court of Equity, beneficently devised to uncover and discomfit fraud, into an engine of iniquity and oppression, in violation of good conscience and contrary to good faith. Complainant avers that all the aforesaid pretences of the defendant are utterly false, except the statement that by the death of his father complainant has become possessed of a large estate. This statement is true, and this fact was too strong a temptation for the defendant to resist, and hence said fraud.

## VI.

An execution has issued on said decree, and has been levied on complainant's lands by the Sheriff of Giles county, said lands being situated therein, and he has advertised them for sale to satisfy said decree.

## VII.

Complainant is advised that all of the said proceedings in said case, after the filing of said bill, were and are a fraud upon your Honor's Court, and a fraud upon complainant, and contrary to good conscience and good faith; and therefore, the premises considered, he comes into your Honor's Court and prays:

1st. That all proper process issue to bring the defendant, William West, into your Honor's Court, and to make him answer this bill, but his oath to his answer is waived.

2d. That an injunction may issue by fiat of your Honor restraining and inhibiting the defendant from further proceeding in the enforcement of said decree, and from transferring the same; and that your Honor grant complainant a restraining order addressed to the said Sheriff of Giles county, requiring him to stay all proceedings on said execution until further orders of your Honor.

brought within three years. *Goodman v. Tenn. M. Co.*, 1 Head, 178. An infant has no more rights | in impeaching a decree than an adult. *Hurt v. Long*, 6 Pick., 445.

3d. That, on the hearing, the decree in said cause of *East vs. West* be declared to be utterly void for fraud, and that said injunction may be made perpetual.

4th. And that complainant may have such further and other relief as he may be entitled to on the facts of the case.

This is the first application for an injunction in this case.

[*Annex affidavit.* See, *ante*, § 789.]

P. C. SMITHSON, Solicitor.

ARTICLE II.

SUITS IN RELATION TO CONSTRUCTIVE FRAUDS.

§ 936. Suits in Cases of Constructive Frauds.

§ 937. Frame and Form of Bills for Violations of Fiduciary Relations.

§ 938. Frame and Form of a Decree in Case of Constructive Fraud.

§ 936. **Suits in Cases of Constructive Fraud.**—Constructive frauds are acts, statements or omissions, which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable.<sup>1</sup> Constructive frauds mainly consist of the following:

1. **Frauds against Law, or Public Policy,** such as (1) usurious and gaming contracts; (2) contracts in restraint of marriage; (3) contracts in restraint of trade; (4) contracts in reference to buying or selling offices, or illegally influencing public officers; (5) contracts to suppress criminal prosecutions; and (6) contracts founded upon illicit intercourse, or upon the doing of some act in violation of law, or upon failing to do some act required by law.<sup>2</sup>

2. **Frauds upon Persons wholly, or partially, Incapable of Contracting,** such as, (1) contracts with persons under age, or of unsound mind; (2) contracts with persons intoxicated, or under duress; (3) contracts with persons in great pecuniary necessity and distress; (4) contracts with persons very ignorant, or illiterate; (5) contracts with sailors, expectant heirs, reversioners and others having expectant interests; and (6) contracts in any case where influence is acquired and abused, or where confidence is reposed and betrayed.<sup>3</sup>

3. **Frauds Presumed because of the Fiduciary Relations of the Parties,** as in cases of very advantageous contracts by (1) a guardian with his ward, (2) an executor or administrator with a distributee or legatee, (3) a trustee with the beneficiary, (4) an agent with his principal, (5) an attorney with his client, (6) a parent with his child, (7) a husband with his wife, (8) a physician with his patient, (9) a priest with a penitent, and (10) or by any other person occupying a position of special trust and confidence towards the party from whom he obtains a gift, or a contract unduly advantageous.<sup>4</sup>

4. **Frauds on Sureties** as (1) in cases where the creditor, upon sufficient consideration, gives the principal debtor further time for payment, without the surety's consent; (2) in any other case of a subsequent contract between the principal debtor and the creditor to the detriment of the surety; and (3) any case where the creditor does any act injurious to the surety, or omits any act he is bound to do, and the surety is injured by such omission.<sup>5</sup>

<sup>1</sup> Smith's Eq. Jur., 71. Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which Equity regards as wrongful, and to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief. It embraces: (1) Contracts illegal, and, therefore, void; (2) transactions voidable because contrary to public policy; and (3) transactions merely presumptive of fraud and requiring

the party benefited to prove his good faith. 2 Pom. Eq. Jur., § 922.  
<sup>2</sup> 2 Pom. Eq. Jur., § 929-936; 1 Sto. Eq. Jur., §§ 269-306.  
<sup>3</sup> 1 Sto. Eq. Jur., §§ 307-346; 2 Pom. Eq. Jur., §§ 943-945.  
<sup>4</sup> 1 Sto. Eq. Jur., §§ 307-330; 2 Pom. Eq. Jur., §§ 955-963.  
<sup>5</sup> 1 Sto. Eq. Jur., §§ 326; 383; 883; 2 Pom. Eq. Jur., § 907.

5. **Frauds on Creditors** as (1) in case of secret agreements by an insolvent debtor with any creditor to pay him more than his proportionate share to join in a composition; (2) where an insolvent debtor makes voluntary conveyance of his property, and (3) cases where a debtor makes conveyances, or suffers a judgment, in order to hinder, delay or defraud creditors.<sup>6</sup>

§ 937. **Frame and Form of Bill for Violations of Fiduciary Relations.**—A consideration of the doctrine of relations in former sections,<sup>7</sup> and of the frame of a bill to undo fraud in the preceding Article,<sup>8</sup> will greatly aid a draughtsman in drawing a bill under this section; but as a further aid the following general form is given:

**GENERAL FORM OF BILL FOR VIOLATION OF FIDUCIARY RELATIONS.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That [Here show that complainant had an estate as a ward, distributee, legatee, beneficiary, principal, or otherwise, and that the defendant is, or was, guardian, executor, trustee, agent, attorney, or in some other confidential relation, and as such had the custody, control or management of complainant's said estate, describing such estate.]

II.

That [Here show, if such be the fact, that complainant was not fully informed as to the amount or value of his said estate in the hands of the defendant, or under his control, or within his knowledge; and if defendant kept back full information, or gave misinformation, in reference to said amount or value, or in any way misled or deceived complainant, so state, and give the particulars, and show what efforts, if any, complainant made to ascertain the said amount, or value.]

III.

That [Here show in what way complainant was dependent on the defendant for information as to the value, amount, or character of his said estate, and what confidence or trust complainant reposed in him, especially if he was his agent, attorney, parent, physician, kinsman, or other adviser; and in what way the defendant took advantage of complainant's dependence on him to secure the title to said estate, or a part thereof, giving the particulars.]

IV.

That [Here show that the property thus acquired by the defendant was worth greatly more than the consideration complainant received, or if the property was money that the amount complainant received was greatly less than the amount justly due him, or, as the case may be, show how, wherein and to what extent the defendant defrauded the complainant, giving the particulars.]

V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [ &c.; see, ante, §§ 158-164.]

2d. That said [transaction, specifying it,] be set aside as fraudulent and therefore void; and that complainant be restored to the possession of said property [if real estate or personal property capable of restoration, if not, then omit all after the word "void," and insert:] and that complainant have a decree against the defendant for the difference between the consideration he received and the real value of the property the defendant acquired as aforesaid. [If the property was money, then let the decree be for the difference between the amount complainant received and the amount he was entitled to.]

3d. That [If an account is necessary to ascertain the amount due complainant, so pray: see, ante, § 159, sub-secs. 6, 10-12.]

4th. That complainant may have such other further and general relief as he may be entitled to.

P. G. FULKERSON, Solicitor.

§ 938. **Frame and Form of Decree in Case of Constructive Fraud.**—As already stated, a decree when in behalf of the complainant, usually follows the special prayers of the bill.<sup>9</sup> If money was fraudulently obtained from the complainant the decree will be against the defendant for the amount he justly owes

<sup>6</sup> 2. Sto. Eq. Jur., §§ 349-379; 2 Pom. Eq. Jur., 965-974.

*Reliefs Granted in Case of Fraud.*—The jurisdiction of the Chancery Court in cases of fraud, actual or constructive, is co-extensive with the injury done, and the remedy required therefor. In framing and applying these remedies, the power of the Court is practically limited only by the requirements of justice. The most important of these equitable reliefs are conferred: (1) by rescinding or cancelling the contract, conveyance or judgment fraudulently obtained, and thereby relieving the injured party from its obligations; (2) by so reforming the deed, con-

tract, or other written agreement, fraudulently framed, as to make it express the real intention of the contracting parties; (3) by requiring the wrongdoer specifically to perform the obligations resting upon him according to their very spirit, and thus giving the defrauded party the very right of which the other sought to defraud him; and (4) by compensating the party defrauded when no other remedy is adequate, or practicable.

<sup>7</sup> See, ante, §§ 165-168.

<sup>8</sup> See, ante, § 936.

<sup>9</sup> See, ante, §§ 566; 581.

the complainant, with interest; if land was obtained the deed will be declared fraudulent, and all the title conveyed thereby divested out of the defendant and reinvested in the complainant; if personal property was obtained it may be restored, or, as is the usual rule, a decree pronounced against the defendant for the difference between its value and what he paid for it. Where real or personal property is restored to the complainant a lien may be declared on it to secure to the defendant the repayment of the consideration by him paid for it. If a reference to the Master is necessary it will be ordered, and, as a rule, the costs are adjudged against the defendant.

**DECREE IN CASE OF CONSTRUCTIVE FRAUD.**

[For title, commencement and recitals, see, ante, §§ 567-568.]

On consideration whereof it is ordered, adjudged and decreed:

1st. That the relation of guardian and ward [or other relation, stating it] existed between complainant and defendant when the deed was executed [or, receipt given, or other transaction occurred, specifying it.] and that the defendant as such guardian, administrator, agent, attorney, [or other trustee or adviser] took undue advantage of such relation and obtained an unconscientious bargain from the complainant, as alleged in the bill.

2d. That said deed [receipt, or other writing, specifying it.] be cancelled, and set aside, and all the right, title and claim of the defendant in and to the tract of land by said deed conveyed to him be, and the same hereby are divested out of him and vested in complainant as an indefeasible inheritance in fee simple, forever, and that a writ of possession issue to put complainant in possession of said tract, which is described as follows: [Here copy the description given in the deed: see, ante, § 172] The defendant will pay all of the costs of the cause, for which execution will issue.

**ARTICLE III.**

**SUITS ARISING FROM ACCIDENTS AND MISTAKES.**

§ 939. Cases Arising From Accident.  
 § 940. Cases Arising From Mistake.

§ 941. Frame and Form of Bills in Cases Arising From Accidents and Mistakes.

§ 939. **Cases Arising From Accident.**—Accident, as remedial in Equity, may be defined to be an unforeseen and injurious occurrence, not attributable to mistake, negligence or misconduct.<sup>1</sup>

The following accidents will be relieved against in Equity: 1, When a deed, bond, note, will, or other valuable instrument in writing, has been accidentally lost, mislaid, destroyed, or materially mutilated or defaced; 2, Where, in consequence of failure to pay a debt, or redeem a mortgage, or comply with any other specific duty, by a day named, a penalty or forfeiture has been incurred, which can be compensated for in damages; 3, Where trustees, agents, bailees, executors or administrators have suffered loss of trust funds or property, by inevitable accident, such as fire, robbery, reasonable confidence disappointed, or the like, without any negligence or misconduct on their part; 4, Where, by accident, a power was defectively executed; and 5, Where by some unavoidable accident a party has been prevented from making his defense at law, and in consequence an unjust and oppressive judgment has been rendered against him.<sup>2</sup>

§ 940. **Cases Arising From Mistake.**—A mistake may be defined to be an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition.<sup>3</sup>

1 Smith's Eq. Jur., 36. Accident is an unforeseen and unexpected event, whereby, without negligence or misconduct on his part, and contrary to his own intention and wish, a party loses some legal right or becomes subjected to some liability, and another person acquires a corresponding legal right which it

would be against good conscience for him, under the circumstances, to retain. 2 Pom. Eq. Jur., § 823; 1 Sto. Eq. Jur., § 78. 2 See 1 Sto. Eq. Jur., §§ 75-109; 2 Pom. Eq. Jur., §§ 823-837; and "Accident" in our Digests. 3 Smith's Eq. Jur., 45. Mistake exists, in a legal

The following mistakes of law and fact will be relieved against: 1, Where arbitrators intending to follow the law, mistake the law; 2, Where an endorser promised to pay under a mistake of mixed law and fact as to his liability; 3, Where a party erroneously supposed he was acquiring a valid title, being mistaken both as to law and fact; 4, Where a party surrenders a valid title in ignorance of plain law; 5, Where both parties believe the seller's title to be good, when in fact it is defective or void; 6, Where a line was agreed on between two adjoining farms upon a mistake as to the calls of the deeds; 7, Where land is sold by the acre and there is a mistake as to the number of acres; 8, Where land is sold and the deed conveys more or less than the contract called for; 9, Where legatees divided notes believed to be good, and some prove to be worthless; 10, Where a redeeming creditor paid under belief that the execution sale was valid; 11, Where money is paid by mistake; 12, Where a deed of trust misdescribes a note intended to be secured; 13, Where a note was misdrawn by mistake; 14, Where a settlement includes items, or omits items, by mistake, accident or fraud; 15, Where in drawing any writing a material error has been made by accident, or by mistake of law or fact, such error being the error of the draftsman; 16, Where a will on its face shows an error; 17, Where a person parts with a right or title in ignorance of its existence; 18, Where, at the time of the sale, the property sold had ceased to exist, having been destroyed by flood or fire, or having died, or a life estate had terminated, and the purchaser ignorant of the fact; 19, Where a testator cancelled a former will under a belief that a later will was properly executed, when it was not; 20, Where a party surrenders, or cancels, a note of hand, bond, deed, or other instrument, either in ignorance of his rights thereunder, or on mistaken belief that the instrument had been paid or otherwise become of no effect; and 21, Where a power has been defectively executed, in favor of a charity, a purchaser, creditor, wife or child.<sup>4</sup>

In all cases of mistake in written instruments Courts of Equity will interfere only between the original parties, or those claiming under them in privity—such as personal representatives, heirs, devisees, legatees, assignees, judgment creditors or purchasers from any of them with notice of the facts. As against *bona fide* purchasers for a valuable consideration without notice, Courts of Equity will grant no relief.<sup>5</sup>

The following mistakes of law, or fact, will not be relieved against: 1, Where the obligee releases one of the obligors on a bond thinking the other would continue bound; 2, Where a payee releases one surety thinking the other, or others, will continue liable; 3, Where a person releases, or accepts satisfaction from, one of several joint trespassers, thinking the others would continue liable; 4, Where a note was drawn calling for usurious interest, in ignorance of the law; 5, Where a widow failed to dissent to her husband's will in time, being ignorant of the limit of dissent; 6, Where the purchaser of land knew of a vendor's lien, but thought there was enough personal property to satisfy it; 7, Where an administrator paid to a mother and children what wholly belonged to the mother, under a mutual mistake of law: he was required to account to her for the residue; 8, Where a party sells land in ignorance of a mine on it, the purchaser not practicing any fraud; and 9, Where the price of an article has been suddenly greatly enhanced, the seller not knowing it, and the buyer practicing no deception.<sup>6</sup>

sense, where a person acting upon some erroneous conviction, either of law or of fact, executes some instrument, or does some act, or omits to do some act, which, but for that erroneous conviction, he would not have executed, done or omitted. Hayne's *Outlines of Equity*, 132; 2 Pom. Eq. Jur., § 839. But the doctrine is settled that, in general, a mistake of law, pure and simple, is not an adequate ground of relief; for *ignorantia juris non excusat*. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an Equity in his behalf, enters into a transaction

affecting interests, rights or liabilities, under an ignorance or error with respect to the rules of law controlling the case, Courts will not, in general, relieve him from the consequences of his mistake. 2 Pom. Eq. Jur., § 842. Mistakes, to be remediable in Equity, must cause a loss to the party complaining which the other party ought not in reason and conscience to take advantage of.

<sup>4</sup> See 1 Sto. Eq. Jur., §§ 110-183; 2 Pom. Eq. Jur., §§ 838-856; and "Mistake" in our Digests.

<sup>5</sup> 1 Sto. Eq. Jur., § 165.

<sup>6</sup> See authorities next above cited.

§ 941. **Frame and Form of Bills in Cases Arising From Accidents, and Mistakes.**—The frames and forms of bills to set up instruments lost, destroyed or mutilated by accident, and of bills to reform instruments because of mistake, will be found in the Articles treating of such bills,<sup>7</sup> and reference is made thereto. Great particularity of details is required in framing such bills; the circumstances attending, or causing the accident or mistake complained of should be fully set forth, and it should be shown that complainant was free from any fault in the matter, and in no way responsible for the accident or mistake.

The bill should be filed promptly after the happening of the accident, or the discovery of the mistake, or the delay should be accounted for.

**BILL TO CORRECT A MISTAKE IN A DEED.<sup>8</sup>**

[For address and caption, see, ante, §§ 155, 164.]

Complainant respectfully shows to the Court:

I.

That on November 9, 1905, he sold to the defendant the following tract of land in civil district No. 4, in Dickson county, [*Here set out the corners, courses, and distances according to the deed.*]

II.

That the defendant contracted to pay thirty-five dollars per acre for said tract, and it was agreed that a survey should be made to ascertain the number of acres, and a man was employed to make the survey. In the meantime and before the deed was drawn, defendant paid complainant one hundred dollars and gave his note for four hundred dollars, and was to give his notes for the residue when the acreage was ascertained as the result of said survey.

III.

That after said survey was made, but before its result was known to complainant, defendant came to complainant's house, bringing with him the deed and notes for the land. Complainant inquired as to the result of the survey, but defendant stated that he did not know, but was willing to take the farm at thirty-five dollars per acre for thirty acres, and urged complainant to sign the deed he had drawn calling for "thirty acres, more or less," defendant saying he had urgent official business at home, and was in a hurry to leave. So complainant signed and delivered the deed, and took the defendant's notes for five hundred and fifty dollars, the balance of the purchase money.

IV.

That since delivering said deed complainant has ascertained that said tract contains forty-five acres, fifteen more than he was paid for. Complainant will here state that the defendant was with the surveyor when said survey was made, and stayed that night with the surveyor, making calculations from the latter's field book, and that when said deed was signed he well knew that said tract contained largely over thirty acres; and complainant would probably have ascertained this fact from the surveyor, who was present as defendant's companion, but had not made his calculations as to the acreage, had not defendant hurried him to sign the deed, and hastened away as soon as the signing had been done, hardly waiting for the ink to dry on complainant's signature. Complainant will further state that he is an old and feeble man, and was sick the day he signed the deed, and wanted the signing put off until the acreage was ascertained, but the defendant would not agree so to do, and urged immediate action: so complainant signed.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*: see, ante, §§ 158; 164.]

2d. That he be given a decree against the defendant for the price of said fifteen acres at thirty-five dollars per acre, and that such decree be declared a lien on said tract of land, and if not otherwise paid, the land be sold to satisfy the same.

3d. That if necessary said deed be reformed so as to show that the land contained forty-five instead of thirty acres, and that the consideration was fifteen hundred and seventy-five dollars, instead of ten hundred and fifty dollars, as mistakenly stated in said deed.

4th. That complainant have such further and other relief as he may be entitled to.

ROBERT M. JONES, Solicitor.

<sup>7</sup> See Article on Suits to Set up Lost Instruments, §§ 942-944; and Article on Suits for the Reformation of Written Instruments, §§ 945-946.

<sup>8</sup> This bill is based on *Barnes v. Gregory*, 1 Head, 230.

## CHAPTER XLVII.

## SUITS TO SET UP, REFORM AND RESCIND WRITINGS.

ARTICLE I. Suits to Set up Written Instruments.

ARTICLE II. Suits to Reform Written Instruments.

ARTICLE III. Suits to Rescind Written Instruments.

## ARTICLE I.

## SUITS TO SET UP WRITTEN INSTRUMENTS.

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|--|---|
| <p>§ 942. Suits to Set up, or Have Re-executed,<br/>Lost or Destroyed Instruments, or<br/>Records.</p> <p>§ 943. Frame and Form of Bills and Decrees</p> | <p>to Set up Lost or Destroyed Instru-<br/>ments, or Records.</p> <p>§ 944. Statutory Method of Supplying Lost<br/>Instruments, Papers and Records.</p> |
|--|---|

§ 942. **Suits to Set up, or Have Re-executed, Lost or Destroyed Instruments.** When a written contract, such as a note of hand, deed, will, lease, partnership agreement, or other valuable instrument, or a Court record, has been accidentally lost or destroyed, under circumstances not attributable to any reprehensible negligence on the part of its owner, on his application and due proof the Chancery Court will set it up and enforce it.<sup>1</sup> If the loss or destruction was caused by the fraud, negligence or other misconduct of the defendant, and the instrument was originally executed by him, the Court will, by attachment, compel him to re-execute it, if such re-execution is essential to the complainant's enjoyment of his rights thereunder. In the same suit in which an instrument, or record, is set up or instrument re-executed the Court will, on a bill framed for the purpose, proceed further and fully enforce complainant's rights thereunder.

§ 943. **Frame and Form of Bills to Set up Lost or Destroyed Instruments, or Records.**—The bill should describe the instrument or record as fully as possible, and should set out, on its face, or in an exhibit if the instrument or record will cover more than a page, as perfect a copy as complainant can make; and, if an instrument, will allege its execution by the defendant, or by some one authorized to bind him, and show the consideration therefor paid by complainant; and will set forth the loss, destruction, or mutilation of the instrument or record, and the circumstances thereof; and should show that complainant was guilty of no negligence or blame in the matter. The bill should, also, show how and wherein complainant is injured by such loss, destruction or mutilation, and should pray that said instrument or record be set up and established, and declared in force and operative; and, in a proper case, may pray that the instrument or record be enforced, or the relief sought in the suit whose record is set up be granted.<sup>1</sup> The bill should be sworn to.<sup>2</sup>

**BILL TO SET UP A LOST NOTE.**

[For address and caption of the bill, see, ante, §§ 155; 164.]

I.

That on or about the first day of July, 1905, the defendant, John Jones, for value received, executed and delivered to complainant his promissory note for five hundred dollars payable six months after date with interest from date, which note is still the property of complainant and wholly unpaid.

II.

That on, or about, the fourth day of July, 1905, said note was lost [or mutilated, or de-

<sup>1</sup> Hale v. Hord, 11 Heisk., 242.

<sup>2</sup> Sto. Eq. Jur., §§ 82, 88.

stroyed] in the following manner: [*Here state briefly the circumstances of the loss, mutilation or destruction, if known, to complainant; if not known he should so state, but should aver that he was guilty of no blame or negligence, but was wholly without fault in the matter.*]

III.

That complainant drew a true copy of said note, except the signature of the defendant thereto, and requested the defendant to sign and return it, or to make him a new note in the place of the one lost [*or mutilated, or destroyed*] and offering to indemnify him against any and all loss that might arise from the original note coming up against him, but the defendant refused and still refuses to sign said copy, or to renew said lost note. Complainant renews his said offer of indemnity, and will cheerfully submit to any order your Honor may make for the indemnity of the defendant against said note.

IV.

That complainant has made diligent search for said lost note among his valuable papers and in all receptacles and places where he keeps valuable papers, or where said lost note would in any probability be, but has utterly failed to find the same, and so he alleges and charges that said note is utterly lost, and that he will inevitably lose the same and the money due and payable thereon, unless your Honor's Court will give him relief and remedy.

V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.: see, §§ 158; 164.*]

2nd. That said lost note be set up and established by decree of your Honor's Court, and be declared unpaid and payable, and that your Honor pronounce a decree against the defendant for the amount due on said note, principal and interest, and award execution therefor, and for the costs of the cause, in complainant's favor.

3rd. That complainant have further and other relief.

WM. YORK, Solicitor.

[*Annex affidavit and jurat as in § 789, ante.*]

A bill to set up a negotiable instrument must be sworn to,<sup>3</sup> and should offer a bond of indemnity to the defendant against liability arising from such lost instrument returning to torment him.<sup>4</sup> The Court may, however, stay the decree until such bond is given, when no bond is tendered in the bill.<sup>5</sup> The defendant may make any defences to the bill that could be made to a bill suing directly on the note if in existence, such as *non est factum*, payment, the statute of limitations, infancy, failure of consideration, illegal consideration, duress, fraud, or the like.

**DECREE TO SET UP A LOST NOTE.**

[*For title, commencement and recitals, see, ante, § 567.*]

Upon consideration whereof it is ordered and decreed by the Court that complainant was the owner of the note set out in his bill, and that the same has been lost [*mutilated or destroyed*] without fault on his part, and that he is entitled to have it set up and established, as his property, and that the defendant owes the same, and that it is due and wholly unpaid.

It is, therefore, decreed that said note be set up and established, and the defendant pay the complainant the sum of six hundred and ten dollars, the amount due on said note, principal and interest, and that he, also, pay the costs of this cause, and on his failure so to do in the time required by law an execution will issue.

The execution in this case will be stayed until complainant files with the Clerk and Master a bond in the penalty of twelve hundred and twenty dollars, with two solvent sureties to be approved by the Clerk and Master, to indemnify the defendant against any loss to him by having to pay said note or any part thereof to any other person.

**BILL FOR THE RE-EXECUTION OF A DEED.**

[*For address and caption of the bill, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

I.

That on the 23d of September, 1905, the defendant executed and delivered to him a warranty deed for the following tract of land in the State of Kentucky. [*Here give the county in which the land lies, and otherwise describe it as described in said deed.*] The consideration expressed in said deed was one thousand dollars, all of which was paid by complainant when the deed was delivered.

II.

That after the execution and delivery of said deed, complainant entrusted it to the defendant to take to Kentucky and have it probated and registered in said county, the defendant volunteering to do so, stating that he had some business in said county. Complainant gave defendant two dollars to pay the fees for probating and registering said deed.

<sup>3</sup> See, *ante*, § 161.

<sup>4</sup> 1 Sto. Eq. Jur., §§ 83-88.

<sup>5</sup> Lowry v. Medlin, 6 Hum., 450.



## III.

That, on defendant's return complainant went to see him to get the deed, but he pretended he had forgotten it, and would send for it. Thereupon, complainant, after waiting a month or more, wrote to the register of deeds of said county and was informed by him that no such deed had been left with him, or been registered in his office. Complainant's suspicion being aroused he made inquiries and learned that defendant was denying ever having sold said land to complainant and was trying to sell it to other parties, pretending to them that the deed had been cancelled and destroyed without registration.

## IV.

Complainant thereupon, through his attorney, called upon the defendant to make him another deed, or produce the original. This he refused to do, and pretended to become very angry, setting up various pretences and conflicting explanations, but admitted that the deed had been made by him.

## V.

That, inasmuch as the land is situated in the State of Kentucky and, therefore, out of the jurisdiction of your Honor's Court, complainant is advised that his remedy is to apply to your Honor for a decree to compel the defendant to re-execute said deed.<sup>5a</sup>

## VI.

Complainant therefore prays:

1st. That subpoena to answer issue [*&c.*; see, *ante*, §§ 158; 164.]

2d. That the defendant be required to re-execute said deed; and that, in the meantime, he be enjoined from setting up any claim to said tract of land, or in any way transferring or encumbering the same.

3d. That complainant may have such other, further and general relief as the nature of his case may require.

This is the first application for an injunction in this case.

ED. P. McQUEEN, Solicitor.

[*Annex affidavit and jurat. See, ante, §§ 161; 164.*]

**§ 944. Statutory Method of Supplying Lost Instruments, Papers and Records.**—The Code<sup>6</sup> provides a summary method of supplying instruments, papers and records, and under its provisions any record, proceedings, or paper, if lost, or mislaid unintentionally, or fraudulently made away with, may be supplied, upon application, under the orders of the Court, by the best evidence the nature of the case will admit of.<sup>7</sup> Papers are often supplied in the Chancery Court under this statute.<sup>8</sup> To entitle a party to supply a record, paper, or proceeding, lost, mislaid, or made away with, it must be made to appear:

1. That such a record, proceeding, or paper once existed in the Court where-in the application to supply is made. If it be a pleading, deposition, or other part of a file, it must, also, appear that it was filed in the cause.<sup>9</sup>

2. That such record, proceeding, or paper is lost, mislaid unintentionally, or fraudulently made away with; and that due and diligent search has been ineffectually made for it in the place where it should be, or was last known to be; and that the last or proper custodian of it does not have it, and cannot find it on due search, and does not know where it is, and believes it is lost, or mislaid unintentionally, or fraudulently made away with.

3. On such facts being made to appear by the affidavits of the Clerk and Master,<sup>10</sup> and of the Solicitors in the cause, or other person<sup>11</sup> last having it in his possession, if such be the case, the Court will, if satisfied that these affidavits make out a case under the statute, order the record, proceeding, or paper to be supplied by the best evidence that the nature of the case will admit of. This

<sup>5a</sup> When land is situated in another State, but the defendant lives in this State, and is before the Court by service of subpoena, the Court may by process of contempt compel him to execute deeds or other instruments. See, *ante*, § 652.

<sup>6</sup> Code, §§ 3901-3908a. This statute in no way limits the jurisdiction of the Chancery Court. *Powers v. Fitzhugh*, 10 Hum., 417; *Hale v. Hord*, 11 Heisk., 242. See, *ante*, § 37.

<sup>7</sup> Code, § 3907.

<sup>8</sup> The practice in such a case is fully set out in *Cornelius v. City Bank*, 3 Tenn. Ch., 5.

<sup>9</sup> *Mullins v. Aiken*, 2 Heisk., 551; *Baker v. Mayor*. *Ibid.*, 117. These and similar cases show the importance of the Clerk's entries of the filing of papers in his rule docket.

<sup>10</sup> The Clerk being the custodian, his affidavit must always be made, showing that he is the Clerk and

the custodian of the files and records of the Court; that such a record, proceeding, or paper was in his office, according to his own knowledge, or according to some record on his rule docket, trial docket, or execution docket, as the case may be; that he has made diligent search for it in his office, and in such other place or places as it is likely to be found, and that he has been unable to find it; and that it is lost, mislaid, or fraudulently made away with. The deputy clerk's affidavit is inadmissible, ordinarily. *Cornelius v. Bank*, 3 Tenn. Ch., 7.

<sup>11</sup> The affidavit of such Solicitor or other person must, also, be filed. Indeed, the Solicitors of both parties should make affidavit of the existence of the record or paper; that they have made diligent search for it, and cannot find it; and that they verily believe it is lost, or mislaid, or fraudulently made away with.

evidence is ordinarily the affidavits of the Clerk, Sheriff, and Solicitors, best acquainted with the facts. The Clerk generally makes affidavit to all writs by him issued, or bonds by him taken, or other papers drawn by him; the Sheriff makes affidavit to all returns made by him, and to the fact that he had the lost writ; the Solicitors make affidavit to all pleadings or other papers by them drawn respectively; and the entries on the rule docket, the trial docket, and the execution docket, will be regarded as in the nature of a record to aid in supplying the lost record, proceeding, or paper.

4. On such affidavits and other evidence being presented to the Court, the Court judicially determines whether (1) they constitute the best evidence the nature of the case will admit of; and (2) if so, whether they are sufficiently clear, cogent and definite to enable the Court to adjudicate that the record, proceeding, or paper, exhibited to the affidavits, is substantially a copy of the record, proceeding, or paper, allowed to be supplied. If the Court determines this affirmatively, an order will be entered on the minutes showing the loss, the order to supply, the fact that the record, proceeding or paper has been duly supplied under the order, and that it is ordered to be filed in the cause, and to be substituted for, and have all the force and effect of, the original record, proceeding, or paper.

5. If the lost papers consist of depositions, the Court may, in its discretion, order the testimony to be retaken, if the witnesses are alive.<sup>12</sup> The following is the form of an order where a paper has been supplied under the statute:<sup>13</sup>

**ORDER SUPPLYING A LOST PAPER.**

John Doe, }  
*vs.* } No. 678.  
 Richard Roe. }

In this cause, it appearing from the affidavits of the Clerk and Master, and of the Solicitors of the parties, that the file [*or some other paper, naming it,*] in this cause is lost or mislaid unintentionally, or fraudulently made way with, so that it cannot be found or had; and the Court being satisfied from said affidavits, [and from an inspection of the rule docket, the trial docket, and the execution docket, *if any of them are put in evidence,*] that said file [*or other paper*] once existed, and that it has been lost, or mislaid unintentionally, or been fraudulently made away with, it is so ordered and adjudged.

The Court, therefore, orders that said file [*or other paper*] be supplied by the best evidence the nature of the case will admit of. Thereupon, the complainant [*or, defendant,*] presented to the Court alleged copies of the bill, prosecution bond, subpoena to answer and return thereon, the answer of Richard Roe,<sup>14</sup> and the deed filed as an exhibit to the bill [*or other paper or papers sought to be supplied*] along with the affidavits of the Clerk and Master, the deputy Clerk and Master, the Sheriff, the Solicitors of both parties [*and of any other person deposing,*] from all of which the Court being satisfied that said copies are substantial copies, it is ordered and decreed by the Court that each and all of said copies be filed in the cause, and be substituted for the originals, and have all the force and effect thereof, and be and constitute the file in this cause.

**ARTICLE II.**

**SUITS TO REFORM WRITTEN INSTRUMENTS.**

§ 945. Suits for the Reformation of Written Instruments. | § 946. Effect of Reforming a Written Instrument.

§ 945. **Suits for the Reformation of Written Instruments.**—When an agreement is made and reduced to writing, but through mistake, inadvertence or fraud, the writing fails to express correctly the contract really made, the Court of Chancery will reform the instrument so as to make it conform to the real

<sup>12</sup> Code, § 3908.  
<sup>13</sup> This statute is one of many instances in which the remedies of Equity have been granted to the Circuit Courts by statute. See, *ante*, § 7, where many other instances are given.

<sup>14</sup> The Court may order each party to supply his own pleading. *Cornelius v. City Bank*, 3 Tenn. Ch., 8.

intention of the parties; and, in a proper case, after such reformation, the bill so praying, the Court will enforce the instrument by a decree for the amount due the complainant, if a money demand; or, in a proper case, a decree awarding the possession of the property sued for to the complainant.

#### BILL TO REFORM A DEED.

[For address and caption of the bill, see, ante, §§ 155-164.]

Complainant respectfully shows to the Court:

##### I.

That the complainant contracted with the defendant to purchase from him the following tract of land. [*Describe it by its location and boundaries, and state its acreage.*] And the defendant contracted to convey said tract to complainant and make and deliver to him a deed therefor with full covenants, and acknowledge the same for registration, for the following consideration: [*Here state the consideration, and if it has been paid so state, and if not paid show the facts in reference to payment.*]

##### II.

That the defendant did on the 8th day of April, 1905, execute, deliver and acknowledge for registration a paper writing which complainant then believed to convey the above boundary of land, and complainant fully paid the purchase money [*or has done the acts required as the consideration, specifying them.*]

That on comparing the metes and bounds in said deed with the tract of land above agreed to be sold to him complainant finds and so charges that [*Here show the mistake whether in metes and bounds, or otherwise.*]

##### III.

That [*If complainant has ground to charge that the defendant made a mistake in drawing the deed, or the draughtsman made the mistake, let him so charge. If he has grounds to charge that the defendant acted knowingly and fraudulently in having the deed so drawn, let him so charge.*]

##### IV.

That complainant has called on the defendant to correct said deed and make it conform to their contract, or make and deliver to him a new deed so conforming, but the defendant refused and still refuses so to do.

##### V.

That [*If the defendant is withholding any part of the land belonging to complainant so avenge, and give the facts relating thereto fully.*]

##### VI.

The premises considered, complainant prays:

1st. That subpoena to answer issue [see, ante, §§ 158; 164.]

2d. That said deed be reformed so as to express the real contract of the parties thereto, and especially that the mistake alleged be corrected.

3d. That [*If the defendant is withholding any part of the land covered by the deed as it should be reformed, pray that complainant be given possession thereof.*]

4th. That [*If complainant desires any extraordinary process or relief, let him pray thereof, having laid the necessary grounds therefor in the body of the bill.*]

5th. That complainant have such further and other relief as he may be entitled to.

J. H. WALLACE, Solicitor.

The bill need not be sworn to unless some extraordinary process is prayed, in which case add:

This is the first application for an injunction, [attachment, or receiver] in this case.

#### DECREE OF REFORMATION.

[For title of cause, commencement and recitals of decree, see, ante, § 567.]

It is therefore ordered, adjudged, and decreed, that the complainant is entitled to have the deed referred to in his bill reformed as prayed; and the Clerk and Master will execute, acknowledge for registration and deliver to complainant a deed with full covenants conveying to him in fee simple forever the tract of land described in the bill, bounded as follows: [*Here give the boundaries of the deed as reformed.*]

That all the right and title of the defendant to said tract of land be divested out of him and vested in the complainant, and that a writ of possession issue to put the complainant in full possession of said tract, and of every part thereof.

That the defendant pay all the costs of the cause, for which an execution will issue.

If the instrument as reformed calls for the payment of money, the decree, in a proper case, will adjudge the amount due complainant thereon, and award an execution therefor.

§ 946. **Effect of Reforming a Written Instrument.**—When a written agreement has been reformed, it stands in all respects, and has identically the same

force and effect, between the parties, as though originally made in its reformed condition, for Equity regards that as done which ought to have been done. The reformed instrument is substituted for, and is in lieu of, the original instrument, and takes effect from the date of the original instrument. The change is made *nunc pro tunc*, and the reformed instrument becomes the only evidence of the original agreement.

On the reformation of an instrument, the rights of the respective parties thereto are determined exclusively by the instrument as reformed; and those rights are precisely the same, no more and no less, for each and all of the parties, as they would have been had the reformed instrument been the one originally by them signed. The result is, the complainant is generally required to go one step further in his bill for reformation, and pray for the enforcement of the reformed contract: if a deed, for instance, has been reformed as against a defendant in possession, or claiming an interest, complainant may pray for a writ of possession, or a decree adjudicating the title, or both. So, whatever the character of the instrument reformed, if the complainant has rights under it needing affirmative enforcement, he may, in the same suit, have the instrument reformed, and enforced as reformed. If a defendant is sued on an instrument that may be reformed to his advantage, he may file a cross-bill and have it reformed, and then rely on the reformed instrument as a defence to the original suit.<sup>1</sup>

### ARTICLE III.

#### SUITS TO RESCIND WRITTEN INSTRUMENTS.

§ 947. Suits for the Rescission and Delivery-<sup>1</sup> up of Written Instruments. | § 948. Form of Bill for Rescission.

#### § 947. Suits for the Rescission and Delivery-up of Written Instruments.

When a written instrument, such as a note of hand, bond, deed or mortgage, has been obtained by fraud, force, or duress, or is based on an illegal or immoral consideration, or has been paid or otherwise discharged, but is retained by the payee, on application by the maker of such instrument and the proof of such facts, the Chancery Court will rescind and cancel the same, and require the defendant to deliver it up, and will enjoin him from setting up any claim under it, or in any way attempting to enforce it, and if he has instituted any legal proceedings on such instrument will enjoin them.

But a rescission will not be allowed for fraud unless the complainant disaffirmed the deed, or other instrument, promptly on discovering the fraud, and consistently adhered to such disaffirmance;<sup>2</sup> and he must file his bill promptly, for if he sleep on his rights he will be repelled.<sup>3</sup> On a bill for rescission because the consideration was grossly inadequate, the Court will inquire 1st, would a sane man, uninfluenced by some cause not explained, make such a contract; 2d, would the defendant if a fair man take such a contract; and 3d, if he would, ought a Court of Equity to permit him to do it.<sup>4</sup>

§ 948. Form of Bill for Rescission.—The bill must be definite and certain, and must aver positively the facts on which the complainant relies for relief;

<sup>1</sup> See *Helm v. Wright*, 2 Hum., 72, where a mistake in a bond was corrected, and the bond as corrected substituted for the original bond in a suit in the Circuit Court. The decree of correction is set out in the report.

<sup>2</sup> *Precious Blood Society v. Elythe*, 18 Pick., 40; *Street R. Co. v. Giardino*, 8 Cates, 368.

<sup>3</sup> See, *ante*, § 49; *Talbot v. Manard*, 22 Pick., 60.

<sup>4</sup> *Hansard v. Sharp*, Thomp. Cas., 73. As to in-

adequacy of price as a ground for rescission, see *Talbot v. Manard*, 22 Pick., 60. It is contrary to good conscience for a defendant to insist on retaining the benefit of a bargain when the consideration paid by him is shockingly inadequate, and the complainant is financially ruined or disastrously injured by the transaction, while the defendant can be put *in statu quo*.

general allegations and conclusions of law are not adequate; nevertheless, it is not necessary, nor indeed proper, for a complainant to set forth all the details and minute facts constituting the grievance of which he complains.

The bill may contain an alternative prayer for damages in case the rescission prayed for is not granted.<sup>1</sup>

**BILL FOR THE RESCISSION AND DELIVERY-UP OF A MORTGAGE.**

[For address and caption of the bill, see, ante, §§ 155-164.]

Complainant respectfully shows to the Court:

I.

That on December 25, 1904, he executed and acknowledged in presence of two witnesses, a deed of mortgage to the defendant on [specifying the property conveyed.] This mortgage has not yet been registered.

II.

That [Here specify in detail the circumstances under which said mortgage was executed, giving the details thereof showing fraud, duress, drunkenness, or considerations contrary to law or public policy, and that the defendant was an actor in the matter.]

III.

That [Show that complainant was an innocent victim, if such was the case; or if there be any circumstances which mitigate his participation in the immoral or illegal considerations state them.]

IV.

That [If the defendant is about or likely to use said instrument to the detriment of complainant give all the facts so showing, in order to lay ground for an injunction.]

V.

Complainant therefore prays:

1st. That subpoena to answer issue [ &c.: see, ante, §§ 158; 164]

2d. That the defendant be required to deliver up said mortgage; and that he be enjoined from having the same registered, and from setting up any claim to, or under, it, and that it be declared void and cancelled; and that whatever title it may have conveyed to the defendant be divested out of him and reinvested in complainant, [or, if the land has been sold and the purchaser is a defendant and his conduct equitable and the purchase-money not paid, pray for a judgment against the first purchaser for the full amount due and against the second purchaser for the amount due from him on his purchase, and declare a lien on the land therefor and pray a sale of the land on credit and in bar of the equity of redemption, if necessary.]

3d. That he may have such further and other relief as the nature of his case may require.

This is the first application for an injunction in this case.

DAVID A. WOOD, Solicitor.

[Annex affidavit. See, ante, §§ 161; 164.]

On a bill for rescission the complainant must tender whatever consideration he may have received, if any, and offer to do whatever is necessary to place the defendant *in statu quo*.<sup>1</sup>

The answer to a bill to rescind a sale of land for failure of title should fully set forth complainant's title, if defendant resists the rescission.<sup>2</sup>

<sup>1</sup> Hill v. Harriman, 11 Pick., 300.

<sup>2</sup> Topp v. White, 11 Heisk., 165.

CHAPTER XLVIII.

SUITS FOR SPECIFIC PERFORMANCE.

§ 949. Cases for Specific Performance.

§ 950. Frame and Form of Bill for Specific Performance.

§ 951. Decree for a Specific Performance.

§ 949. **Cases for Specific Performance.**—A contract is an agreement between two or more parties to do, or not to do, some specified thing. To constitute a valid contract enforceable in a Court of Equity there must be 1, The reciprocal or mutual assent of two or more persons, competent to contract; 2, A consideration deemed sufficient in law; and 3, A thing to be done which is not forbidden by law, or a thing not to be done, the performance of which is not commanded by law. When a contract is found to be valid all a Court can do is to enforce it. The mere fact that one party or the other may have obtained an advantage does not justify a Court in an endeavor to mitigate the hardship; for the law allows a party to obtain an advantage, provided he occupies no relation of trust or confidence, or practices no fraud, or does no act to mislead or deceive the other party. Courts of Equity do not stand as the guardian of all persons who contract to see that absolute equality prevails between them.<sup>1</sup> When a contract is binding on the parties it is binding on the Courts, for Courts have jurisdiction only to enforce contracts between parties, not to make contracts between them.<sup>2</sup> If a contract is so indefinite or uncertain as to convey no reasonable meaning, it is void for vagueness; if it provides for the doing of something unlawful to be done, or for the omission of something required by the law to be done, it is void for illegality; if the party seeking to avoid it, was incapable at the time of contracting by reason of some disability, as infancy, coverture, duress, drunkenness or want of mental capacity, then the contract is void for want of a competent party; and if the consideration is wanting or is illegal, the contract is void for want of a legal consideration. If a contract has all the essentials of validity, and is certain in its terms, is based on an adequate and valuable consideration, is fair and just in all its provisions, is free from any fraud, misrepresentation, illegality, or mistake, is capable of being enforced without hardship to either party, and if compensation in damages for its breach is impracticable, or would be inadequate, a bill will be maintained for its specific performance.<sup>3</sup> The broad ground of jurisdiction in such cases is the inadequacy, or the impracticability, of damages to do complete justice to the

1 Talbot v Manard, 22 Pick., 60.

2 The following are the principal maxims relating to the law of contracts, not already given:

MAXIMS RELATING TO CONTRACTS.

1. *Modus et conventio vincunt legem.* (When there is an agreement its terms prevail against what otherwise would be the law.) But Equity will relieve against an inequitable agreement. Snell's Pr. Eq., 290.

2. *Privatorum conventio juri publico non derogat.* (The agreements of private individuals will not be allowed so to operate as to diminish the effect of a public law.)

3. *Qui sentit commodum sentire debet et onus.* (He who acquires property or a right must take it subject to all its encumbrances.)

4. *Facta qua turpem causam continent non sunt observanda.* (Contracts based upon immoral or illegal considerations are not enforceable by law.)

5. *Ex nudo pacto non oritur actio.* (No right of action arises out of a contract based on no consideration.)

6. *Qui facit per alium facit per se.* (He who does an act by means of an agent is considered in law as doing it in person.)

7. *Delegatus non potest delegare.* (An agent cannot transfer his authority to another;) nor can a trustee.

8. *Respondent superior.* (The principal is responsible for the acts of his agent.)

9. *Ratihabito mandato equiparatur.* (When a principal ratifies what his agent does, such ratification is equivalent to an order to do what was done.)

10. *Nemo potest plus juris ad alium transferre quam ipse habet.* (No one can transfer to another a greater right than he himself possesses.)

3 3 Pom. Eq. Jur., §§ 1401-1405. A Court of Chancery will not specifically enforce a contract when (1) it is illegal or immoral; or when (2) it is without consideration; or (3) when the contract involves personal skill or knowledge, as to sing, or perform in public; or when (4) the contract is to construct buildings, or make repairs; or when (5) there is a want of mutuality, as where one of the parties is an infant. Snell's Pr. Eq., 519-522.

injured party. Hence, where damages are practicable, and would be adequate, the Court, as a rule, will not compel a specific performance, but will leave the complainant to his remedies at law, or will itself award damages. If the contract relates to lands, or an interest in them, and in addition to all of the foregoing requirements is, also, in writing, a specific performance will be decreed as of course, for no damages can adequately represent real estate. On the other hand, chattels of all kinds, can ordinarily, be duplicated in the market, or can be reproduced; and hence, a pecuniary compensation is both practicable and adequate, unless, as it sometimes happens, the article has a special value, such as a keepsake, a family relic, heirlooms, paintings, gems, coins, statuary, rare works of art, manuscript, title papers, and the like, in all of which cases a specific delivery is ordinarily decreed.<sup>4</sup>

The most ordinary cases for a specific performance are: (1) agreements in writing to buy or sell land; (2) contracts to give or renew leases; (3) contracts to give a mortgage; (4) contracts to insure; (5) contracts for chattels of special value; and (6) agreements of separation between husband and wife.

§ 950. **Frame and Form of Bill for Specific Performance.**—In drawing the bill the contract must be fully set out, and the consideration specified, and complainant must offer to do all that the contract requires of him.

#### BILL FOR A SPECIFIC PERFORMANCE.

[For address and caption of bill, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

##### I.

That on the 1st day of September, 1905, [give the date of the contract,] the defendant was the owner and in possession of the following lot [or tract] of land situated in the County of Knox, [give the county in which the land lies, and remember the bill must be filed in that county. See, ante, § 177. If the contract does not relate to land, here state the substance and subject-matter of the contract,] and bounded as follows: [here insert the description contained in the contract, and if this description is not definite enough give, also, the description in the deed under which the defendant holds.]

##### II.

That the defendant being so seized and possessed of said lot [or tract] of land, did, on said 1st day of September, 1905, [give the date of the contract,] contract in writing, signed by him and delivered to complainant, to convey to complainant, for the consideration of one thousand dollars, said lot [or tract] of land, with the usual covenants. [In this paragraph of the bill give the details of the contract, if not given in paragraph I, and especially set forth the consideration complainant is to pay, or what he is to do as the consideration of the contract.] Said contract is hereto exhibited, and marked A.

##### III.

That, [Here, show for and to what extent complainant has complied with conditions precedent binding on him, if any, thus:] in accordance with the terms of said contract, the complainant did on the day said contract was executed, pay defendant the sum of two hundred dollars, which is receipted for on the face of said contract [or, for which defendant gave him a receipt, if such be the fact.] On the 1st day of November, 1905, complainant paid the defendant on said contract the further sum of three hundred dollars, and took his receipt therefor, which is hereto exhibited, and marked B; and on making this payment complainant called on the defendant to make and deliver said deed of conveyance, when defendant, greatly to complainant's surprise, insisted the deed was not to be made until the entire consideration was paid. [Here show what reasons and excuses, if any, the defendant gives for not performing his contract.]

##### IV.

That [If the defendant is doing any act, or threatening to do any act, in reference to the subject-matter of the contract which materially impairs or will impair its value, or is threatening to convey it, so allege and give the particulars, as foundation for an injunction, thus:] the defendant is having many of the most valuable trees on said tract of land cut down to be converted into lumber, and has offered to sell said tract to another party.

##### V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [ &c., as in §§ 158; 164, ante.]

2d. That said agreement be specifically performed by order of your Honor, and that any and all orders, injunctions, attachments of the person, and other process necessary to that end be made and awarded by your Honor, and duly enforced.

<sup>4</sup> 1 Sto. Eq. Jur., § 709; *Womack v. Smith*, 11 Hum., 478; 3 Pom. Eq. Jur., § 1402.

3d. That an injunction issue [*if necessary, to restrain the defendant from doing the acts complained of in the bill, thus:*] to restrain the defendant from cutting the valuable trees on said tract, or committing any waste thereon, and that he, especially, be enjoined from selling or encumbering said tract.

4th. That complainant have such further and other relief as the facts will justify.

[*If there is a prayer for an injunction, add:*] This is the first application for an injunction in this case.

CHARLES H. SMITH, Solicitor.

The bill need not be sworn to unless an injunction, or other extraordinary process, is prayed for.

If any money has been tendered by the complainant out of Court, the bill should so state, and should renew the tender; and the money should be filed with the bill.

The bill may pray in the alternative for a specific performance, or, in case that cannot be had, for damages for the defendant's breach of the contract; or, in a proper case, such damages may be awarded under the prayer for general relief. And if the amount of the damages does not appear at the hearing, the Master may be directed to hear proof and report thereon.<sup>5</sup>

§ 951. Decree for a Specific Performance.—The following decree will indicate the general character of such decrees:

#### DECREE FOR A SPECIFIC PERFORMANCE.

[*Here insert title, commencement and recitals: see, ante, § 567.*]

From all of which the Court is of opinion that complainant is entitled to the relief by him specially prayed, and it is, therefore, ordered, adjudged and decreed that the agreement set out in the bill of complaint be specifically performed by the defendant.

It is further ordered and decreed that the defendant execute, and acknowledge for registration before two competent witnesses in the Master's office, and deliver to the Master for the complainant a deed conveying to the complainant the following lot [*or tract*] of land: [*describing it by courses and distances, or other sufficient description,*] with covenants of warranty and seizin.<sup>6</sup> If the parties differ as to the form of the deed the Master will settle the same. [*If any transfer is to be made in writing to specifically perform the contract, or any transfer of property, so specify in the decree, and if a writ of possession is necessary, upward it, thus:*] And, on the delivery of said deed to the Master, a writ of possession will issue to put complainant in full possession of said tract [*or lot*] of land. A lien is hereby declared on said land to secure the payment of the balance of the purchase-money, which may be paid into the Master's office by the complainant for the defendant.

The defendant will pay all the costs of the cause down to the execution of the writ of possession.

And either party is given liberty to apply to the Court as occasion may require.<sup>7</sup>

<sup>5</sup> Sto. Eq. Jur., § 794; Pom. Eq. Jur., 1410; Bracken v. Martin, 3 Yerg., 58; Acts of 1877, ch. 97.

<sup>6</sup> See Chapter on How Decrees are Enforced, *ante*,

§§ 646-661; see, also, Brakfield v. Anderson, 3 Pick., 206.

<sup>7</sup> See, *ante*, §§ 566, note 31; 579.



## CHAPTER XLIX.

## SUITS FOR AN ACCOUNTING.

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| <p>§ 952. Accounts Generally Considered.</p> <p>§ 953. Suits for an Accounting Where the Account is Open.</p> <p>§ 954. Form of Bill and Decree for an Accounting Where the Account is Open.</p> <p>§ 955. Suits to Open, or Surcharge and Falsify a Stated or Settled Account.</p> | <p>§ 956. Form of Bill and Decree to Open a Stated or Settled Account.</p> <p>§ 957. Suits to Open Settlements Made by Executors, Administrators, and Guardians.</p> <p>§ 958. Proceedings in the Master's Office on an Accounting.</p> |
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§ 952. **Accounts Generally Considered.**—An account is a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relation.<sup>1</sup> Accounts are either: 1, Open; 2, Stated; or 3, Settled.

1. **An Open Account** is one of which the balance has not been struck, or which is not accepted by both parties.

2. **A Stated Account** is one, 1, that has been made out and agreed to, or 2, rendered and admitted to be correct, or 3, rendered and acquiesced in, or 4, not objected to in a reasonable time.

3. **A Settled Account** is one that has been stated and paid.<sup>2</sup>

Settlements of executors, administrators and guardians, made in the County Court, in pursuance of law, are to be taken as *prima facie* correct;<sup>3</sup> and if adult parties in interest are present when such settlements are made, they have, as to such parties, all the force and effect of stated accounts.<sup>4</sup>

The Chancery Court will, on a proper bill filed for that purpose and sustained, open either a stated or settled account, 1, where by reason of some mistake, or omission, or accident, or fraud, or undue advantage, the account is vitiated, and the balance incorrectly fixed;<sup>5</sup> and 2, where by reason of some relation of trust or confidence between the parties, the complainant was at a disadvantage, and as a consequence the account is inequitable.<sup>6</sup>

When, however, the bill is filed to open the settlement of an executor, administrator or guardian, made in the County Court, no fraud, or undue advantage, or other special Equity need be alleged,<sup>7</sup> unless the complainant was present when the settlement was made; in which event, the settlement has all the force and effect of a stated account, and must be impeached in the same way.<sup>8</sup>

Where the fraud, mistake, undue advantage or imposition is gross, the Court will direct the whole account to be opened and taken *de novo*; but where the mistake, omission, inaccuracy, fraud, or imposition is not shown to affect or stain all the items of the transaction, the Court will, ordinarily, allow the account to stand, with liberty to the complainant to surcharge and falsify it.<sup>9</sup> The effect of such a course is to leave the account in full force except in so far as the complainant can prove errors and mistakes. Sometimes the Court confines the complainant to the particular items of error or mistake set forth in

<sup>1</sup> Bouv. Law Dic., "Account."

<sup>2</sup> *Ibid* "Account Stated;" Smith's Eq. Jur., 261. Phillips v. Belden, 2 Edw. Chy., (N. Y.) 1; Murray v. Toland, 3 Johns. Ch., (N. Y.) 569; and Desty's notes to both cases, Law. Ed.: 1 Sto. Eq. Jur., § 576; Sto. Eq. Pl., § 798; 1 Dan. Ch. Pr., 665, note; Bussey v. Gaut, 10 Hum., 238; Craighhead v. Bank, 7 Yerg., 409.

<sup>3</sup> Code, §§ 2305; 3786; see, *ante*, § 333.

<sup>4</sup> Turney v. Williams, 7 Yerg., 172; Matlock v. Rice, 6 Heisk., 33.

<sup>5</sup> 1 Sto. Eq. Jur., § 523; 1 Dan. Ch. Pr., 667-668.

<sup>6</sup> 1 Sto. Eq. Jur., 527a. But in the absence of fraud, and after a long delay, it requires very clear proof to surcharge and falsify settled accounts. Patton v. Cone, 1 Lea, 14.

<sup>7</sup> Elrod v. Lancaster, 2 Head, 571; Milly v. Harvison, 7 Cold., 191.

<sup>8</sup> Turney v. Williams, 7 Yerg., 172.

<sup>9</sup> 1 Sto. Eq. Jur., § 523; 1 Dan. Ch. Pr., 667-668.

his bill, treating the account as, in other respects, conclusive.<sup>10</sup> The Court is more reluctant to open a settled account than a stated account; and, except in cases of apparent fraud, or many errors, will allow the account to stand, and give complainant leave to surcharge and falsify.<sup>11</sup>

Where a party is given leave to surcharge and falsify, the burden of proof is on him; but where the account is opened *in toto*, and a general accounting ordered *de novo*, each party must prove his own charges and his own credits.<sup>12</sup>

**§ 953. Suits for an Accounting Where the Account is Open.**—Where parties have business dealings, involving many items, or where in consequence of relations of trust, or confidence, one party has handled the estate of the other, or done business for him, involving a series of transactions, or numerous items, a bill for an accounting will lie in behalf of the party entitled to a settlement. Bills of this character are usually brought by wards against their guardians, by principals against their agents, by one partner against another, by clients against their attorneys, by landlords against tenants, by a guardian against his predecessor, by beneficiaries against their trustees, by legatees, distributees and creditors against executors and administrators, and by one or more tenants in common against another, or other tenants in common, when the respective defendants have failed duly to exhibit an account for the funds or other property in which the complainant has an interest, and to pay over whatever may be due or belong to him.

The bill in such a suit should start out by stating clearly the relations<sup>13</sup> of the parties, and that in consequence of such relations various sums of money or other property of the complainant went, or should have gone, into the possession, or under the control, of the defendant, giving items, dates, values, and circumstances. The bill should then show that the defendant has rendered no account of such money and property and the profits thereof; or, if he did render any, that it was imperfect and incorrect, that complainant refused to accept it in any respect, and so notified the defendant; and allege, if known, the balance due complainant on a fair accounting; and pray for an account to be taken by the Clerk and Master and for a decree for the amount found due. If the defendant has any sureties bound for his good conduct they should be made defendants, and their suretyship alleged in the body of the bill.

A bill that seeks to open and reform a stated or settled account, or to set aside such an account, or to surcharge and falsify any settlement made by executors, administrators or guardians, is a very different bill from one for an accounting where the account is open.

**§ 954. Form of Bill and Decree for an Accounting Where the Account is Open.**—The following forms indicate how the bill and decree should be framed in ordinary cases for an accounting where the account is open:

**FORM OF BILL FOR AN ACCOUNTING, WHEN THE BILL IS OPEN.**

[For Address and Commencement of bill see § 164, ante.]

The complainant respectfully shows to the Court:

I.

That [Here show the relation of the parties, how and when it originated, and what it related to.]

II.

That [Here show the business dealings resulting from the relations of the parties, and what matters were entrusted to, or assumed by, the defendant, and give a full history of all the various transactions engaged in by the defendant, and as fully as possible the moneys and other property belonging to complainant which went into his hands, or could have gone by due diligence.]

III.

That [Here detail any misrepresentations, concealments, frauds or other acts of bad faith, by the defendant, if any; and any promises by him to account, make corrections, or pay over the moneys or property belonging to the complainant.<sup>14</sup>]

<sup>10</sup> 1 Sto. Eq. Jur., § 523.

<sup>11</sup> 1 Sto. Eq. Jur., § 527; *Patton v. Cone*, 1 Lea,

<sup>12</sup> 1 Dan. Ch. Pr., 668; 1 Sto. Eq. Jur., § 525.

<sup>13</sup> See §§ 165-169, ante.

<sup>14</sup> If the defendant has rendered an account which

## IV.

That [If the defendant has done, or is about to do, anything making an attachment or injunction expedient, specify such inequitable conduct.]

## V.

That [If the defendant has any sureties for the faithful discharge of his duty to complainant, so state, giving their names, and the nature of their obligation, and insert their names as defendants in the caption of the bill.]

The premises considered the complainant prays:

1st. That subpoena to answer [See § 164, for prayer for process.]

2nd. That the defendant be required to set out in his answer a full and detailed account of all moneys, notes of hand, accounts, or other evidences of debt, and all property of every kind that came into his hands, and show what disposition he made of them. [And if the defendant is charged with having sold, transferred, given away or otherwise disposed of any property not accounted for, pray he may be required to specify the same and to state what consideration he received therefor. And if he has failed to account for any money or property, pray that he be required to state why he so failed, and what has become of the same.]

3rd. That an account be taken and stated by the Clerk and Master showing all the moneys, accounts, choses in action and other evidences of debt, and all property, that went into the defendant's hands, or should by due diligence have gone into his hands by virtue of his being the guardian, [agent, attorney, trustee, executor, administrator, partner, tenant in common, or other confidee,<sup>15</sup>] and what disposition he has made thereof, and what profit he made, or could by due diligence have made out of the money and property that went, or might have gone, into his hands as such guardian, [agent, trustee, administrator or other confidee.] That the Master show in his said report what balance is due complainant, after allowing the defendant all just credits, but no compensation, and that a decree be rendered in favor of complainant against the defendant [and his said sureties, if any, and they are sued,] for said balance.

4th. That an injunction issue to restrain the defendant from [stating the acts of defendant to be restrained.] Also, that an attachment issue and be levied upon the property of the defendant. And, also, that complainant have such further and other relief as he may be entitled to.

DAVID K. YOUNG, Solicitor.

The bill should be sworn to, if it seeks an injunction or attachment, and should allege that it is the first application for such process.

The decree in favor of the complainant for an account should specify the rules to govern the Master, and blaze out his road as definitely as possible so as to prevent too wide a range of proof and investigation.<sup>16</sup> The decree in form ordinarily follows the special prayer of the bill in stating what matters the Master will inquire into and report on, coupled with such directions as the Chancellor may see fit to make to limit and define the scope of the inquiry.

#### DECREE FOR AN ACCOUNTING.

[For title, commencement and recitals see ante, § 567.]

It is ordered, adjudged and decreed, that the matters of account in controversy be and are referred to the Clerk and Master to take and state an account between the complainant and defendant concerning the business of [stating the business, if any] and all transactions relating to or growing out of the same, [and, if a partnership is involved, add: charging each party with the several sums by them respectively drawn or received from the firm assets on their individual account; also interest<sup>17</sup> thereon.] The Master is authorized to compel the production of all such books, papers, documents and other writings as may be in the possession or power of the parties, or either of them, and shall be called for by either party, or he shall think proper to be produced before him in taking such account. The Master shall require each party, before the taking of depositions is begun, to produce and file with him a charge or statement in writing, duly signed, of all the several items which he claims the other party should be charged with, giving the date, character and amount of each item, and no item not contained in these several statements will be considered by the Master, unless on good cause shown,<sup>18</sup> he allow said statement, or statements, to be amended by the insertion of additional items or the alteration of the original items.<sup>19</sup>

The Master will so state and take said account as to show the balance which either party may owe the other, and he will report hereon to the next term of the Court, until which time all other matters are reserved. The Master shall have liberty to state any special circumstances.

is false the bill must so state, and show that complainant at once rejected it and so notified the defendant, for if complainant retained the account an unreasonable time without such notice the Court may decide that he accepted, or acquiesced in the account, which would convert the open account into a stated account.

<sup>15</sup> See note 35 to § 46, ante.

<sup>16</sup> See § 599.

<sup>17</sup> Interest is charged against a partner on the balance found due from him on the day of the dissolution of the partnership, such day being the proper time to make a rest, and adjust the balance of the partnership account. Blake's Ch. Pr., 235

<sup>18</sup> See, ante, § 62, sub-sec. 8, for what is meant by "good cause shown."

<sup>19</sup> These statements of charge and discharge will

§ 955. **Suits to Open, or Surcharge and Falsify, a Stated or Settled Account.** If a bill is filed for an account, when there exists a stated or settled account between the parties, the defendant may plead or set up in his answer the stated or settled account,<sup>20</sup> and thus defeat the suit. To avoid this defence, the bill must set forth the facts connected with the account, and show that by reason of some acts of fraud, oppression, imposition or undue advantage, or of some gross and manifest error, or by reason of some relation of trust or confidence between the parties, the complainant should not be bound by the account. The bill must specify the fraudulent acts, impositions, undue advantages, or gross and manifest errors complained of, or the relations of trust or confidence existing; and where the ground for opening the account is fraud, or a relation of trust or confidence, the bill must set forth such facts as will show the account to be inequitable.<sup>21</sup> General charges of fraud, mistake, error, injustice, or undue advantage, are wholly insufficient either in a bill to open a stated or a settled account, or in a bill to surcharge and falsify such an account, but the complainant must give the specific acts and facts complained of. This is especially true of a bill to surcharge and falsify which will not be sustained unless the specific mistakes, omissions and errors are pointed out, and proved as stated.<sup>22</sup>

But while a complainant must specify the errors he insists on, it is not necessary to prove all that he specifies; if he prove some, he is entitled to a decree giving him liberty to surcharge and falsify. Where one party is allowed to surcharge and falsify the other may do so, too.<sup>23</sup>

What is meant by "surcharging" is showing the omission of an item in the account for which the complainant is entitled to credit, and "falsifying" is showing a charge against him in the account which is false, and should be stricken out.<sup>24</sup> A surcharge seeks to have credits inserted which have been omitted, and a falsification seeks to have debits omitted which have been inserted. And it must be borne in mind that there is a marked difference between a bill to open a stated or a settled account for a general accounting *de novo*, and a bill that merely seeks to surcharge and falsify such an account. On a bill praying for the opening of a stated or a settled account, if sustained and a general accounting ordered, the account complained of is wholly set aside and stands for nought;<sup>25</sup> and each side must prove the charges and credits for which he contends.<sup>26</sup> The Court will not ordinarily open a stated or settled account *in toto*, even on a bill filed for that purpose, unless the assent of the complainant was obtained by fraud or imposition, or was given by inadvertence or mistake, or unless there were relations of trust or confidence between the parties; but will allow the account to stand, and give complainant the right to surcharge and falsify it on a reference to the Master.<sup>27</sup> The burden of proof is always on the party who seeks to surcharge or falsify,<sup>28</sup> but when an account is opened generally, the burden of proof rests upon the party asserting a charge or claiming a credit.<sup>29</sup> On a bill to surcharge and falsify a stated account the parties will be limited to such matters as they have specifically alleged to be overcharges, errors and omissions,<sup>30</sup> for, on such a bill, the account

be found of great value by the Master. They will prove to be charts to guide him through the labyrinths and mazes of a tangled mass of testimony, and a heterogeneous conglomeration of facts and figures. Such statements are required by the rules of Chancery practice. See Blake's Ch. Pr., 218-228; 1 Barb. Ch. Pr., 493; 503-509; 2 *Ibid*, 494-497; 2 Dan. Ch. Pr., 1221-1222; Hicks v. Chadwell, 1 Tenn. Ch., 251; Myers v. Bennett, 3 Lea, 184. For form of such statements, see, *post*, § 958.

<sup>20</sup> See, *ante*, §§ 142; 333; 838; 934; 1 Dan. Ch. Pr., 667.

<sup>21</sup> It seems to be well settled that a bill to open a settled account must specify the errors in the account. Sto. Eq. Pl., § 800, note.

<sup>22</sup> Raht v. Mining, 5 Lea, 22. While Courts will not hesitate to relieve against an error apparent on the face of the account, there is a general disinclination to unravel an old account, even when set-

tlcd upon an erroneous principle, unless a confidential relationship existed between the parties. *Ibid*.

<sup>23</sup> 1 Dan. Ch. Pr., 668; 1 Sto. Eq. Jur., § 525, note.

<sup>24</sup> Bouv. Law. Dic., "Falsify," "Surcharge;" 1 Sto. Eq. Jur., § 525.

<sup>25</sup> 1 Dan. Ch. Pr., 668. The account will be wholly unravelled and the parties will not be bound by deductions agreed upon between them on taking the former account. *Ibid*. While it stands for nought as an account it will nevertheless be evidence against the party who made it out, in so far as he charges himself, or credits the other party.

<sup>26</sup> Phillips v. Belden, 2 Edw. Ch., (N. Y.) 1.

<sup>27</sup> 1 Sto. Eq. Jur., § 523.

<sup>28</sup> Phillips v. Belden, 1 Edw. Ch., (N. Y.) 1.

<sup>29</sup> *Ante*, § 333; 1 Dan. Ch. Pr., 668.

<sup>30</sup> Phillips v. Belden, 1 Edw. Ch., (N. Y.) 1; Stoughton v. Lynch, 2 Johns. Ch., 210.

is impliedly admitted to be correct, except in so far as overcharges, errors and omissions are alleged.

Where a bill impeaches a stated account, and alleges that the complainant has no counterpart of it, and calls on the defendant to file a copy of it with his answer, the defendant must do so; and if on inspection of such a copy the complainant discover errors therein, he will be allowed to amend his bill to allege them.<sup>31</sup> So, if at any time, new errors or new frauds, or other new grounds for impeaching the account be discovered, the complainant may put them in issue by amending his bill. If, however, he is allowed to surcharge and falsify the account, he is not confined to the errors and omissions alleged in his bill and proved at the hearing, but may show others at the taking of the account ordered, unless the order of reference expressly forbid.

In general, where fraud, imposition, undue advantage, or fiduciary relations are shown to exist, the Court will incline to open up the whole settlement; in cases of accident, mistake, omission or inaccuracy, the Court will ordinarily allow the account to stand, with liberty to the complainant to surcharge and falsify; or, in a weak case, the Court may open the account only as to the matters specially set out by complainant in his bill.<sup>32</sup>

**§ 956. Form of a Bill and Decree to Open a Stated, or a Settled Account.** The following general forms will illustrate both the form and the frame of bills and decrees to open stated or settled accounts:

**BILL TO OPEN A STATED, OR A SETTLED ACCOUNT.**

[For address and commencement see, ante, §§ 155; 164.]

The complainant respectfully shows to the Court:

I.

That, [Here show the relations of the parties, as that they were partners, or merchant and customer, or principal and agent, or guardian and ward, or landlord and tenant, or trustee and beneficiary, or that they had other business relations resulting in the various transactions of debit and credit entering in the account complained of. See ante, §§ 165-169.]

II.

That [Here show that while said relations were in existence, or in a short time after they had ceased, the complainant and defendant had a settlement of their business, which was reduced to writing. If the account was made out by defendant alone and delivered to the complainant, or sent to him, so state.]

III.

That [Here show each and every error, omission or mistake, in the account complained of. Remember that a general allegation of mistake or injustice will not be sufficient. You must put your finger on each and every item of the account you dispute, and must specify each and every item you claim has been omitted from the account. It is sometimes well to give the history of the items omitted or mischarged, so as to show that your complaint in reference to it is equitable.]

IV.

That, [Here show when this settlement took place, and the circumstances in which it was made; and if there was any hurry or confusion, any promises made to correct errors, any failure to produce vouchers or other papers, or any other act or omission that interfered with a full and honest and intelligent settlement, state these incidents in full, giving the particulars. If the account was made out by the defendant alone, and delivered to the complainant, or sent to him, so state; and if there was any delay in complaining, explain why the latter did not complain at once, why he delayed calling the defendant's attention to the errors and omissions in the account. If the account has been paid, explain fully how the complainant happened to pay it, and if any inducements were held out, or promises or representations made to obtain payment, state these facts fully, or allege, if such be the fact, that the errors were not discovered until after payment; and remember it is harder to open a settled account than a stated account.<sup>33</sup>]

V.

That, [Here show any fraud, imposition, undue advantage, act of oppression, concealment, or misrepresentation, on the part of the defendant whereby the complainant was misled, or deceived, or his suspicions quieted, or his objections met, or his confidence obtained, or his assent procured. If any relation of trust or confidence existed between the parties, show the facts fully.<sup>34</sup>]

31 1 Dan. Ch. Pr., 667.

32 Webb & Meigs' Digest, "Accounting."

33 Patton v. Cone, 1 Lea, 14; 1 Sto. Eq. Jur., § 527.

34 See, ante, §§ 46; 48; 449; 932.

VI.

That, [If the defendant has made any promises to correct the errors complained of, so state, and show his subsequent refusal so to do. If there has been any delay in filing the bill give the reason thereof fully.]

VII.

That, [If the defendant has sued at law on the account, so state, specifying when the suit was brought, and in what Court, and what steps have been taken. See, ante, § 814, and notes. If the defendant is threatening to sue, or to assign the account, so charge. If any other ground for an injunction, or attachment, exists, give such ground. See, ante, §§ 871-873.]

VIII.

That, [If complainant never had a counterpart of said account or has lost or mislaid it, so state, and pray that the defendant file a copy of it with his answer. In such a case reserve the right to amend your bill, if, on inspecting said account, you deem it advisable.]

IX.

The premises considered, the complainant comes into your Honor's Court and prays:

1st. That subpoena to answer issue [ &c.: see, ante, §§ 158; 164. If an injunction is necessary to stay a suit brought on the account, or to prevent the defendant from suing, or from transferring the account, so pray: if an attachment is desired, and grounds therefor have been laid, so pray. See, ante, § 158.]

2d. That said account be opened and set aside, and that a general account of all dealings and transactions between complainant and the defendant be taken and stated by the Master on a reference for that purpose; and that on said reference, said stated [or settled] account be held for nought.

[If, however, a general accounting is not desired but only liberty to surcharge and falsify, then pray:] That complainant be allowed to show the said errors and omissions and mistakes in said account; and that the said account be opened for that purpose, and be referred to the Master, and complainant be given liberty to surcharge and falsify the same.

3d. That complainant may have such other further and general relief in the premises as the nature and circumstances of this case may entitle him to, and as, to your Honor shall seem meet.

4th. This is the first application for writs of injunction [and attachment,] in this case.

J. C. J. WILLIAMS, Solicitor.

[Annex affidavit as in § 789, ante.]

The decree will, of course, follow the special prayer of the bill and the opinion of the Chancellor, and specific instruction should be given the Master as to the particular matters of law or fact in controversy.

**DECREE OPENING A STATED ACCOUNT.**

[For the style of the cause, commencement and recitals, see, § 567, ante.]

From all of which it appears that the complainant is entitled to have the account referred to in the bill opened and set aside, and to have an account in this Court.

It is therefore ordered and decreed by the Court that said account be opened and set aside and for nothing held. And the Master is directed to take and state an account of all dealings and transactions between the parties. [If the account is to be limited to any particular business, such as partnership, agency, trust, &c., then add:] growing out of the partnership, [agency, trust or other business] referred to in the bill. The Master will, before entering upon the account, require each of the parties to file a sworn statement of the credits he claims, and the charges he admits,<sup>35</sup> and no items not set out in these statements shall be considered by the Master in stating the account. [If any special directions as to particular charges and credits are deemed necessary by the Court, here give them.<sup>36</sup>]

[If necessary further order:] And for the better taking of said account, both parties are required to produce all books and papers in their custody or power relating thereto.

All other questions are reserved until the incoming of said report.

If the decree merely opens the account for the purpose of allowing it to be surcharged and falsified, it will be as follows:

It is therefore ordered and decreed by the Court that said account be opened, and that any of the parties have liberty to surcharge and falsify the same. The Master will restate the account between the parties, and report the same to the next term. In restating the account he will allow the account set up by the defendant to stand except in so far as it may be successfully surcharged or falsified by the complainant. [If the Court should limit the liberty to surcharge and falsify then add:] But the complainant will be limited to the items of surcharge and falsification set forth in the bill.<sup>37</sup>

All other questions are reserved until the incoming of said report.

<sup>35</sup> 2 Dan. Ch. Pr., 1221-1222, note. This is good practice.

<sup>36</sup> The Court should settle the principles upon which the account will be taken, and may order certain claims to be allowed, and others to be disallowed. *Ante*, §§ 599-600.

<sup>37</sup> The Court may, also, allow the defendant to surcharge and falsify when once the account is opened, because when opened for one party, it is equally open for both parties. 1 Dan. Ch. Pr., 668.

If the items of surcharge and falsification are few, and the proof all in, the Chancellor may reform the account without a reference to the Master, and make a final decree at the hearing.<sup>38</sup>

§ 957. **Suits to Open Settlements Made by Executors, Administrators and Guardians.**—When a bill is filed to open an official settlement made by an executor, administrator or guardian, it is not necessary to allege any fraud, imposition or undue advantage, unless the complainant, then an adult, was present at the making of the settlement, or had due notice thereof. It is sufficient to show that the complainant is interested in the settlement, and has been aggrieved by errors, omissions and false credits therein; and that a just and legal settlement will benefit him. If however the complainant was an adult, and present at the settlement, or after attaining majority, ratified the settlement, or acquiesced therein, he must then show fraud, oppression, imposition, undue advantage, or other equitable circumstances, to entitle him to an opening of the settlement.

The bill should, as a rule, be filed, not only against the personal representative or guardian, but also against his sureties on his official bond, so as to make them liable for the decree obtained.

On an accounting before the Master, the official settlement by the personal representative and guardian will be taken as *prima facie* correct.<sup>39</sup>

#### BILL TO OPEN A GUARDIAN'S SETTLEMENT.

[For address and caption, see, ante, §§ 155-164.]

Complainant respectfully shows to the Court:

I.

That the complainant, while a minor, became entitled to a large estate [showing when, how, and the amount, and that it all went into the defendant's hands.<sup>40</sup>]

II.

That the defendant was appointed guardian of complainant, [showing when, in what Court; and if you seek to hold his sureties liable, show who they were. Show, also, that all of said estate went, or should have gone, into the defendant's hands.]

III.

That the defendant, in his settlements with the Clerk of the County Court, falsely and fraudulently demanded and received credit for the following items, [showing each item as-sailed.] The facts relative to said items are as follows: [showing specifically such facts as invalidate the credits, and render them inequitable, or illegal.]

IV.

That the defendant, in said settlement, falsely and fraudulently neglected and failed to charge himself with the following sums of money, and items of property, by him received, or that might by due diligence have been by him received, as such guardian: [specifying each sum of money, and each piece of property, he should have been charged with in said settlement, and the particular circumstances connected with each.<sup>41</sup>]

V.

That, if the defendant had not thus obtained said false and fraudulent credits, and had not falsely and fraudulently kept back said sums, and pieces of property, and failed to charge himself therewith, he would have been liable to complainant in the sum of three thousand dollars more than his said settlement shows, and more than he paid over, or offered to pay, to complainant, and he, as such guardian, [and the other defendants, as his sureties, if they are sued,] is liable<sup>42</sup> to complainant therefor, on his said bond, and by virtue of his said trust; and is liable to pay complainant compound interest thereon.

VI.

In said settlement, the defendant is allowed undue compensation; [show wherein,] and for his said frauds he should be denied any compensation whatever.

VII.

The premises considered, complainant prays:

1st. For proper process [Ec.: see, ante, §§ 155; 164.]

2d. That complainant be allowed to surcharge and falsify said settlement, and to show said errors, omissions and fraudulent charges, and to have said settlement reopened generally, to the end that the complainant may show by proof, not only said errors, but any others he may hereafter discover.

<sup>38</sup> Gray v. State, 11 Pick., 317; McLean v. State, 8 Heisk., 286. This while good law is not good practice. See, ante, § 597, note 12.

<sup>39</sup> Code, § 3786.

<sup>40</sup> The items charged against the guardian by the County Court Clerk will, of course, be all charged against him in the bill.

<sup>41</sup> The Court will not sustain a bill to open an account stated, unless specific errors therein are distinctly pointed out. Sto. Eq. Pl., § 251.

<sup>42</sup> The sureties of the guardian on all his bonds should be sued in the same suit with him.

3d. That the Master take and state an account between complainant and defendant, showing therein, fully and in detail, the various amounts justly chargeable to the defendant, and the various amounts he is justly entitled to credit for; that, in taking said account, said false and fraudulent settlement with the said Clerk be wholly disregarded, and for nought held, [complainant never having had any notice thereof, and being then an infant,] and that said settlement be made anew. That no compensation be allowed the defendant, and that he be charged with compound interest.

4th. And that complainant may have all such further and other relief as he may be entitled to.

J. W. CULTRON, of Counsel.

ANDREW GAMBLE, Solicitor.

**DECREE FOR AN ACCOUNTING, WITH LIBERTY TO SURCHARGE AND FALSIFY.**

[For title, commencement and recitals, see, ante, § 567.]

The Court doth order and decree that the account stated on the...day of....., 19...., [giving its date,] do stand, with liberty to either party to falsify or surcharge the same. And the Master is ordered to take a general account of all dealings and transactions between the complainant and defendant from the foot of said stated account, and report what shall appear to be due from either party to the other on the balance of the account when taken. It is further ordered and decreed that the stated account dated the ... day of ..... 19...., [giving a date after the other stated account,] be opened and set aside, and not considered by the Master.

§ 958. **Proceedings in the Master's Office on an Accounting.**—The proceedings in the Master's office on a reference for an account have been heretofore considered somewhat extensively,<sup>43</sup> and need not be repeated.

The Master should require the parties to file their respective statements of charge and discharge at an early day after the decree, and should not begin the examination of witnesses until both of said statements have been filed. Ordinarily, in examining witnesses, it is best to examine the parties and their respective clerks, bookkeepers and cashiers first, beginning with the complainant; for by so doing it will be found that so many items in the respective statements are undisputed as to render any further testimony in reference to them unnecessary.

The Master should not allow these statements to be amended on mere motion, but only on good cause<sup>44</sup> shown, and no additions should be allowed by a party after he and his clerks, bookkeepers and cashiers have been examined, except for good cause shown by affidavit.<sup>45</sup> These statements are in the nature of pleadings, and if they could be amended on mere motion their value would be greatly impaired.

**COMPLAINANT'S CHARGE BEFORE THE MASTER.**

John Doe, }  
vs. } Complainant's Charge.  
Richard Roe. }

The complainant insists that upon the reference pending in this cause the defendant should be charged with the following sums of money:

- 1. 1903, Jany. 1. Cash paid.....\$100.00
- 2. Feb. 2. Money paid for defendant to John Smith, on note..... 360.00
- 3. Mch. 4. Price of horse, saddle and bridle..... 140.00
- 4. April 16. Bill of goods (Bill annexed)..... 30.00

[And so on to the end of the charges.]

Complainant reserves the right to amend this charge, or add new items, as he may be advised.

Nov. 21, 1905.

JOHN DOE

**DEFENDANT'S DISCHARGE BEFORE THE MASTER.**

John Doe, }  
vs. } Defendant's Discharge.  
Richard Roe. }

The defendant insists that upon the reference in this case he, the defendant, is entitled to the following credits:

- 1. 1903, Jany. 10, Cash paid complainant.....\$200.00
- 2. March 5, Value of horse..... 90.00
- 3. March 31, Personal services, for 1 month..... 50.00

<sup>43</sup> See, ante, §§ 603-610.

<sup>44</sup> For what is meant by "good cause," see, ante, § 62, sub-sec. 8.

<sup>45</sup> This good cause should be such as would warrant a rehearing of a decree because of newly discovered evidence. See, post, §§ 1215-1219.



4. April 30, Paid a note for complainant, (Note attached).....	184.00
5. July 31, Rent of house for 3 months, May, June and July, 1903.....	30.00
6. Aug. 1, Taxes paid for 1900.....	116.00

[*And on to the end of the items of discharge.*]

And defendant claims interest on each of the above items from the date thereof until the making of the Master's report.

And defendant craves leave to add to, or alter, this discharge as he may be advised.

Nov. 25, 1905.

RICHARD ROE.

If either party finds that he has accidentally omitted any items or claims in his statement of charges or discharge, he may file a further statement thus:

**FURTHER CHARGE BY COMPLAINANT BEFORE THE MASTER.**

John Doe, }  
*vs.* } Further Charge.  
 Richard Roe. }

Complainant hereby adds to his charge in this cause dated Nov. 21, 1905, as follows:

1. Complainant insists that the defendant should be charged with interest on the several items and amounts specified in his original charge from their respective dates.

2. Since the original charge was filed, to-wit, on Nov. 25, 1905, complainant has been compelled to pay as defendant's surety on a note to John Brown, (note attached,) \$68.00.

And complainant craves leave to further alter, or amend, his said charge.

Nov. 26, 1905.

JOHN DOE.

And so the defendant may likewise amend or alter his discharge thus, on showing cause:

**FURTHER DISCHARGE OF DEFENDANT BEFORE THE MASTER.**

John Doe, }  
*vs.* } Further Discharge of Defendant.  
 Richard Roe. }

The defendant hereby adds to his discharge, dated Nov. 25, 1905, the following:

1. 1903, May 2. One suit of clothes returned.....\$16.00

2. June 13. One car ticket for complainant's wife to St. Louis and return..... 20.00

And defendant craves leave to further alter or amend his said discharge.

Nov. 27, 1905.

JAMES H. GRANT, Solicitor.

## CHAPTER L.

## SUITS IN RELATION TO PARTNERSHIPS.

§ 959. Partnerships Generally Considered.

§ 960. Suits by Partners to Wind up a Partnership.

§ 961. Pleadings, Decrees and Procedure in a Suit to Wind up a Partnership.

§ 959. **Partnerships Generally Considered.**—A partnership is a union of two or more persons on an agreement to place their money, effects, labor or skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain stipulated proportions. Each of the partners has an interest in the assets of the firm, and each is personally responsible for its contracts and liabilities.<sup>1</sup> Each partner is an agent of the firm, and by using the firm name may bind the firm by contract as to any matter relating to the business of the firm.<sup>2</sup> While individuals as between themselves they are a unit as to all others, so far as the firm's business is concerned.

Courts of Equity will dissolve a partnership before the regular time of its expiration, in case, by reason of the ill-feeling between the partners or other circumstances, it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or beneficially; or in case of the insanity, permanent incapacity, or gross misconduct of one of the parties. And a partnership will also be dissolved at the instance of a partner who was induced to enter into it on false representation. On the other hand, in case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, Equity will grant an injunction against a dissolution, if a sudden dissolution is about to be made in bad faith, and would work irreparable injury. And an injunction will be granted to prevent a partner from doing acts injurious to the partnership. Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a receiver will be appointed to close the business, and make sale of the property.<sup>3</sup>

The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything.<sup>4</sup> The partnership property of all kinds is regarded in Equity as a trust fund to secure the partnership debts.

The partnership creditors may in the first instance proceed against the executors or administrators of a deceased partner, leaving them to their remedy over against the surviving partner.<sup>5</sup>

§ 960. **Suits by Partners to Wind up a Partnership.**—Inasmuch as one partner cannot sue another in a Court of law, while the relation exists, all such suits must be instituted in the Chancery Court. In partnership suits, *inter se*, all of the partners must be made parties, either complainant or defendant, and when one or more partners wish to file a bill against one or more partners all of the partners who do not wish to join in the bill must be made defendants, and if a partner is dead his personal representative must take his place either as complainant or defendant.

<sup>1</sup> Mann v. Taylor, 5 Heisk., 269.<sup>2</sup> Venable v. Levick, 2 Head, 354; McIntire v. McLaurin, 2 Hum., 71; Crouch & Emerson v. Bowman, 3 Hum., 209; Sto. Part., § 102.<sup>3</sup> Smith's Eq. Jur., 349-350.<sup>4</sup> Pennington v. Bell, 4 Sneed, 200; House v. Thompson, 3 Head, 515; Jackson Ins. Co. v. Partee, 9 Heisk., 298; Allen v. Bank, 6 Lea, 562.<sup>5</sup> Smith's Eq. Jur., 353.

**§ 961. Pleadings, Decrees and Procedure in a Suit to Wind up a Partnership.**—In a suit by one partner against another, the following forms may be found useful:

**BILL TO DISSOLVE AND WIND UP A PARTNERSHIP.**

[*Insert address and caption as in §§ 155; 164, ante.*]

The complainant respectfully shows to the Court:

I.

That on the 1st of January, 1895, he and the defendants formed and entered into a partnership agreement for the purpose of conducting a mercantile business under the name and style of John Smith & Co. Said agreement was in writing, and will be filed at the hearing or sooner if required. [*If the agreement was verbal so state, and give its substance so far as necessary to the litigation.*]

II.

That the complainant and the defendants were each to put into said business. [*Here state what each partner was to pay in in money, or property, and what in services, if not already stated,*] all of which complainant did faithfully according to his said agreement, and he has done all other things stipulated by him or lawfully required of him.

III.

That the defendants, James Smith and John Brown [*Here state what they were to do, if it has not been already stated. If either or both of them failed to do what they had agreed to do, so state.*]

IV.

That said partnership was to continue five years, unless sooner dissolved by mutual consent, but after the lapse of two years from its beginning the defendant, John Brown, formed habits of intemperance to such an extent as to disqualify him to be a manager or partner in a mercantile concern, and, notwithstanding his promises to reform, or retire from the partnership, he has totally failed to do either, but persists in participating in the business and profits of the partnership, much to the embarrassment of complainant and to the hazard of the concern. [*If any losses by bad bargains, or bad conduct of said Brown, so state in a general way, giving amount of losses when known.*]

V.

The premises considered complainant prays:

1st. That subpoena to answer issue [*&c.: see, ante, §§ 158; 164.*]

2nd. That said partnership be dissolved, and that a receiver be appointed with full power and authority to wind up the business of the partnership, to collect and receive all money, debts and property now due or to become due to the said partnership, or to any of the partners as partners; to pay all debts of the partnership now due or to become due; to manage and conduct the business of the partnership as long as it can profitably be done, or until otherwise ordered by your Honor, and then to sell all the property and effects of the partnership and make distribution of the profits according to the respective interests of the parties therein.

3rd. That [*If there be any allegations that any of the parties has received or become accountable in any way to the firm, or has taken or received more than his share of the property or profits of the concern, the bill should pray that*] an account be taken of all the partnership dealings so as to show the liability of each partner to the firm.

4th. That [*If the conduct of any defendant, as set out in the bill, is such that he should be enjoined from collecting any of the firm's debts, or meddling with the firm's assets, or doing any act detrimental to the business of the partnership, there should be a prayer to that effect.*]

5th. That [*If a defendant has fraudulently disposed of any of his property, or of any of the firm's property, and the bill makes out a case for relief against the transferee, he should be made a defendant, and an attachment prayed for to be levied upon such property, and the sale of the attached property prayed for, the proceeds to be applied towards the liquidation of the fraudulent partner's liability to the firm.*]

6th. And that complainant have such further and other relief as he may be entitled to.

JAMES A. GREER, Solicitor.

The bill must be sworn to, if an injunction or attachment is prayed; and there should be added to it the allegation: That this is the first application for an injunction or attachment in this case.

If the defendants are unable to defeat a dissolution of the partnership, or do not so desire, they will file an answer consenting thereto.

**ANSWER CONSENTING TO A DISSOLUTION.**

[*For title and commencement, see, ante, § 380.*]

The defendants, answering the bill in said cause, do not admit the various charges of misconduct against them in the bill, but deny each and all of them. However, being advised that it is to their interest not to resist a dissolution of their partnership with complainant

they, therefore, consent thereto, and unite with the complainant in praying for the appointment of a receiver, and a speedy winding-up of the affairs and business of the partnership, the collection of its assets, the payment of its debts, and the division of the residue among the partners according to their respective interests.

And now, having fully answered, the defendants pray to be dismissed with their costs.

SAM A. BREAZEALE, Solicitor.

The answer must be sworn to unless the defendant's oath is waived. If necessary, the answer while consenting to a dissolution and receivership, may dispute any material allegations of misconduct, especially such as make the defendant liable to the firm, and such as charge misappropriation of the firm's property, or fraudulent transfer of property, or other inequitable conduct.

#### DECREE DISSOLVING A PARTNERSHIP.

[For title, commencement and recitals, see, ante, § 567.]

I.

That the partnership heretofore existing between the complainant and the defendants be, and the same is hereby dissolved; and that Frank Dealer be and he hereby is appointed receiver to take into his possession all the property and assets of said partnership of every kind and wheresoever found, and reduce the same to cash by sale or collection as speedily as may be consistent with the interests of the parties to this suit, and to collect all debts due the said partnership, and to pay all just debts owing by said partnership.

II.

That the complainant and defendants forthwith deliver to said receiver all the books and papers of the firm, and all cash on hand, and all accounts, securities, notes of hand, or other evidences of debt, and all the merchandise, fixtures, furniture and other property and effects, of every kind whatsoever belonging to the said partnership, to be by him accounted for in this case.

III.

That the receiver be authorized to bring all suits he may deem necessary to collect the debts due the said partnership, and with the consent of the partners may compromise any doubtful claim whether in behalf of or against said partnership.

IV.

That the receiver before entering on the discharge of his duties under this decree shall give bond [*&c.* See § 909.] The receiver will report to the Court from time to time as to the progress made by him, and duties discharged.

V.

That the Master take and state an account<sup>6</sup> of all dealings and transactions by and between complainant and the defendants as partners from the commencement of the partnership to this day; and for the better taking of said account the parties are respectfully required to produce and leave with the Master all books, papers and writings in their custody or under their control relating thereto. If, in taking said account any special matter shall arise the Master is at liberty to state the same in his report.

VI.

All further questions are reserved until the incoming of said reports; and any of the parties are at liberty to apply as occasion may require.

<sup>6</sup> The method of taking a partnership account is:  
1. To ascertain how the firm stands in relation to third parties. 2. To ascertain what each partner is entitled to charge in account with his co-partners. 3. To apportion between the partners all profits to be divided, or losses to be made good, and ascertain what, if anything, each partner must pay to the

others in order that all cross-claims may be settled. *Myers v. Bennett*, 3 Lea, 184; 2 Dan. Ch. Pr., 1249. The parties should employ a competent bookkeeper to make out a balance sheet, showing the exact status of the firm business. *Ibid.* The procedure in an accounting has heretofore been considered. See, ante, §§ 603-610; 958.

## CHAPTER LI.

## SUITS FOR EXONERATION, SUBROGATION AND CONTRIBUTION.

ARTICLE I. Suits for Exoneration.

ARTICLE II. Suits for Subrogation.

ARTICLE III. Suits for Contribution.

## ARTICLE I.

## SUITS FOR EXONERATION.

§ 962. Suits for Exoneration of Sureties.

§ 963. Frame and Form of Bill for Exoneration of Sureties.

§ 962. **Suits for Exoneration of Sureties.**—Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act of duty which he is required to do by the surety, or otherwise bound to do, and that act or omission may prove injurious to the surety; or if a creditor enters into any stipulations with the debtor, unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such act, omission or stipulation, as a defence to any suit brought against him, in a Court of law or Equity. So that if a creditor stipulates with his debtor, in a binding manner, upon a sufficient consideration, to give further time for payment, without the consent of the surety, the latter will be thereby discharged, if the arrangement might be injurious to him. Mere delay on the part of the creditor, at least if some other Equity does not intervene, unaccompanied with any valid contract for such delay, will not amount to *laches*, so as to discharge the surety; for the creditor is under no obligation to press the principal for payment. However, sureties are not obliged to wait for their principal to bring suit, but are entitled to come into a Court of Equity, after a debt has become due, and compel the debtor to exonerate them from their liability by paying the debt.<sup>1</sup>

If a surety requests the creditor to sue forthwith, stating that he will consider himself no longer bound as surety if the creditor fails to do so, he will be discharged by the creditor's failure so to sue, if his principal was solvent<sup>2</sup> when the notice was given, but becomes insolvent after the expiration of the time probably required to prosecute the suit to judgment if it had been promptly instituted as requested.<sup>3</sup>

§ 963. **Frame and Form of Bill for Exoneration of Sureties.**—The bill must allege (1) the fact of suretyship and how arising, (2) the solvency of the principal debtor when the right of action on the obligation accrued, (3) that, after such right accrued and while the principal was solvent, complainant notified the creditor to bring suit at once on said obligation or he, the complainant, would stand as surety no longer,<sup>4</sup> (4) that after such notice the creditor failed to sue in a reasonable time, (5) that in the interim between such notice and the bringing of suit by said creditor, against complainant on said obligation the principal debtor became insolvent, and (6) should pray that said creditor's suit be enjoined and complainant discharged from liability on said obligation.

<sup>1</sup> Smith's Eq. Jur., 84-86; Crowder v. Denny, 3 Head, 360; Greene v. Starnes, 1 Heisk., 583. See Digests; and, *ante*, § 805.

<sup>2</sup> The solvency of the principal need not be shown beyond a reasonable doubt, but will be determined, like all other facts, by the preponderance of probabilities. See, *ante*, § 445; and Thompson v. Watson, 10 Yerg., 362; and Hopkins v. Spurlock, 2

Heisk., 152. But see Jackson v. Huey, 10 Lea, 184

<sup>3</sup> Rice v. Simson, 9 Heisk., 811; Love v. Allison, 2 Tenn. Ch., 111; Hancock v. Bryant, 2 Yerg., 473; McGuire v. Bank, 9 Hum., 440.

<sup>4</sup> Or would be no longer liable or responsible, or would consider himself discharged or released, or some equivalent expression.

**BILL FOR EXONERATION OF A SURETY.**

[For address and caption, see, ante, §§ 155-164.]

Complainant respectfully shows to the Court:

I.

That on February 1, 1903, John Doe executed his note to the defendant for one thousand dollars, due one year after date, and complainant signed said note as surety.

II.

That John Doe was then solvent, and continued so solvent until on or about April 19, 1905, when his stock of goods was totally consumed by fire, and was wholly uninsured, his loss being about five thousand dollars.

III.

That on March 1, 1904, complainant notified the defendant, in presence of a witness that he would not stand as surety for John Doe any longer, and requested defendant to bring suit on said note at once, or he would consider himself discharged. Complainant a few days afterwards wrote to the defendant to the same effect.

IV.

That, notwithstanding said notices, the defendant failed to bring suit until the 2d day of the present month, (May 2, 1905,) when he sued complainant and said John Doe in the Circuit Court of Anderson county, where said suit is now pending. If defendant recovers a judgment on said note against said Doe and complainant, complainant will have the whole of it to pay as said Doe is totally insolvent, and has been ever since April 19, 1905.

V.

The premises considered complainant prays:

1st. That subpoena to answer issue, [*&c.* see, ante, §§ 158; 164.]

2d. That the defendant be enjoined from further prosecution of said Circuit Court suit and from attempting to collect said note in any other way, as against complainant; and that at the hearing said injunction be made perpetual.

3d. That complainant have such other, further and general relief as the nature of his case may require.

This is the first application for an injunction in this case.

M. H. HOLLINGSWORTH, Solicitor.

[Annex affidavit: see, ante, §§ 164; 789.]

**ARTICLE II.**

**SUITS FOR SUBROGATION.**

§ 964. Suits for Subrogation and Substitution. | § 965. Form of Bill for Subrogation and Substitution.

§ 964. **Suits for Subrogation and Substitution.**—Subrogation is the substitution of one person in place of a creditor, whose debt he has paid under compulsion not being liable primarily therefor, and to whose rights as to the collection of that debt he, thereupon, succeeds. So, whenever a surety, or other person secondarily liable, discharges a debt, he is entitled to the benefit of all collaterals or liens which the creditor held as security; and the person secondarily liable is entitled to be subrogated to the rights of the creditor against the person primarily liable. In such cases, Equity regards the payment by the surety, or other person secondarily liable, as equivalent to a purchase of the creditor's rights, equities and collaterals as against the debtor primarily liable; and the Court will treat such payor as an assignee of the creditor, to that extent. So, a creditor is entitled to the benefit of any indemnity, or collateral security, given by the debtor to his surety. Where, in any case, one not primarily liable pays a debt, or discharges an encumbrance or lien, being under legal compulsion so to do, he will in Equity be substituted to all of the creditor's rights against the person primarily liable.<sup>1</sup>

The following are the most usual cases of substitution and subrogation:

1. Where a surety discharges the debt or obligation of his principal.
2. Where a co-surety pays a judgment that is a lien on the other surety's land.<sup>2</sup>

<sup>1</sup> *Bittick v. Wilkins*, 7 Heisk., 307; *Eberhardt v. Wood*, 2 Tenn. Chy., 438, affirmed in 6 Lea, 467; 3 Pom. Eq. Jur., § 1419.

<sup>2</sup> He is entitled to enforce the lien as to one-half of the judgment. *Holt v. Strain*, 2 Shan. Cas., 166.

3. Where anyone not primarily liable pays the debt or discharges the obligation of the one primarily liable.

4. Where a purchaser, for his own protection, discharges an incumbrance on the purchased property.

5. Where a junior encumbrancer for like reason pays off a prior encumbrance.

6. Where a person advances money to discharge an incumbrance on an agreement that he should succeed to the rights of the encumbrancer.

7. Where a devisee, heir, or legatee satisfies a debt against the estate for which others are equally liable.

8. Where any person, for his own protection, or the protection of some interest he represents, pays a debt for which another is primarily liable.

9. When an insurance company pays in full a loss, it thereby becomes subrogated to the rights of the insured against the party causing the loss, and against other insurers.

§ 965. **Form of Bill for Subrogation and Substitution.**—The following bill illustrates one of the most common cases for subrogation and substitution:

**BILL FOR SUBROGATION AND SUBSTITUTION.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That on June 3, 1903, the defendant, John Doe, borrowed one thousand dollars from the defendant Richard Roe, and to secure the repayment thereof he executed to said Richard Roe a note for said sum, due one year after date, with complainant and defendant Henry Doe as sureties.

II.

That when said note became due suit was brought thereon by the defendant Richard Roe, against complainant and the defendants John Doe and Henry Doe, and judgment recovered, which judgment complainant was compelled to pay on September 30, 1905, the sum he so paid, being eleven hundred and three dollars, including the costs of the suit.

III.

That the defendant John Doe applied the said one thousand dollars borrowed from defendant Richard Roe to the purchase of the following tract of land: [*describe it*], but took the title in the name of his son, the defendant, Henry Doe, who claims it as his homestead.

IV.

That about the time suit was brought on said note, as aforesaid, the defendant John Doe assigned and transferred to defendant Richard Roe, as further security, a note of hand for three hundred dollars executed to said John Doe by the defendant George Jones, and now due and wholly unpaid.

V.

That the defendant John Doe is insolvent, and the defendant Henry Doe has no visible property subject to execution, except said tract of land, which he claims as his homestead. Complainant charges and avers that said purchase by defendant John Doe in Henry Doe's name was in fraud of creditors, and to hinder and delay them, and that said Henry Doe aided his father therein, and agreed to deed said land to him when called on so to do, and in the meantime to hold it for him.

VI.

The premises considered the complainant prays:

1st. That subpoena to answer issue [*&c.*: see, ante, §§ 158; 164.]

2d. That complainant be subrogated and substituted to all the rights and collaterals of the defendant Richard Roe as against the other defendants; that said tract of land, and said note made by the defendant George Jones, be held liable to reimburse complainant for what he paid on said judgment and interest thereon.

3d. That the transfer of said land to Henry Doe be declared fraudulent and void, but if that be not done that a resulting trust in favor of John Doe be declared thereon, and complainant declared to have a lien thereon, by virtue of the premises; that defendants, John Doe and Henry Doe be enjoined from transferring or encumbering said land, and that an attachment issue and be levied upon it to secure complainant's claim.

4th. That complainant be given a decree for the amount due him, from the defendant John Doe as principal, and from the defendant Henry Doe as co-surety on said thousand dollar note; that a decree be rendered against the defendant George Jones for the amount due on said note made by him, to be collected by execution; that said tract of land be sold on a credit of six months and in bar of redemption, and its proceeds, along with the proceeds of

the decree against said Jones, be applied to the satisfaction of the decree in favor of complainant.

5th. That complainant may have such further and other relief as the nature of his case may require.

This is the first application for an injunction and attachment in this case.

G. W. MONTGOMERY, Solicitor.

[*Annex affidavit. See, ante, §§ 164; 789.*]

### ARTICLE III.

#### SUITS FOR CONTRIBUTION.

§ 966. Suits for Contribution by Co-Sureties, Co-Principals, Co-Debtors, Co- Owners, Co-Heirs, Co-Partners	and Other Co-Sharers of Liabilities. § 967. Form of Bill for Contribution Between Partners.
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§ 966. **Suits for Contribution by Co-Sureties, Co-Principals, Co-Debtors, Co-Owners, Co-Heirs, Co-Partners, and Other Co-Sharers of Liabilities.**—Where two or more persons are bound by a common charge, not arising from a tort, and one of them pays more than his share of the common liabilities, he can compel the other or others to reimburse him. This rule of Equity is based on the broad principle that where one person has discharged more than his share of a debt or obligation which others are equally bound with him to discharge, the others ought in conscience to refund to him enough to reduce his burden to an equality with theirs.<sup>1</sup> In a Court of Chancery equality is Equity.<sup>2</sup> This rule applies as between co-principals, co-sureties, co-owners of property, co-insurers, co-heirs, co-devisees, co-legatees, co-owners of party walls, co-partners, co-directors and co-stockholders in a corporation, and even to co-tort-feasors, when the one asking relief was not primarily liable, or was innocent of the tort.<sup>3</sup>

If a co-surety is dead his personal representative may be sued for the decedent's proportion; and if a co-surety is insolvent, he may be wholly ignored and treated as no surety; but in such a case the bill should state the fact of his insolvency as the reason he is not sued.<sup>4</sup>

#### BILL FOR CONTRIBUTION BETWEEN CO-SURETIES.

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

I.

That he and the defendants, along with others, were co-sureties on a guardian bond for one thousand dollars, payable to the State of Tennessee, to secure the faithful discharge of duties by John Smith as guardian of Henry Brown and William Jones.

II.

That in consequence of the alleged defaults of said John Smith as said guardian, a decree was rendered against him in the Chancery Court of Hamblen county on the 18th day of April, 1905, in favor of his said wards, Henry Brown and William Jones, for the sum of seven hundred and ten dollars, and costs of the suit aggregating seven hundred and fifty-three dollars.

III.

That on said decree execution issued and was levied on complainant's property. Complainant called on the defendants to come to his relief, and contribute and pay their proportionate parts of said decree, and thus relieve his property, but this they all failed to do, in consequence of which the whole burden fell on complainant, and he was so compelled to pay, and has paid the full amount called for by said execution, to-wit, the sum of seven hundred and seventy dollars, and took the sheriff's receipt therefor, dated June 5th, 1905, the day he paid said amount, a copy of which receipt is filed with the bill marked exhibit A, and the original will be produced at the hearing, or sooner, if required.

IV.

That the defendants are the only co-sureties on said bond who are solvent, and for that reason they alone are sued. Complainant has besought them to help him bear the burden

<sup>1</sup> Riley v. Rhea, 5 Lea, 115; Stephens v. Meek, 6 Lea, 226; Crowder v. Denny, 3 Head, 360.

<sup>2</sup> See, ante, § 47.

<sup>3</sup> Maxwell v. R. R. Co., 1 Tenn. Ch., 8.

<sup>4</sup> Smith's Eq. Jur., 347.



of said payment and contribute their proportion thereof, but they have failed so to do, and so complainant despairing of their doing equity comes to your Honor and prays:

v.

1st. That subpoena to answer issue [*&c.*: see, ante, §§ 158; 164.]

2nd. That he be given a decree against the defendants for their ratable proportion of the amount paid by complainant as aforesaid, and of the interest thereon, and for the costs of this cause, and

3d. That he have such further and other relief as the nature of his case may require.

T. A. PEACE, Solicitor.

§ 967. **Form of Bill for Contribution Between Partners.**—The right to contribution often arises between partners. The following bill will serve as a form in such a case.

**BILL FOR CONTRIBUTION BETWEEN PARTNERS.**

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

I.

That he and the defendant were formerly partners, but that on the 18th day of April, 1900, said partnership was dissolved by mutual consent, and, on January 8, 1902, all the partnership matters, so far as then known to complainant, were settled and adjusted between him and the defendant, all the debts of the partnership, so far as then known to complainant, having been previously paid.

II.

That on May 1st, 1903, John Jones recovered a judgment against complainant and defendant in the Circuit Court of Knox county, Tennessee, for five hundred and twenty dollars, on a note made to him in St. Louis, Missouri, by the defendant in the firm name, whereof complainant knew nothing when said settlement between him and the defendant was made. Complainant charges that the defendant got the exclusive benefit of the consideration of said note, and that the partnership got none.

III.

That as the defendant got the exclusive benefit of the consideration of said note, complainant insisted that he should satisfy said judgment without any contribution from complainant, but this he not only refused to do, but has failed and refused to pay even his one-half of said judgment, and complainant was compelled to pay, and has paid the amount due on said judgment, an execution having issued therefor and been levied upon his property.

IV.

That the said judgment amounted to five hundred and sixty dollars, and was paid on July 1, 1903, to the Sheriff of said county of Knox, and his receipt therefor taken, which will be duly proved, and produced at the hearing, if denied.

v.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*: see, ante, §§ 158; 164.]

2d. That he be given a decree against the defendant for the amount paid on said execution, and interest thereon and costs of this suit; but if your Honor holds that the defendant is only liable to contribute and pay complainant one-half of said amount then he prays therefor, and for all the costs of this suit.

3d. That he have such further and other relief as the nature of his case may require.

P. C. SMITHSON, Solicitor.

CHAPTER LII.

SUITS RELATING TO PERSONS UNDER DISABILITY.

- ARTICLE I. Suits Where the Chancery Court Acts as Guardian.
- ARTICLE II. Suits to Sell the Property of Infants and Wives.
- ARTICLE III. Suits Relating to Persons of Unsound Mind.

ARTICLE I.

SUITS WHERE THE CHANCERY COURT ACTS AS GUARDIAN.

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| <p>§ 968. Suits Where the Court Guards the Interests of Wives.</p> <p>§ 969. Frame of Bill to Enforce a Wife's Equity.</p> | <p>§ 970. Suits Where the Court Guards the Interests of Minors and Lunatics.</p> <p>§ 971. Frame of Bill by Next Friend Against a Guardian.</p> |
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§ 968. **Suits Where the Court Guards the Interests of Wives.**—Courts of Equity act for those who by reason of some disability of nature or of law are unable to act for themselves;<sup>1</sup> and wives being under a disability of law and sometimes of both law and nature, frequently require the care of the Court for their welfare.

Courts of Equity standing *in loco parentis* will not suffer the husband to obtain possession of the wife's property without making a suitable provision for her and her children, unless she being capable of giving her consent voluntarily waives her right to a settlement. If the wife be not of full age she is incapable of giving her consent, and in such case, the Court will not take her examination, nor suffer her to waive her Equity;<sup>2</sup> and will act in spite of her protestations.<sup>3</sup> Husbands, and especially young husbands, cannot always be depended on to guard providently the financial interests of their wives, and often themselves need a guardian's supervision as much as, and sometimes more than, do their wives.

The Chancery Court will not, however, on its own motion, reach forward and intervene in a wife's behalf; but when its protecting care and power are invoked, the Court is ever ready to act; and whether the application be made by the wife herself, or by next friend, relative, guardian, or even a third person in her behalf, is immaterial, when the Court has the opportunity to declare and enforce the wife's Equity to a suitable provision out of her personal estate before it passes into the hands of her husband, or his assignee.<sup>4</sup>

The Equity of the wife is enforced: 1, Incidentally, when the husband, or his assignee, is before the Court asking its aid to reduce her property to his possession;<sup>5</sup> and 2, Directly at the suit of the wife, or of her trustee, guardian or next friend, asking the interposition of the Court in her behalf: in which case the party in possession of the wife's estate will, if necessary, be enjoined from turning it over to the husband, or his assignee, until due provision has been made for her and her children.<sup>6</sup>

This right of a wife to a provision out of her property before the husband or his assignee has reduced it to possession, is the creature of Courts of Equity, and the assignment of her personal property, though duly probated, is not

<sup>1</sup> See, *ante*, § 35.  
<sup>2</sup> Phillips v. Hassell, 10 Hum., 197.  
<sup>3</sup> Pillow v. Thomas, 1 Bax. 122; Murphy v. Green, 2 Bax. 405.  
<sup>4</sup> Pillow v. Thomas, 1 Bax., 128; Phillips v. Hassell, 10 Hum., 197; Murphy v. Green, 2 Bax., 405; Dan. Ch. Pr., 90-109.

<sup>5</sup> In such case if the wife is not a party she should, by next friend, file a bill in the nature of a cross bill and enjoin her husband, or his assignee, from proceeding in his suit except concurrently with hers, and she should have the two suits consolidated and heard together.  
<sup>6</sup> Dearin v. Fitzpatrick, Meigs, 551.

valid as to the wife, and will be set aside on application to the Chancery Court before the assignee takes possession.<sup>7</sup> But if the husband or assignee is suffered to reduce the wife's property to his possession the Court will not undertake to follow it.<sup>8</sup>

§ 969. **Frame of Bill to Enforce a Wife's Equity.**—To aid the pleader in drawing an ordinary bill under the foregoing section the following frame is given. If a suit is pending by the husband or assignee to reduce her estate to his possession this bill will be so changed as to recite such fact, and to pray that her bill be filed as an original bill in the nature of a cross bill, and that the two causes be consolidated and heard as one :

**FRAME OF BILL TO ENFORCE A WIFE'S EQUITY.**

To the Honorable ....., Chancellor, holding the Chancery Court at .....  
Mary Doe, wife of John Doe, who sues by Henry Jones, her next friend, all residents  
of Knox county, complainant,

*vs.*

John Doe, and George Brown, executor of Thomas Jones, deceased, and Henry Brown  
and James Doe, his sureties as such executor, all residents of Knox county, de-  
fendants.

Complainant respectfully shows to the Court :

I.

That [*Here show what personal estate the complainant has, whence derived, as from her father's estate, or from some legacy, and that it is in the hands of the defendant George Brown.*]

II.

That [*Here show her age, that she is the wife of the defendant, John Doe, and give the number and ages of her children, and if she is a feeble woman, or any of her children are feeble, so state, and if there be any other reason why her fortune should not go into his hands, so state. If he has assigned it, in whole or in part, so state, and make the assignee a defendant.*]

III.

That [*Show that the debts of her deceased father have been paid, and that the time has arrived for his executor, the defendant, George Brown, to pay over to her her distributive share of her father's estate, specifying the amount, and if she has made any demand therefor so state, and state his response.*]

IV.

That, [*If the husband or his assignee is making efforts to induce the executor to pay to him said share, so state. If any other facts exist showing the necessity for an injunction to protect said share, state them fully and particularly.*]

V.

That, [*Show that the defendants Henry Brown and James Doe are the sureties of George Brown as such executor.*]

VI.

Complainant therefore prays :

1st. That subpoena to answer issue against all of the said defendants requiring them to answer the bill fully and on oath [*or fully, but not on oath.*]

2nd. That the amount due complainant from the defendant George Brown and his said sureties be decreed to her, and be settled upon a trustee, or otherwise safely invested for her sole and separate use, free from the liabilities and control of her said husband. [*If this amount has not been fixed by settlement with the Clerk of the County Court, or otherwise, and an accounting is necessary to ascertain the amount then pray:*] and that all necessary accounts be taken to ascertain said amount.

3d. That an injunction issue to restrain the defendants, or any of them, from in any way interfering with complainant's said equity, and to restrain the defendant, George Brown, from paying it, or any part of it, to any of the defendants or to any one else. This is the first application for an injunction in this case.

4th. That complainant may have such other, further, and general relief as the nature of her case may require.

EUGENE WEBB, Solicitor.

[*To be sworn to: see, ante, § 789.*]

§ 970. **Suits Where the Court Guards the Interests of Minors and Lunatics.** The Chancery Court has jurisdiction of the persons and estates of infants, and of idiots and lunatics, and other persons of unsound mind, and may appoint guardians for them, and have their estates cared for and their interests promoted to the same extent and in the same manner as do the County Courts.<sup>9</sup>

<sup>7</sup> Coppedge v. Threadgill, 3 Sneed, 579; see Smith v. Greer, 3 Hum., 118; McElhatton v. Howell, 4 Hay., 19.

<sup>8</sup> Dearn v. Fitzpatrick, Meigs, 551.

<sup>9</sup> See, ante, § 24. Originally, in North Carolina, from which State our laws were derived, the Chan-

and, in many very important particulars, more fully. Thus, the Chancery Court may make fuller provision for the education of the infant, and for its medical or surgical treatment in extreme cases, and may expend a part or all of the infant's estate for these purposes, when necessary for its permanent welfare; and the Court may exercise a much larger discretion in dealing with the property of idiots, lunatics and other persons of unsound mind as hereafter shown.<sup>10</sup> A guardian may trespass on the *corpus* of his infant ward's estate, in case of sickness, death, marriage, or for other good reason, or urgent necessity, and the Chancery Court will ratify such action, on his showing a state of facts that would have justified such an allowance on a bill filed by him in Chancery for that purpose, and on his giving good reason for not appealing to the Court in advance.<sup>11</sup> But it is better for the guardian to get authority for such expenditures in advance by bill applying therefor; for, even when the Court ratifies his action in such matters, it often taxes him with the costs; whereas on a proper bill, filed in advance, costs and counsel fees will be paid out of the ward's estate. If a guardian fail to make his settlements as required by law, fails to renew his bond, or converts his ward's funds by paying his individual debts with the same, or fails to keep it loaned on good security, but uses it as his own in making his personal expenditures, it is cause for his removal.<sup>12</sup>

The Chancery Court delights to help those who cannot help themselves, and whenever the estate of an infant, idiot, or lunatic is being wasted, or converted, whether by a parent, guardian, or stranger, the Court, on a bill filed by any one as next friend,<sup>13</sup> will right the wrong, and hold the wrongdoer liable, treating him as a trustee, when necessary to promote the interest of the beneficiary.<sup>14</sup>

Whenever it is necessary for the welfare of an infant, idiot or lunatic to convert his realty into personalty, or his personalty into realty, or to invest his money, or to ratify or avoid his contracts, the Chancery Court has authority to order it to be done, and to superintend the execution of its order. In short the Chancery Court, acting *in loco parentis*, and as general guardian for minors, idiots, lunatics and persons of unsound mind, will do for them and their property, what they themselves would in all probability have done if possessed of good reason and good conscience.

§ 971. **Frame of Bill by Next Friend Against a Guardian.**—The following frame of a bill is given to aid the Solicitor of the next friend in drawing a bill to cover the usual delinquencies of a general guardian. Of course, all of the enumerated delinquencies never exist in any one case, and, as a rule, it is enough if any one of them exists.

#### FRAME OF BILL BY NEXT FRIEND AGAINST A GUARDIAN.

To the Honorable H. B. Lindsay, Chancellor, holding the Chancery Court at Knoxville. The State of Tennessee, for the use of Sarah Brown, an infant, [or idiot, or lunatic, or person of unsound mind,] who sues by John Brown, her next friend, both residents of Knox county, complainant,<sup>15</sup>

*vs.*

Charles Brown, guardian of said Sarah Brown, and Henry Brown and George Brown, his sureties as such guardian, and Richard Roe, all residents of Knox county, defendants.

cery Court, by its inherent power, had exclusive jurisdiction of the persons and estates of infants; and when, for greater local convenience, the County Courts were given jurisdiction thereof, it was expressly provided in the statute, (Act of 1762, ch. 5, § 26) that "the powers of the Court of Chancery over orphans and their estates should not be abridged" thereby. 1 Scott's Rev., 105. And this provision has existed in our statutes ever since. Code, § 2493. See *Oakley v. Mitchell*, 10 Hum., 256; *Lake v. McDavitt*, 13 Lea, 26; *Talbot v. Provine*, 7 Bax., 510.

<sup>10</sup> See, *post*, § 984. See, also, Code, §§ 3708-3719. Imbecility from old age is covered by the statute. *Porter v. Porter*, 3 Hum., 589; *Fentress v. Fentress*, 7 Heisk., 431.

<sup>11</sup> *Owens v. Pearce*, 10 Lea, 45; *Hobbs v. Harlan*, 10 Lea, 268. The County Court has no jurisdiction over these matters. *Mitchell v. Webb*, 2 Lea, 152.

<sup>12</sup> *Fincher v. Monteith*, 5 Lea, 144. If a guardian wilfully neglects, or obstinately refuses, to exhibit his account, the Court may attach him until he does so. Code, § 2528.

<sup>13</sup> *Stephenson v. Stephenson*, 3 Hav., 123; *Miles v. Kaigler*, 10 Verg., 10; *Benton v. Pope*, 5 Hum., 393; *Johnson v. Hunter*, 9 Bax. 186; *Cohen v. Shyer*, 1 Tenn. Ch., 192; *Green v. Harrison*, 3 Sneed, 131. See, *ante*, §§ 103-108. Wards may by next friend, recover trust property sold by their guardian without authority. *Gross v. Gillenwaters*, 2 Shan. Cas., 537.

<sup>14</sup> *Nelson v. Allen*, 1 Verg., 374.

<sup>15</sup> The bill may be filed by the minor or lunatic by next friend, directly, without using the name of the next friend. See, *ante*, §§ 927; 957. For form of caption and commencement, see, *ante*, § 156.

The complainant, the State of Tennessee, suing for the use of Sarah Brown, an infant, who sues by John Brown, her next friend, respectfully shows to the Court:

## I.

That [*Here show what estate and rights Sarah Brown has, and, if land, give its location and value.*]

## II.

That [*Here show that the defendant Charles Brown is her guardian, and specify in what way, and to what extent he is violating his trust, such as failing to settle with the County Clerk, or to renew his bond, or, if he has settled, charge that the settlement is false and fraudulent, and specify in what particulars; or that he fails to keep the trust money loaned or properly invested; if the estate is land show that the guardian has let it greatly deteriorate, or does not keep it leased or under proper cultivation, or so use it as to derive a reasonable profit therefrom. If the guardian is, in any way, neglecting his duty, specify in what way; if he is speculating on the assets so state, and particularize how; if he is using the assets for his own use or profit, so charge; if he has sold any property to Richard Roe without authority specify it, and give the facts in full; if he is committing any waste of the estate, or allowing Richard Roe, or any others, to commit any, specify in what way; if he has bought any property with his ward's money and taken the title in his own name, or is loaning his ward's money to Richard Roe, or any one else, and taking notes in his individual name, give the particulars in full so as to identify the property so bought, or the notes so taken; if he has used the ward's estate to pay his own debts to Richard Roe, or to any other person, or is lending her money on insufficient security; if he fails to collect from Richard Roe a large sum of money owing by said Roe to complainant, give the facts and circumstances; and show any other default on his part as guardian.*]

## III.

That [*Here set forth any ground that may exist for an injunction to prevent any act by the guardian or any other defendant, especially Richard Roe, that if done will be prejudicial to complainant's rights and interests, giving the particulars, and showing clearly the necessity for such injunction.*]

## IV.

That [*If it be necessary to attach any of the property of any of the defendants to secure the payment of the money due complainant, and if any statutory or equitable ground of attachment exist, state it.*]

## V.

That the defendants, Henry Brown and George Brown, are the sureties of the defendant Charles Brown as guardian of Sarah Brown, and along with him have given bond, dated August 14, 1905, payable to the State of Tennessee in the penalty of five thousand dollars, conditioned for the faithful discharge of the duty of said Henry Brown as said guardian; and complainant charges and avers that the condition of said bond has been broken by defendant Charles Brown by the various violations of his said duty hereinbefore set out and alleged.

## VI.

Complainant therefore prays:

1st. That subpoena to answer issue [*&c.: see, ante, §§ 158; 164.*]

2d. That an injunction be ordered by your Honor [*&c.: ante, § 158, sub-secs., 3, 4.*]

3d. That an attachment issue and be levied [*&c.: see, ante, § 158.*]

4th. That an account be taken between Sarah Brown and the defendant Charles Brown, showing therein, fully and in detail, the various matters and moneys justly chargeable to him, and various matters and moneys he is justly entitled to credit for; that he be held liable for the reasonable rents of said lands, and for all waste by him committed or permitted thereon, and for the reasonable value of the said property of Sarah Brown by him appropriated or converted, that the title to the said tract of land by him purchased with complainant's money, from the defendant Richard Roe, and deed taken in his own name, be divested out of him and vested in complainant; that no compensation be allowed him, and he be charged with compound interest; that a decree be rendered in Sarah Brown's favor against him and his said sureties for the full amount found due from him, and that he be removed as guardian and a new guardian be appointed, and that the defendant Richard Roe be held liable to Sarah Brown for all trust money and property by him received as aforesaid, and that he be held to account for the same as trustee; that all attached property be sold to satisfy Sarah Brown's claims, and that she may have all such further and other relief as she may be entitled to.

This is the first application for an injunction or an attachment in this case.

G. W. PICKLE, of Counsel.

W. R. TURNER, Solicitor.

[*Attach affidavit to bill: see, ante, §§ 161; 164.*]

In case of a bill by a next friend against the guardian of a lunatic the above frame will be found helpful, the necessary changes being very few, and such only as will readily occur to the pleader. The liabilities and defaults of the guardian of an idiot or lunatic are mainly the same as those of the guardian of an infant, and the bill against him is mainly the same.

ARTICLE II.

SUITS TO SELL OR LEASE THE PROPERTY OF INFANTS AND WIVES.

- § 972. When a Sale or Lease May be Made.
- § 973. The Frame of a Bill to Sell.
- § 974. Proceedings on Behalf of the Defendants.
- § 975. Reference to the Master to Ascertain the Facts.

- § 976. Report of the Master as to the Sale.
- § 977. Action on the Report, and Final Proceedings.
- § 978. Proceedings to Confirm a Sale Previously Made.
- § 979. Proceedings to Authorize or Ratify a Purchase of Land by a Guardian.

§ 972. **When a Sale or Lease May be Made.**—Property is valuable only as a means of support and education; and a small estate belonging to an infant cannot be better invested than in educating and supporting him.<sup>1</sup> It, also, often happens that a very advantageous sale may be made of an infant's or married woman's property, or that the property should be sold because dilapidating, or unproductive, or encumbered. It is, therefore, provided by the Code, that, whenever a sale of the property, real or personal, of an infant or married woman is (1) necessary for their support, education, and maintenance, or (2) is manifestly for their interest, the Chancery Court may consent to and decree a sale thereof.<sup>2</sup> And the jurisdiction may be exercised as to any kind of property, and whether the interest or estate of the person under disability, or any of the parties litigant, is in possession, reversion, or remainder, or subject to any limitation, restriction, or contingency whatsoever;<sup>3</sup> except, that in no case shall property be sold, if it be claimed under a will which expressly directs otherwise.<sup>4</sup> Even property wherein persons not in being may have an interest may be sold, if all those interested, then in being, are before the Court; and sale is necessary, or manifestly for the interest of such persons then in being, having a common interest with those who may come into being.<sup>5</sup>

But the jurisdiction of the Chancery Court in the foregoing matters does not depend exclusively on the Code; that Court has inherent power over the persons and estates of infants,<sup>6</sup> and has plenary jurisdiction, upon proper pleadings and process, to control and sell, or consent to the sale of, the real estate of minors, and to compromise their rights.<sup>7</sup> Indeed, it may be said, generally, that the Chancery Court has inherent power to convert realty into personalty; and in so doing can bind the rights and interests, legal or equitable, vested or contingent, present or future, of all persons whether *in esse* or *in posse*, and

<sup>1</sup> Whenever a person is disabled by law or nature to care for their own persons or property, a Court of Chancery will act for them, and do all that may be necessary for the welfare of their persons, the education of their minds, and the management or disposition of their property. The Court will appoint guardians, remove guardians, and compel guardians to do their duty, and, when proper, will authorize guardians to expend a part or all of the principal of their ward's estate in maintaining or educating them; and will sell the lands of the ward for that purpose. See. *ante*, § 35.

<sup>2</sup> Code, §§ 3323; 3333. Inasmuch as the greater contains the less, the Court could, it would seem, consent to and decree a long lease of their property

when manifestly for their interest. Note to original edition.—And it has been so held since the original edition of this work was published. See *Ricardi v. Gaboury*, 7 Cates, 484. The Court will in a proper case, confirm, or consent to, a sale or lease already made or negotiated. *Ibid. Post*, § 979.

<sup>3</sup> Code, § 3327.

<sup>4</sup> Code, § 3340. But see *Porter v. Porter*, 1 Bax., 299.

<sup>5</sup> Code, § 3337; *Gray v. Barnard*, 1 Tenn. Ch., 298.

<sup>6</sup> *Oakley v. Mitchell*, 10 Hum., 256; *Lake and wife v. McDavitt*, 13 Lea, 26.

<sup>7</sup> *Wilson v. Schaefer*, 23 Pick., 300; *Hurt v. Long*, 6 Pick., 445; *Lenow v. Arrington*, 3 Cates, 720.

whether *sui juris*, or under disability, who are before the Court by service of process or by virtual representation.<sup>8</sup>

§ 973. **The Frame of a Bill to Sell.**—The bill may be filed by the husband of the wife, and by the regular guardian of the infant, against the person under a disability,<sup>9</sup> and should be filed in the county where the property, real or personal, sought to be disposed of, is, or where the person under disability at the time resides, at the option of the complainant.<sup>10</sup>

The bill should set forth fully and particularly: (1) the age, circumstances and condition of the party under disability, (2) what other property, if any, such person owns, or is in any way entitled to; (3) and the causes or reason why a sale of the particular property is sought; and (4) must be sworn to.<sup>11</sup> The following is a form of a

#### BILL TO SELL LAND OF MINORS FOR THEIR EDUCATION.

To the Hon. Thos. M. McConnell, Chancellor, holding the Chancery Court at Manchester;  
John Rogers, guardian, &c., a resident of Coffee county, complainant,

*v.s.*

Henry Clark and Mary Clark, residents of the same county, defendants. }

The complainant respectfully shows to the Court:

I.

That the defendants, Henry Clark and Mary Clark, are infants, without mother or father living, and complainant is their regular guardian. Said Henry Clark is eighteen years old, and said Mary Clark is twelve years old; and the residence of all the parties is in Coffee county.

II.

The defendants are the owners, as tenants in common, in fee simple, of a tract of land in the 5th civil district of said county, bounded as follows: Beginning on a rock, Charles Brown's corner, [and giving the metes and bounds,] to the beginning, containing about one hundred acres. They own no other realty, and the value of their personal estate is less than fifty dollars to each, and is money.

III.

That said tract of land is worth about five hundred dollars, and is unencumbered, except the taxes on it for the last year are unpaid. The land has no improvements except a small cabin and a clearing of about one acre. It yields no revenue whatever, and complainant has no means, as guardian, sufficient to pay taxes.<sup>12</sup>

IV.

The defendant, Henry, is an apt, energetic, and industrious boy, and desires to qualify himself to be a civil engineer. It will cost about one hundred and fifty dollars to complete his education for that business, coupled with what he can himself earn. He has already partially qualified himself for the business, and has a talent and a fondness for it.

V.

The defendant, Mary, is a bright child, with a talent for music, and has an aunt, Mary Brown, who will keep her, if complainant as guardian will help pay for her musical education. This is an opportunity too valuable to be lost.

VI.

Complainant believes that it is manifestly for the interest of his wards, as well as necessary for their support and education, that said land be sold;<sup>13</sup> and therefore prays:

1st. That they be made parties to this bill by service of subpoena; that the defendant, Henry, answer in person as well as by guardian *ad litem*, and that a guardian *ad litem* and Solicitor be appointed for both of them.

2d. That said tract of land be sold, and the proceeds be used for the purposes above stated.

3d. That such other relief be granted as the rights and interests of the defendants and the duties of complainant may require

JOHN ROGERS, Guardian.

[To be sworn to by complainant in person, and on his own knowledge. See, ante, § 789.]

<sup>8</sup> Ridley v. Halliday, 22 Pick., 607; Ricardi v. Gaboury, 7 Cates, 484.

<sup>9</sup> Code, § 3324. The bill may, also, be filed by a next friend. Code, §§ 3335; 3339; Mason v. Tinsley, 1 Tenn. Ch., 154.

<sup>10</sup> Code, § 3326; Williams v. Williams, 10 Heisk., 566.

<sup>11</sup> Code, § 3329; Greenlaw v. Greenlaw, 16 Lea, 435.

<sup>12</sup> If the guardian has no means of paying the taxes, this, alone, will justify the sale of an infant's land. Greenlaw v. Greenlaw, 16 Lea, 435.

<sup>13</sup> If the bill is filed to confirm a sale already negotiated by complainant, the proposing purchaser should be made a defendant, and paragraph VI would read as follows: Complainant realizing the necessity of a sale of said land, has negotiated the

same to the defendant, [purchaser], for six hundred dollars, a sum believed to be one hundred dollars more than could be obtained at public sale; and he, the said purchaser, is ready and willing to pay for the same in such installments as your Honor may prescribe, and has paid complainant one hundred dollars as a forfeit, which sum is paid into Court with the filing of this bill.

And in such case, the foregoing prayer will be so changed as to pray:

2d. That the said sale of said tract to the defendant, [purchaser], be ratified and confirmed, and the proceeds be used for the purposes above stated. See further, as to confirming a sale, *post*, § 979.

When a sale is sought to be confirmed, the purchase money must be paid into Court. Mason v. Tinsley, 1 Tenn. Ch., 154.

§ 974. **Proceedings on Behalf of the Defendants.**—On or after the return day of the subpoena duly served on the defendants, the Court, if in session, or the Chancellor or Master,<sup>14</sup> if in vacation, will appoint a guardian *ad litem* for the infant defendants, and for a defendant who is a married woman, and the guardian *ad litem* may be required to give a bond<sup>15</sup> faithfully to discharge his trust. If the person under disability is not represented by counsel, the Court will appoint counsel for such a person, and fix the compensation, which shall be the same whether a sale is ordered or not, and shall in no event exceed one hundred dollars.<sup>16</sup>

The infant, if over fourteen years of age, and the married woman, must answer the bill in person;<sup>17</sup> and in their answer should fully and truthfully set forth any facts material to their interests and to the suit, not contained in the bill; and should deny, or correct, any misstatements in the bill; and should state their own wishes in reference to the sale, and to the application of the proceeds. Their answer must be sworn to.

§ 975. **Reference to the Master to Ascertain the Facts.**—The Court may hear the case without a reference; but the usual practice is to direct the Master to examine unexceptionable and disinterested witnesses, and to put such questions as will elicit the whole truth, and will enable the Court to obtain a full understanding of the real facts of the case.<sup>18</sup> If the case is heard without such a reference, the Court will be obliged to determine it upon such proof as the parties may themselves see fit to present. But proof there must be, and cogent proof, to authorize a decree, and no consents of parties *sui juris* will bind an infant.<sup>18a</sup> The following is a form of an

**ORDER OF REFERENCE.**

John Rogers, guardian, &c., }  
*vs.*  
 Henry Clark, *et al.* }

This cause, coming on for orders before the Hon. Thomas M. McConnell, Chancellor, on this Sept. 6, 1891, on the bill the answers of the defendants, by Charles Wilson, their guardian *ad litem*, and the answer of said Henry Clark in person; the Court, in order to ascertain the real facts, is pleased to direct the Master to examine disinterested and unexceptionable witnesses, and report upon the facts established by the proof:

1st. What estate each of the defendants possess, its kind and value, and the net income derived therefrom; and how they are being supported.

2d. What is the age of each of the defendants; and has each or either of them, any and what talent for any particular business, trade, or profession; and what have they been doing for the last year?

3d. Whether a sale of the land described in the bill is necessary for the support, education, and maintenance of the defendants, or is otherwise manifestly for their interest, and why. And what is a reasonable minimum price for said tract of land.

The Master will base his conclusions on the facts proven by the witnesses, and not on their opinions; and he will examine such witnesses, and put such questions, as will elicit the whole truth; and will report against a sale unless the testimony leaves no reasonable doubt as to its propriety.

He will report to the present or next term of the Court.

§ 976. **Report of the Master as to the Sale.**—The Master is expected to use extraordinary diligence and good faith in ascertaining the facts, in cases of this character, and in reporting them to the Court.<sup>19</sup> His report will be in the usual form; but, as an illustration of its character, the following form is given of the Master's response to the 3d head of inquiry, in the foregoing reference.

<sup>14</sup> The Master may appoint the guardian *ad litem* and Solicitor. *Beaumont v. Beaumont*, 7 Heisk., 226.

<sup>15</sup> Code, § 3324. As to guardians *ad litem* generally, see, *ante*, §§ 106-108. The guardian in these proceedings cannot file a cross bill to have a sale confirmed. *Browning v. Browning*, 11 Lea, 106.

<sup>16</sup> Code, § 3330. Counsel not appointed by the Court are not entitled to any compensation out of the fund in Court; they sometimes really represent third parties who are more anxious to buy the property than guard the interests of the person under disability. For this reason, the Court should rely on the guardian *ad litem*, or next friend, rather than on counsel not appointed by the Master, or Chan-

cellor. The Master should appoint no one as guardian *ad litem*, or Solicitor, who is at all in sympathy with a proposing purchaser.

<sup>17</sup> Code, § 3325. Their guardian *ad litem* should also answer for them. He should, as a rule, content himself with a formal answer, unless he knows, or has reliable information of, facts that should be made known to the Court. He should never make any admissions except as to the infancy of his ward, and the ward's ownership of the property. For form of a formal answer, see, *ante*, § 383.

<sup>18</sup> Code, §§ 3331-3334.

<sup>18a</sup> *Sawyers v. Sawyers*, 22 Pick., 597.

<sup>19</sup> Code, §§ 3331-3334.



## REPORT AS TO NECESSITY, OR PROPRIETY, OF A SALE.

\* \* \* \* \*

## III.

*As to the necessity, or propriety, of the proposed sale.*

On this point, the Master reports that the facts clearly show:

1st. That the sale prayed for is necessary for the support, education, and maintenance of the defendants, because (1) the defendants are both orphans; (2) the personal estate of each of them is only thirty-nine and 43-100 dollars, which is in money in their guardian's hands, [*Dep. of John Rogers, p. 2, q. 3; and exhibit A;*] (3) they have no other source of income or support, except their own labor, [*Dep. of John Rogers, p. 3, q. 4;*] (4) Henry Clark is learning civil engineering, is apt, industrious, and capable; and for one hundred and seventy-five dollars can complete his studies, and be prepared to engage in the business of civil engineering, which is a good business, and he has a talent and a fondness for it, [*Deps. of William Brown, pp. 2-4, q. 2; Charles Jones, pp. 1-3, q. 2; and Henry Clark, pp. 2-4, q. 3;*] (5) Mary Clark has a talent for music, and her aunt, Mary Brown, a professional musician of good repute, will board, clothe, and educate her for forty dollars a year. [*Deps. of Mary Clark, pp. 2-5, qs. 2 and 3; and Henry James, pp. 1-2; q. 1.*]

2d. And said sale is, also, manifestly for the interest of the defendants, because: (1) the land yields no revenue; and cannot be made to yield any, without converting it into a farm, which would require a large expenditure of money, [*Deps. of Henry Farmer, pp. 2-4, qs. 2 and 3; and John Rogers, p. 6, q. 7;*] (2) the defendants have no means of paying the taxes, and the guardian has been compelled to sell timber for that purpose from the land, which is now deficient in good timber, [*Dep. of John Rogers, p. 7, q. 8;*] and (3) the land is covered with scrubby timber, and is being damaged by several large and growing wash-outs through its midst, [*Dep. of Henry Farmer, p. 5, q. 4.*]

\* \* \* \* \*

All of which is respectfully submitted. Sept. 8, 1891.

JOHN S. MOORE, C. &amp; M.

The other heads on which the Master is required to report will be reported on with equal fullness and exactness, to the end that the Court may have that full understanding of the circumstances and condition of the person under disability required by the statute.<sup>20</sup> The Master should summon witnesses who best know the facts and should not depend on witnesses suggested to him by the parties.<sup>21</sup>

§ 977. **Action on the Report, and Final Proceedings.**—It is the duty of the Chancellor to hear the proof read, and to set aside the Master's report, on his own motion, even though unexcepted to, if not fully satisfied that the case for a sale is clearly made out.<sup>22</sup>

If the Master's report is confirmed, the Court orders the land to be sold. No guardian, next friend, or witness, can purchase at the sale, or at any time afterwards until five years from the removal of the existing disabilities; and a sale to any such person is void.<sup>23</sup> The Court will see that the proceeds of the sale, if made for education or support, are so applied; and if made for reinvestment, are invested in lands, bonds of this State, or of the United States, or loaned on good mortgages on realty.<sup>24</sup>

The following will serve as a form of

## DECREE ORDERING A SALE.

John Rogers, guardian, &amp;c.,

vs.

Henry Clark, et al.

This cause, coming on to be heard, this Sept. 19, 1891, upon the pleadings, including the answer of the minor defendant, Henry Clark, [in person, if over fourteen years of age, and] by guardian *ad litem* and Solicitor, and proof, and report of the Master, which report is in the words and figures following:

## I.

[Here set it out, in full.]

And said report being unexcepted to, and the Court being fully satisfied that the case for a sale of the land of the defendant, Henry Clark, for his education and support, is clearly made out by proof of facts established by unexceptionable and disinterested witnesses, the conclusions of the Master are fully ratified and approved, and his report in all things confirmed.

<sup>20</sup> Code, § 3334.

<sup>21</sup> See, *Hunt v. Glenn*, 11 *Lea*, 16.

<sup>22</sup> Code, § 3334.

<sup>23</sup> Code, § 3339.

<sup>24</sup> Code, § 3338. A witness is not disqualified to purchase unless he testifies to some material fact necessary for a decree of sale. *Hunt v. Glenn*, 11 *Lea*, 16.

II.

It is, therefore, ordered and decreed by the Court, that the tract of land, described in complainant's bill and in the Master's report, be sold by the Master, in the manner provided by law, to the highest bidder, on a credit, six, twelve, eighteen and twenty-four months. The Master will take notes from the purchaser, for the instalments, drawing interest from date, with good personal security, and will, also, retain a lien on the land for further security. He will not sell said land for less than five hundred dollars;<sup>25</sup> and will not sell to the guardian, next friend, or any witness in the cause. He will report to the next term of the Court.

III.

Said sale is ordered both because it is manifestly to the interest of the defendants, and because the proceeds are necessary for the support, and especially for the education, of the defendants; and said proceeds will be paid out for said purposes, under the order of this Court, to the end that the defendants may receive the full benefit thereof. And the cause will be retained in Court until the funds are all disbursed, and the purpose of this proceeding fully attained.

If the bill is dismissed, the Court may adjudge all the costs of the cause against the complainant, personally, including the counsel fees of any counsel appointed by the Court.<sup>26</sup>

§ 978. **Proceedings to Confirm a Sale by a Guardian.**—In any case where it would be proper, on a bill filed for that purpose, to sell the property, real or personal, of an infant or a married woman, the Court may confirm or adopt a sale, already made by the guardian or husband, or consent to a sale proposed to be made.<sup>27</sup> When the action of the Court is sought in such a case, a bill must be filed for that purpose in the same manner as when a sale sought, and the same proceedings must be had, the same answers put in, the same kind of witnesses examined, and the same report made. In such a case, however, the purchaser, or proposing purchaser, should also, be made a defendant. The bill, after reciting the facts showing a proper case for a sale, should then proceed to show that an advantageous sale has been negotiated, and should state its terms, and pray that it be ratified, and confirmed. The form of such a bill is the same as a bill for a sale, with the changes indicated in the marginal notes.<sup>28</sup>

On such a bill being filed and answered, the Master, in addition to the matters referred to him on a bill for sale,<sup>29</sup> will be directed to report:

**REFERENCE TO MASTER AS TO CONFIRMATION OF A SALE.**

4th. Whether the sale referred to in the pleadings is an advantageous one, and whether it is manifestly for the interest of the defendant under disability to confirm the same, stating the facts and reasons.

If there be any probability of a higher price being obtained than that offered by the proposing purchaser, it would be prudent to decree a private sale of the property, and direct the Master to accept the proposed offer, if no higher bid was obtained before the next term of the Court, or before some other fixed period.

On confirmation of such a sale, the proceeds will be applied, or reinvested, as in other cases of sale.

§ 979. **Proceedings to Authorize or Ratify a Purchase or Exchange of Land by a Guardian.**—On proper bill filed therefor under the rules hereinbefore stated, and on suitable references and reports showing that the interests of the minor will be manifestly promoted by the purchase of real estate made or proposed by the general guardian, the minor being before the Court, represented by a guardian *ad litem*, and answering in person if over fourteen years of age, the Court may authorize or ratify the proposed purchase of real estate by the

<sup>25</sup> In a sale of this kind, it is proper to fix a minimum price for the land. *Horn v. Denton*, 2 Sneed, 126.

<sup>26</sup> Code, § 3335. The object of the statute is to guard well the interests of those under disability; and extraordinary care is required of the Court, extraordinary good faith is required of the regular guardian, the next friend, the guardian *ad litem*, and the witnesses, and extraordinary impartiality and diligence are required of the Master, and all are expected and required to seek nothing but the wel-

fare of the party under disability. See Code, §§ 3324; 3330-3332; 3334-3335; 3339; *Hunt v. Glenn*, 11 Lea, 16; *Porter v. Porter*, 1 Bax., 302.

<sup>27</sup> The language of the Statute is, the Court "may consent to and decree a sale." Code, § 3323; and "to give consent or order the sale," Code, § 3334; *Hurt v. Long*, 6 Pick., 445.

<sup>28</sup> See, *ante*, § 973.  
<sup>29</sup> See, *ante*, § 975, for the remainder of the order of reference.

general guardian with his ward's money, being careful to see that the title of the minor to the land will be good.

And so, on like proceedings, the Court may authorize or ratify an exchange of lands, when clearly shown to be to the manifest interest of the minor.

### ARTICLE III.

#### SUITS RELATING TO PERSONS OF UNSOUND MIND.

§ 980. The Jurisdiction of Chancery Over Persons of Unsound Mind.

§ 981. How Jurisdiction is Exercised.

§ 982. Proceedings on an Inquisition of Lunacy.

§ 983. Appointment of a Guardian.

§ 984. The Guardian's Duties and Powers.

§ 980. **The Jurisdiction of Chancery Over Persons of Unsound Mind.**—The Chancery Court has jurisdiction to take care of the financial affairs of persons who are mentally incompetent to promote or protect their own interests; and to make any decree in reference to their estates, required for the well-being of their persons or their property. The Court may do anything in reference to their property which they would, in good reason and good conscience, have been bound to do, if capable of making contracts. And by statute the Court is given jurisdiction over the persons and estates of idiots, lunatics, and other persons of unsound mind,<sup>1</sup> where the estate exceeds five hundred dollars.<sup>2</sup>

§ 981. **How Jurisdiction is Exercised.**—Whenever a person of unsound mind has an estate in excess of five hundred dollars, and no regular guardian, any person<sup>3</sup> may file a sworn petition in the Chancery Court of the county where the *non compos* resides,<sup>4</sup> setting forth the facts in regard to the person and property of the supposed idiot, or lunatic, alleging that his estate exceeds five hundred dollars,<sup>5</sup> and making him a defendant.<sup>6</sup> The following is a form of

#### A PETITION FOR AN INQUISITION OF LUNACY.

To the Hon. B. M. Webb, Chancellor, holding the Chancery Court at Jamestown:

The petition of Frank Friend,

*against*

John Need, both residents of Fentress county. }

Petitioner would respectfully show:

#### I.

That the defendant, John Need, has recently become [*or is*] a person of unsound mind, so that he has not capacity sufficient for the government of himself and property. He has a wife, Susan Need, and two young children, dependent on him for support. He is also considerably indebted.

#### II.

The said John Need owns the following property: (1) a farm of one hundred acres in the 2d civil district of said county of Fentress, adjoining the farms of Henry Jones, John Tate, George Smith, and perhaps others, and worth one thousand dollars; (2) two horses, three cows, various agricultural implements, and a set of household furniture; and (3) a small stock of merchandise, worth about six hundred dollars.

#### III.

In consequence of the mental unsoundness of said John Need, his business has fallen into confusion, and his property is being wasted. His creditors are not being paid, and his debts are not being collected. And unless a guardian is appointed to take charge of his estate, it will suffer irreparable injury.

<sup>1</sup> Code, §§ 3681; 4298. A person incapable of governing himself or property may have a guardian appointed for him under the statute. *Fentress v. Fentress*, 7 Heisk., 428.

<sup>2</sup> Code, § 3692.

<sup>3</sup> 2 Barb. Ch. Pr., 228.

<sup>4</sup> Code, § 3682.

<sup>5</sup> Code, §§ 3691-3692.

<sup>6</sup> The proceeding is not *ex parte*, or *in rem*, but

*in personam*. The statute designates the person proceeded against as "the defendant" and speaks of "both parties" and "either party," Code, §§ 3693-3707, and requires the defendant to be notified, and served with a copy of the petition. Code, § 3695. The defendant is treated by the statute as having all the rights of a sane man, until the jury determine that he is not sane. See, *Dozier, ex parte*, 4 Bax., 81.

IV.

Therefore, the petitioner prays:

1st. That a writ of inquisition issue to inquire and ascertain whether the defendant be a person of unsound mind; and that defendant be given due notice thereof.

2d. That if so found, a guardian be appointed to manage his person and estate; and

3d. For general relief.

L. T. SMITH, Solicitor.

FRANK FRIEND.

[*Annex affidavit and jurat as in § 797, ante.*]

Upon this petition being presented to the Chancellor, either in Court, or at Chambers, he will endorse on the petition an order for a writ to be issued, on bond being given. The following will serve as a form of

**THE CHANCELLOR'S FIAT.**

To the Clerk and Master of said Court:

Upon the petitioner giving bond, with good security, in the sum of five hundred dollars, conditioned as required by the statute,<sup>8</sup> you will issue a writ of inquisition as prayed, and do all such acts in connection therewith as are required of you by law.

June 4, 1890.

B. M. WEBB, Chancellor.

**WRIT OF INQUISITION.**

State of Tennessee, }  
County of Fentress. }

To the Sheriff of said county:

You are hereby commanded to summon a jury of twelve freeholders to meet at a day and place to be designated by you, to inquire and ascertain by their verdict, whether John Need is an idiot, lunatic, or person of unsound mind;<sup>9</sup> and if so, the value of his estate, of what it consists, and who would be his heirs, and next of kin, were he to die intestate.<sup>10</sup>

Witness, O. C. Conatser, Clerk and Master of the Chancery Court of said county, at office in Jamestown, the 4th day of June, 1890.

O. C. CONATSER, C. & M.<sup>11</sup>

Summon, also, the following persons to attend at the time and place fixed for the inquisition, to testify in behalf of the petitioner: Dr. John Jones, George Brown, and Henry Smith.

O. C. CONATSER, C. & M.

§ 982. Proceedings on an Inquisition of Lunacy—The Clerk and Master will cause the defendant to be served with a copy of the petition, and notice of the time and place of holding the inquest, at least five days previous thereto.<sup>12</sup> The following will serve as a form of

**THE NOTICE TO THE DEFENDANT.**

Frank Friend, }

vs.

John Need. }

Mr. John Need: }

In the Chancery Court, at Jamestown.

Take notice, that a writ of inquisition to inquire as to your alleged unsoundness of mind has been issued in said cause by the Chancery Court of Fentress county; and the inquest will be held on June 15, 1890, in the Court House of said county, beginning at nine o'clock, a. m., when and where you can attend, if you wish, with your witnesses. June 6, 1890.

O. C. CONATSER, C. & M.

**RETURN OF THE OFFICER.**

This notice, and a copy of the petition in the cause, came to hand June 6, 1890. A true copy of this notice, and said copy of the petition, were delivered to the defendant, and the contents thereof fully made known to him. This June 7, 1890.

A. J. MACE, Sheriff.

The defendant should be represented by counsel employed by himself, or friends. Both parties are entitled to process of subpoena, and an attachment, if necessary, to be issued by the Clerk, to compel the attendance of witnesses. At the trial, the Clerk and Master presides, and receives the verdict.<sup>13</sup> The jury must not only hear the testimony, but should inspect and examine the defendant himself.<sup>14</sup> The Clerk must take down the testimony of the witnesses,

<sup>7</sup> Code, § 3691.

<sup>8</sup> Code, § 3693.

<sup>9</sup> Code, § 3694.

<sup>10</sup> Code, § 3699.

<sup>11</sup> This form follows the form given in the Code,

§ 3683.

<sup>12</sup> Code, § 3695. As the Sheriff designates the time and place, he should fix the time far enough ahead to enable the Clerk to give the five days' notice. It would be well for the Sheriff and Clerk to agree on a time and place in order to avoid confusion. Notice to the defendant is essential. Dozier, *ex parte*, 4 Bax., 81.

<sup>13</sup> Code, §§ 3696-3697.

<sup>14</sup> Code, § 3697. But the defendant may be confined in a distant asylum, he may have wandered off, it may be dangerous to his health of mind for him to be examined, or even to be present, so that it may be impracticable or inexpedient for the jury to inspect and examine him. In such a case, his examination is probably not essential to the validity of the proceedings. The next section of the Code, (§ 3698) says, "his examination, if made, shall be taken down," thus showing that the statute contemplates circumstances when an examination will not be made. Code, §§ 3706-3707, would, also, seem to

and the examination of the defendant, if made, and return them with the verdict to the Chancellor in Court.<sup>15</sup>

The verdict of the jury may be endorsed on, or attached to, the writ of inquisition, as follows:

**THE VERDICT OF THE JURY.**

State of Tennessee, }  
Fentress county. }

The undersigned jurors, having been duly summoned and sworn, to inquire and ascertain whether the within named John Need is an idiot, lunatic, or person of unsound mind, upon oath, do say:

1. That he is of unsound mind, so that he has not capacity sufficient for the government of himself, or of his property.

2. That the value of his estate is about two thousand dollars, and consists of the farm, stock of goods, two horses, three cows, various agricultural implements, and set of household furniture, specified in the petition, and various debts due him; and

3. His next of kin and heirs, were he to die intestate, are his two children, James and Jane Need, both infants; he has, also, a wife, Susan Need.

As witness our hands, this June 15, 1890.

*[To be signed by all the jurors.]*

This verdict received by me from  
the jurors, this June 15, 1890.

O. C. CONATSER, C. & M. }

If the jury cannot agree, the Clerk may issue a new writ to the Sheriff, who shall summon twelve other freeholders, before whom the matter shall be again tried, and in the same manner. The defendant is entitled to a new notice of the time and place of the new inquest. The second jury must hear the witnesses anew, and inspect and examine the defendant for themselves. The Clerk must issue process for witnesses, preside over the trial, and take down the testimony, as in the first trial. If the second jury does not agree, the evidence on both trials must be returned to the Court, and submitted to the Chancellor, who may order a new inquisition, or decide the case for himself upon the testimony thus returned, and such other testimony as may be offered, and may inspect and examine the defendant, if he think proper.<sup>16</sup>

At the first term of the Court after the return of the inquisition, either party may move the Court to set the verdict of the jury aside, and grant a new trial. Upon this motion, the Court hears the evidence, and the examination of the defendant, as taken down and returned by the Clerk and Master, and also, such affidavits as may be competent and proper, and grants or refuses a new trial. Upon setting aside the verdict of the jury, the Chancellor may, at his discretion, order another inquest to be held, or may pronounce a final decree upon the facts,<sup>17</sup> adjudging the defendant to be of unsound mind, and appointing a guardian, or adjudging him sane and dismissing the petition.

If the defendant die pending the litigation, even after an appeal to the Supreme Court, the suit abates, and cannot be revived against his administrator even as to the costs accrued.<sup>18</sup>

**§ 983. Appointment of a Guardian.**—If the jury find the defendant of unsound mind, it is the duty of the Clerk to appoint a guardian to take care of the defendant, and manage his estate, until the next term of the Chancery Court, at which time the Court will appoint a regular guardian,<sup>19</sup> unless the verdict of the jury is set aside.

If the defendant is finally adjudged to be an idiot, lunatic, or person of unsound mind, the Court will appoint a regular guardian for his person and estate. The following is a form of an order based upon the verdict of a jury:

imply that the Chancellor may determine the case without inspecting and examining the defendant. The appearance of the defendant may be enforced by attaching his person. *Yourie v. Nelson*, 1 Tenn. Ch., 275.

<sup>15</sup> Code, § 3698.

<sup>16</sup> Code, §§ 3701-3707.

<sup>17</sup> Code, §§ 3703-3705. It is a calamity, and not a crime, for a person to become insane; and the proof to sustain a charge of insanity need not, therefore, be beyond a reasonable doubt. A preponderance of evidence is sufficient, the presumption of sanity,

however, counting as so much evidence in defendant's behalf. A defendant, even if not insane, cannot be much injured by having a good man appointed his guardian. Juries should regard the matter from a business point of view, from a dollar-and-cent standpoint; and not treat it as a criminal prosecution. The true question is: has the defendant sufficient capacity for the government of himself and property? Code, § 3683; *Fentress v. Fentress*, 7 Heisk., 428.

<sup>18</sup> *Posey v. Posey*, 5 Cates, 588.

<sup>19</sup> Code, § 3700.

**ORDER APPOINTING A GUARDIAN.**

Frank Friend, }  
*vs.*  
 John Need. }

This cause coming on to be heard before the Chancellor, this July 20, 1890, upon the petition to have the defendant declared a person of unsound mind, and to have a guardian appointed for his person and estate, and upon the writ of inquisition and the verdict of the jury, and the evidence, which verdict is as follows:

I.

[Here copy the verdict in full.]

II.

And thereupon the defendant moved the Court to set aside the said verdict, and grant him a new trial; and the Court having heard the evidence, and the examination of the defendant as taken down and returned by the Clerk and Master, and the affidavits<sup>20</sup> in support of the motion, and the argument of counsel, overruled said motion, and refused a new trial.<sup>21</sup>

III.

It is, therefore, ordered and adjudged that said verdict be and the same is hereby in all things confirmed, the Court being of opinion that it is well sustained by the evidence, and that the defendant, John Need, is a person of unsound mind.

IV.

And the Master having appointed Frank Friend guardian of the defendant's person and estate, and the Court being satisfied that he is a suitable person for said trust, it is ordered that said Frank Friend be, and he is hereby, appointed the regular guardian of the person and estate of the defendant, John Need, upon his being duly sworn and giving bond as such in the penalty of five thousand dollars, with two sufficient sureties to be approved by the Master, and conditioned faithfully to discharge all his duties as such guardian.

V.

The said guardian will at once make out and file with the Clerk and Master of this Court, a full and true itemized inventory of all the real and personal estate of said John Need, which report the Clerk will enter upon his Book of Guardian Settlements.

VI.

The costs of this cause, including a fee of twenty-five dollars to James C. Taylor, Esq., the defendant's counsel, will be paid by the said guardian out of the estate of his ward.

Should the defendant afterwards become restored in mind, he may, on application by petition to the County Court, have a jury appointed to inquire into the condition of his mind; and if found of sound mind, and competent to control himself and property, the Court will declare him of sound mind; and the guardianship of his person and property thereupon ceases, and he may demand a settlement of his guardian.<sup>22</sup>

**§ 984. The Guardian's Duties and Powers.**—The guardian should report his receipts and disbursements, and make settlements and renew his bond, in the Master's office, in strict compliance with the law governing guardians of infants. In addition to these duties; (1). He may file a bill in Chancery to have a child of his ward, coming of age or marrying, decreed a portion of the ward's estate.<sup>23</sup> This bill is in the nature of a bill for partial partition, and all persons should be made parties who would have any interest in the ward's estate, in case of his death intestate, including his wife, if any. (2). He may file a petition in Chancery, to have his ward's property,<sup>24</sup> real or personal, sold when manifestly for the ward's interest, or the interest of the ward and his family.<sup>25</sup> To this petition the ward should be made a defendant, and the proceedings should be similar to those upon a bill by a guardian of an infant to sell his ward's property.<sup>26</sup> The same state of facts that would justify the sale of an infant's property would justify the sale of the property of a person of unsound mind; and in the latter's case the welfare of his family may be considered along with his own.

<sup>20</sup> These affidavits are such as would be proper in support, or rebuttal, of a motion for a new trial in the Circuit Court.

<sup>21</sup> Code, § 3704.

<sup>22</sup> Acts of 1887, ch 149.

<sup>23</sup> Code, §§ 3708-3715. The bill may, also, be filed by the child coming of age, or marrying, in which case the guardian must be made a party defendant along with the others indicated in the text.

<sup>24</sup> An interest in expectancy may, also, be sold. Code, § 3328.

<sup>25</sup> Code, §§ 3716-3719. The statute evidently means that this petition shall be in the form of a bill. The term, petition, is elsewhere used in similar cases as synonymous with a bill. Code, §§ 3270; 3274; 3294; 3298; 3324-3326.

<sup>26</sup> See, *ante*, §§ 972-973.

## CHAPTER LIII.

## SUITS TO ADMINISTER THE ESTATES OF DECEDENTS.

ARTICLE I. Suits to Appoint an Administrator.

ARTICLE II. Suits to Sell a Decedent's Land to Pay His Debts.

ARTICLE III. Suits to Administer Insolvent Estates.

## ARTICLE I.

## SUITS TO APPOINT AN ADMINISTRATOR.

§ 985. When and How an Administrator May be Appointed in Chancery.	§ 987. Proceedings After the Filing of the Bill.
§ 986. Frame and Form of the Bill.	

§ 985. **When and How an Administrator May be Appointed in Chancery.** Ordinarily, the County Court appoints administrators; but there are two states of facts in which the Chancery Court may appoint an administrator:

1. Where six months have elapsed since the death of a person, and no one will apply, or can be procured, to administer on his estate.<sup>1</sup> In such a case a bill may be filed for the express purpose of having an administrator appointed.

2. Where a suit is pending in the Chancery Court,<sup>2</sup> and the estate of a deceased person is involved, and there is no executor or administrator of such estate, or the executor or administrator thereof is interested adversely thereto, the Chancellor may, on motion, appoint an administrator *ad litem* of such estate for all the purposes of that particular suit. An administrator *ad litem*, so appointed, will not be required to give any bond, except in cases where it becomes necessary for him to take control or custody of the property or assets of his intestate, in which case he must give a bond with good security, and in such amount as the Chancellor may order. This bond will be conditioned as in case of an ordinary administrator's bond. If the death of the decedent does not appear of record in the cause, it may be made known to the Court by the affidavit of any person interested in the case. The Master may make the appointment in vacation, on the facts being made to appear.<sup>3</sup> The order of appointment when made in Court may be as follows:

**ORDER APPOINTING AN ADMINISTRATOR AD LITEM.**

John Doe, vs. Richard Roe, <i>et al.</i>	}	No. 618.
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In this cause it appearing from the record [*or*, from the affidavit of John Doe, the complainant,] that the defendant, Robert Roe, is dead, intestate, and that no administrator has been appointed to take charge of his estate; and it being necessary to have said estate represented in this suit, on motion of the complainant it is ordered by the Court that Richard Roe be appointed administrator *ad litem* of the estate of said Robert Roe, and no bond is required of him [*or*, and it appearing that it will be necessary for said administrator *ad litem* to take into his control and custody the property and assets of his intestate, it is further ordered by the Court, that, before entering upon the discharge of his duties, the said Richard Roe will execute an administration bond<sup>4</sup> with good security, in the penalty of one thousand dollars, conditioned as required by law. Such bond will be filed as a part of the record in this cause.

<sup>1</sup> Code, § 2209. It would seem that the lapse of six months without any one applying to the County Court, is presumptive evidence that no one will apply, or can be procured to administer.

<sup>2</sup> An administrator *ad litem* cannot be appointed by the Supreme Court. *Ragio v. Collins*, 17 Pick., 662.

<sup>3</sup> Acts of 1889, ch. 137; *Denning v. Todd*, 7 Pick., 422.

<sup>4</sup> For the form of an administrator's bond, see, Code, § 2223. This form is suitable for an administrator *ad litem*.

§ 986. **Frame and Form of Bill for Appointment of Administrator.**—If the next of kin desires to have an administrator appointed, or any creditor of the deceased so desires, he may file his bill for that purpose in the Chancery Court of the county in which the deceased resided at the time of his death, or in which his estate or effects were at the time of his death.<sup>5</sup> If the bill is filed by a creditor, it must be on behalf of all other creditors who may wish to come in and be made parties; and the distributees and heirs must be made defendants. If the bill is filed by the next of kin, or any of them, it must be on behalf of all the distributees and heirs, and against all creditors who may be made or become defendants.<sup>6</sup>

The bill, by whomsoever filed, will set forth (1) the death of the deceased; (2) where he resided, or where his effects were, at the time of his death; (3) of what those effects consisted, and their probable value; (4) that six months have elapsed since his death; (5) that no person will apply or can be procured to administer; and (6) will pray that an administrator be appointed, with such other specific prayers as are required by the facts, and for general relief.<sup>7</sup> The following is a form of a

**BILL TO HAVE AN ADMINISTRATOR APPOINTED.**

To the Hon. Albert G. Hawkins, Chancellor, holding the Chancery Court at Huntingdon.  
 George Rich, a resident of Haywood county, on behalf of himself and all other creditors of William Kent, deceased, complainant,  
*vs.*  
 Susan Kent, George Kent, and Charles Kent, residents of Haywood county, defendants.

The complainant respectfully shows to the Court:

I.

That in June, 1889, William Kent died intestate, leaving defendant Susan Kent his widow, and defendants George Kent and Charles Kent, his only children, distributees, and heirs at law, said Charles Kent being a minor without regular guardian.

II.

The said William Kent, at the time of his death, resided and had considerable estate in Haywood county, and six months have elapsed since his death, and no person will apply or can be procured to administer on his estate.

III.

The said William Kent, at the time of his death, was indebted to complainant, by note, for one thousand dollars, dated May 10, 1888, and payable one day after date, which note, with the interest thereon, remains wholly unpaid, and is herewith filed, marked exhibit A, and prayed to be taken as a part of this bill. Said note was given in settlement of balance due complainant on dissolution of a partnership between the complainant and said William Kent.

IV.

The said William Kent died seized and possessed of a tract of land in the 10th civil district of Haywood county, containing about one hundred acres, adjoining the lands of James Jones, George Cole's heirs, and others, being the same on which the said defendants now reside. Said land, subject to the homestead and dower rights of the widow, is available assets for the payment of the liabilities of said estate, and is well worth two thousand dollars. Said decedent, also, left considerable personal estate, including two horses, three cows, a mule, a large flock of sheep, and a mowing machine; and complainant is informed and believes, and on that information and belief charges, that the said decedent left about one thousand dollars in money, and a considerable amount in collectible choses in action, all of which is now in possession of his said widow.

V.

The said William Kent is largely indebted to others beside complainant, and his said estate was acquired mainly with what he obtained from his creditors. Nevertheless his widow and heirs, the defendants, are unwilling to pay said indebtedness, and have conspired to deny and conceal a large part of said personal assets, especially the said money and choses in action; and are seeking to defraud said creditors, and appropriate the whole estate among themselves; and to aid in this, they not only refuse to administer on the decedent's estate, but discourage others from administering.

VI.

No year's support or exempt property has been set apart to the widow, nor has homestead

<sup>5</sup> Code, §§ 2209-2210.  
<sup>6</sup> Code, §§ 2211-2212. The widow is a distributee under the statute, and is a necessary party to a creditor's bill. She may, also, file a bill herself to

have an administrator appointed, and this her interests may often require.  
<sup>7</sup> Code, §§ 2209-2210.



or dower been assigned her, but she has said tract of land and said chattels in her possession.

Complainant therefore prays :

VII.

1.

That process issue to cause the defendants to appear, and that they be required to answer this bill fully, but not on oath; and they may be required and enjoined to deliver to the administrator, when appointed, all the money, choses in action, and other personalty, not exempt from execution, belonging to said William Kent at his death; and that a guardian *ad litem* be appointed for said Charles Kent, who is a minor.

2.

That an administrator of said estate be appointed by your Honor; that all necessary accounts be taken of the assets, real and personal, of the said decedent, and that due distribution thereof be made among the creditors of his estate; that homestead and dower be assigned the said widow, and the remainder interest in said tract of land be sold for the satisfaction of the liabilities of said estate, if necessary; that the administration of said estate be conducted under the authority of this Court, in accordance with the statute for such case made; and that general relief be granted.

3.

That publication be made for all other creditors of said estate who may wish, to come forward and have themselves made parties, and file and prove their claims.

HAWKINS & HAWKINS, Solicitors.

The bill should be sworn to by the complainant, especially if he seeks the immediate appointment of an administrator, or guardian *ad litem*.

§ 987. **Proceedings After the Filing of the Bill.**—Upon the filing of the bill, the Court in term time, or the Chancellor in vacation,<sup>8</sup> will appoint an administrator of the estate upon such terms as he may think best. The following is a form of an

#### ORDER APPOINTING AN ADMINISTRATOR.

George Rich, &c.,  
vs.  
Susan Kent, et al. }

In this cause, it is ordered by the Court that Charles Smith be appointed administrator of the estate of William Kent, deceased; and the said Charles Smith thereupon appeared in open Court and accepted said appointment, and having been sworn to perform the duties of such administrator, and having given bond in the sum of two thousand dollars, with Henry Smith and George Rich, his sureties, conditioned for the faithful performance of all the duties required of him by law in the administration of said estate, he is clothed with all the powers of administrator of said William Kent, deceased; and letters of administration will issue to him on his demand.

The said administrator will forthwith demand, and take into his possession, all the personal estate of said decedent liable to his debts, whosoever and in whosoever's hands found; and convert the same into money, and report a true inventory thereof to this Court, at its next term.<sup>9</sup> The defendants are hereby commanded and enjoined to deliver to said Charles Smith, all money, choses in action, and other personalty, not exempt from execution, belonging to said William Kent at his death.

The Master will make publication for all creditors of said William Kent to come forward, and have themselves made parties, and prove their claims.

The administrator thus appointed becomes a party to the suit, and is bound by any order or decree in the cause.<sup>10</sup> He is under the same responsibilities as a receiver in Chancery, and must make reports to the Court in the same manner. He may be removed from office for neglect or improper conduct, as a receiver may be, and when he is removed, or dies, or resigns, the Court may appoint a successor.<sup>11</sup>

An administrator thus appointed is not in any way limited in his powers or jurisdiction, but has all the authority of a general administrator appointed by

<sup>8</sup> If the order is made in vacation, it will be as follows:

#### CHAMBERS ORDER APPOINTING AN ADMINISTRATOR.

In this cause it is ordered by me that Charles Smith be appointed administrator of the estate of William Kent, deceased. Before he enters upon the duties of his trust, however, he will be duly sworn by the Clerk and Master. The administrator will give bond with surety in the penalty of two thousand dollars, payable to the State, conditioned as required by law in such cases. After the giving of said bond, the said administrator will take into his possession and sell all the perishable property belonging to the

estate, except such as is exempt from execution; and the defendants are hereby commanded and enjoined to deliver to him all money, choses in action, and other personalty, not exempt from execution, in their possession or under their control, belonging to said William Kent at his death. The Master will notify the defendants of this order.  
February 10th, 1890.

ALBERT G. HAWKINS, Chancellor.

See, Code, §§ 2213-2215.

<sup>9</sup> Code, § 2214.

<sup>10</sup> Code, § 2216.

<sup>11</sup> Code, § 2218.

the County Court,<sup>12</sup> and must discharge all the duties of a general administrator, except that his settlements are made with the Clerk and Master.

The administration is conducted under the authority of the Court, in the same manner, and under the same rules, as the administration of an insolvent estate in Chancery; and creditors must have themselves made parties, and prove their claims; reports of assets and liabilities are made; the real estate is sold, when necessary; and the assets distributed in the manner hereafter shown in treating of the administration of insolvent estates.<sup>13</sup>

ARTICLE II.

SUITS TO SELL A DECEDENT'S LANDS TO PAY HIS DEBTS.

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| <p>§ 988. When and How a Decedent's Lands May be Subjected to His Debts.</p> <p>§ 989. Form of an Administrator's Bill to Sell Lands.</p> <p>§ 990. Frame and Form of a Creditor's Bill to Sell a Decedent's Land to Pay His Debts.</p> <p>§ 991. Defences to the Bill by Heirs and Others.</p> | <p>§ 992. Petitions by Creditors and Claimants to Become Parties.</p> <p>§ 993. Reference to the Master to Ascertain the Facts.</p> <p>§ 994. The Master's Report of Assets and Liabilities.</p> <p>§ 995. Decree of Sale.</p> <p>§ 996. Proceedings Subsequent to the Sale.</p> |
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§ 988. When and How a Decedent's Lands May be Subjected to His Debts.

When an executor not authorized by will to sell and convey real estate, or an administrator, has exhausted the personal estate of the deceased in the payment of his debts, leaving just debts or demands against him unpaid, or paid by the representative out of his own means, and the deceased died seized and possessed of real estate, such executor or administrator may file a bill in the Chancery Court,<sup>1</sup> to have such land, or enough thereof, sold to satisfy such debts or demands.<sup>2</sup>

The bill must be filed in the county where the land or some portion of it lies,<sup>3</sup> and it must allege, as jurisdictional facts: 1, The death of the owner of the realty sought to be sold; 2, The appointment of complainant as his executor, or administrator; 3, The exhaustion of the decedent's personalty in the payment of his *bona fide* debts; 4, The existence of debts or demands against him remaining unpaid, or paid by the representative out of his own means; and 5, That the deceased died seized and possessed of real estate, some portion of which lies in the county where the bill is filed.<sup>4</sup>

The bill should specify particularly the names of the creditors, and the amounts of the debts, or the demands of each, for the satisfaction of which the land is sought to be sold; and should also describe the various tracts of land by metes and bounds, or other description sufficient to identify them,<sup>5</sup> and should pray for the sale of such real estate, or such portions thereof, as may prove least injurious to the heirs and legal representatives, and be sufficient to satisfy the debts or demands set forth in the bill, and shown to exist.<sup>6</sup>

The heirs, devisees, legatees, widow, and all persons having any legal or equitable interest in the land, must be made parties defendant: and if the title

<sup>12</sup> Todd v. Wright, 12 Heisk., 447; Shown v. McMackin, 9 Lea, 604.

<sup>13</sup> Code, § 2219. See, *post*, § 997, for proceedings in the administration of an insolvent estate.

<sup>1</sup> The Chancery Court has inherent jurisdiction to wind up the estates of decedents and sell their lands to pay their debts. Allen v. Shanks, 6 Pick., 359.

<sup>2</sup> Code, § 2267. The jurisdiction of the Court in such a case is not limited to one thousand dollars. Bashaw v. Temple, 7 Cates, 596.

<sup>3</sup> Code, §§ 2267; 2270.

<sup>4</sup> Griffith v. Philips, 9 Lea, 417.

<sup>5</sup> See, *ante*, § 172.

<sup>6</sup> Code, § 2267. All debts can be paid that are shown to exist in the course of the investigation

originated by the bill, whether set forth in the bill, or not. Dalas v. Read, 6 Yerg., 53; Kendall v. Titus, 9 Heisk., 727. No sale can take place until there has been an account and a report confirmed, showing a deficiency of personal assets, and the consequent necessity of a sale of realty. Frazier v. Pankey, 1 Swan, 75; Jones v. Douglass, 1 Tenn. Ch., 359. It is not enough that the necessity for a sale appear probable; it must actually appear, and be so adjudicated, and adjudicated upon the facts, those facts to be ordinarily ascertained by a Master's report, showing the due exhaustion of the personalty, and *bona fide* debts outstanding. Wade v. Fisher, 10 Heisk., 490; Kendall v. Titus, 9 Heisk., 727.

of the deceased is equitable, the holder of the legal title must also be made a party. All persons known to have claims against the estate should be made parties, and called on to prove their claims before the Master when the account prayed for is taken.

§ 989. **Form of an Administrator's Bill to Sell Land.**—The frame and ordinary allegations of an administrator's bill to sell land to pay the decedent's debts are substantially given in the preceding section. If there be any liens or other encumbrances on the land, the owners thereof must be made parties; and if the decedent held the equitable title only, the holder of the legal title must be made a party. The following will serve as a

**GENERAL FORM OF A BILL TO SELL LAND TO PAY A DECEDENT'S DEBTS.**

[Address and commencement of bill as in §§ 155-156, ante.]

The complainant respectfully shows to the Court:

I.

That in the month of [giving month and year] A B [the intestate] departed this life, intestate, at his residence in [give name] county, leaving the said [naming the defendants who are] his only children and heirs at law, whose places of residence are respectively as stated in the caption of the bill. Complainant is the administrator of said estate, duly appointed by the County Court of said county at its [stating month and year of] term; and then and there duly qualified as such. [The said defendant, O P, is a minor without a general guardian.]

II.

The whole of the available personal assets of said estate, for the payment of debts, amounted to about the sum of one thousand dollars, and complainant has applied them all to the payment of the debts and liabilities of said estate, leaving *bona fide* debts, as he believes, outstanding and unpaid to the amount of about one thousand dollars, to-wit: 1. A judgment in the Circuit Court of said county, rendered on [giving date,] in favor of the defendant, C D, for one hundred dollars and costs of suit, now amounting to one hundred and twenty-three dollars in all. 2. A note, executed to G H, and by him endorsed to the defendant C D, due one year after date, for three hundred dollars, dated January 1st, 1889, and drawing interest from date; and 3. An account claimed by E F, for about five hundred dollars, for services as attorney-at-law in said suit of C D against said intestate. There may be other claims against said estate, which have not yet been presented.

III.

The said A B [the intestate] died seized and possessed of one hundred and sixty acres of land, more or less, lying in the 8th civil district of [give name of] county, and bounded as follows: [Here describe it by metes and bounds.] This land is the only asset now left for the payment of said outstanding debts. [If there be any homestead or dower rights attaching to this land, so state, and state whether they have been assigned.]

IV.

The premises considered, complainant prays:

1st. That process issue against the resident defendants aforesaid, and that publication be made as to said non-resident defendants, to cause said defendants to appear; and that they be required to answer this bill fully and particularly, but their oaths to their answers are waived. [That a guardian *ad litem* be appointed to answer for said minor, O. P.]

2d. That an account of the assets and liabilities of said estate be taken, to the end that it may appear whether the personal estate of said intestate has been duly exhausted, and whether a sale of said land is necessary.

3d. That said land, or so much thereof as may be necessary, be sold to pay said outstanding liabilities of said estate; and also any *bona fide* debts and charges against said estate which may be found to exist in favor of any other creditors not named herein who may choose to come forward and become parties to this proceeding, and establish their claims to the satisfaction of the Court, before the proceeds of said sale are paid out.

4th. That he may have all such further and other relief, as the nature of his case may require.

JESSE L. ROGERS, Solicitor.

[The bill need not be sworn to unless it falls within some of the exceptions stated in § 161, ante.]

Inasmuch as bills of this character are often filed, the following more special and complicated form of a bill is given, as a further guide to draftsmen:

**BILL TO SELL THE LAND OF A DECEDENT.**

To the Hon. John P. Smith, Chancellor, holding the Chancery Court at Dandridge:  
John Wilson, administrator of James Wilson, deceased, a resident of Jefferson county, complainant,

vs.

Henry Wilson, Henry Jones, Charles Stiles, George Brown and his wife, Susan Brown, Sarah Wilson, senior, and Samuel Wilson, a minor without general guardian, all residents of Jefferson county, and Sarah Wilson, Junior, a non-resident of the State, defendants.

The complainant respectfully shows to the Court:

I.

That James Wilson died intestate in Jefferson county, where he resided, on June 1, 1888 leaving as his only heirs at law the complainant and the defendants, Henry Wilson, Susar Brown, formerly Wilson, Samuel Wilson, a minor without regular guardian, and Sarah Wilson, junior. He, also, left a widow, the defendant, Sarah Wilson, senior. George Brown is made a party in the right of his wife only. Complainant was on June 15, 1888, appointed and duly qualified as the administrator of the estate of said James Wilson, deceased; and has been acting as such ever since.

II.

The personal estate of said decedent, available for the payment of his debts, amounted to seven hundred and twenty dollars, all of which has been exhausted in discharging the indebtedness of said decedent; and settlement therefor has been made with the County Court Clerk of Jefferson county, and such settlement duly approved.

III.

There remains outstanding and unpaid the following demands against the estate of said decedent:<sup>7</sup>

1. One note for sixty dollars, and accrued interest, executed to Henry Jones, Sept. 1, 1886 and due in one day thereafter; and now alleged to be the property of said Henry Jones.

2. One judgment in favor of Charles Stiles, for four hundred dollars, rendered Oct. 10, 1885, by James Johnson, a J. P. for Jefferson county, credited Jan. 15, 1886, with two hundred dollars.

3. Three hundred and ten dollars, which Henry Brown claims to be due him for money alleged to have been paid July 15, 1886, by said Brown as stayor of said decedent, on a judgment rendered against the latter, by John Wright, a J. P. of Jefferson county, Sept. 4, 1885.

4. The defendant, Henry Wilson, has presented a sworn account for two hundred dollars against said estate for nursing and caring for the decedent in his last illness.

Two years and six months not having elapsed since complainant was appointed administrator, there may be other claims against said estate not yet presented.

Complainant knows of no evidence or facts whereby he can controvert the justice of said demands, and he calls upon the widow, heirs, and distributees, of the said James Wilson, to contest the same, if they so desire.<sup>8</sup>

IV.

Said decedent at his death was the owner in fee of the following tracts of land: and three town lots in Jefferson county: Tract No. 1 being his homestead, where he died, containing four hundred acres, beginning at a black walnut on the bank of French Broad river, [and so on, giving the metes and bounds exactly as they appear in his deed.] Tract No. 2 containing one hundred and forty acres beginning [&c., giving metes and bounds as in the deed.] The three town lots are on Main street in Dandridge, and are known in the plan of said town as lots No. 24, No. 25 and No. 26, all adjoining, each fronting on said Main street, and running back two hundred feet to a ten-foot alley, the said lot No. 24 beginning at a stake, the junction of Main and Blount streets [&c., describing each lot according to the deeds, or otherwise, so as to fully specify the bounds of each.]

V.

Neither homestead nor dower have been assigned to said widow, but she and her said minor son, Samuel, are occupying the Home Farm, worth about two thousand dollars, as a homestead. All of the lots and tracts hereinabove described are liable for said decedent's debts, subject to the homestead rights of said widow and minor, and subject to the widow's right of dower. Complainant believes and so charges that the said three town lots will bring enough to pay all of the outstanding indebtedness of his intestate; and that it would be to the interest of the heirs to sell said three lots rather than sell either of said two farms, either of which is worth at least two thousand dollars.

VI.

Complainant, therefore, prays:

1st. That subpoena issue against the resident defendants, and that publication be made as to the defendant, Sarah Wilson, who is a non-resident of the State.

2d. That a guardian *ad litem* be appointed for the minor defendant, Samuel Wilson, he having no regular guardian.

3d. That all the defendants be required to answer the bill fully and on oath, except the defendants, Henry Wilson, Henry Jones, and Charles Stiles, whose oaths to their answers are waived.

4th. That an account be taken of the assets and liabilities of said estate, and of what *bona fide* debts of said estate are outstanding and unpaid, including those hereinbefore set out, and such others as may be duly presented by petition in this cause, and duly proved.

<sup>7</sup> Both the bill and the report of the Master should show (1) the amount of the personal assets, (2) the *bona fide* debts outstanding, (3) the names of the creditors, and (4) the amount due each; and the sale should be made to pay these specific debts. Young v. Young, 12 Lea, 335. Where there are minors, their guardian *ad litem* should demur to the bill, if it fails to set out the specific debts for the

payment of which the land is sought to be sold, or fails to set out any other jurisdictional fact. Many doubtful claims are frequently allowed, which, if they had been set out in the bill, and thus had attention drawn to them, could have been successfully resisted. Administrators should be held to the strict law when they seek to sell the realty.

<sup>8</sup> The heirs have the right to contest the justness

5th. That the defendants, Henry Wilson, Henry Jones, and Charles Stiles, be required to prove their claims before the Master at the taking of said account.

6th. That a sale be made of such part of said real estate as may be sufficient to pay all of the outstanding indebtedness of said estate, including costs, counsel fees, and compensation to complainant for his services as administrator; and, if necessary, that the homestead of said widow and minor, and the dower of the widow, be laid off, to the end that the remainder interest of the heirs in the land so assigned may be sold.

7th. That complainant have such further and other relief as he may be entitled to under the pleadings and proof in the cause, and as may be necessary to enable him properly and effectually to discharge his trust.<sup>9</sup>

ALLEN G. MATHEWS, Solicitor.

**§ 990. Frame and Form of a Creditor's Bill to Sell a Decedent's Lands to Pay His Debts.**—A *bona fide* creditor may, likewise, file the bill, in which event the suit should be for the benefit of all other *bona fide* creditors of the estate; and the personal representative, the widow, heirs, legatees, devisees, and other persons interested in the land, or in the proceeds thereof, should be made defendants. Other creditors must come forward by petition, which the administrator or other party interested may answer. The justness of all claims filed may be contested before the Master. The proceedings upon a bill by a creditor are the same as on a bill by the personal representative.

The following would be the form of the caption and commencement of the bill when filed by a creditor:

**CAPTION AND COMMENCEMENT OF A CREDITOR'S BILL.**

Charles Stiles, a resident of Jefferson county, who sues in behalf of himself and all other creditors of the estate of James Wilson, deceased, complainant,

*vs.*

John Wilson, administrator of said James Wilson's estate, Henry Wilson, Henry Jones, George Brown and wife, Susan Brown, Sarah Wilson, senior, and Samuel Wilson, a minor without general guardian, all residents of Jefferson county, and Sarah Wilson, junior, a non-resident of the State; defendants.

The complainant, who sues in behalf of himself and all other creditors of the estate of James Wilson, deceased, respectfully shows to the Court:

That [*A creditor's bill contains the same allegations as an administrator's bill, and must show the same facts, except (1) that it must allege that complainant is a bona fide creditor of said estate, and state the origin or character of the indebtedness, and (2) it may state why the complainant did not wait for the administrator to file the bill: this latter statement is not essential, but if a good reason be given, such as an unreasonable delay on the part of the administrator, it gives the bill a better savar.*]

**§ 991. Defences to the Bill by Heirs and Others.**—Inasmuch as the personal estate is the primary fund for the satisfaction of a decedent's debts, the persons to whom his lands descend, or have been bequeathed, and all other persons interested in the lands, or the proceeds thereof, have a right to require that all creditors be satisfied out of the personal estate, and that the lands or their proceeds be not subjected to the payment of the decedent's debts until the personal estate has been exhausted in due course of administration. When, therefore, a bill is filed, whether by the personal representative or by a creditor, to sell a decedent's lands to pay his debts, the heirs, widow, devisees, and the other persons interested in the land, or in its proceeds, have the right to show: 1, That the alleged debts, for which the land is sought to be sold, are illegal, or unjust, or have been paid, or are within the statute of frauds, or are barred by the statutes of limitation, or are otherwise not recoverable; or 2, That if recoverable, nevertheless the land should not be held liable for their satisfaction, for the reason that personal assets sufficient to pay the same came, or by due diligence should have come, into the hands of the personal representative; or 3, That the personal assets have been wasted, that false claims have been paid, and that the estate has been so otherwise misadministered that the administrator is liable on his official bond for enough to satisfy the debts sought to be made a charge on the decedent's land; or 4, That seven years have elapsed since the death of the decedent.

of all debts set forth in the bill, and of all brought forward during the progress of the cause.

<sup>9</sup> The bill need not be sworn to, except for the purposes stated in § 161, *ante*.

An administrator *de bonis non* cannot maintain a bill to sell the decedent's land to pay debts until there has been a settlement with the previous administrator, showing that the personal assets have been legally administered.<sup>10</sup>

The following general form of an answer will serve as a guide in case the heirs deem it necessary to contest the sale of the land described in the bill:

**GENERAL FORM OF AN ANSWER TO A BILL TO SELL LAND.**

[For title and commencement, see § 380, ante.]

These defendants, jointly and severally answering the bill filed against them in this cause, say:

I.

They admit the death and intestacy of A B [*the intestate*], deceased, and the appointment and qualification of complainant as administrator of the estate of said intestate, as stated in the bill; and that the legal heirs of the said decedent are as stated in the bill. They, also, admit the descent to them of the real estate described in the bill. [*Here set up any claim or facts relative to homestead or dower, if any.*]

II.

Further answering, they say that the complainant may have paid off some debts that were owing by said intestate, but respondents do not know to whom, or to what amount. Neither do they know whether or not any or all of the claims mentioned in the bill are just, nor whether there are any *bona fide* debts against the estate, yet outstanding and unpaid; and they require strict proof upon these points. [*Here set up any defences known to any of the debts or claims set out in the bill. Rely on the statute of limitations as to said debts, if available, and plead the seven-year statute as against all claimants, if available.*]

III.

Respondents have no personal knowledge as to whether or not complainant has exhausted the personal estate in the payment of debts, but according to their information and belief, he has not done so, but has, or should by due diligence have had, about one thousand dollars in his hands as such administrator, which has not been applied to the payment of debts; or otherwise duly accounted for; and according to the best of their information and belief, it will not be necessary to sell said real estate to pay debts, if said personal estate is duly collected and properly applied. [*If the administrator has made no settlement with the County Court, so allege. If you can show any assets he has not collected, or has not accounted for, specify them.*]

IV.

And now, having fully answered, these respondents pray to be hence dismissed with their reasonable costs.

BEATY CECL, Solicitor.

[*The answer must be sworn to, unless the oath thereto is waived in the bill. § 380, ante.*]

**§ 992. Petitions by Creditors and Claimants to Become Parties.**—Any creditor, not made a party to the bill, who desires his debt paid out of the proceeds of land, must come forward by petition, and prove his claim before the Master. And any person claiming the land, or any interest therein, not made a party to the bill, may assert his rights by petition,<sup>11</sup> or he may file an original bill and enjoin the sale. Form of such petitions, and proceedings thereunder, have been heretofore given.<sup>12</sup>

**§ 993. Reference to the Master to Ascertain the Facts.**—No decree of sale can be made, until the truth of the jurisdictional facts stated in a preceding section, has been satisfactorily shown to the Court; and no debts can be paid out of the proceeds of the sale except those shown to exist during the progress of the cause. If there be any creditor whose debt has not been set forth in the bill, he must have himself made a party by petition, showing therein the nature and amount of the debt, and why it was not presented to the personal representative.

To ascertain whether a sale should be made, the Court will make a reference<sup>13</sup> to the Master to take and state an account with the administrator, to ascertain whether there be a deficiency of personal assets, and, also, to report what *bona fide* debts are owing to creditors, or to the personal representative. A return of *nulla bona* on an execution against the administrator is not sufficient to authorize a decree to sell a decedent's lands to pay his debts. There must be

<sup>10</sup> Woodfin v. Anderson, 2 Tenn. Ch., 331; Jones v. Douglass, 1 Tenn. Ch., 357.

<sup>11</sup> See, ante, §§ 795; 797, and post, § 1003, where forms of petitions are given.

<sup>12</sup> *Ibid.*

<sup>13</sup> This reference will be made whether the bill be filed by the personal representative, or by a creditor. No sale can be ordered until a deficiency of personal assets has been adjudged. Frazier v. Pankey, 1 Swan, 75; Jones v. Douglas, 1 Tenn. Ch., 359.

an investigation of the administrator's accounts, and a report thereon by the Master. In taking the account, it should be shown: 1, What personal assets the administrator received, or might by due diligence have received;<sup>14</sup> 2, What *bona fide* debts and charges he has paid; 3, What *bona fide* debts and charges are outstanding against the estate, and to whom owing; 4, Whether the personal estate has been duly exhausted in the payment of *bona fide* debts and charges; and 5, What real estate the decedent died seized and possessed of, and what part thereof should be sold to pay the outstanding indebtedness. The following is a form of

**REFERENCE TO THE MASTER.**

John Wilson, admr., &c., }  
*vs.* } No. 543.  
 Henry Wilson, *et al.* }

In this cause, on motion of complainant's solicitor, the Master is directed to hear proof and report to the present or next term of the Court:

1. What personal assets of the estate of James Wilson, deceased, came or ought by due diligence to have come, to the hands of the complainant as administrator of said estate, showing in the report the total gross amount, and specifying the amount from each principal source.
2. What *bona fide* debts and charges against said estate have been paid by the administrator, specifying the principal expenditures, and giving the total amount.
3. Whether the personal assets of said estate have been duly exhausted in the payment of *bona fide* debts and charges.
4. Whether any *bona fide* debts and charges against said estate remain outstanding and unpaid; and if so, the amount and nature thereof, and to whom owing.
5. What real estate the said James Wilson died seized and possessed of, and what is its reasonable minimum value.
6. Whether it will be necessary to sell any or all of said real estate, to pay said outstanding debts or charges; and if not necessary to sell all, the sale of what part will prove least injurious to the heirs and legal representatives.
7. [On allegation or suggestion that said real estate is encumbered, add the following:] Whether any of said real estate is encumbered, if so, the nature and amount of the encumbrance, and the owner thereof.

The Master will report on no claim not specified in the pleadings, or in a petition duly filed, unless the parties waive a petition.<sup>15</sup> If any petitions be filed, he will notify the administrator and the Solicitor of the defendants thereof. Petitions and claims may be filed any time prior to the closing of the account.

**§ 994. The Master's Report of Assets and Liabilities.**—The Master will

proceed in the usual manner, in making his report.<sup>16</sup> No claim will be reported on not set forth in the pleadings, or duly brought forward by petition, unless the parties in interest allow claims to be filed before the Master without petition. The following will serve as a form of

**THE MASTER'S REPORT.**

John Wilson, admr., &c., }  
*vs.* } No. 543.  
 Henry Wilson, *et al.* }

In obedience to the order of reference made in this cause at the last [or present] term of the Court in relation to the necessity of selling the land of complainant's intestate to pay debts, the Master respectfully reports as follows:

I.  
 The personal assets of the estate of James Wilson, deceased, which came, or ought by due diligence to have come, to the hands of the complainant, as the administrator of said estate, are as follows:

1. Cash on hand at decedent's death, ( <i>Dep. of John Wilson, page 5, q. 12.</i> )	\$216.40
2. Amount of the administrator's sale of personal property, ( <i>Ex. A to dep. of John Wilson.</i> )	840.00
3. Cash collected, (principal and interest,) from John Smith, upon a note executed by him to the decedent, ( <i>Dep. of John Smith, page 2, q. 3.</i> )	618.00
Total amount of personal assets,	\$1,674.40

<sup>14</sup> The administrator is responsible for all the personal assets, wheresoever found within the limits of the State. *Gilchrist v. Cannon*, 1 Cold., 581.

<sup>15</sup> If a creditor is not a party to the bill, he must make himself a party by a petition setting forth the nature and the amount of his claim. *Reid v. Huff*, 9 Hum., 345. But if all parties acquiesce, claims

may be filed without petitions, in which case those filing claims have all the rights of parties. *Ewing v. Maury*, 3 Lea, 389; *Caruthers v. Caruthers*, 2 Lea, 264. The Master should notify the administrator and the Solicitor of the heirs, of the filing of all claims and petitions. *Reid v. Huff*, 9 Hum., 345.  
<sup>16</sup> See, *ante*, §§ 603-610.

II.

The administrator has paid the following *bona fide* debts and charges against said estate:

1. Funeral expenses of said decedent,	\$ 63.00
2. Judgment and costs in favor of John Johnston against the decedent, ( <i>Dep. of John Wilson, p. 7, q. 16; and copy of judgment.</i> )	1,604.10
3. Charges and fees paid County Clerk, ( <i>Ex. B to dep. of John Wilson.</i> )	8.60
	_____

Total amount of debts and charges paid, \$1,675.70

III.

The personal assets of said estate have been duly exhausted in the payment of the *bona fide* debts and charges above named.

IV.

The following *bona fide* debts and charges against said estate remain outstanding and unpaid:

1. Judgment in favor of Charles Stiles, interests and costs, ( <i>Ex. C to dep. of John Wilson.</i> )	\$418.20
2. Note by the decedent to Henry Jones, due Jan. 1, 1890, including interest,	63.11
3. Amount expended in making sale of personal estate, ( <i>Ex. D to dep. of John Wilson.</i> )	12.45
4. Fee due Pickle & Turner, for services as attorneys in the suit of Charles Stiles vs. complainant, ( <i>Dep. of W. R. Turner, p. 2, q. 3.</i> )	50.00
5. Amount due the administrator for excess of disbursements over receipts,	1.30
6. Amount due complainant for services as administrator, not yet fixed,	
Total outstanding liabilities, not including amount due complainant as administrator,	\$545.06

V.

The only real estate of which James Wilson died seized are the two tracts of land and the three town lots described in the bill.<sup>17</sup> [*Exhibits E, F, G, H, and I, to dep. of John Wilson.*] Each of the two tracts is well worth \$2,000; one of the town lots is worth \$500, and the two others are worth each \$200. It is to the interest of the heirs to sell the three town lots. [*Dep. of Geo. Brown, p. 4, q. 10.*]

VI.

It will be necessary to sell two, if not all three, of said town lots to pay said outstanding debts and liabilities, the amount due the administrator, and the costs of this proceeding. All of which is respectfully submitted, this June 12, 1890.

DAN. H. MEEK, C. & M.

The Master must be sufficiently specific in his report to enable any party in interest to except to any item thereof; and the proceedings upon exceptions filed are the same as in ordinary cases.<sup>18</sup>

§ 995. **Decree of Sale.**—On the confirmation of the Master's report showing the existence of specific debts, the exhaustion or insufficiency of the personalty, and the necessity of a sale of a sufficiency of the real estate to pay the decedent's debts, the Court decrees a sale accordingly.<sup>19</sup> If homestead and dower rights exist, they must be determined and set apart, before the sale is made, so that there may be no conflict between the rights of the purchaser and those of the widow and minor heirs.

**DECREE OF SALE.**

John Wilson, admr., &c., }  
vs. } No. 543.  
Henry Wilson, et al. }

This cause came on to be further heard before Chancellor John P. Smith, on this 14th day of June, 1890, on the pleadings and proof in the cause, and especially on the report of the Master to the present term of the Court, which report is as follows:

[Here copy it.]

And said report being unexcepted to is in all things confirmed.

I.

And it appearing to the Court from the said report that the personal assets of the estate of James Wilson, deceased, have been duly exhausted by the administrator in the payment of *bona fide* debts and charges against said estate, leaving *bona fide* debts and charges against the same still outstanding and unpaid to the amount of five hundred and forty-five

<sup>17</sup> If the lands are not described in the bill, or in exhibits thereto, the Master should describe them in his report sufficiently to fully identify them. They should be described by metes and bounds in the decree of sale. See, *ante*, § 172.

<sup>18</sup> See, *ante*, § 615-617.

<sup>19</sup> It is error to decree a sale before adjudicating debts against the estate. *Miller v. Taylor*, 2 Shan. Cas., 461. The inheritance fathers have left their children should be dealt with reverently by the Courts, and saved from sacrilege. See, *post*, § 1141, sub-sec. 6.



dollars and six cents, not including the amount due the administrator for his services as such, and the cost of this proceeding;

## II.

And it further appearing from said report that said James Wilson died seized of two certain tracts of land and three town lots, fully described in the bill, and in the deeds exhibited to the said report; that it would be least injurious to the heirs to have said town lots sold rather than either of the farms, and that it will be necessary to sell all three of said lots to pay said outstanding liabilities; said lots being described as follows: [*Here describe them according to the title papers, so as fully to identify them.*]

## III.

It is, therefore, decreed by the Court that the Master, after advertising according to law,<sup>20</sup> proceed to sell said three town lots at public sale, at the Court House door in Dandridge, to the highest and best bidder, on a credit of six and twelve months [except the sum of one hundred dollars, which he will require to be paid in hand,<sup>21</sup>] taking notes drawing interest from date, with approved security, for each installment of the purchase-money, and retaining a lien on the land for further security. The Master will report his action in the premises to next term of the Court, until which time all further questions are reserved.

§ 996. **Proceedings Subsequent to the Sale.**—The proceedings preliminary to, during, and subsequent to, the sale, are the same as in ordinary cases;<sup>22</sup> and the decree confirming the sale, and divesting and vesting title, is in the usual form. The Master should pay out the proceeds of the sale, not the administrator.

## DECREE CONFIRMING SALE.

John Wilson, admr., &c.,  
vs.  
Henry Wilson, et al. } No. 543.

This cause came on to be heard before Chancellor John P. Smith, on this 12th day of December, 1890, on the pleadings and proof, and especially on the Master's report of sale to the present term, which report is in the words and figures following:

[*Here copy the report in full.*]

## I.

And said report, being unexcepted to, is by the Court, in all things confirmed. It is, therefore, decreed that all the right, title, and interest, of all the parties to this suit, complainant and defendant, and especially of such as are the heirs at law of James Wilson, dec'd, in and to said three lots of land, be divested out of them and vested in said purchaser, Charles Stiles, subject to the lien aforesaid for the unpaid purchase-money. On paying the legal fees therefor, the said purchaser may have a copy of this decree for registration as a muniment of title to said land; or, if he so prefer, the Master will make him a deed conveying to him said three lots as an indefeasible inheritance in fee simple forever.

On demand of the purchaser, a writ of possession will issue to put him into the possession of said three lots.

## II.

Out of the proceeds of said sale<sup>23</sup> as paid in, the Master will retain enough to pay all the costs of this cause, and then will pay *pari passu*:

1. The amount due on the judgment in favor of Charles Stiles.
2. The amount due on the note of Henry Jones.
3. The fee of fifty dollars due Pickle & Turner.
4. The sum of one hundred dollars to complainant, in full of all services rendered, and all expenses incurred, and all sums paid out of his own means.
5. The sum of fifty dollars to Allen G. Mathews, Esq., for his services as Solicitor of complainant in this cause.
6. The sum of ten dollars to George James, the guardian *ad litem* of Samuel Wilson. This sum will be charged to said Samuel by the Master in paying out the residue in his hands to the distributees.
7. Whatever balance may remain in the hands of the Master after making the above payments, and paying the costs of the cause, he will pay out to the heirs of James Wilson, deceased, share and share alike. The amounts due any of the parties who are *sui juris* may be paid to their Solicitors of record in this cause.

<sup>20</sup> Inasmuch as the statute provides how lands shall be sold under a decree, it is not necessary to encumber the minutes, and consume the time of the Court, by reciting these statutory provisions. Code, §§ 2145a-2155. If, however, special directions to the Master are given, such as directions to advertise by posters, or hand-bills, or in special newspapers, or directions to sell on the premises, or directions to subdivide the land and sell in lots, such directions will be inserted here.

<sup>21</sup> As a rule no cash payment should be required, for reasons heretofore given; but if unpaid taxes, or other pressing liens, exist, it may be necessary to require a cash payment sufficient for their discharge. See, *ante*, § 623, note 11.

<sup>22</sup> *Ante*, §§ 621-627.

<sup>23</sup> The proceeds of the sale should be paid out by the Master, under the orders of the Court, and not by the administrator. The administrator's bond does not cover the proceeds of realty sold to pay debts. *Gambill v. Campbell*, 12 Heisk., 739.

## ARTICLE III.

## SUITS TO ADMINISTER INSOLVENT ESTATES.

- § 997. Jurisdictional Facts.  
 998. Frame of Bill.  
 999. Form of Bill.  
 1000. Proceedings on Bill, at Chambers.  
 1001. Proceedings to Bring Parties in Interest Before the Court.

- § 1002. Order Sustaining Bill, and Transferring the Settlement.  
 § 1003. Petitions by Creditors, and Claimants.  
 § 1004. Taking the Account, and Final Distribution.

§ 997. **Jurisdictional Facts.**—The administration of the estates of decedents is ordinarily within the exclusive jurisdiction of the County Court; but where the assets of an estate, real and personal, amount to, or exceed, one thousand dollars in value,<sup>2</sup> are insufficient to pay the debts of the estate, according to the complainant's information and belief, and the estate has been reported insolvent to the County Court, or to its Clerk, the personal representative, or any creditor, may file a bill in the Chancery Court and have the administration of such estate transferred from the County to the Chancery Court.<sup>3</sup>

The executor or administrator may, as the representative of the creditors of an insolvent estate, file a bill to set aside a fraudulent conveyance of property; and when such conveyance is set aside, the assets recovered must be distributed *pro rata* among the creditors.<sup>4</sup> Any creditor may, also, file such a bill. But the suit cannot be maintained unless: (1) the estate be insolvent, (2) and such insolvency duly suggested, and (3) the conveyance shown to be fraudulent.

Inasmuch as the assets of an insolvent estate are distributed ratably among all the general creditors, and as the suit, whether instituted by a personal representative or by a creditor, is for the common benefit of all entitled to share in the assets, the statute provides that the suit shall be conducted on equitable principles, and after the manner of a general creditor's bill.<sup>5</sup>

§ 998. **Frame of Bill.**—The bill must be filed in the county where the will was proved, or the letters of administration granted, or where the personal representative resides, or is served with process;<sup>6</sup> and may be filed at any time after the estate is reported insolvent to the County Court, or its Clerk, or Deputy Clerk.<sup>7</sup> The bill should set forth:<sup>8</sup>

1. That the assets of the estate, real and personal, amount to as much as one thousand dollars, in value.<sup>9</sup>
2. That the assets are insufficient to pay the decedent's debt, and the costs of administration, according to the complainant's information and belief.<sup>10</sup>
3. All the debts the complainant knows, or believes, are owing by the de-

<sup>2</sup> Code, § 2362, amended by Acts of 1871, ch. 106; M. & V.'s Code, § 3207. But, where there have been no suggestion and advertisement of the insolvency of an estate in the County Court, the Chancery Court has jurisdiction to sell a decedent's land to pay his debts, even when his estate is less than one thousand dollars in value. *Bashaw v. Temple*, 7 Cates, 596.

<sup>3</sup> Code, §§ 2364; 2381. The Chancery Court, in administering an insolvent estate, has, in addition to its own powers, all the powers of the County Court in such a case. Code, § 2382.

<sup>4</sup> Code, § 2395. When the personal representative files the bill, it must (1) be on behalf of creditors, (2) it must allege that the estate is insolvent, and that the insolvency has been suggested, (3) that there are *bona fide* debts against the estate, (4) that there were *bona fide* debts when the alleged fraudulent deed was made, and (5) that the sale of the land so fraudulently conveyed is necessary to pay the decedent's debts. *Boxley v. McKay*, 4 Sneed, 286; *Pitts, admr., v. Poole*, 7 Pick., 70.

<sup>5</sup> Code, § 2363. The pleadings and practice in a general creditors' bill are given, *post*, §§ 1030-1035.

<sup>6</sup> Code, § 2362.

<sup>7</sup> Code, §§ 2328; 2366; *Wade v. Fisher*, 10 Heisk., 495; *Boxley v. McKay*, 4 Sneed, 286.

<sup>8</sup> Code, § 2364.

<sup>9</sup> It is not necessary that the insolvency of an estate should be certain; the probability of insolvency is sufficient. Often by virtue of the prudent management of the Chancery Court an estate is saved from insolvency. The Code, §§ 2379; 2388; 2389; 2392, clearly shows that the law contemplates a probability of insolvency and a possibility of solvency. Indeed, the suggestion of insolvency is often a mere precaution of prudence on the part of an administrator.

<sup>10</sup> If this allegation is omitted, the bill may be dismissed on motion, if made at the first term after the filing of the bill, but the omission may be supplied by a sworn amendment to the bill. Code, § 2365.

ceased, giving names of creditors and the amount of each debt, where possible; also, all disputed claims against the estate, the amount of each, and the names of the claimants.

4. That the estate is insolvent, and its insolvency has been duly reported to the County Court, or its Clerk, or Deputy Clerk, as the case may be.<sup>11</sup>

If the personal representative file the bill, he may do it in his own behalf, as well as in behalf of the widow, heirs, and legatees, or distributees, of the estate against all such of the creditors and claimants as are named therein and sought to be enjoined, and all others interested and not named as complainants;<sup>12</sup> but the better practice is to join the widow, heirs, and legatees or distributees, as defendants.<sup>13</sup> If a creditor file the bill, he must file it in behalf of himself and all other creditors and persons interested in the estate, and who may wish to come in under the decree; and must file it against the personal representative, and such other persons as are sought to be enjoined;<sup>14</sup> the widow, heirs, devisees, distributees, and legatees, should also be made defendants, especially when the deceased died seized of real estate.<sup>15</sup>

All persons who are suing or threatening to sue the administrator, either at law or in Equity, should be made defendants, and if any suits, or threatened suits, are vexatious or liable to be costly or oppressive, the facts should be fully set forth in the bill, and an injunction should be prayed against the commencement or prosecution of all suits against the estate.<sup>16</sup>

§ 999. **Form of Bill.**—The form of the bill is substantially the same, whether filed by an administrator or executor, or by a creditor.<sup>17</sup> The following form will serve as a precedent:

**BILL TO WIND UP AN INSOLVENT ESTATE.**

To the Hon. Andrew Allison, Chancellor, holding the Chancery Court, at Nashville:  
John Smith, a resident of Davidson county, and administrator of William Smith, deceased, complainant,

*vs.*  
Nancy Smith, the widow, and Sarah Smith and Thomas Smith, the heirs of said William Smith, John Jones, Thomas Johnson, Henry Stokes, George Brown, and Robert Moore, all residents of Davidson county, and all others interested in the estate of William Smith, deceased, defendants.

The complainant respectfully shows to the Court:

**I.**

That William Smith, a citizen of Davidson county, died on the 2d day of February, 1890, intestate, and on the first Monday of March, 1890, complainant was duly appointed by the County Court of said county, and duly qualified, to administer upon his estate. Nancy Smith is the widow, and Sarah Smith and Thomas Smith are the only heirs of said decedent. The said widow has had duly assigned to her a year's support, the exempt personalty, and homestead, and dower.

**II.**

The assets of said estate, real and personal, subject to the decedent's debts, exceed one thousand dollars in value, but are insufficient to pay the decedent's debts and the costs of administration, according to complainant's information and belief; and he has accordingly reported the insolvency of the estate to said County Court. A certified copy of said report of insolvency is herewith filed as a part of this bill, marked A.

<sup>11</sup> The bill will not lie until after the suggestion of insolvency to the County court, or its Clerk. *Campbell v. Bryant*, 2 Shan. Cas., 146.

<sup>12</sup> Code, § 2367.

<sup>13</sup> It would seem from a scrutiny of the statute that one of its objects was to save something for the widow, heirs, and legatees or distributees, out of the wreck that would probably result from many suits against the administrator, and from the loose methods of administration prevalent in the County Court. It is in this view that the administrator may sue in behalf of the widow, heirs, and legatees or distributees, and thus benefit them.

<sup>14</sup> Code, § 2368.

<sup>15</sup> Code, §§ 2379-2380.

<sup>16</sup> Code, § 2383. One of the main objects and benefits of this proceeding is the saving of the costs incident to a multiplicity of suits; and consequently, all suits commenced or threatened should be enjoined.

<sup>17</sup> If the bill is filed by a creditor, its caption would be in the following form:

**CAPTION OF A CREDITOR'S BILL.**

John Jones, a resident of Davidson County, who sues in behalf of himself and all other creditors of, and persons interested in, the estate of William Smith, deceased, complainant,

*vs.*  
John Smith, the administrator, Nancy Smith, the widow, Sarah Smith and Thomas Smith, the heirs and distributees of said William Smith, Henry Stokes, Thomas Johnson, Robert Moore, and George Brown, all residents of Davidson county, defendants.

It would be well for the creditor to show why he filed the bill, instead of waiting for the administrator to file it; this, however, is not necessary. If the administrator is too slow, or incompetent, or in collusion with any creditor or heir, or is otherwise remiss in the discharge of his trust, it would be proper for any creditor to file the bill, without waiting for the administrator to do so.

## III.

The following debts complainant believes to be justly owing by said estate:

1. A judgment against the decedent in favor of the defendant, John Jones, rendered July 2, 1889, by the Circuit Court of Davidson county, amounting to nine hundred and eighteen dollars debt, and forty-two dollars costs.

2. A note of hand for six hundred dollars, executed by the decedent on June 12, 1889, to the defendant, Henry Stokes, bearing interest from date, and one year after date.

3. An account for one hundred dollars by Dr. Thomas Johnson for medical and professional services rendered the decedent in the years 1889 and 1890.

4. There are other claims against said estate for various minor amounts, believed to be just, the largest of which are the following: (1) Thomas Cook, (account,) \$10.00; George Dalton, (account,) \$8.00; Samuel Long, (note,) \$12.00; and Edmund Gray, (account,) \$42.00.

## IV.

The defendant, Robert Moore, has brought suit against complainant in the Circuit Court of Davidson county for five thousand dollars, which the said Moore claims the estate owes him for a breach of contract by the decedent. Complainant believes said claim is unjust. Said Moore has had a subpoena issued for a large number of witnesses, and if he obtains even a small recovery, the costs will probably be very great.

## V.

The defendant, George Brown, claims that the decedent owes him a large balance on a settlement made between them as partners two years ago, and he threatens to bring a suit to enforce his claim. The decedent stated on his death-bed that he owed said Brown nothing, and complainant believes such to be the fact.

## VI.

There are several other persons who assert that they have claims against said estate, some of which may be just, but complainant has no means of ascertaining their correctness, except by having them duly established by proof before the Master, in your Honor's Court.

## VII.

The personal estate of said William Smith, consists of about six hundred and eighteen dollars, the proceeds of a small stock of merchandise, of notes, and accounts, and of some horses, and cattle, and other property converted into money by complainant, a full inventory of all which has been filed in said County Court. The real estate of which he died seized and possessed consists of (1) one house and lot, No. 46, on John street, Nashville, worth about fifteen hundred dollars, and which has been assigned as homestead and dower to his widow; (2) and a lot No. 216, on Sanders street, Nashville, worth about fifteen hundred dollars. The deeds to said two lots are herewith filed as exhibits to this bill, marked B and C, and will be read at the hearing.

## VIII.

The premises considered, complainant prays:

1. That all those named as defendants in the caption be made such by service of subpoena, but that no copy of the bill be issued, unless expressly ordered by your Honor. That an abstract of the bill be made out by the Clerk and Master, and be made known to such of the defendants as your Honor may require;<sup>18</sup> but answer under oath is waived as to each of the defendants.

2. That the administration of said estate be transferred from the County Court of Davidson county to this Court;<sup>19</sup> and to this end that all necessary references be ordered, and all proper accounts be taken, and proper distribution of the estate be made among those entitled.<sup>20</sup>

3. That all further proceedings in reference to the administration of said estate in the said County Court be enjoined;<sup>21</sup> that the commencement or prosecution of all suits at law, and of all other suits in Equity against complainant be enjoined;<sup>22</sup> that the defendant Robert Moore be specially enjoined from further prosecuting his said suit at law against complainant; and that the defendant George Brown be enjoined from bringing any suit against complainant in reference to said estate.

4. That all persons, defendants included, having claims against said estate be required to present and substantiate them in this cause by legal proof before the Master<sup>23</sup> within such time as your Honor may order, or be forever barred.<sup>24</sup>

5. That said real estate be sold, subject to the widow's homestead and dower rights, and the proceeds thereof, as well as the proceeds of the personal estate of the decedent, be applied in due course of administration, and paid out to those thereunto legally entitled; and that proper allowance be made complainant for his services as administrator; and that proper allowance be made his Solicitors for their services in this cause.

6. And that complainant, and the widow and heirs of the decedent<sup>25</sup> have such other and further and better relief as they or any of them may be entitled to, under the pleadings and proofs in the cause.

This is the first application for an injunction in this case.

JOHN M. LEA, Solicitor.

<sup>18</sup> Code, §§ 2369-2370. This abstract is given in § 1001, *post*.

<sup>19</sup> Code, § 2381.

<sup>20</sup> Code, §§ 2387; 2392.

<sup>21</sup> Code, § 2381.

<sup>22</sup> Code, § 2383.

<sup>23</sup> Code, §§ 2371; 2373; 2386.

<sup>24</sup> Code, § 2376.

<sup>25</sup> The bill is for the benefit of the widow and heirs, and the administrator acts in their behalf. Code, § 2367.

The bill should be sworn to, as it both seeks preliminary injunctive relief, and transfers the jurisdiction of the cause.

§ 1000. **Proceedings on Bill, at Chambers.**—If the Court be not in session when the bill is filed, it must be presented to the Chancellor, at Chambers, for his action. If he thinks a copy of the bill should be issued, he will so order; and will designate such of the defendants as shall be served with process.<sup>26</sup> He will, also, order proper publication to be made.<sup>27</sup> If any suits have been instituted, or are threatened against the administrator, the Chancellor may enjoin them, or make other orders in reference to them in his discretion, having in view the rights of the parties suing, as well as the interest of the estate.<sup>28</sup>

The following form for a fiat would be adapted to the bill in the preceding section.

#### CHANCELLOR'S FIAT ON AN INSOLVENT BILL.

To the Clerk and Master at Nashville:

File the foregoing bill; issue abstract of the bill and subpoena, to be served on all named as defendants in the caption of the bill. Make publication in the Nashville Banner for four weeks, notifying all creditors of William Smith, deceased, and all other persons interested in his estate, to come forward and exhibit their demands, and have themselves made parties to the bill, within the time prescribed by law.<sup>29</sup> Issue an injunction against Robert Moore and George Brown as prayed in the bill, without bond therefor. ANDREW ALLISON, Chancellor.

June 4, 1890.

§ 1001. **Proceedings to Bring the Parties in Interest Before the Court.**—As soon as the bill is filed, and prosecution bond given, the Clerk and Master will issue the abstract and process required by the Chancellor's fiat. The following abstract of the foregoing bill will serve as a form.

#### ABSTRACT OF BILL.

John Smith, admr., &c., }  
                           *vs.* } Abstract of the Bill. No. 7163.  
 Nancy Smith, *et al.* }

The bill in this cause is filed against the widow, heirs, and creditors, of William Smith, deceased, and alleges:

1. That complainant is the administrator, that Nancy Smith is the widow, and that Sarah and Thomas Smith are the only heirs of said William Smith. That the year's support, the exempt property, homestead, and dower, have all been set apart to the widow.

2. That the assets of the estate exceed \$1,000; but that the estate is insolvent, and has been so reported to the County Court.

3. That the estate owes the following debts: (1) John Jones, \$918.00 debt, and \$42 costs, on a judgment; (2) Henry Stokes, \$600 on a note; (3) Dr. Thomas Johnson, \$100 on an account, and (4) other smaller amounts to various other parties.

4. That Robt. Moore has brought suit in the Circuit Court of Davidson county against the estate for \$5,000 on an alleged breach of contract, believed to be unjust.

5. That George Brown is threatening to sue the estate for an alleged balance due him as a partner of the deceased.

6. That there are other persons asserting claims against said estate.

7. That the personal estate of the decedent amounts to about \$618; and his real estate consists of two lots in Nashville, worth about \$1,500 each, one of which, No. 46 John street, has been assigned the widow as homestead and dower; the other, No. 216 Sanders street.

8. The bill makes all said persons defendants, waives their answers under oath; and prays to have said estate administered in Chancery as an insolvent estate; and to have all suits against the administrator enjoined, especially the said suit of Robt. Moore, and the threatened suit by George Brown.

[Signed]

and duly sworn to by the complainant.

JOHN M. LEA, Solicitor.

<sup>26</sup> Code, §§ 2369-2370.

<sup>27</sup> The Clerk and Master may, also, make the order for publication to be made. Code, § 2371.

<sup>28</sup> Code, §§ 2383-2384.

<sup>29</sup> Code, §§ 2370-2371; 2376. The publication notice sometimes requires all claims to be filed within six months, or be barred. But there is no law authorizing such a procedure. If, however, the funds have all been distributed before a creditor comes forward, he would be forced to compel those who had received the funds to contribute to his just *pro rata*. Creditors may present their claims within the time prescribed by law. Code, § 2376; that is, within the ordinary time for suits against administrators. See, Code, §§ 2393-2393.

The reason why creditors and claimants are excluded, unless they come in within a limited time, is, because, (1) otherwise, the Court would not know how to distribute the fund; and (2) those who are vigilant should not be kept out of their rights by the *laches* of the negligent. 2 Dan. Ch. Pr., 1204-1205, notes. A creditor who comes in after a distribution may sue those who have drawn out the fund for his *pro rata*. An executor, administrator, trustee, or Clerk of Court, who has paid out such funds, under the order of the Court, cannot, however, be held personally liable for any funds by them so paid or distributed. 2 Dan. Ch. Pr., 1206-1207.

I certify that the foregoing is a correct abstract of said bill, and that the prayer for an injunction has been granted by the Chancellor.

June 5, 1890.

GEO. K. WHITWORTH, C. & M.

This abstract will be substituted for a copy of the bill itself, unless the Chancellor order the whole bill to be copied.<sup>30</sup>

The Master will, also, make due publication for creditors and others interested to have themselves made parties. If the Chancellor's fiat does not order publication, the Master may order it.<sup>31</sup> The following is a form of

**PUBLICATION NOTICE TO CREDITORS.<sup>32</sup>**

**To the Creditors of William Smith, deceased:**

John Smith, admr., &c., }  
*vs.* } In Chancery, at Nashville.  
 Nancy Smith, *et al.* }

All creditors, and other persons interested in the estate of William Smith, deceased, are hereby ordered to come forward, and exhibit their demands, and have themselves made parties to the bill in this cause, within the time prescribed by law, or they will be forever barred.<sup>33</sup> This order will be published for four consecutive weeks in the Nashville Banner.

This June 5, 1890.

GEO. K. WHITWORTH, C. & M.

When a non-resident creditor's claim exceeds one hundred dollars, a copy of the abstract may be forwarded to him by the Clerk at his usual place of residence, by mail; and this shall be equivalent to service of process.<sup>34</sup>

**§ 1002. Order Sustaining Bill, and Transferring Settlement.**—If the bill omit any jurisdictional fact, it may be dismissed on motion, or on demurrer, at the first term, after it is filed, unless properly amended on affidavit.<sup>35</sup> If it contain the proper allegations,<sup>36</sup> the Court will, on motion of any party, sustain the bill, and order the administration of the estate to be transferred from the County Court, and further proceedings therein in the County Court enjoined. This order may be in the following form:

**ORDER SUSTAINING THE BILL.**

John Smith, admr., &c., }  
*vs.* } No. 7163.  
 Nancy Smith, *et al.* }

On motion of complainant, and it appearing that the bill in this cause is properly filed, it is ordered by the Court that the bill be sustained; and that the administration of the estate of William Smith, deceased, be transferred from the County Court of Davidson county to this Court. The institution of any and all suits against said estate is hereby enjoined, and the Master will so state in notice to creditors. All persons having claims against said estate will file them in this cause by petition accompanied by a proper prosecution bond. The Clerk of said County Court will forthwith transmit to this Court all inventories, reports, settlements, vouchers, and other original papers, in his office, relating to said administration; and, also, a transcript of all orders, decrees, and other entries, in the cause, on the minutes of his Court. And all proceedings relative to said administration in the County Court are hereby enjoined, this Court now assuming exclusive jurisdiction of such administration, and of all matters properly incident thereunto.

It is not necessary for all the parties to be before the Court to enable an order or decree to be made, provided such and so many of them are before the Court, as to enable the Court to do complete justice in the particular matter.<sup>37</sup>

**§ 1003. Petitions by Creditors and Claimants.**—If the bill seeks to sell land that the decedent did not own at his death, the owner may become a party by petition and make defence;<sup>38</sup> or he may file an original bill, and enjoin the suit.<sup>39</sup> Any person having a claim against the estate, and not made a party, must file a petition to become a party, and prove his claim. This petition will (1) be addressed to the Chancellor, (2) will give the style of the cause in which

<sup>30</sup> Code, § 2369. As a rule, the saving of expense by the issuance of an abstract is insignificant.

<sup>31</sup> Code, § 2371.

<sup>32</sup> This is merely the name of the notice, and should not be published. See, *ante*, § 198.

<sup>33</sup> Code, §§ 2371; 2376.

<sup>34</sup> Code, § 2372. The object of this notice is to enable the creditor to file his claim before a distribution is made.

<sup>35</sup> Code, § 2365. See, also, *ante*, §§ 430-432.

<sup>36</sup> Perhaps there should be proof of the suggestion of insolvency, if demanded by any defendant.

<sup>37</sup> Code, § 2385.

<sup>38</sup> Code, § 2799; See, *ante*, §§ 794-795.

<sup>39</sup> *Haynes v. Rizen*, 14 Lea, 252. See, *ante*, § 795.

it is to be filed, (3) will state the amount and character of the claim, and how evidenced, and (4) will pray for leave to petitioner to file the petition, to become a party to the cause, and to prove his claim and to have it allowed, and paid out of the assets of the estate. If the petitioner has any lien on the property sought to be sold, entitling him to priority of satisfaction, or has any equity superior to those of the general creditors, he should set it forth in his petition, with due precision and particularity along with the written evidences thereof, if any. The petitioner should, also, offer to contribute to the expenses of the suit, in case the expenses cannot be paid out of the funds sought to be reached.<sup>40</sup> The following form will show the character of such a petition:

**PETITION BY A CREDITOR TO BECOME A PARTY.**

John Smith, admr., &c., }  
 vs. } No. 7163.—In Chancery, at Nashville.  
 Nancy Smith, et al. }

To the Hon. Andrew Allison, Chancellor:

Your petitioner, Robert Roe, a resident of Nashville, Davidson county, respectfully snows to the Court:

I.

That William Smith, deceased, complainant's intestate, died justly indebted to him in the sum of one thousand dollars, evidenced by a note of hand, dated Aug. 3, 1889, due one day after date, which, with interest, is wholly due and unpaid. [*If the claim is based on account, or is for work and labor, or for services, or for goods or chattels, or for any other matter, so state, and specify it fully and particularly, giving its amount and date.*]

II.

Your petitioner would have sued the complainant as administrator of said William Smith, deceased, had he not been restrained from so doing by the pendency of this suit, and your Honor's injunction. Petitioner is, therefore, constrained to pray your Honor to allow him to become a party to this cause, to the end that he may prove his said debt, and have a decree for the amount thereof, and have it paid out of the assets to be administered in this cause. He files said note as a part of this petition, and marks it A.

III.

Your petitioner would further show that said note was given by said William Smith as evidence of the amount he owed your petitioner as part of the purchase price of the house and lot No. 216 Sanders street, Nashville, sought to be sold in this cause; and to secure the payment of said note, a lien was expressly retained on the face of the deed executed by petitioner to said William Smith, for said house and lot, as will be seen by reference to said deed, now on file in this cause, and marked exhibit C to complainant's bill. Petitioner, therefore, claims a prior and superior lien and equity to the proceeds of said house and lot, and prays your Honor to decree him satisfaction in full in preference to the general creditors of said estate. [*If the petitioner has any right or claim to priority of satisfaction based on any contract, or statutory lien, or any attachment or judgment lien, so specifically show, giving the facts in full, and praying to have his priority of satisfaction decreed and enforced.*]

IV.

Petitioner prays your Honor to allow him to file this petition in this cause, and to become a party to the cause, for the purposes aforesaid; and for general relief.

And he hereby offers to contribute to the expenses of the suit, in any way your Honor may deem it equitable for him so to do.

JOHN J. VERTREES, Solicitor.

[*To be duly sworn to by the petitioner, or by his agent, or Solicitor, as shown in § 789, ante.*]

The complainant's answer, under oath, to such a petition merely makes an issue, and has no probative force.<sup>41</sup>

The Court may, by consent of parties, allow claims to be filed without the necessity of a formal petition. But even in such a case, unless the claim is itself evidenced by writing, it should be reduced to writing, specifying its date, character, and amount, and should be signed by the claimant, and sworn to. Such a claim could be put into the form of a proven account, thus:

**INFORMAL CLAIM.**

John Smith, administrator of William Smith, deceased,

				To John Doe, Dr.
1889.	Aug. 2.	To 20 bus. corn,	- - -	\$ 10 00
	" 4.	" 60 " wheat,	- - -	75 00
	" 20.	" 10 days' work on barn,	- - -	15 00
				<hr/>
				\$100.00

State of Tennessee, }  
Davidson County. }

Personally came John Doe, and made oath that the foregoing account is just and correct, and is all unpaid, and due to him, and is entitled to no credits.

Sworn to and subscribed before me, July 5, 1891.

JOHN DOE.

GEO. K. WHITWORTH, C. & M. }

§ 1004. **Taking the Account, and Final Distribution.**—After the time allowed by law for creditors to have themselves made parties has expired,<sup>42</sup> the Court will, on motion of any party, direct the Master to take and state an account of the assets and liabilities of the estate. The order of reference may be as follows:

**ORDER FOR AN ACCOUNT OF ASSETS AND LIABILITIES.**

John Smith, admr., &c., }  
vs. } No. 7163.  
Nancy Smith, et al. }

In this cause, on motion of the complainant's Solicitor, it is ordered by the Court that the Master report to the next term of the Court:

I.  
What assets, real and personal, William Smith died seized and possessed of, specifying the main items thereof, and describing the real estate fully.

II.  
What personal assets came, or ought by due diligence to have come, to the hands of the administrator, specifying the main items thereof, and giving the total amount.

III.  
Whether the year's support, the exempt personalty, and homestead and dower, have been duly set apart for the widow, and in what real estate, homestead and dower have been assigned, if assigned.

IV.  
What *bona fide* debts and charges against said estate have been paid by the administrator, if any; to what creditors paid, and the amount paid to each.

V.  
What *bona fide* debts and charges against said estate remain outstanding and unpaid, specifying each creditor, the amount due him, and the total amount.

VI.  
Whether there are probably any other *bona fide* debts against the estate outstanding and unpaid; and if so, in whose hands.

VII.  
The Master will report on any other matter that may be proper to enable the Court to properly distribute the assets, real and personal, of the decedent among those lawfully entitled thereto.

All other matters are reserved until the incoming of said report.

The Master will consider all claims presented by petition, or filed without petition by consent of the administrator, down to the closing of the account. Notice of all claims presented to the Master shall be given to the complainant, or his Solicitor, and if not admitted by him to be just, the claimant must substantiate them by legal proof, which shall be reduced to writing and filed.<sup>43</sup> Notice of claims filed should, also, be given the Solicitors of the principal creditors; and they may contest a claim, even where admitted by the complainant to be just, and may except to the report allowing it.

Creditors whose debts are not due must become parties, and present their claims, or be barred; and, to save the bar, any creditor may present his claim to the Master in vacation, and apply to become a party.<sup>44</sup>

The report of the Master, and the exceptions thereto, and the proceedings thereon, and the decree to sell the realty, are substantially the same as in a suit to sell land to pay debts.<sup>45</sup> The estate of the decedent having been all converted into money, and the total liabilities ascertained, a final decree is pronounced in substance as follows:

<sup>42</sup> This will be two years and six months after qualification of the personal representative. The Court will not, ordinarily, delay a year longer for the benefit of non-resident creditors. Code, § 2372, is probably intended to warn non-residents to sue within the two years and six months, or run the

risk of the estate being distributed before they do sue.

<sup>43</sup> Code, § 2386.

<sup>44</sup> Code, §§ 2375-2378.

<sup>45</sup> See, *ante*, §§ 994-996.



## FINAL DECREE.

John Smith, admr., &c., }  
*vs.* } No. 7163.  
 Nancy Smith, *et al.* }

This cause, coming on this Jan. 12, 1891, before Chancellor Allison, to be further and finally heard upon the whole record in the cause, including the report of the Master, showing the various creditors, and the amounts due each, and the total amount for distribution among them, and the exceptions of the defendants, Robert Moore and George Brown, to the Master's report, filed Jan. 10, 1891; the Court, after due consideration of said exceptions, overruled each and all of said exceptions, and confirmed said report, and ordered it to be spread on the minutes,<sup>46</sup> which is done in the words and figures following:

[*Here copy it, in full.*]

It is, therefore, adjudged and decreed by the Court, that the Master, after deducting from the funds in his hands all the costs of the cause, and after paying John M. Lea, Esq., a fee of five hundred dollars for his services in the cause, will distribute the balance of said funds *pro rata* among the creditors, as set out in his said report of Jan. 10, 1891, hereinabove copied, and made part of this decree.

The proceeds of the sale should be disbursed by the Clerk and Master under the order of the Court, and not by the administrator.<sup>47</sup> If the estate should prove to be solvent, and there be a surplus after paying the debts and costs, the Court will distribute this surplus among those entitled, taking refunding bonds, if necessary.<sup>48</sup>

<sup>46</sup> If the report is voluminous, the Court should order it to be recorded in the Insolvent Book. Code, M. & V., § 3237.

<sup>47</sup> *Moses v. Moses*, 1 Shan. Cas., 414.

<sup>48</sup> Code, §§ 2392-2393.

CHAPTER LIV.

SUITS BY CREDITORS WITHOUT REMEDY AT LAW.

- ARTICLE I. Suits where Judgment at Law Cannot be Obtained.
- ARTICLE II. Suits where Judgment at Law Has been Obtained, but Execution at Law Cannot be Levied.
- ARTICLE III. Suits where Judgment at Law Has been Obtained, but a Discovery of Property by Bill is Necessary.
- ARTICLE IV. Suits where a Creditor Has Obtained a Judgment in Another State and Has Exhausted his Legal Remedy There.
- ARTICLE V. Suits where Judgments at Law May be Had, but Executions at Law Cannot be Levied.
- ARTICLE VI. Suits by General Creditors for their Pro Rata of an Insolvent Debtor's Property.

ARTICLE I.

SUITS WHERE JUDGMENTS AT LAW CANNOT BE OBTAINED.

- |   |  |
|---|--|
| <p>§ 1005. Suits in Cases Where no Original Process Can be Executed.</p> <p>§ 1006. Suits in Cases Where the Demand is Purely of an Equitable Nature.</p> | <p>§ 1007. Frame of Bills Where Judgments at Law Cannot be Obtained.</p> <p>§ 1008. Form of Bills Where Judgments at Law Cannot be Obtained.</p> |
|---|--|

§ 1005. **Suits in Cases Where no Original Process<sup>1</sup> Can be Executed.**—The Code provides that in all cases (1) where personal service of process cannot be made at law, and where no original attachment at law will lie, and no judgment at law can be obtained; and, also, (2) in cases where the demand is purely of an equitable nature, the Court of Chancery has jurisdiction to subject legal and equitable interests in every kind of property,<sup>2</sup> except property held in trust for the defendant, when the trust has been created by, or the property so held has proceeded from some person other than the defendant himself, and the trust is declared by will duly recorded, or deed duly registered.<sup>3</sup>

In the first class of cases above mentioned, (where no judgment can be obtained at law,) the following facts must all co-exist, and must all be specifically alleged in the bill:

1. **No Personal Service of Process Can be Made at Law.** This must arise either from the non-residence of the defendant, or from some of the other causes mentioned in the Code where personal service of process cannot be made at law.<sup>4</sup>

2. **No Original Attachment at Law Will Lie.**<sup>5</sup> This, of course, must arise from the fact that the defendant has no property liable to levy at law. He may have equitable interests in property, but these cannot be levied on at law.

3. **No Judgment Can be Obtained at Law.** This results, of course, from the other two facts above set out. For, if no process can be served either on the defendant's person or on his property, a Court of law would have no jurisdiction to render a judgment against him.<sup>6</sup>

§ 1006. **Suits where the Demand is Purely of an Equitable Nature.**—These comprise the second class of cases named in the Code section, (4287,) now being considered.<sup>7</sup> In this class are included none of the essentials specified in the

<sup>1</sup> By "original process" is meant either a subpoena to answer or an original attachment of property.

<sup>2</sup> Code, § 4287.

<sup>3</sup> Code, § 4283.

<sup>4</sup> See, *ante*, §§ 196; 870.

<sup>5</sup> *Allen v. Gilliland*, 6 Lea, 535.

<sup>6</sup> When these three facts co-exist then a bill will lie under Code, § 4287. *Herndon v. Pickard*, 5 Lea, 702. See, also, *Graham v. Merrill*, 5 Cold., 622.

<sup>7</sup> See, *ante*, § 1005.

preceding section; all that is necessary to give the Court jurisdiction, *prima facie*, is to allege such a state of facts as to show that the demand is purely of an equitable nature, that is, a demand not cognizable in a Court of common law, but cognizable in a Court of Equity only. This class of cases includes all those heretofore enumerated in treating of the exclusive and inherent jurisdiction of the Chancery Court,<sup>8</sup> wherein the Circuit Courts have no concurrent jurisdiction.<sup>9</sup>

§ 1007. **Frame of Bills where Judgments at Law Cannot be Obtained.**—In drawing a bill in the first class of cases above mentioned, care should be taken to show that complainant has a just claim against the defendant, giving its nature with particularity and preciseness, so that the Court may see that the claim is a just one; and, also, so that, on a *pro confesso* a final decree may be pronounced. The draughtsman should then show that the complainant has not been able to recover a judgment at law against the defendant because the latter was not in reach of process, and had no property liable to attachment at law; and that therefore complainant has no remedy except in the Chancery Court. The bill should then set forth the equitable interests owned by the defendant, such as: 1, a mortgage; 2, a vendor's lien; 3, a mechanics' or other statutory lien; 4, an interest in a partnership; 5, an interest in land bought in another's name with the defendant's money; 6, a debt due but that cannot be realized until the debtor's assets have been marshalled; 7, property in another's name but belonging in Equity to the defendant; 8, property held in trust for the benefit and enjoyment of the defendant on an agreement in parol; 9, property held in trust for the defendant under a will not recorded or under a deed not registered; 10, property conveyed to another by the defendant in fraud of his creditors; 11, property of defendant devised to another in fraud of complainant; and 12, any other property interest, or estate, of the defendant visible to the eye of Equity, but hidden from the sight of the law by the veils of form, or concealed under the cloaks of fraud.<sup>10</sup> These interests should be as fully described and as definitely located as possible, and the names of the persons given who have the possession of them, and the legal title, or ostensible legal title. The bill should make all such persons defendants, and, if deemed advisable, they should be compelled to set forth and discover the nature, location and value of any and all property in their custody or control, or within their knowledge, or, in the custody or control of any other person, belonging to the defendant debtor, or in which he has any interest or concern. An attachment should be prayed against all of the defendant debtor's property, legal as well as equitable, and especially against the property described in the bill; and all of the defendants should be enjoined from selling, transferring, encumbering, concealing, or in any way disposing of the property described, or of any other property, legal or equitable, to which the defendant debtor has any title or interest, or has the benefit or use of.

§ 1008. **Form of Bill where Judgment at Law Cannot be Obtained.**—The draughtsman should keep in mind the essentials of the bill as stated in the preceding section, and also what is said about the consideration of relations<sup>11</sup> in drawing a bill. The following general form will aid him in the class of cases it belongs to:

**BILL WHERE JUDGMENT AT LAW CANNOT BE OBTAINED.**

[For address and caption see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I,  
That the defendant, Richard Roe, is justly indebted to him in the sum of ..... dollars and interest thereon from the ..... day of ....., 19.....

<sup>8</sup> See, ante, §§ 23-25.

<sup>9</sup> Of course, if the Circuit Court has jurisdiction of any case it cannot be "purely of an equitable nature."

<sup>10</sup> For various kinds of equitable property, see, ante, § 882.

<sup>11</sup> See, ante, §§ 165-169.

II.

That, [*Here show the ground of said indebtedness, as a note of hand, an account, breach of contract, or otherwise. See forms of bills in §§ 873; 1079.*]

III.

That, [*Here show that the defendant, Richard Roe, is a non-resident, or for some other statutory reason process cannot be served upon him. See, ante, §§ 196; 870.*]

IV.

That the defendant, Richard Roe, has, so far as complainant knows or believes, no property liable to attachment at law, and complainant has made diligent inquiry for such property. [*If an attachment has been sued out at law and been returned "nulla bona," so state, and tell what became of the suit; showing it is ended.*]

V.

That the defendant, Richard Roe, [*Here show what equitable interests he has, describing and locating it, and naming the owner of the legal title, who must be made a defendant.*]

VI.

The premises considered, complainant prays:

- 1st. That subpoena to answer issue [*&c.: see, ante, §§ 158; 164.*]
- 2d. That complainant be given a decree against the defendant, Richard Roe, for the amount he owes complainant by reason of the premises, including interest.
- 3d. That, [*Here pray that the equitable interests described in the bill be sold along with the legal estate; and that, after any prior liens are satisfied, the remainder of the proceeds of such sale be applied to the payment of complainant's debt.*]
- 4th. That the defendants be enjoined from selling, transferring or encumbering said property, or any part thereof, or any other property, legal or equitable of the defendant, Richard Roe, and that an attachment be issued and levied thereon.
- 5th. That complainant have such further and other relief as he may be entitled to, and to your Honor may seem proper.

This is the first application for an attachment or injunction in this case.

CLEM J. JONES, Solicitor.

[*Annex affidavit; see, ante, § 789.*]

## ARTICLE II.

### SUITS WHERE JUDGMENT AT LAW HAS BEEN OBTAINED, BUT EXECUTION AT LAW CANNOT BE LEVIED.

- |  |  |
|--|--|
| <p>§ 1009. Suits to Set Aside Fraudulent Conveyances.</p> <p>§ 1010. Ordinary Badges of Fraud.</p> <p>§ 1011. When Fraud Will be Presumed.</p> <p>§ 1012. Conveyances When Fraudulent in Law.</p> <p>§ 1013. Frame of Bill to Set Aside a Fraudulent Conveyance.</p> <p>§ 1014. Form of Bill to Set Aside a Fraudulent Conveyance.</p> | <p>§ 1015. Defences and Decrees in Suits to Set Aside Fraudulent Conveyances.</p> <p>§ 1016. Suit to Set a General Assignment as Fraudulent.</p> <p>§ 1017. Some Practical Suggestions in Suits to Set Aside Fraudulent Conveyances.</p> <p>§ 1018. Suits in Aid of a Judgment Creditor Where no Fraud is Alleged.</p> |
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§ 1009. **Suits to Set Aside Fraudulent Conveyances.**—The law favors creditors. The Constitution has established Courts for the benefit of those who have been injured in person, property, or character;<sup>1</sup> and the Legislature has enacted many laws to enable complainants to obtain redress for injuries done or rights withheld, and to have relief decreed to them, according to right and justice. All of a debtor's property, real and personal, excepting such as is specially exempted by statute, is, in the eye of the law, a fund for the benefit of his creditors. This fund he is not allowed to give away to the injury of those to whom he is indebted, for the law requires every man to be just before it permits him to be generous, honesty being deemed a greater virtue than generosity, especially when that generosity is at another's expense.<sup>2</sup> Neither does the law

<sup>1</sup> Const. of Tenn., Art. I, § 17.

<sup>2</sup> It is a fraud in law and dishonest in morals, for a man to give to others what is required to pay his debts. The very property he gives away may have been directly or indirectly purchased with the money he owes; or the debt he owes may have been con-

tracted on the faith of that property being a means of its payment. While much has been said and written, in and out of the Courts, about the rapacity of the creditor class, it is certain that creditors, as a rule, are more slow in collecting than debtors are swift in paying; and, as a rule, creditors invent no

allow a debtor to hinder, delay, or defraud his creditors by making conveyances, or suffering judgments, or by putting his property out of their reach, or by covering it up, by sham deeds or other colorable transactions, or by resorting to any other device. The law makes all such conveyances, judgments, transactions and other devices utterly void, except (1) as against the fraudulent debtor himself, and (2) as against an innocent purchaser from him, or from his assignee.<sup>3</sup> Fraudulent conveyances are void, not only as to existing creditors, but also, as to subsequent creditors.<sup>4</sup> Any one is a creditor within the meaning of the statute who has a just right of recovery, whether such right be based on contract or on a tort, or be reduced to a judgment or not.<sup>5</sup> But in order to invalidate a transfer for a valuable consideration, it must be shown that it was made with a fraudulent intent on the part of the debtor, and that the grantee had notice of this intent, and participated in it.<sup>6</sup>

Fraudulent intent is, sometimes a question of law. Every man is presumed to intend the necessary consequences of his acts; and if an act necessarily delays, hinders, or defrauds, creditors, then the law presumes that the act was done with fraudulent intent. If the law adjudges the effect of the conveyance to be to delay, hinder, or defraud, creditors, then the transfer is to be regarded as fraudulent, though this may not have been the intention of the parties to the transfer. In such a case, the intent to defraud is a question of law.<sup>7</sup>

§ 1010. **Ordinary Badges of Fraud.**—Inasmuch as frauds are generally secret, and have to be tracked by the foot-prints, marks and signs made by the perpetrators,<sup>8</sup> and discovered by the light of the attending facts and circumstances, these evidences are termed “badges of fraud.”<sup>9</sup> The most common badges are the following: 1, The fact that the debtor is embarrassed; 2, that a suit is pending or threatened; 3, that he transfers all of his property; 4, the transfer secretly or hurriedly made; 5, false recitals of consideration or other matters in the deed; 6, giving an absolute deed as a mere security; 7, inadequacy of actual consideration; 8, unusually long credit given to the vendee; 9, the retention of the possession of property conveyed; 10, the enjoyment of the use, benefit, rents, proceeds, or other profits of the property conveyed; 11, acts

more devices, and put forth no more efforts to obtain payment, than debtors do to postpone, evade, or defeat payment. All the laws made to enable creditors to collect their debts were necessitated by delays of debtors in payment, or by their inventions and devices to hide their property by pretended sales, or fraudulent gifts, or other tricks to deceive or thwart their creditors, or avoid the payment of honest debts. The distress caused by the failure of a debtor in paying is often as great as that caused by the success of a creditor in collecting.

<sup>3</sup> Code, § 1759. This statute is based on the North Carolina Act of 1715, ch. 38, which in turn is based on the English statute, 13 Elizabeth, ch. 5, *anno*, 1570.

The fraudulent conveyance is not permitted to stand as security for money advanced by the conveyee. *Lazell v. Powell*, Thomp. Cas., 195.

A fraudulent conveyance is in violation of the implied fundamental antecedent contract between the parties that neither has done or will do anything to hinder, delay, or defeat a faithful compliance with the contract on his part. See, *ante*, §§ 58; 932.

<sup>4</sup> *Young v. Pate*, 4 Yerg., 164; *Nicholas v. Ward*, 1 Head, 325.

<sup>5</sup> *Patrick v. Ford*, 5 Sneed, 532; Code, § 4288. Formerly no one was deemed a creditor unless he had a judgment.

<sup>6</sup> *Peck v. Carmichael*, 9 Yerg., 325; *Mills v. Haines*, 3 Head, 332; *Bump on Fraud*, Conv., 582.

<sup>7</sup> The statute against fraudulent conveyances refers to a legal intent, and not a moral intent; for one man's right does not depend on another man's moral sense. The moral sense is much stronger in some men than in others. The statute supposes that every one is capable of perceiving what is wrong; and, if he does what is forbidden, intending to do it, he is not allowed to say that he did not intend to do a forbidden act. A man's moral perceptions may be so perverted as to imagine an act to be fair

and honest which the law justly pronounces fraudulent and corrupt; but he is not, therefore, to escape from the consequences of such an act. The law must have a more certain standard of measuring men's intents than each individual's varying and capricious notions of right and wrong. Whatever a man's opinions of his own acts may be, there are certain rules, founded in experience and established by law, for determining the validity of transfers under the statute; and if these rules are transgressed, the transfers are void, without regard to the opinions of the parties. *Bump on Fraud* Conv., 25. A debtor's evidence as to his intent is not regarded as anything more than an expression of his opinion as to the character of the transaction; and, unless supported by other evidence, is entitled to but little weight. *Ibid*, 593-594. If the question of fraudulent intent could be determined by the parties, the statute might as well be repealed. No man can be the judge of his own case: it is for the jury or the Chancellor, under the law and facts of the case, to judge of the intent of the parties. The parties may admit that they made a conveyance to defraud creditors, and yet, if no creditor was, in fact, defrauded, the conveyance would be good; whereas, they may deny, and truthfully deny, that a particular conveyance was made to defraud creditors, and yet, if the effect of such a conveyance was to hinder or delay a single creditor, the law adjudges it to be fraudulent. It is an unnecessary, and often a cruel strain of a defendant's conscience for his Solicitor to ask him whether the conveyance in question was made, or taken, with any intent to hinder, delay, or defraud, any creditor.

<sup>8</sup> See, *ante*, § 448.

<sup>9</sup> *Bump on Fraud*, Conv., 31; 2 *Meigs' Dig.*, § 1522; *Waite on Fraud*, Conv., §§ 224-242. A “badge of fraud” is any fact that throws a suspicion on the transaction and calls for an explanation. *Ibid*.

connected with the transfer out of the usual course of such transactions when *bona fide*; 12, unusual mode of payment; 13, relationship of the parties; 14, long credit in connection with the insolvency or non-residence of the vendee; 15, the use of unusual clauses and expressions in the deed; 16, the use of general and sweeping terms to describe the property conveyed,<sup>10</sup> and 17, antedating the conveyance and other papers connected therewith, if any.

What weight shall be given to any one or more of these badges is a question for the jury, or Chancellor; and how many of them are necessary to exist in a given case to prove the fraud depends on the other facts and circumstances existing in that case.<sup>11</sup>

§ 1011. **When Fraud Will be Presumed.**<sup>12</sup>—A Court of Equity will not presume fraud in the absence of any proof on which to found the presumption; but when inculpatory facts are proved, which are termed badges, or signs, of fraud, the Court will presume its existence. In finding fraud a Court of Equity will act on a lower degree of proof than what is required in a Court of law.<sup>13</sup> Fraud will be presumed in the following cases:

1. Where the conveyance is voluntary, that is without a valuable consideration, and creditors are hindered or defrauded by such conveyance, whatever be the real intent of the debtor.<sup>14</sup>

2. Where the debtor remains in possession of personalty after an absolute conveyance thereof; but, in this case, the presumption may be rebutted.<sup>15</sup>

3. Where the assignment reserves a benefit to the assignor; or the assignor is allowed to retain the possession of the property.<sup>16</sup>

4. Where the property assigned is consumable in use, and the assignment gives the debtor the right to use it.<sup>17</sup>

5. Where the assignment keeps the proceeds of the property away from the creditors for a period exceeding the law's delay.<sup>18</sup>

6. Where fictitious debts are secured by the deed of assignment.<sup>19</sup>

7. Where the deed of trust requires creditors to receipt in full, or get nothing.<sup>20</sup>

8. Where the consideration of an absolute conveyance is grossly inadequate.<sup>21</sup>

If the complainant's evidence place the conveyance attached under a great suspicion of fraud, the burden is then cast on the vendee to prove the *bona fides* of the transaction, or, at least, remove the suspicion. And if the consideration is impeached by the bill, and the proof casts suspicion upon it, the burden is then on the vendee to show that a valid consideration was paid.<sup>22</sup>

§ 1012. **Conveyances when Fraudulent in Law.**—When the consideration is greatly inadequate, or was obtained under suspicious circumstances, but actual fraud is not shown, the Court will consider the conveyance voluntary to the extent of the value of the property in excess of the price paid, and will declare such conveyance fraudulent in law, and treat it as a mere security for the consideration actually paid.<sup>23</sup> But where fraud is proved the conveyance will not be permitted to stand as security for the money paid.<sup>24</sup>

§ 1013. **Frame of Bill to Set Aside a Fraudulent Conveyance.**—Where a debtor has made any conveyance, or suffered any judgment, or resorted to any other device, to hinder, delay, or defraud his creditors, or any of them; or, where he has given away any of his property, whether fraudulently or otherwise, the proper remedy is by a bill in the Chancery Court, against the debtor and the

<sup>10</sup> Bump on Fraud. Conv., 31-60; Waite on Fraud. Conv., §§ 224-242; and see "Fraudulent Conveyances," in our Digests.

<sup>11</sup> *Qua non valeant singula, juncta juvant.* *Ante*, § 448, note; Bump on Fraud. Conv., 601.

<sup>12</sup> On the subject of the proof and the presumption of fraud, see *ante*, §§ 448-449.

<sup>13</sup> Smith's Eq. Jur., 57; see *ante*, § 448.

<sup>14</sup> Bump on Fraud. Conv., 271.

<sup>15</sup> 2 Meigs' Dig., § 1522.

<sup>16</sup> 1 Meigs' Dig., § 235.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*; Bump on Fraud. Conv., 412.

<sup>19</sup> 1 Meigs' Dig., § 235.

<sup>20</sup> *Ibid.*

<sup>21</sup> 2 Pom. Eq. Jur., § 927.

<sup>22</sup> 2 Meigs' Dig., § 1527.

<sup>23</sup> Alley v. Connell, 3 Head, 578; Turbeville v. Gibson, 5 Heisk., 586.

<sup>24</sup> Lazell v. Powell, Thomp. Cas., 195.

fraudulent grantee, or bargainee, or the voluntary grantee, or donee, or their representatives or assigns. The bill in such a case should:

1. Set out the facts, showing that the vendor or donor is indebted to the complainant, the date and amount of such indebtedness, and how evidenced. If the debt be evidenced by a note, or other writing, it should be exhibited to the bill, and filed with it.

2. It should, also, show what property said vendor or donor had, describing and locating it, and show to whom it has been transferred, how and when; and any and all inequitable or illegal facts or circumstances connected with such transfer, and invalidating the same.

3. The bill should positively aver and charge that such transfer was for the purpose of hindering, or delaying, or defrauding the complainant, or other creditor or creditors of the vendor or donor; and should allege that the vendee or donee had knowledge of such purpose, or that he paid nothing for the property, or both.

4. The bill should pray for an attachment to impound the property, and an injunction to restrain the conveyee from transferring it; and should, also, pray to have the sale, transfer or gift set aside, and the property subjected to the satisfaction of the complainant's debt; and for general relief.

The bill may be filed for the benefit of the complainant alone,<sup>24a</sup> or he may file it in behalf of himself and of all the other creditors of the fraudulent vendor.<sup>25</sup> The complainant will, however, ordinarily file the bill for his own exclusive benefit, unless the property is of value sufficient to pay all of the debts, or unless the litigation threatens to be very onerous, and the complainant desires all the help he can get. So any number of creditors may join as complainants in one bill, each setting forth his separate claim in a separate paragraph.<sup>26</sup> But where such bill must be sworn to, each of such co-complainants, or his agent or Solicitor, must verify it.

A bill may be filed to set aside a fraudulent conveyance made by a deceased debtor whose estate is insolvent. In such a case, however, it must be a general creditors' bill; and it must allege that the insolvency of the decedent's estate has been suggested to the County Court, or to its Clerk.<sup>27</sup>

§ 1014. **Form of Bill to Set Aside a Fraudulent Conveyance.**—The substance of the bill, as given in the preceding section, and the following form, will enable the draftsman to frame a bill for any ordinary case of fraudulent or voluntary conveyance.

**BILL TO SET ASIDE A FRAUDULENT CONVEYANCE.**

To the Hon. William B. Staley, Chancellor, holding the Chancery Court at Knoxville.  
John Doe, a resident of Knox county, complainant,<sup>28</sup>

*vs.*  
Richard Roe and Roland Roe, both residents of Knox county, defendants. }

The complainant respectfully shows to the Court:

I.

That the defendant, Richard Roe, is justly indebted to him in the sum of one thousand dollars, evidenced by a note of hand, dated January 1, 1880, and due one day after the date thereof, which note, with the accrued interest, is wholly unpaid. [If the indebtedness is evidenced by a judgment, or by any writing, so state. Show the amount, date, and character of the debt, and any special equities attaching to it, if any.]

II.

The said Richard Roe being thus indebted to complainant, and intending or contriving not

<sup>24a</sup> A judgment at law is not necessary to enable the complainant to maintain the bill. Code, § 4288.  
<sup>25</sup> Code, § 4288.

<sup>26</sup> Thus:

1. Complainant A respectfully shows to the Court that the defendant, C, is justly indebted to him in the sum of — dollars, evidenced, &c.

2. Complainant B respectfully shows to the Court that the defendant, C, is justly indebted to him in the sum of — dollars, evidenced, &c.

All of the complainants will join in charging the fraud.

<sup>27</sup> Code, § 2395; *Boxly v. McKay*, 4 Sneed, 286. See, *ante*, § 997, note 4.

<sup>28</sup> If the bill is filed in behalf of all the creditors, the caption should so show; thus:

John Doe, a resident of Knox county, who sues for himself and all the other creditors of Richard Roe, [the grantor or donor,] complainant,

*vs.*

Richard Roe, [the fraudulent or voluntary grantor or donor,] and Roland Roe, [the fraudulent or voluntary grantee or donee,] both residents of Knox county, defendants.

The complainant, who sues in behalf of himself and all the other creditors of the defendant, Richard Roe, respectfully shows to the Court:

to pay said debt, did, on August 6, 1881, convey to his co-defendant, Roland Roe, who is, also, his brother, [show the relationship of the parties, if any,] the following tract of land in the 10th civil district of Knox county: [Describe it by metes and bounds, or, at least, so as to fully identify it.<sup>29</sup>] This conveyance was made and contrived of fraud, covin, collusion, and guile, to the intent and purpose to delay, hinder, and defraud, the creditors of said Richard Roe of their just and lawful debts;<sup>30</sup> and especially, to delay, hinder, and defraud, complainant of his said debt.

## III.

The defendant, Roland Roe, took said conveyance from his co-defendant, well knowing the fraudulent purpose and character thereof, and with intent to aid said Richard Roe to hinder, delay, and defraud his creditors, especially complainant, of their just debts. And complainant avers that said conveyance was collusively made; and that there is a secret agreement between the defendants whereunder the said Roland Roe is to hold said land in secret trust and for the benefit of his co-defendant, Richard Roe. [If there be anything showing such a trust, or showing any collusion between the parties, or showing that the grantor is to have any benefit, or to have any rents or profits, or to retain the possession, state these facts fully and particularly.]

## IV.

Said conveyance recites that it was made on the consideration of one thousand dollars in hand paid. Complainant charges that this recital is absolutely false, that no cash was paid at all; and that if any was pretended to be paid it was a mere device in furtherance of the covin, collusion, and fraud whereby the defendants were contriving to hinder and delay complainant. [If any relationship, or business connection, or special confidence, existed between the parties, state the facts. Show, also, any facts, or circumstances, that impeach the recitals of the deed as to the payment of the alleged consideration.]

## V.

The premises considered, the complainant prays:<sup>31</sup>

1st. That those named as defendants in the caption be made such by the issuance and service of all proper process requiring them to answer this bill; but their answer on oath is waived.

2d. That the complainant may have a decree against the defendant, Richard Roe, for the amount due him as hereinabove shown, principal and interest, and for the costs of this suit; and, if the suit is in behalf of the other creditors, then add: and that all the other creditors of the defendant, Richard Roe, who may come in under this proceeding and prove their debts, may have decrees against him for the amounts justly due them, respectively.]

3d. That said conveyance to the defendant Roland Roe be decreed to be fraudulent, null, and void, as against complainant, [and if the suit is brought in behalf of all other creditors, then add: and as against all the other creditors of the defendant, Richard Roe;] and that said tract of land be sold on a credit of not less than six nor more than twenty-four months, and in bar of all equity or right of redemption; and the proceeds of said sale be applied to the satisfaction of the debt of complainant [and of all the other debts that may be proved by the other creditors of said Richard Roe, who may come in under this bill.]

4th. That all other creditors of said Richard Roe may be allowed to come in by petition, filed in vacation or in term, and prove their debts, and have a decree therefor. That this bill be sustained as a general creditors' bill; and that due notice be given by public advertisement that all of said creditors may become parties to this cause who desire to obtain the benefits of this proceeding. [If the suit is for the exclusive benefit of the complainant, this paragraph of the prayer will be omitted.]

5th. That to secure and impound said property, a writ of attachment be issued by fiat of your Honor, and be levied on said tract of land; and that an injunction, also, issue to inhibit and restrain the defendant Roland Roe from selling, encumbering, or in any other manner disposing of said property, or any part thereof. This is the first application for writs of attachment and injunction in this case.

6th. Complainant prays for all such other, further, and general relief as he [or the other creditors who may come in under this bill] may be entitled to on the facts as alleged and proved.

WEBB & McCLUNG, of Counsel.

JAMES COMFORT, Solicitor.

[The bill must be sworn to, as in § 789, ante.]

The attachment in this case must issue on the fiat of a Judge or Chancellor, and cannot be issued by the Clerk and Master without.

§ 1015. Defences and Decrees in Suits to Set Aside Fraudulent Conveyances. The usual defences are: 1, That the defendant does not owe the debt alleged; or

<sup>29</sup> This description is important, as it gives complainant a lien upon the property specifically described, from the filing of the bill. Unless the property is specified, the lien will only date from the levy of the attachment.

<sup>30</sup> It is well to follow the phraseology of the statute, even though somewhat stiff and antiquated. Code, § 1759.

<sup>31</sup> If the suit is in behalf of all the other creditors of the fraudulent grantor, then say:

The premises considered, the complainant, in behalf of himself and all the other creditors of Richard Roe, prays:



2, That it is barred by the statute of limitations; or 3, That it is based on a usurious consideration, or on some other illegal or immoral consideration; or 4, That it is without consideration in whole, or in part; or 5, That there was no fraud in the conveyance. The defendant may deny the alleged fraud in his answer.<sup>32</sup> The decree, if for the complainant,

1. Should adjudge that the principal defendant, (the vendor,) is indebted to the complainant by reason of the facts alleged and proved, specifying the amount of the debt, principal and interest where it draws interest.

2. The decree should next adjudge that the conveyance complained of in the bill (describing the property, and, if land, giving its boundaries and location,) was made with intent to hinder and delay complainant in collecting the said debt and that the vendee defendant knew of this intent and aided therein, and that, therefore, such sale was fraudulent and void, as against complainant.

3. The decree should finally order the sale of the land, or other property, mentioned in the bill, describing the property if not already described in the decree, specifying the terms of the sale, and directing how the proceeds should be distributed.

4. If any property not described in the bill has been attached order its sale, also; and direct an execution to issue for any residue after the proceeds of the sale have been exhausted in satisfying the decree.

#### GENERAL FORM OF DECREE SETTING ASIDE A FRAUDULENT CONVEYANCE.

[For title of cause, commencement and recitals, see, ante, § 567.]

##### II.

That the defendant John Brown is justly indebted to the complainant in the sum of eight hundred and ten dollars, the principal and interest due on the note [or judgment, or account, or contract sued on, or otherwise. Specify the amount of debt the Court finds the defendant owes, and out of what arising.]

##### III.

That the defendant John Brown sold and conveyed to his co-defendant James Brown the tract of land described in the bill with intent to hinder and delay the complainant in collecting his said debt, the defendant James Brown well knowing the intent and purpose of the conveyance, and aiding therein, and that therefore such sale and conveyance is fraudulent, null and void as against complainant.

##### IV.

That said tract of land, to-wit: [*Here describe it by metes and bounds and by location.*] be sold on a credit of six and twelve months and in bar of the equity of redemption, the complainant so praying: that out of the proceeds of such sale, when confirmed, there be paid 1st, the costs of the cause; 2nd, the amount of the debt herein described to complainant and interest to date of payment, and 3rd, the balance, if any, to the defendant James Brown. If, however, the proceeds of said sale should be insufficient to pay the costs of the cause, and the debt of complainant as herein decreed, an execution will issue against the defendant John Brown for the residue.

But if the complainant fail to establish the fraud he may have a decree for the amount of his claim. In such a case, however, he will be taxed with all the costs down to the decree.<sup>33</sup>

§ 1016. **Suit to Set Aside a General Assignment as Fraudulent.**—If a general assignment for the benefit of creditors fails to comply with the statute, or gives the trustee an unreasonable time to close the trust and pay the creditors, it is fraudulent in law, and may be set aside. The following is the usual form of bill in such a case:<sup>33a</sup>

#### BILL ATTACKING A GENERAL ASSIGNMENT.

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

##### I.

That the defendant, Richard Roe, is justly indebted to him in the sum of two thousand dollars, and interest thereon from November 24, 1900: said indebtedness evidenced by a note of hand of that date, due one year after date with interest from date. No part of said note has ever been paid.

<sup>32</sup> 2 Templeton v. Mason, 23 Pick., '625.

<sup>33</sup> Code, § 4292.

<sup>33a</sup> The bill should be filed against the grantor and grantee of the deed of assignment, and against all the beneficiaries named in said deed, complainant of

course excepted, if a beneficiary. This bill is based on the three cases referred to in the following notes, and is an illustration of what can be done by a party who, in the words of Judge Neil, is "diligent and wise." Scheibler v. Mundinger, 2 Pick., 694.

## II.

That on October 3, 1902, said Richard Roe pretended to make a general assignment of all his property for the benefit of his creditors, the deed of assignment being made to the defendant Richard Fen. The other defendants and complainant are the creditors named in the bill. Said deed is hereto attached, marked A, and made a part of the bill.

## III.

Complainant knows nothing of the validity or amounts of the alleged debts of Richard Roe to the defendant creditors, and if at any time in the progress of this suit it becomes necessary to have such validity and amounts established, complainant requires satisfactory proof thereof.

## IV.

Complainant charges that said deed of assignment is fraudulent and void as against him.

1st. The description of the personal property sought to be conveyed is wholly insufficient, the language of the schedule being, "all notes and accounts due me," the grantor.<sup>34</sup>

2d. The said schedule is not verified by the oath of the grantor, the words "sworn to and subscribed before me," the clerk, not being an affidavit.<sup>35</sup>

3d. The delay required by said deed for converting the property conveyed into money is unreasonable and oppressive to complainant and the other creditors of said grantor and operates as a fraud upon them by hindering and delaying them in the collection of their debts.<sup>36</sup>

All three of said defects in said deed will more fully and at large appear by reference to said deed which is made a part of the bill.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*: see, *ante*, §§ 158; 164.]

2d. That said deed of assignment be declared fraudulent and void, and that an injunction issue to prohibit the defendant, Richard Fen, as trustee or otherwise, from taking any steps under said deed, and from in any way meddling with the property in said deed or schedules mentioned, or described.

3d. That an attachment issue and be levied upon all of said property, and especially upon the leasehold interest in the storehouse, and upon the goods, wares and merchandise, notes and accounts, in said deed of assignment and said schedules mentioned, or described.

4th. That a receiver be appointed to take charge of all said property, and convert the same into cash as rapidly as may be prudent.

5th. That complainant be given a decree for the amount due him on said note, principal and interest, and that enough of the proceeds of said property be applied to satisfy the same and the costs of the cause.

6th. That complainant have such other and further relief as he may be entitled to.

This is the first application for an injunction, attachment or receiver in this case.

T. L. CARTY, Solicitor.

[*Annex affidavit: see, ante*, §§ 164; 789.]

**§ 1017. Some Practical Suggestions in Suits to Set Aside Fraudulent Conveyances.**—If the defendant vendor and vendee do not become witness in their own behalf, the complainant may be compelled to make witnesses of them himself. In either event, make them specify when, where and from whom the vendee got the money to make the payments for the land, and what the vendor has done with the money by him so received. Make them show the place, day and hour when the writings were drawn, and signed and who were present. Prove by them that the vendee knew the vendor was in debt, especially to complainant, and was liable to be sued. Ask them in reference to conversations between them, or talk by either of them, in reference to the vendor's debts, and his liability to the sued. Prove the existence of as many badges of fraud<sup>37</sup> as possible by themselves, or by other witnesses. Show that the vendee was in a situation to know of his vendor's indebtedness.

If the defence is fabricated, the chances are that the defendants in their depositions will contradict each other, or the statements in their answers. Be particular in examining them to question them closely as to the time, place and circumstances of the conveyance; do this at the very outset of their examination and repeat it at the very close; and note inconsistencies, if any.

**§ 1018. Suits in Aid of a Judgment Creditor where No Fraud is Alleged.** The Code gives the Chancery Courts exclusive jurisdiction to aid a creditor by judgment or decree, to subject the property of the defendant which cannot be

<sup>34</sup> Scheibler v. Mundinger, 2 Pick., 674.  
<sup>35</sup> *Ibid*; Lookout Bank v. Noe, 2 Pick., 21.

<sup>36</sup> Bank v. Martin, 12 Pick., 1.  
<sup>37</sup> See, *ante*, § 1010.

reached by execution, to the satisfaction of the judgment or decree, under the provisions of the Code.<sup>38</sup> This is a comprehensive and far reaching statute, and includes all manner of judgments and decrees for money, no matter by what Court rendered or whether the amount exceeds fifty dollars or not,<sup>39</sup> and subjects to their satisfaction all property of the defendant that cannot be levied on under an execution; and it is not necessary to have an execution issued, and returned "*nulla bona*," before filing the bill, nor is it necessary to charge in the bill that the defendant has fraudulently transferred or concealed his property, or that a discovery is necessary.<sup>40</sup>

The complainant has a lien upon the equitable interest of the defendant in real estate or other property from the filing of the bill; but he may acquire a lien from the rendition of the judgment or decree by causing a memorandum thereof, within sixty days from its rendition, to be registered as provided in Code sections 2984, 2985, and by filing his bill within thirty days from the return of the execution unsatisfied.<sup>41</sup>

If the property reached by the bill is insufficient to satisfy complainant's demand, and the defendant is receiving the rents but fails to pay the taxes, a receiver may be appointed.<sup>42</sup>

The character of the property that may be reached under this section is described in another section.<sup>43</sup>

A bill will not lie under Code, § 4282, in behalf of a judgment creditor to reach property that may be levied on at law, for, having a judgment already, he can have an execution on it.<sup>44</sup> Nor will it lie in behalf of a complainant who has no judgment, on the sole ground that the defendant is insolvent and complainant fears he may sell or encumber what property he has.<sup>45</sup>

The following is a form of a bill under this section:

#### BILL BY A JUDGMENT CREDITOR.

[For address and commencement, see, ante, §§ 156; 164.]

Complainant respectfully shows to the Court:

I.

That on May 1, 1890, he recovered a judgment in the Circuit Court of McMinn county against the defendant, Richard Roe, for five hundred and ten dollars, and costs of suit. [On this judgment an execution issued, and was returned June 10, 1890, "no property found." *This allegation is unnecessary,*<sup>46</sup> *except in cases specified in Code, §§ 2984-2986.*]

II.

That the defendant, Richard Roe, has no property subject to execution at law; but on April 12, 1889, he conveyed by registered deed to the defendant, Henry Fen, a tract of land in the 2d civil district of said county in trust to secure to him the payment of an alleged debt of four hundred dollars. Said tract of land is bounded as follows: [*Give description: see, ante, § 172.*] Said tract of land is well worth one thousand dollars.

III.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*, see, ante, §§ 158; 164.]

2d. That said tract of land be sold, 1st to satisfy whatever, if anything, may be due the defendant Henry Fen under said deed of trust; and 2d, that what balance of the proceeds of sale may remain be applied to satisfy complainant's said judgment; that said sale be on a credit of twelve months and in bar of redemption.

3d. That complainant have such further and other relief as may be consistent with equity.

Geo. G. WILLIAMS, Solicitor.

<sup>38</sup> Code, § 4282; *Stark v. Cheatham*, 2 Tenn. Chy., 302.

<sup>39</sup> *Putnam v. Bentley*, 8 Bax., 84; *State v. Covington*, 4 Lea, 58; *Malone v. Dean*, 9 Lea, 338; *Piano Co. v. Schell*, 6 Cates, 410.

<sup>40</sup> Considerable confusion in the reported cases on Code § 4282, has arisen from dealing with § 4282 as a mere prelude to §§ 4283-4286, whereas § 4282 is an independent section, originating with the Code of 1858. *Porter v. Lea*, 4 Pick., 792-3; and §§ 4283, 4284, 4285, 4286 and 4287 are taken from the Act of 1832, which was copied from the New York Act of 1828. *Jourlmon v. Massengill*, 2 Pick., 119, 121. In various decisions of our Courts, and in *Thompson & Steger's Code*, section 4282 is credited to the Act of 1832. Even Judge Cooper, one of the authors of the Code of 1858, several times refers to section

4282, as taken from the Act of 1832. See *Johnson v. Tucker*, 2 Tenn. Chy., 399; *Hoobery v. Harding*, 3 Tenn. Chy., 684, and *Turley v. Taylor*, 3 Lea, 172. See, also, *Bryan v. Zarecor*, 4 Cates, 516-517, where contradictory statements are inadvertently made.

<sup>41</sup> Code, § 4286; *Stark v. Cheatham*, 2 Tenn. Chy., 302. No attachment is necessary to make good this lien.

<sup>42</sup> *Cone v. Pante*, 12 Heisk., 506; and *Johnson v. Tucker*, 2 Tenn. Chy., 398.

<sup>43</sup> See, ante, § 882.

<sup>44</sup> *Bryan v. Zarecor*, 4 Cates, 513.

<sup>45</sup> *McKeldin v. Gouddy*, 7 Pick., 677, citing § 788, (now § 806,) of this book. Such complainant can take his decree and execution under the Act of 1877, and no more. *Ibid.*

<sup>46</sup> *Stark v. Cheatham*, 2 Tenn. Chy., 300.

If there be any grounds for an attachment, or injunction, or receiver, they should be specifically alleged, and then the bill should state that it is the first application for such process, and must be sworn to.

ARTICLE III.

SUITS WHERE JUDGMENT AT LAW HAS BEEN OBTAINED BUT A DISCOVERY OF PROPERTY IS NECESSARY.

- § 1019. When a Bill of Discovery Will Lie.
- § 1020. Character of the Discovery Enforced.
- § 1021. Rights Acquired Under the Bill.
- § 1022. Frame of the Bill of Discovery.

- § 1023. Form of the Bill of Discovery.
- § 1024. Character of the Orders to Compel the Discovery.

§ 1019. **When a Bill of Discovery will Lie.**—The Code<sup>1</sup> provides that a creditor whose execution has been returned unsatisfied in whole, or in part, may file a bill in Chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held in trust for him, except when the trust has been created by, or the property so held has proceeded from some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered.

To sustain such a bill the complainant must allege and prove: 1st, that he is a creditor by judgment or decree on which an execution has issued and been returned unsatisfied in whole or in part; 2d, that the defendant, (who is the judgment debtor,) has property legal or equitable, or both; and 3d, that this property has been so concealed that it can be reached only by aid of a discovery. Such a bill will not lie to reach property capable of being reached on an execution by levy or garnishment,<sup>2</sup> nor money in the debtor's possession.<sup>3</sup>

§ 1020. **Character of the Discovery Enforced.**—The statute aims to aid the judgment creditor, to the utmost limit of the powers of a Chancery Court, in his efforts to ferret out the assets and estate of his debtor, and to uncover all receptacles of property and open all doors to deposits. And not only is the creditor authorized to search the conscience of the judgment debtor, and of any other person or corporation, by interrogatories in his bill, in order to ascertain what stocks, choses in action, money or other legal or equitable property, of the judgment debtor is in their possession, or under their control, or within their knowledge, including money, stocks, choses in action, or other property held in trust for him, but he may, also, take their depositions, or, if opportunity permit, cross-examine them to the uttermost to compel them to disclose all they may know, and to disgorge all they may have, pertinent to the relief sought by the bill.

Under Code sections 4283, 4284, 4285, the debtor defendant may be compelled to disclose what property in any way belongs to him, including stocks, choses in action, or money, due him or held in trust for him, with the exception above stated; and where such property is, and, if in another's possession, the name and place of residence of such person; and when the existence of any property is disclosed by the answer of the defendant or defendants, either in their answers to the bill or to interrogatories or questions propounded, the Court will compel the party in possession to surrender the same into the custody of the Court, and it will be subjected to the satisfaction of complainant's judgment or decree.

If any of the defendants fail or refuse to make full disclosures in answer to the bill, or to interrogatories or questions, or having made disclosures, or, the facts otherwise appearing, fail or refuse to surrender, or pay into Court, money, stocks, choses in action, or other property due or belonging to the debtor de-

<sup>1</sup> Code, § 4283.

<sup>2</sup> Bryan v. Zarcor, 4 Cates, 503, citing above sec-

tion, then § 979, of this book.

<sup>3</sup> Webb v. Jones, 13 Lea, 200.

defendant, or held in trust for him, with the exception stated, or refuse to make all necessary transfers to pass the title or possession of such property, when duly ordered by the Court, the defendants so failing or refusing may be imprisoned by process of contempt until they comply.<sup>4</sup>

§ 1021. **Rights Acquired Under the Bill.**—The complainant has a lien upon all of the judgment debtor's property from the filing of his bill, but he may acquire a lien from the rendition of his judgment or decree, by causing a memorandum thereof within sixty days from its rendition to be registered as provided in Code sections 2984-2985, and by filing his bill within thirty days from the return of the execution unsatisfied.<sup>5</sup>

§ 1022. **Frame of the Bill of Discovery.**—As the object of the law is to compel the discovery of the judgment debtor's property and to prevent its transfer, payment or delivery to any other person, so the bill of complaint should be equally as vigorous and far-reaching.<sup>6</sup>

The bill in such a case should contain the following averments and prayers:

1. It should commence by stating the recovery of the judgment on which the bill is founded. The name of the Court rendering the judgment, the names of the parties, the amount of the judgment, and its date, should all be set forth with substantial accuracy.

2. It should next show that an execution duly issued upon said judgment, specifying when and to the Sheriff of what county; and that said execution has been duly returned unsatisfied, in whole or in part. The very words of the return ought to be given; but this is not essential.

3. It should aver that the defendant has property, specifying it, and showing its character, amount, form, and whereabouts as nearly as possible, and if in the hands of third parties, so stating, and making such averments and charges in reference to such property, and to the possession or control thereof by any of the co-defendants, as the complainant is justified in making.

4. It must pray for process, and for a discovery of the property of the judgment debtor, and to subject the same to the satisfaction of the complainant's judgment, whether such property could be levied on or not.<sup>7</sup> The discovery called for should be of the most searching character probing the knowledge, memory and conscience of the defendants to the uttermost. If an injunction or an attachment, or both, are necessary and proper, they may be prayed for, also.

§ 1023. **Form of the Bill of Discovery.**—The subject of Bills of Discovery will hereafter be fully treated, and reference is made to the Chapter on the subject.<sup>8</sup>

The following form will indicate the character of bill contemplated by the statute under consideration:

**BILL OF DISCOVERY BY A JUDGMENT CREDITOR.**

To the Honorable Oliver P. Temple, Chancellor, holding the Chancery Court at Knoxville:  
John Doe, a resident of Knox county, complainant,

*vs.*  
Richard Roe, Robert Roe, John Smith, William Brown and Henry Jones, }  
all residents of Knox county, defendants.

Complainant respectfully shows to the Court:<sup>9</sup>

I.

That at the January term, 1876, of the Circuit Court of Knox county, he recovered a judgment for five thousand dollars and costs of suit against the defendants, Richard Roe and Robert Roe, said Robert being the surety of said Richard on the note on which said judgment was based.

II.

In February, 1876, an execution was duly issued, on said judgment, to the Sheriff of Knox

<sup>4</sup> Cresswell v. Smith, 8 Lea, 688. This statute was intended to be efficacious, and there is no reason why the Court should not make it so. In a republic no one, not even a debtor, should be superior to the law. Let it not be said, *De legibus non curat debitor!*

<sup>5</sup> Code, § 4286.

<sup>6</sup> *Vana est illa potentia quæ nunquam venit in ac-*

*tum.* (Worthless is that power which is never used.)

<sup>7</sup> Code, § 4284; Bryan v. Zarecor, 4 Cates, 518.

<sup>8</sup> See, *post*, §§ 1116-1121.

<sup>9</sup> This bill is based on a form in 2 Barb. Ch. Pr., 587-593. Our statute is very similar to that of New York. Cresswell v. Smith, 8 Lea, 700. See, Code, §§ 3088; 3478-3495.

county, being the county then and now of the said two defendants' residence. Said Sheriff made diligent search for goods and chattels, lands and tenements, but was unable to find any, and so he returned said execution wholly unsatisfied, for that reason, his return so showing. *[If any money was collected on the execution, so show, and show that the balance of said execution is unsatisfied.]*

## III.

Complainant charges and avers that the defendant Richard Roe, shortly before said judgment, was a merchant in the town of Knoxville, and had been doing a large business; and complainant charges and avers that many persons are indebted to him in various amounts, large and small; and that he holds many notes, due bills, accounts stated and open, county warrants, bonds, coupons, and various other securities and evidences of debt, to a large amount, and has goods, wares and merchandise, choses in action, and chattels, of various kinds and divers amounts, in his possession, or under the control or possession of others for his use, advantage or benefit, or subject to his order, or wherein he is in some manner beneficially interested; all of which property, debts, choses in action, and other estate, might and ought to be applied to the satisfaction of complainant's said judgment. *[Specify any debts, choses in action, or other effects of the principal defendants due from, or in the hands of, the other defendants.]*

## IV.

Complainant charges and avers that the said defendant Robert Roe was possessed of considerable estate when he became security on said note, but about the time suit was brought on said note he put all of his property out of sight of a Court of law. Complainant charges and avers that said Robert is the owner of, or in some way or manner beneficially interested in, some real estate in this State, or some contract or agreement relating to real estate, or the rents, profits or issues of some real estate, or some interest in some real estate; also that the said Robert is the owner of, or in some way beneficially interested in some real estate; also that the said Robert is the owner of, or in some way beneficially interested in, the stock, property or profits of some company, incorporated or unincorporated, or in the stock, property or profits of some company or partnership; or has some other sources of income, or some other kind of estate held for him by some one as friend, agent, bailee, tenant, clerk, custodian or trustee; or has money, county warrants, notes, bonds, coupons, certificates, accounts, securities or other choses in action, or evidences of debt or deposit, deposited in some bank, or with some company, firm or person to his credit, or for his use or benefit, or in trust for him, or in some way to be subject to his order or be applied according to his direction or suggestion. *[If any specific facts are known, charge them fully and particularly.]*

## V.

Complainant further charges, and avers that the other defendants John Smith, William Erown and Henry Jones, are indebted to said Richard and Robert, or to one of them, or have money, county warrants, notes of hand, due bills, accounts, trust deeds, mortgages, stock certificates, bonds, coupons, or other evidences of debt, or securities, or valuable papers, or property of some other kind, belonging to said Richard or said Robert, or to both; or subject to the order, or control, of either said Richard, or said Robert, or of both; or held for the benefit of one or the other of them, or of both; or in which the said Richard and Robert, one, both, or either, have some beneficial interest, or some right of use, enjoyment or profit, whether said property is held in the name of said Richard or Robert or of either of them, or in the name of any or all of the defendants or of any two or more of them, or held in any other manner or form. *[If any of these defendants are known or believed to have any property of any kind belonging to their co-defendants, or held for their use or benefit, or to be in any way their debtor, trustee, bailee, agent, depository or donee, as to any debts, effects, choses in action, interests or estates, of any kind, specify the supposed facts fully and particularly.]*

## VI.

And if the said Richard or Robert Roe have made any assignment or transfer of any of their property or effects, complainant charges and avers that such assignment or transfer is merely colorable, and made with a view and for the purpose of placing the same beyond the reach of complainant's said judgment and execution thereon, and of enabling the said Richard and the said Robert, one or both, to control and enjoy the same, and have the use, benefit, and proceeds thereof; and so it would appear if they would state and set forth when and to whom such transfer or assignment was made, and what was the kind, amount and value of the property, debts, choses in action, or effects so assigned or transferred, and what were the terms or conditions, express or implied, upon which such transfers or assignments were made, and what disposition has been made of the property so assigned or transferred, and in whose possession the same now is, or what has been done with the same, or the rents, profits, proceeds, or income thereof. Complainant claims, and calls for, a full and complete discovery of all such property, debts, claims, effects, and things in action, belonging in any way to said Richard or Robert Roe, or to both; and of all agreements or understandings, express or implied, and of all trusts, whereby any property, debts, choses in action, or other effects, or the use, benefit, income, rents, issues, or profits thereof, are held for the use or benefit, or at the disposal, of said Richard or Robert, or of both; and of every assignment or transfer, bailment or pledge, gift or donation, which either or both of said last named defendants has,

or have, made directly or indirectly of his or their property, debts, choses in action, or other effects, or of any part thereof, and of the person or persons to whom such assignment, transfer, bailment or pledge, gift or donation, has been made directly or indirectly, in whole or in part; the amount and value of the property, debts, choses in action, or other effects so assigned or transferred; and the trusts, conditions, limitations, agreements, or understandings, express or implied, upon which such assignment, transfer, bailment, pledge, donation or gift, was made, and all the facts and circumstances relating thereto; and particularly what is the situation of said property, debts, choses in action, or other effects, assigned, transferred, delivered, pledged, donated or given away, directly or indirectly, at the time of the filing of this bill, and in the possession, or under the control of what persons the same is, at such filing. [*If any specific facts, or supposed facts, are charged, identifying any particular chattel, debt, chose in action, or other property or estate, legal or equitable, of the principal defendants, call for a discovery in reference thereto.*]

## VII.

Complainant charges and avers that the defendants, John Smith, William Brown, and Henry Jones, have jointly or severally confederated and agreed, directly or indirectly, expressly or impliedly, to aid said Richard and Robert Roe, one or both, in covering up his or their property, effects, debts, choses in action, and other estate, and have themselves possession or control, directly or indirectly, of some of the property, effects, debts, choses in action, and other estate of said Richard and Robert, or of one or the other of them; or that other persons hold some of said property, effects, debts, choses in action, stocks, moneys, checks, bonds, county warrants, coupons, certificates, or evidences of property, debt, deposit, stock, or interest, in pledge or in bailment for the said Smith, Brown, and Jones, or for one or more of them, and they, the said Smith, Brown and Jones, one or more of them, hold the same by some agreement, trust, or understanding, express or implied, for said Richard or Robert Roe, or both of them. [*Here specify any fact or facts complainant has reason to believe to be true, showing that any of the foregoing general charges are true.*]

## VIII.

The premises considered, complainant prays:

1st. That subpoena to answer issue as to all of those named as defendants in the caption of this bill, and that they all be made parties defendant hereto, and be required to abide and perform your Honor's orders and decrees.

2d. That each of said defendants be required to answer this bill fully and particularly, upon his oath, paragraph by paragraph, according to the best of his knowledge, remembrance, information, and belief; and that each of them be compelled to set forth and discover the nature, character, kind, amount, value, and whereabouts of all the property, debts, choses in action, effects, and other interests or estate of the said Richard and Robert Roe, or of either of them, whether in the hands of any of the defendants, or of any other person as bailee, pledgee, donee, trustee, lessee, mortgagee, or depositary, direct or indirect.

3d. That each of said defendants, Richard Roe and Robert, answer fully and particularly to the best of their knowledge, remembrance, information, and belief, (1) whether they, or either of them, at the time of the filing of this bill, owned directly or indirectly any and what property, debts, notes, accounts, choses in action, county warrants, certificates of deposit, or of indebtedness, stocks, bonds, coupons, shares, or interests in any company or firm, incorporated or incorporated, of any kind whatsoever; or (2) whether any and what person or persons, or company, or corporation, at the time of the filing of this bill, held for them, or for either of them, directly or indirectly, or as trustee, pledgee, bailee, or donee, any property, debts, notes, accounts, money, choses in action, checks, county warrants, certificates of deposit or of indebtedness, stocks, bonds, coupons, shares or interests in any firm, company or corporation, or other estate, or evidence thereof, of any kind or character whatsoever, and the amount and value thereof; or (3) whether they or either of them have, since the execution of said note, assigned, transferred, donated, given, pledged, bailed, or delivered to any and what person, firm, company, corporation, or partnership, any of his or their property or effects, money, choses in action, county warrants, accounts, claims, stocks, bonds, coupons, checks, certificates of stock, interest, deposit, pledge, bailment, gift or trust, or any other kind or evidence of property, or of the use, benefit or enjoyment thereof whatsoever; and when, to whom, for what purpose, and upon what terms, conditions, understandings, or agreements, verbal or written, express or implied, direct or indirect, such assignment, transfer, donation, gift, pledge, bailment, or delivery was made; and what has become of said property, effects, or estate; and whether they, the said Richard and Robert, or either of them, or any member of the family of either, or any person for either of them, or for any member of the family of either of them, since such transfer, assignment, donation, gift, pledge, bailment, or delivery, have received any of the benefits, or any of the rents, issues, income, interest, hire, or other profits of any of said property, effects, or estate, of any kind, character, or amount, or in any shape or form whatsoever, and the kind, amount, and value thereof.

4th. That each of the defendants, Smith, Brown, and Jones, answer fully and particularly to the best of their knowledge, remembrance, information, and belief, (1) whether they, or either of them, have in their possession, or under their control, or whether any other person, or persons, for them, or either of them, have in his, her, or their possession or control, as debtor, assignee, transferee, vendee, lessee, trustee, bailee, or donee, any property, money,

goods, chattels, effects, debts, claims, notes, accounts, county warrants, checks, bonds, coupons, certificates, or evidences, or shares, of stock or interest in any firm, company, or corporation, or other choses in action, or evidences of property, interest, or estate, belonging to said Richard and Robert Roe, or either of them, directly or indirectly, or wherein said Richard and Robert, or either of them, are interested, directly or indirectly, or wherefrom the said Richard and Robert, or either of them, or the family, or any member thereof, of either of them, receive, derive, obtain, or in any way have any benefit, use, profit, income, interest, rent, or issue; and the kind, character, amount, and value of such property, estate, or effects; and (2) whether they, or either of them, at the time of the filing of this bill, was in any way indebted to said Richard and Robert Roe, or to either, or to any other person for their use and benefit, or to the use and benefit of either of them, and how and to what amount; and (3) whether there are, to their knowledge or belief, or to the knowledge or belief of either of them, any and what property, debts, and effects in the possession or under the control of any other and what person, belonging to said Richard and Robert Roe, or to either of them, or to any other person for their use and benefit, or the use and benefit of either of them, or of the family, or any member of the family of either or both of them, directly or indirectly. [*Interrogate them as to all special facts charged against them in the bill; and call on them to show fully what they have done with property alleged to have been in their custody.*]

5th. That each and all of the defendants be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, encumbering, or in any way or manner disposing of, or intermeddling with, any debts, demands, claims, accounts, money, property, checks, bonds, coupons, county warrants, or other effects, due or belonging, directly or indirectly, to said Richard and Robert Roe, or to either of them, or to anybody for them, or either of them, and from assigning, transferring or delivering to anybody any of the property, goods, chattels, money, debts, claims, accounts, notes, checks, bonds, coupons, county warrants, certificates or evidences of debt, deposit, shares or interest in or with any person, firm, company, or corporation, or other choses in action, or property or evidences of property, or of any interest in property, a discovery whereof is in this bill sought and prayed for.

6th. That on the incoming of the answers of the defendants, or sooner if necessary, a receiver be appointed of all the property, choses in action, effects and other estate of said Richard and Robert Roe; and that the proceeds of all of said property, effects, and estate be applied to the satisfaction of complainant's said judgment, and of the costs of this suit.

7th. That complainant may have a decree for the amount of his said judgment at law, and the costs of said suit at law; and that he may have all such further and other relief as he may be entitled to at the hearing.

This is the first application for an injunction, or a receiver, in this case.

L. C. Houk, of Counsel.

A. CALDWELL, Solicitor.

[*Affidavit and jurat as in § 789, ante.*]

§ 1024. **Character of the Orders to Compel the Discovery.**—If the defendants, or any of them, fail to fully answer the bill, giving in detail full and direct answer to each specification and requirement of the bill, the answer so deficient may be excepted to, and, if, after exceptions sustained, the defendant in default fails to make a sufficient answer, the complainant may have him attached, or may have an order taking his bill for confessed.<sup>10</sup>

#### ARTICLE IV.

##### SUITS WHERE A CREDITOR HAS OBTAINED JUDGMENT IN ANOTHER STATE, AND HAS EXHAUSTED HIS LEGAL REMEDY THERE.

§ 1025. When a Bill by a Foreign Creditor | § 1026. Frame of the Bill.  
Will Lie Against a Foreign Debtor. | § 1027. Form of the Bill.

§ 1025. **When a Bill by a Foreign Creditor Will Lie Against a Foreign Debtor.**—Under the Code, when a judgment has been recovered in another State against a resident of such State, and the creditor has exhausted his legal remedy, the real or personal property of the debtor in this State may be subjected to the satisfaction of such debt, by bill stating the facts under oath, and filed in the County in which the property is situated.<sup>1</sup> A non-resident

<sup>10</sup> See, *ante*, § 424. And if the bill alleges money or other property of the debtor defendant in the hands of his co-defendant a final decree may be pronounced subjecting the same.

<sup>1</sup> Code, § 4297. *Taylor v. Badoux*, 8 Pick., 249; *Bank v. Motherwell*, 11 Pick., 172. The Code, says the bill is to be filed in the "district in which," &c. See, *ante*, § 177, note 15.



creditor without a judgment cannot maintain a bill against a non-resident debtor either under Code, § 4297, or under the general principles of Equity jurisdiction.<sup>2</sup>

§ 1026. **Frame of the Bill.**—The bill should be drawn with great precision as the inclination of our Courts seems to be to construe the statute strictly.<sup>3</sup> The bill should open by declaring and reciting the judgment complainant has obtained against the defendant, and when, where, and for what amount obtained, and should aver that such judgment is unpaid, and in full force and effect; and that on said judgment an execution issued and was returned wholly unsatisfied, or satisfied only in part, as the case may be, giving the amount realized on the judgment, if anything, and giving the dates of the issuance and return of the execution.

If the property of the defendant is known it should be described so as to identify it, for this would operate as a *lis pendens*; and an attachment should be prayed as further security.

The draughtsman should be careful to show that the defendant is a resident of the State in which the judgment was recovered, and that the complainant is a resident of the same state.<sup>4</sup>

If the bill shows that all of the defendant's property in the State of his residence has gone into the hands of a receiver, or that the defendant is insolvent, the issuance and return *nulla bona* of an execution become unnecessary, and the bill may be filed at once.<sup>5</sup>

It is not necessary for the complainant to allege that the property of the defendant has been fraudulently removed to this State to evade the process of the law in the State of their residence.<sup>6</sup>

Lands descended to heirs in this State cannot be reached in this proceeding to satisfy a judgment against the administrator in another State.<sup>7</sup>

§ 1027. **Form of the Bill.**—The form of the bill is well indicated in the preceding section, but the following illustration may be of service:

#### BILL TO ENFORCE A FOREIGN JUDGMENT.

[For address and caption see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

##### I.

That on the....day of....19.... [insert the date of the judgment,] he recovered a judgment for seventeen hundred and ten dollars, and the costs of the suit, in the law Court of Cincinnati, Ohio, on which judgment an execution duly issued, and was returned on the....day of....19.... [give the date] "*nulla bona*," all of which will more fully appear by reference to said judgment, execution and return, certified copies whereof are herewith filed, marked A, B and C, respectively. Said judgment remains in full force and effect. Complainant and defendant both resided in Ohio when said judgment was rendered, and have resided there ever since, and now reside there.

##### II.

That said defendant owns the following tract of land in Blount county, Tennessee. [Here describe it, and specify any other property he owns in this State, real or personal, giving the county where situated.]

##### III.

Complainant therefore prays:

1st. That an attachment issue and be levied on said tract of land, and on any other property of the defendant to be found in the State.

2d. That on such levy being made, publication be made according to law in attachment suits, notifying the defendant thereof, and requiring him to appear and answer the bill, but his oath to his answer is waived.

3d. That complainant have a decree against the defendant for the amount due him on said

<sup>2</sup> Gasget v. Scott, 9 Yerg., 244.

<sup>3</sup> There seems to be no reason for the disfavor of the Courts, unless it be that it was the first statute ever passed in Tennessee dispensing with service of subpoena upon the defendant. Gilman v. Tisdale, 1 Yerg., 285; Davis, exrs., v. Fulton, 1 Overton, (Tenn.) 121.

<sup>4</sup> Such seems to be the holding of the Courts, but has not been directly decided. See Gilman v. Tisdale, 1 Yerg., 285. In Davis' exrs., v. Fulton, 1 Overton, 121; in Taylor v. Badoux, 8 Pick., 249; and in Bank

v. Motherwell, 11 Pick., 172, both parties resided in the same State; but does the law so require?

<sup>5</sup> Davis' exrs., v. Fulton, 1 Overton, (Tenn.), 121; Bank v. Motherwell, 11 Pick., 172. *Lex neminem cogit ad vana seu inutilia peragenda.* (The law forces no one to do vain or useless things.)

<sup>6</sup> Taylor v. Badoux, 8 Pick., 249. The Act of 1871, ch. 122, Code, § 3455a, does not modify Code, § 4297, but applies to the general attachment laws. *Ibid.*

<sup>7</sup> Gilman v. Tisdale, 1 Yerg., 285.

judgment, and if the same is not paid by a given day, that said tract of land be sold. [See, §§ 626; 844; 977; 995.]

4th. That complainant have such further and other relief as his case will warrant and as your Honor may deem meet.

This is the first application for an attachment in this case.

J. E. CASSADY, Solicitor.

[Annex affidavit; see, ante, § 164; 789.]

ARTICLE V.

SUITS WHERE JUDGMENTS AT LAW MAY BE HAD, BUT EXECUTIONS AT LAW CANNOT BE LEVIED.

§ 1028. Suits to Subject the Separate Property of Married Women. | § 1029. Suits to Marshal Securities.

§ 1028. **Suits to Subject the Separate Property of Married Women.**—Whenever real or personal property is given, granted or devised to a woman after marriage, or in contemplation of marriage, for her separate use, and free from the control of her husband, it will be deemed a separate estate; and as to such property, Equity considers her a single woman, conceding to her the power to charge it with debts or engagements:<sup>1</sup> this power she exercises by express words or by clear implication,<sup>2</sup> in writing, or by parole.<sup>3</sup>

Equity regards her engagement as in the nature of an allotment of enough of her separate estate to discharge her liability: and in subjecting this estate to the satisfaction of her engagement, the Chancery Court regards the separate estate as the debtor, and a bill to enforce such an engagement is in the nature of a proceeding *in rem*, rather than *in personam*.<sup>4</sup> The bill should, therefore, specify and locate the property<sup>5</sup> held by the wife as her separate estate, and aver an express engagement on her part to pay the debt, or discharge the liability, out of such estate.<sup>5a</sup>

The following will indicate the frame and form of a

**BILL TO SUBJECT A WIFE'S SEPARATE ESTATE.**

[For address and caption, see ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That, [Here show the relations of the parties out of which the liability of the wife arose. Such as goods, wares, and merchandise sold and delivered for the use of herself and family, or money loaned her to pay obligations, or the like.]

II.

That, [Here show that complainant made said advances on the express stipulation of the wife that she would pay him out of her separate property, and that complainant made said advances on the faith of such stipulation. If a writing was executed by her in evidence of her engagement, so state, and set it out in full, and make it an exhibit to the bill.]

III.

That at the time said note was executed, [or said engagement entered into] the defendant [wife] owned the following property as her separate estate. [Here describe the property and give its location so as to fully identify it.]

IV.

That, [If the husband is insolvent, so allege, and make him a defendant whether he signed the note or other writing, or not.]

V.

That [If there be any other material matter, here allege it.]

1 See Woodfolk v. Lyon, 14 Pick., 269.  
2 Sto. Eq. Jur., § 1379.  
3 Eckerly v. McGhee, 1 Pick., 661. Such contracts are, however, generally in writing. But a writing, such as a note, not expressly binding the separate estate cannot be shown by parole to be so binding. *Ibid.*

4 Jordan v. Everett, 9 Pick., 390.  
5 The property must be located within the jurisdiction of the Court. Flannigan v. Grocery Co., 14 Pick., 599.  
5a. "I bind my separate estate for the payment of this note," inserted in the body of the note is sufficient. Warren v. Freeman and wife, 1 Pick., 513.

## VI.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*; see, *ante*, §§ 158; 164.]

2d. That complainant have a decree against the defendant [*wife*] for the amount due him, including interest, and that enough of her said separate property be sold to satisfy the same.<sup>6</sup>

3d. That he have such further and other relief as he may be entitled to.

DAVID C. YOUNG, Solicitor.

The bill need not be sworn to unless some defendant is a non-resident or some extraordinary process is prayed: no injunction or attachment is necessary to fix a lien upon the property, the filing of the bill creating a lien, the doctrine of *lis pendens* applying in such a case.<sup>7</sup>

§ 1029. **Suits to Marshal Securities.**—Whenever one creditor has a lien upon two funds, or two parcels of property, and another creditor has a lien upon only one of them, the Chancery Court will require the former creditor to seek satisfaction first out of that fund or property upon which the other creditor has no lien.<sup>8</sup>

Thus, where one creditor (A) is secured by two or more funds, (say two, X and Y,) and another creditor (B) is subsequently secured by only one of said funds, (say X,) a Court of Chancery on due application will compel A to exhaust first the fund, Y, before resorting to fund, X; and if A has exhausted the fund, X, without observing this rule, the Chancery Court will subrogate B to A's right against fund, Y. And this rule applies, also, in favor of two or more creditors against one or more prior creditors.

#### BILL TO MARSHAL SECURITIES.

[For address and caption, see, *ante*, §§ 155; 164.]

Complainant respectfully shows to the Court:

## I.

That the defendant Richard Roe, is indebted to him in the sum of six hundred dollars. [Show the amount of the indebtedness, and that it is secured on farm, lot or fund A, stating how secured, and specifying the security, and giving its date.]

## II.

That the defendant Richard Roe is, also, indebted to his co-defendant, Roland Roe, but the amount of such debt complainant does not know. This debt owing to Roland Roe, alleged by him to be eight hundred dollars, is secured by a deed of trust, [mortgage, lien, or in some other way; specify how,] on said [farm or lot A, specifying the property,] and also on [another piece of property B, describing it.] Said deed of trust [mortgage, or lien,] in favor of Roland Roe, is dated the....day of....190.... [give date.]

## III.

That the deed of trust, [mortgage, or other lien,] of defendant, Roland Roe, is a prior and superior lien to that of complainant, and he is about to sell said [farm, lot, or, &c., A,] without recourse to said [lot B,] having advertised it for sale under his said deed of trust. Complainant is informed and believes, and so charges and avers, that said farm is not worth and will probably not sell for more than the amount of the debt to defendant Roland Roe, in which event complainant's said security will become worthless.

## IV.

That he has requested the defendant Roland Roe to first sell said [lot B,] but he has refused so to do. [It is not necessary to make such an allegation, but if the request was made and refused, so state.]

## V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*, see, *ante*, §§ 158; 164.]

2d. That an injunction issue to restrain and prohibit the defendant, Roland Roe, from selling [farm, lot, or &c., A.]

3d. That the debt due the defendant, Roland Roe, if any, be set up and established in your Honor's Court, and that complainant have a decree for his debt also, and that said two [tracts of land, lots or &c., A and B,] be sold<sup>9</sup> on a credit of not less than six nor more than twenty-four months, and in bar of the equity of redemption, and that the proceeds of said two lots [or tracts] be marshalled, and the debt to the defendant Roland Roe be first paid, if he be found entitled thereunto, and that out of the proceeds of the sale of said [farm, lot or &c. A] complainant's said debt be paid.

<sup>6</sup> If the property is realty, and a sale in bar of redemption is desired, so pray. See, *ante*, § 626.

<sup>7</sup> *Jordan v. Everett*, 9 Pick., 300.

<sup>8</sup> *White v. Fulghum*, 3 Pick., 285; 3 Pom. Eq. Jur., § 1414; 1 Sto. Eq. Jur., §§ 642-645.

<sup>9</sup> *Gilliam v. McCormack*, 1 Pick., 597.

4th. That complainant have such other, further and general relief as the nature of his case may require.

This is the first application for an injunction in this case.

J. W. GAINES, Solicitor.

[*Annex affidavit, see, ante, §§ 161; 789.*]

If the property is not fully worth both debts, and is deteriorating in value; or uninsured, or the taxes unpaid, state these facts in the bill and pray for a receiver.<sup>10</sup>

ARTICLE VI.

SUITS BY GENERAL CREDITORS FOR THEIR PRO RATA OF AN INSOLVENT DEBTOR'S PROPERTY.

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|---|---|
| <p>§ 1030. Rationale of the Pro-rating of the Assets of an Insolvent Debtor.</p> <p>§ 1031. When a General Creditors' Bill Will Lie.</p> <p>§ 1032. Rationale of a General Creditors' Bill.</p> | <p>§ 1033. Frame of a General Creditors' Bill.</p> <p>§ 1034. Form of a General Creditors' Bill.</p> <p>§ 1035. Proceedings on a General Creditors' Bill.</p> |
|---|---|

**§ 1030. The Rationale of the Pro-rating of the Assets of an Insolvent Debtor.**—As a rule, the assets of an insolvent debtor are, directly or indirectly, composed of what he has obtained from his various creditors, and failed to pay back or otherwise make good; so that, in effect, these assets are indirectly the equitable property of these creditors, the legal title only being in the debtor, and he in Equity holding these assets in trust for his creditors as the equitable owners. Hence, the insolvent debtor has no equitable or moral right to take the whole, or an undue proportion, of his assets to pay one or more of these general creditors, for that would be using the equitable shares of the other creditors in those assets to pay those thus preferred; nor has any one of these general creditors any equitable or moral right to the whole, or an undue proportion, of his debt, for, if he got more than his equitable proportion of the assets, he got more or less of the proportions of the other general creditors, and would be liable, in Equity, to account therefor.

It is manifest that the only way in which such assets can be equitably disposed of is to return to each general creditor his proportion of the whole without taking from any other what is his. It will thus be seen that the assets of an insolvent debtor constitute a *quasi* trust fund wherewith to pay his debts. These assets are the crop produced by his debts, and are often a part of the very money or property or services received from the creditors. Every person who labored for this debtor on account, or loaned him money, or sold him property on credit, did so on the faith that the debtor's assets would constitute a fund from which he would be reimbursed. But, as these assets, the common fund for the payment of all the creditors and in Equity belonging to all, are not sufficient to pay each creditor one hundred per cent. of his debt the only equitable rule of distribution is to pay each one as large a per cent. as the assets will warrant, giving each one the same proportion of his debt, and thus administering that equality in which Equity takes delight.<sup>1</sup>

**§ 1031. When a General Creditors' Bill Will Lie.**—Whenever there is a fund which a Court of Equity will distribute ratably among all the creditors of the owner of that fund, then any one of the creditors may file a bill in behalf of himself and of all the other creditors of said owner against said owner, in order to have the fund prorated among such creditors.<sup>2</sup> And if the common debtor has assigned said fund to a third person for the benefit of his

<sup>10</sup> See, *ante*, §§ 895-902.

<sup>1</sup> *Ante*, § 47.

<sup>2</sup> This owner or common debtor may be a corpo-

ration, partnership, or individual. 1 Pom. Eq. Jur., § 410; *Bank of Rome v. Haselton*, 15 Lea, 230. See, *ante*, § 47.

creditors, such assignee must be made a defendant, also. If any of the common creditotrs have filed separate bills exclusively for their own benefit, on a general creditors' bill being filed praying to have the individual suits enjoined, the Court will enjoin them, and will require the complainants therein to come in under the general creditors' bill. A complainant, who has filed an individual bill, will, however, be allowed to so amend it as to make it a general creditors' bill, if such amendment be made before a general creditors' bill has been filed. The most common cases for the filing of general creditors' bills, and bills in the nature of general creditors' bills, are the following:

1. **Bills to Wind up Insolvent Corporations.** The assets of an insolvent corporation constitute a trust fund for the benefit of all the general creditors of such corporation.

2. **Bills to Wind up an Insolvent Estate.** The assets of an insolvent estate are required by statute to be distributed ratably, under the statute among all the general creditors, as heretofore shown.<sup>3</sup>

3. **Bills to Enforce Trust Deeds and Assignments for the Benefit of Creditors.** When an individual, partnership, or corporation makes a trust deed or assignment for the benefit of all his or its creditors, or for the benefit of those therein named, any creditor entitled to share in the fund may file a bill on behalf of himself and all other creditors in order to assert, protect, and enforce his and their common rights to the property conveyed. But in such a case the bill must show that the assignee or trustee is unable or unwilling to execute the trust, or is guilty of inequitable conduct endangering the interests of the beneficiaries, or that for some other sufficient reason the Court should execute the trust.

4. **Bills to Sell the Lands of a Decedent to Pay His Debts.** When such a bill is filed by a creditor it must be filed in behalf of all the other *bona fide* creditors of the decedent.

5. **Bills by a Creditor to Have Administrator Appointed.** When a bill is filed in Chancery to have an administrator appointed, if filed by a creditor, it shall be on behalf of all other creditors who may wish to come in and be made parties on the usual terms; and the distributees and heirs may be made parties defendants; and if the bill is filed by the next of kin, or any of them, it shall be on behalf of all the distributees and heirs against the creditors, who may become defendants.

6. **Bills to Set Aside Fraudulent Conveyances Made by an Insolvent Decedent.** Such a conveyance when set aside enures to the benefit of all the general creditors of the decedent, and the bill must, therefore, be in behalf of all such creditors.

7. **Bills to Set Aside Fraudulent Conveyances of a Living Debtor.** A creditor may file such a bill for himself alone, or he may file it in behalf of himself and all other creditors of the fraudulent debtor, in which latter case it becomes a general creditors' bill.<sup>4</sup>

8. **Bills to Enforce the Liens of Mechanics, Laborers, and Material Men** are akin to general creditors' bills.<sup>5</sup> The property to which the lien attaches is in the nature of a trust fund for the common benefit of all the lien-holders. The bill may be filed in behalf of all having liens, and on such a bill all other suits to enforce like liens may be enjoined.

<sup>3</sup> See, *ante*, §§ 997-1004.

<sup>4</sup> In such a case, there is a growing practice of joining, as complainants in the same bill, several creditors whose debts and claims against the defendants are wholly separate and distinct, and praying one attachment, and decrees for the debt due each of the defendant. No objection is apparent to such a practice; but in such a case the bill should be sworn to by, or on behalf of, each of the complainants. If the defendant should demur to such a bill because of its multifariousness, the Chancellor would not do more than require separate bills to be filed by each complainant against the defendant, Code, § 4326, giv-

ing to the complainant in each the benefit of the attachment in the bill already filed. Such a bill would not, however, be multifarious, but would be deemed as in the nature of a general creditors' bill. Code, § 4288.

<sup>5</sup> See Code, §§ 3544-3546. They would not, in strictness, be general creditors' bills, but rather bills in the nature of general creditors' bills. The bills, however, are framed in the same way, and allow all the claimants to come in under them; and the proceedings on the bills are substantially the same as in case of general creditors' bills.

9. **Bills to Enforce Liens on Boats** are in the nature of general creditors' bills, and may be filed in behalf of all the parties having such liens. On such a bill all persons who have prior liens on the boat may, also, be made parties to the bill.<sup>6</sup>

10. **Bills to Enforce the Liens of Contractors and Laborers on Railroads, and the Liens of Employees of Corporations, Partnerships and Merchants,** are, also, in the nature of general creditors' bills, and may be filed on behalf of the complainant, and of all other persons having liens on the defendant's property.

In case of bills to enforce any of the next three foregoing classes of liens, the property to which the lien attaches may be regarded as a common fund in which all the lien holders are entitled to share ratably.

§ 1032. **Rationale of a General Creditors' Bill.**—If all or many of those entitled to a common fund were allowed to institute separate suits therefor, it is manifest that the costs of the various suits would consume all, or a large part of the fund, and thus nothing be left for the creditors. Besides, if the fund belongs to all the creditors in common, ratably, it would follow, in strict law, that no one of them has the exclusive right to subject any part of it to the satisfaction of his individual claim, regardless of the rights of the other creditors. And in the third place, if the fund belongs ratably to many creditors, it is impossible to distribute it among those rightfully entitled thereto, unless all the creditors have a chance to be heard in one and the same suit, wherein their respective claims can be properly adjudicated, and the right given to all to prove their own claims and contest the claims of others. Whereas, when a suit is brought by one creditor in behalf of himself and all the other creditors of a common debtor, in order to have a common fund distributed *pro rata* among the creditors, the expenses of litigation are reduced to a minimum, all the creditors have a right to be heard, and by one decree all of their various equities may be effectually adjudicated, and the fund divided equitably, according to each his proper *pro rata*. And so it may be said that the main object of general creditors' bills are (1) to prevent a multiplicity of suits, (2) to make an equitable distribution of a common fund, and (3) to prevent the accumulation of costs.<sup>6a</sup>

Equity delights in equality, and whenever the Court is not embarrassed by superior liens, or equities, it will apportion a fund in its custody *pro rata* among the creditors of the owner of that fund,<sup>7</sup> whether such owner be an individual, a partnership, a corporation or a deceased debtor.<sup>8</sup>

§ 1033. **Frame of a General Creditors' Bill.**—In drawing a general creditors' bill the following matters should be kept in mind:

1. The bill must show on its face, either in the caption, or in the prayer, that it is filed in behalf of the complainant and of all the other creditors<sup>9</sup> of the insolvent estate, person, firm, or corporation.

2. It must be filed against the insolvent debtor, and the persons in charge of his or its assets; and against any and all persons intermeddling with said assets, or trying by suit or otherwise to appropriate them, or any part of them.

3. The bill must show on its face that the complainant is a *bona fide* creditor of the insolvent defendant; and should file the evidence of his debt, if any:<sup>10</sup> if he is a judgment creditor, he should so allege; and if execution has issued on his judgment and been returned *nulla bona*, he should so show, and should file a certified copy of the judgment, execution and return.

4. The bill must positively allege the insolvency of the debtor or estate whose assets are to be administered. If the suit be against the estate of a decedent,

<sup>6</sup> Code, §§ 3557-3562. See *Emory I. & C. Co. v. Wood*, 6 Heisk., 198; *Ferguson v. Vance*, 3 Lea, 90.

<sup>6a</sup> *Spencer v. Goodlet*, 20 Pick., 648, citing the above section of this book, then § 967.

<sup>7</sup> See, *Ante*, § 47.

<sup>8</sup> 1 Pom. Eq. Jur., § 410.

<sup>9</sup> A bill filed in behalf of the complainant alone is not a general creditors' bill. *Parks v. Saw Co.*, 20 Pick., 23.

<sup>10</sup> A general creditor can maintain the bill. *Tradesman Co. v. Car Wheel Co.*, 11 Pick., 634.

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the bill must show that the insolvency of the estate has been suggested to the County Court, or to its Clerk. If the suit is against a person, partnership, or corporation, it is always well to show that an execution has issued against the defendant, and been returned unsatisfied.

5. The bill should specify as fully as practicable the character, location and amount of the assets of the defendant debtor; and, so far as possible, the names of the principal creditors, where they reside, and the amount due each, and on what account. These creditors should all be made defendants.

6. If any fraudulent conveyances are assailed, the property alleged to be so conveyed must be described, the fraud charged specifically, and the conveyee made a defendant.

7. The bill should pray: (1) that it may be allowed to be filed in behalf of complainant and of all the other creditors of the defendant debtor; (2) that all those named as defendants in the caption be made such by the issuance and service of all proper process; (3) that all of said creditors not made parties be allowed to come in by petition, and file and prove their respective claims in the cause, and have the benefit of all decrees made therein; and that all creditors be notified hereof by due publication; (4) that all suits against the defendant debtor, and all persons intermeddling with the assets sought to be administered, be enjoined; (5) that a receiver be appointed to take possession of all the property, real and personal, and all the choses in action, franchises and other assets of the defendant debtor; and that such receiver convert all of said property into money; (6) that all accounts be taken necessary to show the amount of said assets, the prior liens thereon if any, the names of the creditors and the amount due each, and who have liens and who none; and (7) that after paying the costs, and expenses of the suit, including complainant's counsel fees, the amounts due the preferred creditors be paid, and the balance of the assets prorated equitably among the general creditors.

§ 1034. **Form of a General Creditors' Bill.**—The frame of the bill, as given in the preceding section, may be better understood by an examination of the following form:

#### GENERAL CREDITORS' BILL.

To the Hon. John P. Smith, Chancellor, holding the Chancery Court at Tazewell:  
John Doe, a resident of Knox county, complainant, who sues on behalf of himself  
and all other creditors of the River Improvement Company,

*vs.*

The said River Improvement Company, a corporation under the laws of Tennessee,  
whose principal office is in Claiborne county, and whose chief officers reside  
there, and Henry Hill and David Doe, both residents of said Claiborne county,  
and Richard Roe, John Smith, and Jesse James, non-residents of Tennessee.

Complainant, who sues in behalf of himself and of all the other creditors of the said River Improvement Company, respectfully shows to the Court:

I.  
That he is a *bona fide* creditor of the defendant, the River Improvement Company, as follows:

1. He has a note for five thousand dollars executed to him by said Company on January 4, 1891, and due ninety days after date, all of which is owing to him and unpaid.

2. He has an account against said Company for work done on the Clinch river, under a written contract with said Company, amounting to four thousand dollars, all of which is due him and unpaid.

3. He has a judgment against said Company for three thousand and sixty-one dollars and costs of suit rendered by the Circuit Court of Knox county against said Company at its May term, 1891, and that on said judgment an execution has duly issued to the Sheriff of Claiborne county, and been duly returned by the Sheriff of said county wholly unsatisfied.

II.

The said note, the said account, and a certified copy of said judgment, execution, and return, are hereto attached as exhibits, and marked A, B, and C, respectively.

The defendant Company is, also, largely indebted to various other persons, to-wit: to P. G. Fulkerson and J. H. S. Morrison, about one thousand dollars each for attorneys' fees; to C. H. Rogers in a large sum, believed to be about five thousand dollars; to G. W. Montgomery about one thousand dollars, and to T. W. Stone and E. A. Hurst, in various large sums, aggre-

gating several thousand dollars. Said Company, also, owes various other persons various amounts.

## III.

The liabilities of said Company complainant is informed and believes, and on that belief charges and avers, will not fall below thirty thousand dollars; whereas its assets will not exceed twenty thousand dollars in value. The Company has ceased to do business, its office is closed, and its corporate franchises are not used. Said Company is unable to pay its debts, and is insolvent.

## IV.

The principal assets of said Company are:

1. Its boom in the Clinch river, in Claiborne county, including the logs, chains, pillars, and ropes, belonging thereto.
2. The logs in said boom, and logs at many places on Clinch river, and its tributaries above said boom.
3. The saw mill near said boom, including the engine, boiler, gearing, attachments, and tools, thereunto belonging, and the shed covering said mill.
4. The lumber now sawed and stacked near said mill; and other lumber there unstacked.
5. The following tracts of land in Claiborne and Hancock counties: [*Describing each tract by metes and bounds.*]
6. The office furniture of said company in their office at Tazewell, consisting of desks, chairs, tables, safe, stove, book-case, books, maps, drawings, &c., &c.
7. The Company has, also, large debts coming to it from various parties; but how much can be realized therefrom complainant is not advised, and does not know.

## V.

The defendant, Richard Roe, is justly indebted to the said River Improvement Company in the sum of three thousand dollars for money collected by him for said Company and not accounted for. He is a non-resident of the State, but owns a valuable house and lot at Cumberland Gap, adjoining the lots of Daniel Boone, David Crockett, and Simon Kenton.

## VI.

Shortly before complainant obtained his said judgment against the defendant Company, it conveyed a valuable tract of timber land in the 4th civil district of Hancock county to the defendant John Smith. Said tract adjoins the lands of John Brown, James Jones, and Charles Clark, and contains about three thousand acres, being the tract conveyed to said Company by said C. H. Rogers, to whom a portion of the purchase-money is yet due. The said conveyance to said John Smith was made by the defendant Company for the purpose of hindering, delaying and defrauding complainant and the other creditors of said Company, and no consideration really passed, but said Smith holds said tract of land under a secret trust for the benefit of Jesse James, the president and general manager of said Company.

## VII.

The defendants Henry Hill and David Doe are each prosecuting a separate suit against the defendant Company, in the Circuit Court at Tazewell, claiming five thousand dollars each as damages for an alleged breach of contract; and they have each attached said mill, logs, lumber, and office furniture of the defendant Company. And complainant avers, on information and belief, that other creditors of the said Company are threatening to bring suit against said Company, so that its assets are in great danger of being consumed by the costs incident to a multiplicity of suits.

## VIII.

The premises considered, complainant prays:

- 1st. That he may be allowed to file this as a general creditors' bill, in behalf of himself and of all the other creditors of the said River Improvement Company; and that the bill be by your Honor sustained as such.
- 2d. That all of those named as defendants in the caption of this bill be made such by the issuance and service of subpoena as to all the residents and by due publication notices as to all the non-residents; and that they each and all be required to answer this bill; but the oath to the answer of each is waived.
- 3d. That all of the *bona fide* creditors of the defendant Company be required to prosecute their claims and demands against said Company in this Court and in this cause; and to that end that they be allowed to file their petitions in term or in vacation, exhibiting their respective claims and demands, and to prove the same before the Master; and that they be granted all the benefits of this proceeding to which complainant may be entitled; and that the Master be directed to notify by due publication all the creditors of said Company to file their claims in this cause.
- 4th. That a judgment be rendered against the defendant Richard Roe for the amount due from him to the defendant Company as aforesaid, and that an attachment issue and be levied on the said house and lot owned by him at Cumberland Gap; and on any other property he may own in this State.
- 5th. That the aforesaid conveyance by the defendant Company to John Smith be declared fraudulent and void; and that the said tract of land so fraudulently conveyed be attached by the levy of an attachment thereon, and be sold and the proceeds applied to the satisfaction of the debts of the defendant Company.



6th. That the defendants Henry Hill and David Doe be enjoined from further prosecuting their said suits in the Circuit Court against the defendant Company; and that all other creditors be enjoined from instituting any suit or suits against the defendant Company in any Court, or on any account; and that said Henry Hill and said David Doe, and all the other creditors of the defendant Company be required to prosecute their claims in this Court, and in this cause.

7th. That a receiver be appointed to take into his possession all of the property of the defendant Company, of every sort whatsoever, real, personal, or mixed; and that said receiver be empowered and directed to convert all of said property into money, at the earliest practicable moment; and that he be authorized and directed to bring all suits necessary to collect debts due the defendant Company, or to assert its rights or claims to any property; and to do all other acts necessary to collect or protect the assets of the defendant Company.

8th. That the Master be directed to take and state an account showing:

- (1) The amount of the assets of the defendant Company;
- (2) The names of the preferred creditors, if any, and the amount due each, and the particular asset on which each has a lien or superior equity;
- (3) The names of the general creditors, and the amount due each;
- (4) The probable amount of the costs and expenses of the suit, including the expenses and compensation of the receiver, and a reasonable counsel fee for the Solicitors of the complainant; and
- (5) The *pro rata* of the general creditors out of the fund subject to distribution among them.

9th. That the property herein attached and prayed to be attached be sold on a credit of six months, and in bar of the right of redemption.

10th. That complainant and the other creditors of the defendant Company be granted all such further and other relief as they may be entitled to.

This is the first application for an attachment, injunction or receiver in this cause.

JOHN P. DAVIS and E. A. HURST,

TULLY R. CORNICK, Jun.,

Of Counsel.

Solicitor.

[*Annex affidavit and jurat, as in § 789, ante.*]

§ 1035. **Proceedings Upon a General Creditors' Bill.**—The bill being filed on behalf of all persons entitled to share in the common fund, the complainant therein should, at the earliest practicable moment, obtain an order of the Court sustaining the bill as a general creditors' bill, and ordering that publication be made for the creditors to appear and file their petitions<sup>11</sup> and prove their claims, in that particular cause;<sup>12</sup> and, if no injunction has already been granted, the Court should, thereupon, restrain the prosecution of all other suits by any of the common creditors. The following is the form of such an order:

#### ORDER SUSTAINING A GENERAL CREDITORS' BILL.

John Doe,

*vs.*

The River Improvement Co., *et al.*

No. 987.

#### I.

The bill in this cause having been read, and it appearing to the Court that it is filed in behalf of the complainant and all other creditors of the defendant corporation, and the insolvency of the defendant appearing by the return of *nulla bona* on the execution exhibited to the bill, [or by the judgment *pro confesso* heretofore taken and entered against it, or by the admission in its answer, or by the admissions of its Solicitor in open Court,] it is ordered by the Court that the bill be sustained and ordered to stand as a general creditors' bill, and as such enure to the benefit of all creditors who may claim its benefits, or come in under it.

#### II.

And the Clerk and Master is ordered to make publication in some newspaper notifying all the creditors of the defendant of the filing of the bill in this cause, and requiring them to come in by petition,<sup>13</sup> and file and prove their respective claims against the defendant, on or before the first day of August, 1892, [allowing at least six months,] or they may be excluded from the benefits of this proceeding.

#### III.

And on motion of the complainant, the institution of any separate suits by any of said cred-

<sup>11</sup> The complainant's answer under oath to such petitions has no probative force, and merely makes an issue. *Irvine v. Dean*, 9 Pick., 346.

<sup>12</sup> 2 Dan. Ch. Fr., 1203-1204; *Bank of Rome v. Haselton*, 15 Lea, 230-231.

In accordance with its fundamental rule to so determine a matter in controversy that all persons interested in it may have a chance to be heard, the Court in all cases relating to the distribution of a fund distributable among various creditors or other

claimants, will require such steps to be taken by the complainant as will enable all persons interested in the fund to set up their respective claims. This is the rule of the Court, whether this fund belong to the estate of a decedent, or to an insolvent partnership, company, or corporation; and whether the fund to be distributed belongs to creditors, legatees, distributees, or other claimants. 2 Dan. Ch. Fr., 991.

<sup>13</sup> For the form of a petition, see, *ante*, § 1003.

itors or claimants against the defendant corporation is hereby enjoined; and all parties to any and all suits now pending against said corporation are enjoined from proceeding further in them than to judgment; and the Master will so state in said publication notice.

iv.

All creditors filing petitions in this cause will execute and file proper prosecution bonds, or take the pauper oath in lieu thereof. Such petitions may be filed without other leave than this order.

v.

After the time for filing claims has expired, the Master will state an account showing who are the *bona fide* creditors, the amounts of their respective debts, and any liens or priorities that may exist in favor of any of the creditors.

This order can be made only in open Court, or by consent, or at Chambers on notice;<sup>14</sup> and cannot then be made until insolvency is shown as stated in the decree, or is shown and adjudged on a reference to the Master for that purpose.

The publication notice to creditors by the Clerk and Master may be as follows:

#### ADVERTISEMENT FOR CREDITORS.

#### To the Creditors of the River Improvement Company.

In obedience to an order made by the Chancery Court at Tazewell, in the case of John Doe *vs.* The River Improvement Co., *et al.*, the creditors of said company are, hereby, notified to have themselves made parties to said cause by petition, and to file and prove their claims against said company in said cause, on or before the first day of August, 1892, or they may be excluded from the benefits of said suit, and from sharing in the assets of said company.

Said creditors and claimants are, also, hereby notified that by order of said Court, in said cause they, and each of them, are enjoined from instituting any suit against said company, otherwise than by petition in said pending cause; and all parties now suing said company are enjoined from proceeding in their suits further than to judgment.

This August 3, 1891.

I. G. LEABOW, C. & M.

If a receiver be necessary, as is often the case, the Court, or the Chancellor at Chambers, will appoint one, and order him to sell all the property, real and personal, collect all the debts of the defendant, and convert all of his or its estate into money.<sup>15</sup> The Master will, at the expiration of the time allowed for filing claims, be directed to take and state an account, showing (1) the amount of the assets, (2) the claims entitled to priority of satisfaction, and (3) the names of the general creditors, and the amount due each. This report<sup>16</sup> will be subject to exception by any creditor or claimant.

The Court will pay all the expenses of the suit out of the fund, or assets of the insolvent defendant, including among these expenses (1) the expenses and compensation of the receiver; (2) the costs of the litigation, and (3) the reasonable fees of the Solicitors of the complainant in prosecuting the suit. The Court will, however, adjudge against a petitioner any costs that he should, in Equity, pay as the result of any false claim, or of any inequitable conduct or contention on his part.<sup>17</sup>

If the bill is not sustained as a general creditors' bill, the complainant may, nevertheless, prosecute the suit for his own exclusive benefit. And if, on the taking of the account, the complainant is shown to be not a creditor, the Court will sustain the bill for the benefit of those who are shown to be creditors, for the suit has become the suit of all who have filed petitions and cost bonds to become parties.<sup>18</sup> But in such a case some petitioner ought to be substituted as complainant so that the suit may proceed *inter partes*. The complainant has control of the suit, and may dismiss it at certain stages.<sup>19</sup>

<sup>14</sup> See, *ante*, § 775.

<sup>15</sup> See Chapter on Receivers, *ante*, §§ 891-917.

<sup>16</sup> For form of report, see, *ante*, § 994.

<sup>17</sup> Bank of Rome v. Haselton, 15 Lea, 253.

<sup>18</sup> Fall v. B. & L. Association, 21 Pick., 26.

<sup>19</sup> See, *ante*, §§ 523-524.

## CHAPTER LV.

## SUITS TO ENFORCE LIENS.

§ 1036. Liens Generally Considered.  
 § 1037. Liens Specially Considered.  
 § 1038. General Rights of Parties Having Liens.  
 § 1039. Frame and Form of Bills to Enforce Liens.

§ 1040. Forms of References and Decrees in Relation to Liens.  
 § 1041. Forms of Bills to Enforce Contract Liens.

§ 1036. **Liens Generally Considered.**—A lien is defined to be “a hold or claim which one person has upon the property of another as a security for some debt or charge.”<sup>1</sup> Whoever owns property subject to a lien owns only what remains of it after the lien has been discharged. There are four kinds of liens, all enforceable in Chancery: 1, Common Law Liens; 2, Equitable Liens; 3, Statutory Liens; and 4, Contract Liens.

1. **Common Law Liens** are those liens which are recognized in the Courts of common law; and include 1, a *general* lien, which is the right to retain the property of another to secure a general balance of accounts; and 2, a *particular* lien, which is a right to retain the property of another on account of labor employed or money expended upon that identical property.<sup>2</sup> A common law lien is simply the right of a creditor to retain possession of the chattel until some debt or demand due the creditors is satisfied; and possession is so essential to the lien that, if it be voluntarily surrendered by the creditor, the lien is at once extinguished.<sup>3</sup>

The following are the principal common law liens: 1, common carriers' liens; 2, innkeepers' liens; 3, bailees' liens; 4, pawnees' or pledgees' liens; 5, factors' liens; 6, brokers' liens; 7, bankers' liens; 8, wharfingers' and warehousemen's liens; 9, attorneys' liens; and 10, execution liens.

2. **An Equitable Lien** is not an estate or property in the thing itself, nor a right to obtain possession of the thing. It is simply a right of a special nature over the thing, constituting a charge or encumbrance upon it entitling the owner of such right to subject the property so charged or encumbered to the satisfaction of that particular claim of his which constitutes the charge or encumbrance.<sup>4</sup> In short, an equitable lien on property is a right to subject that particular property to the satisfaction of a debt which is a charge upon that very property.

As has been stated, a common law lien ordinarily depends on the creditor retaining the possession of the chattel to which the lien attaches. On the other hand, an equitable lien exists although the encumbered property be in possession of the debtor; indeed, as a rule, the debtor retains the possession, in cases of equitable liens, and the creditor seldom has the right to keep or demand the possession: when he has such right, it grows out of special contract.

The following are the principal equitable liens: 1, vendors' liens; 2, *lis pendens* liens; 3, liens of creditors on assets of insolvent partnerships and insolvent corporations; 4, liens of vendees for their debts when their deeds are declared mortgages; 5, liens on property bought with trust money; 6, joint owners' liens; 7, partners' liens; and 8, *bona fide* improvers' liens.

3. **A Statutory Lien** is a right given by statute to subject certain property to

<sup>1</sup> Bouv. Law Dic., “Lien.”  
<sup>2</sup> 2 Kent's Com., § 634.

<sup>3</sup> 3 Pom. Eq. Jur., § 1233.  
<sup>4</sup> 3 Pom. Eq. Jur., § 1233.

the satisfaction of a particular debt, such debt being ordinarily in some way connected with the property, or growing out of it, or contracted on the faith of it. Statutory liens partake largely of the character of equitable liens. In both classes of liens the possession of the property to which the lien attaches is in the debtor, and the creditor ordinarily has no right to the possession. His rights are mainly to have the property sold, and enough of its proceeds applied to pay his lien debt.

The following are the principal statutory liens: 1, landlords' liens; 2, mechanics' liens; 3, material men's liens; 4, boat creditors' liens; 5, liens of corporation, partnership and mercantile employees; 6, liens of creditors on a decedent's land; 7, farm laborers' liens; 8, liens of railroad contractors and laborers; 9, cotton-sellers' liens; 10, wharfage liens; 11, pasturage and season liens; 12, innkeepers' liens; 13, tax liens; 14, attachment liens; 15, judgment liens; and 16, liens of judgment creditors on a return of *nulla bona* and bill filed.

4. **A Contract Lien** is one created by the express agreement of the owner of the property on which the lien is fixed, and gives the lienor the right to sell or have sold the property in satisfaction of a stipulated debt, usually on a specified contingency. The principal contract liens are those created (1) by deed of trust, (2) by mortgages, (3) by reservations in deeds to secure purchase-money unpaid, and (4) by other writings, or (5) by parol agreement that specified property shall stand as security for certain debts.

Any of these liens may be enforced by a bill in Chancery when the amount due is large enough to give the Court jurisdiction.

§ 1037. **Liens Specially Considered.**—The principal liens enforced in Chancery are the following, the substance and character of each being briefly and generally indicated, without attempting to specially and precisely define any of them:

1. **Liens of Vendors on Land.** A lien for the purchase-money exists in favor of the vendor on land sold by him: 1, When the vendee takes a clear deed, but executes a mortgage or a trust deed expressly to secure the purchase-money; 2, When the vendor gives the vendee a title-bond only; and 3, When the vendor on the face of his deed to the vendee expressly retains a lien to secure the unpaid purchase-money; 4, When the deed by the vendor shows on its face that a part of the purchase-money is unpaid, an Equity exists in such vendor's favor, which will become a lien on the land upon the filing of a bill to enforce such Equity. In all the foregoing cases, the lien may be enforced against the vendee, or against any person holding under or through him, with notice, actual or constructive; 5, When no express lien is given or retained, and the deed shows on its face that the purchase-money has been paid, when in fact it has not been, the vendor may, by filing a bill, obtain a lien on the land against the vendee, or against any person holding under or through him, who bought with notice of the fact that the purchase-money was still owing to the complainant.

When the vendor has an express lien, the lien passes to, and may be enforced by, the assignee of the purchase-money notes.

2. **Liens on Lands to Secure Debts.** All mortgages,<sup>5</sup> and all trust deeds, however drawn, are deemed in Equity as mere securities, notwithstanding any stipulations that the title is to become absolute on certain conditions; and such conveyances constitute mere liens, and must be enforced as such.

3. **Other Liens on Land.** A judgment or decree is a lien on the defendant's land; a lien is created by levying an attachment or execution upon land; a recognizance in Court constitutes a lien on the obligor's land; and assessed taxes are a lien on the land assessed.

<sup>5</sup> An absolute deed given in payment of a pre-existing debt, or to secure borrowed money, is deemed a mortgage.

4. **Liens of Contractors and Laborers on Railroads.** A lien exists upon a railroad: (1) to secure the principal contractor for work done and materials furnished in constructing the road, or its appurtenances; and, (2) to secure sub-contractors, laborers, and furnishers of material, when their principal contractor fails or refuses to pay them. The principal contractor's lien continues for six months after the performance of the work, or the delivery of the material, and until the termination of any suit commenced within that time to enforce the lien. The lien of sub-contractors, laborers and furnishers of material to contractors, does not exist unless and until they give certain written notices specified in the statute, and then such lien is only to the extent of the indebtedness of the person notified to the debtor of the person giving the notice.<sup>6</sup>

5. **Liens of Employees of Corporations, Partnerships and Merchants.** All employees and day laborers of corporations, partnerships and individual merchants doing business in this State, have a lien upon the corporation, partnership or individual property, real and personal, to secure payment for their labor and services performed for such corporation, partnership or individual.<sup>7</sup>

6. **Liens of Mechanics and Material Men.** All persons who do any of the work on, or furnish any of the materials, fixtures or machinery, for any building or improvement, constructed or repaired, on any lot or tract of land, or who put any fixtures or machinery thereon, by special contract with the owner or his agent, have a lien upon such lot or tract of land to secure payment for such work, materials, fixtures, and machinery.<sup>8</sup>

7. **Liens on Boats.** A lien exists on any steam or keel boat, her tackle and furniture, (1) to secure payment for work done or material or articles furnished, in building, repairing, fitting, furnishing, or equipping such boat; and (2) to secure payment for wages due the hands of such boat.<sup>9</sup>

8. **Liens for Wharfage.** The owners and proprietors of wharves and landings where wharfage is allowed by law, have a lien on all boats, rafts, and other water crafts, and their loading, for the payment of their wharfage fees.<sup>10</sup>

9. **Liens on Crops.** The statutes give a lien on the crop growing or made, on a particular tract of land: 1, to secure the payment of the rent due the landlord;<sup>11</sup> 2, to secure payment for supplies, labor, money, implements of industry, or work stock, furnished by the owners of the land to lessees, or by lessees to sub-tenants, and used in the cultivation of the crop;<sup>12</sup> 3, to secure payment for the necessary supplies of food and clothing furnished by the landlord or his agent to the tenant to enable him to make the crop;<sup>13</sup> 4, to secure payment for labor or service in cultivating the soil and making the crop.<sup>14</sup>

10. **Liens of Cotton Sellers.** When merchants, factors or cotton brokers sell cotton, they have a lien upon the cotton sold, to secure payment of the purchase-money agreed to be paid.<sup>15</sup>

11. **Liens on Tobacco.** Liens exist in favor of all persons who make advances in money on tobacco, in barns, storage-houses, warehouses, sheds or elsewhere.<sup>16</sup>

12. **Liens Upon Animals.** Liens exist 1, upon any animal to secure the payment of pasturage, or for service of the male; 2, upon the offspring of the male to secure the payment for the season;<sup>17</sup> and 3, upon all stock received by livery stable keepers for board and feed, to secure the payment of all reasonable charges.<sup>18</sup>

13. **Liens Upon Other Personal Property.** A lien exists 1, upon the furniture, baggage, wearing apparel or other goods and chattels of any guest or patron

6 M. & V.'s Code, §§ 2774-2783.

7 Acts of 1897, ch. 78.

8 M. & V.'s Code, §§ 2739-2750; Acts of 1889, ch. 103; Lumber Co. v. Loeb, 2 Cates, 251.

9 Code, § 1991.

10 Code, § 1993.

11 Code, § 3539.

12 Code, § 3542 a.

13 M. & V.'s Code, § 4285.

14 M. & V.'s Code, § 2771.

15 M. & V.'s Code, § 2761.

16 Acts of 1905, ch. 6.

17 M. & V.'s Code, §§ 2756-2759.

18 M. & V.'s Code, § 2760.

of a hotel, boarding-house or lodging-house, to secure the payment of all sums due for board or lodging;<sup>19</sup> 2, upon any material or article left with an artisan to be manufactured or repaired and not called for, to secure payment for storage, repairs or other necessary expenses;<sup>20</sup> 3, lawyers have liens upon moneys by them collected, and upon their client's papers, to secure their reasonable fees; and 4, a lien exists on property expressly pledged to secure the payment of a debt, or the performance of a duty.

**§ 1038. General Rights of Parties Having Liens.**—The ordinary purpose of a lien is to secure the payment of a debt fastened by operation of law, Equity or contract upon a particular piece of property; and the Chancery Court treats this particular property as a security for the debt; and, if the debt is not duly paid, the owner of the lien, (sometimes called the lienor,) has the right to file a bill in Chancery, and have such property sold in satisfaction of his debt.

**§ 1039. Frame and Form of Bills to Enforce Liens.**—Any of the foregoing liens may be enforced by a bill in the Chancery Court;<sup>21</sup> and there is no special form for such a bill. In drawing the bill, the draftsman should state definitely and particularly, the ground, origin, or occasion, of the lien; when and how it originated; the amount of the lien, on what property it rests, and who is the owner thereof; and if notice to the defendant is necessary to bind him, such notice must be alleged. The property should be fully described; and, if it be land, the description should be by metes and bounds. The bill should pray to have the lien declared, and enforced by a decree of sale; and for general relief.

Different bills to enforce different liens on the same property may be consolidated; or one bill may be filed by a lienor against the owner of the property and all the other lienors, in the nature of a general creditors' bill; or one lienor may file a bill in behalf of himself and all other lienors against the owner of the property, each bill praying that the various lien debts be ascertained, the property sold, and the proceeds administered according to the priorities of the various lienors.

If an injunction, attachment or receiver is prayed for the bill should state that it is the first application therefor. An attachment in such a case can issue only on the fiat of a Judge or Chancellor.<sup>22</sup> Such an attachment is ancillary.<sup>23</sup>

**GENERAL FORM OF BILLS TO ENFORCE LIENS.**

*[Address and commencement of the bill as in §§ 155; 164, ante.]*

The complainant respectfully shows to the Court:

I.

That [*Here show how and when the alleged lien originated, stating the contract, particularly. Give any special facts or circumstances throwing light on the nature, origin or extent, of the lien. If any notice is necessary to make the defendant liable, or if any notice is required by the statute to fix the lien, show that such notice was given; and show that all other antecedent steps necessary to establish the lien were duly taken.*]

II.

That [*Here show what efforts have been made, if any, to obtain payment without recourse to the Court; and if no efforts, why. This is not necessary, but is proper; and sometimes affects the adjudication of costs.*]

19 M. & V.'s Code, §§ 2784-2786.

20 M. & V.'s Code, §§ 2763-2766.

21 The statutes in reference to the enforcement of said liens are as follows:

1. *Mechanics' Liens.* M. & V.'s Code, §§ 2747; 4286-4289; Acts of 1889, ch. 103.

2. *Liens on Crops.* M. & V.'s Code, §§ 4280-4285; 2772.

3. *Liens on Boats.* M. & V.'s Code, §§ 2752; 4293-4305.

4. *Cotton-Sellers' Liens.* M. & V.'s Code, § 2762.

5. *Railroad Contractors' and Laborers' Liens.* M. & V.'s Code, §§ 2774-2783.

6. *Liens of Employees of Corporations and Partnerships.* M. & V.'s Code, §§ 2768-2770.

7. *Vendors' Liens.* M. & V.'s Code, §§ 4306-4309.

8. *Statutory Liens on Personalty.* Acts of 1889, ch. 12. This statute applies to cases where no specific remedy by statute exists. See *Lumber Co. v. Loeb*, 2 Cates, 251.

22 *Lumber Co. v. Loeb*, 2 Cates, 251; *Lane v. Wood*, 1 Shan. Cas., 648.

23 An attachment in aid of a statutory lien is ancillary, and not intended to enforce the defendant's appearance: a subpoena to answer must issue, or publication be made, to bring the defendant into Court. *Barnes v. Thompson*, 2 Swan, 313; *Brown v. Brown*, 2 Sneed, 431.

## III.

That [*Here specify, locate, and fully describe, the property bound by the lien, if such description has not already been given.*]

## IV.

That [*If any person besides the principal debtor is interested in said property, or is setting up any claim to it, or is secondarily liable for complainant's debt, give the facts relative thereto, fully, and make him a co-defendant. If there be any superior liens on the property, so show, and make the holder thereof a co-defendant.*]

## V.

That [*If there be need for it, and a statutory or other ground of attachment exist, state such ground. If there be any necessity for an injunction, and sufficient cause, specify in detail the facts and circumstances warranting such an injunction.*]

## VI.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c., as in § 164, ante.*]

2d. That complainant have a decree for the full amount of his said debt, principal and interest; and that he be declared to have a lien on the property hereinbefore described, to secure the amount of said debt.

3d. That to enforce said lien, said property be sold on a credit of not less than six nor more than twenty-four months, and in bar of all equity of redemption; and that the proceeds of said sale be applied to the satisfaction of this decree, and in discharge of said lien.

4th. That an attachment issue and be levied upon said property; and an injunction issue to restrain the defendant [*from doing the act or acts specially complained of, stating them briefly.*]

5th. That complainant have all such further and other relief as he may be entitled to at the hearing.

[*If an attachment or injunction is prayed for, add:*] This is the first application for an attachment [*and injunction*] in this case.

H. M. GOINS, Solicitor.

[*The bill should be duly sworn to; see, ante, § 789.*]

### BILL TO ENFORCE A MECHANIC'S LIEN.

[*Address and commencement of the bill as in §§ 155; 164.*]

The complainant respectfully shows to the Court:

## I.

That by special contract with the defendant, he constructed and built for him a dwelling-house on a lot of ground belonging to the defendant, in the 10th civil district of Knox county, complainant furnishing all the materials, and doing all the work, according to said special contract.

## II.

By the terms of said special contract, complainant was to be paid the sum of one thousand dollars cash, whenever said house was finished. [*Here specify the terms of payment.*] Complainant avers that he has fully complied with the terms of his said special contract, that said house was fully finished on the 9th day of June, 1891, and was on that day delivered to, and accepted by the defendant; and he and his family at once moved into it, and are now living in it.

## III.

The day after possession was delivered as aforesaid, complainant demanded said sum of one thousand dollars, to which he was then entitled in accordance with the terms of his said contract. The defendant, thereupon, began to find fault with some of the workmanship and some of the material, but said he would call on complainant in a few days and arrange matters with him. But so it is he has not so done; and complainant has now waited one month in vain, although he has sent word to the defendant and written to him, urging payment.

## IV.

Said lot of ground on which said dwelling-house was built, as aforesaid, is in the 10th civil district of Knox county, adjoining the lands of John Doe and Richard Roe, and bounded as follows: Beginning on a maple [*and fully describing it by metes and bounds,*] to the beginning, containing ten acres, more or less. Complainant is advised that he has a lien on said lot of ground to secure the payment of the amount justly due him for constructing and building said dwelling-house, and for furnishing the material therefor, as aforesaid. Less than one year has elapsed since said work was finished and said materials furnished.

## V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.; see, ante, § 164.*]

2d. That complainant may have a decree against the defendant for said sum of one thousand dollars, and for interest thereon from June 9, 1891, and for all the costs of this cause.

3d. That to secure the payment of this decree, and the better to enforce complainant's lien

on said lot of ground, an attachment be issued and levied thereon. This is the first application for an attachment in this case.

4th. That at the hearing complainant's said lien be declared, and that said lot of ground be sold on a credit of not less than six nor more than twenty-four months, and in bar of all equity of redemption, and that the proceeds of said sale be applied to the satisfaction of this decree.

5th. That complainant have such further and other relief as he may be entitled to at the hearing.

L. A. GRATZ, Solicitor.

[Annex affidavit and jurat, as in § 789, ante.]

If the bill be filed by a journeyman or other person employed by the contractor to do work or furnish materials, its material allegations will be as follows:

**BILL BY A JOURNEYMAN OR SUB-CONTRACTOR.**

[For address and caption, see, ante, § 164.]

The complainant respectfully shows to the Court:

I.

That John Doe, [the principal contractor,] was employed by Richard Roe, [the owner of the land,] by special contract to build a dwelling-house on a lot of ground in the 10th civil district of Knox county, said Doe to do all the work and to furnish all the material, for which the said Roe agreed to pay him the sum of one thousand dollars, when said house should be fully and duly completed and finished, according to the terms of said contract.

II.

That complainant was employed by said Doe to do the brick-work on said house, and to furnish the brick, mortar, lime, sand and hair, requisite and necessary to said brick-work. Under his said contract complainant built the brick foundations for said house, built the chimneys, laid the hearths, and made the walks. Complainant files herewith an itemized account of all the material by him furnished, and all of the work by him done, under his said contract with the defendant Doe, which account is correct, just and true, and owing to the complainant, and amounts to the sum of one hundred and nine dollars, all of which is due from said Doe, and wholly unpaid.

III.

Within thirty days after said material was furnished and said work done, complainant notified the defendant Roe in writing that he claimed a lien on said lot of ground for the work by him done, and the material by him furnished, as aforesaid. Complainant, also, within said thirty days filed with the County Register of Knox county a sworn statement of the amount due for such work, labor and materials, and said Register duly registered said statement and affidavit.

IV.

Complainant not having been paid said account by either of the defendants, and having given the notice aforesaid and caused it to be registered, and less than ninety days having elapsed since he gave said written notice, he is advised and claims that he has a lien on said lot of ground to secure the payment of the amount due him on his said account, which account is herewith filed, marked A, and made a part of this bill. Said lot of ground is bounded as follows [Describe it fully, by metes and bounds, if practicable.]

V.

[The prayers are substantially the same as those in the preceding form; and the bill should be sworn to.]

§ 1040. **Forms of References and Decrees.**—When payments have been made as to which there is some dispute, or there is a dispute as to the amount, character or value of work done or materials furnished, or as to whether complainant has complied with his contract, or as to any other matter affecting the right or amount of recovery, the Chancellor generally narrows the dispute down to a few questions of fact and refers them to the Master.

The following is given as a general illustration of the form of an order of reference to the Master:

**ORDER OF REFERENCE AS TO AMOUNT OF LIEN DEBT.**

John Doe, }  
*vs.* } No. 619.  
 Richard Roe, *et al.* }

This cause came on to be heard this 10th day of June, 1890, before Chancellor W. S. Bearden, upon the original bill, the answers of all three of the defendants thereto, the cross-bill of the defendant, Sarah Roe, and the answer thereto, and the proof in the cause, including the stipulation signed by all the parties except Sarah Roe, and upon argument of counsel, from all of which,

I.

The Court is of opinion that the defendant, Richard Roe, was the owner of the lot upon



which the dwelling-house, and other improvements specified in the bill, were made at the time they were made; and that the deed made by him to his wife, Sarah Roe, not having been registered, and being based on no valuable consideration, but having been made to defraud complainant and other creditors, is void, and of no effect as against complainant, and the defendant, Charles Stokes, and it is so adjudged and decreed accordingly.

## II.

It is, therefore, decreed by the Court, that the complainant has a mechanic's and furnisher's lien upon said house and lot, and all the improvements thereon, to secure the payment of all the work by him done, and of all the materials by him furnished, in erecting the houses, and making the improvements, specified in his bill, on the lot described in the bill; and that he has a right to have said lien enforced by a sale of said lot and improvements as prayed by him.

## III.

But because it does not fully appear how much is due from the defendant, Richard Roe, for said improvements; and how much of the debt due from said Roe to complainant belongs to the defendant, Stokes, the Court orders the Master to consider the pleadings and competent proof now on file, and such further competent evidence as may be produced by either or both parties, and report to the next term:

1. What amount was originally due from the defendant, Richard Roe, to the complainant for the construction of the dwelling-house referred to in the bill, after deducting payments made to the complainant before the assignment by complainant to the defendant, Stokes. In fixing this amount, the Master will take the written contract between the parties as *prima facie* proof of the true amount, but will allow such deductions and payments as the defendant, Richard Roe, may prove, and such additions as complainant may prove, by reason of changes made in the contract after it was signed. The Master will report whether the \$300.00 check was cashed, and if not, why not.

2. How much of the debt due from the complainant to the defendant, Charles Stokes, did the defendant, Richard Roe, pay, and under what sort of contract; and what payments said Roe made to said Stokes by virtue of said assignment.

3. Whether said dwelling-house was constructed according to contract; and if not, what deduction should reasonably be made from the contract price, by reason of imperfect materials or defective workmanship, or for any other of the violations of contract alleged in the answer and cross-bill of Sarah Roe.

4. What amount does the defendant, Richard Roe, owe complainant for building the out-houses and fences on the lot containing said dwelling-house, after deducting all payments made by said Roe, or his wife, and all credits for defective work, if any be shown. If Roe or his wife made any payment on this account to the defendant, Stokes, it will be allowed as a credit.

5. What balance is due from the defendant, Richard Roe, and what part of said balance belongs to complainant, and what part thereof to the defendant, Charles Stokes.

The Master will not look at so much of the testimony of the defendant, Roe and wife, as seeks to set up conversations with complainant prior to the signing of the contract to build the dwelling-house; such testimony being inadmissible to vary said contract. All the receipts evidencing payments made by the defendant, Richard Roe, now on file will be allowed, except the check hereinbefore referred to, and the Master will inquire as ordered in reference to that.

The cross-bill of Sarah Roe is dismissed, and all costs thereof, including the costs of witnesses examined relative to the question of her title, will be paid by her and her prosecution surety, John Bright, for all of which execution is awarded.

The following forms of decrees enforcing liens illustrate the general frame of decrees in such cases. In all cases the decree should show that the debt is a lien, and should specify the property to which the lien attaches, and should order its sale in enforcement of the lien.

#### GENERAL FORM OF DECREE TO ENFORCE LIENS.

[For title, commencement and recitals, see, ante, § 567.]

On consideration whereof, it is ordered, adjudged and decreed by the Court:

1st. That the defendant is indebted to the complainant in the sum of — dollars, the amount due for [specifying what, whether for work in building a house, or material furnished for such building, or repairing, or equipping a boat, or work or materials in constructing a railroad, or labor and services performed for a corporation, partnership, or individual merchant,] and interest thereon from the...day of...19... [insert date when the work was done, or materials furnished, or services rendered,] making in all the sum of — dollars.

2d. That said sum is a lien on said house and lot [or railroad, or boat, or the property of said corporation, or partnership, or individual merchant,] and complainant is entitled to have said lien enforced by the sale thereof, unless previously paid and discharged. Said house and lot are described as follows: [Here insert location and description; if a railroad, locate it by termini and county; if a boat, give her name, name of her owners or officers and

river on which sailing; if a corporation or partnership, or individual merchant, locate their property and place of business.]

3d. And unless said debt, and the costs of the cause, which are adjudged against the defendant are paid into Court, in sixty days, it is ordered and decreed that the Clerk and Master sell said house and lot [or other property. For forms of decrees of sale, see, ante, §§ 626; 844; 977; 995; 1069,] and out of the proceeds of said sale he will pay first the costs of this cause, then pay complainant the amount due him on this decree, and the remainder, if any, to the defendant. If the proceeds of said sale fail to satisfy this decree an execution will issue for the balance unpaid.

An examination of the foregoing decree will show that it contains only three parts: 1, An adjudication that the defendant is indebted to the complainant in a certain sum on a certain account, specifying each; 2, That this debt is a lien on the property for building which the debt arises, or is a lien on such other particular property on or concerning which the work was done, the services rendered, or the materials furnished; 3, That, in the event said debt is not paid by a fixed date, the Clerk and Master is ordered to sell the property, and pay the costs of the cause and said debt out of the proceeds. As the proceeds of the property may not satisfy the decree it is prudent to award an execution for the balance.

#### DECREE ENFORCING A MECHANIC'S, FURNISHER'S OR LABORER'S LIEN.

[After giving the style of the cause, and adjudging the amount of the indebtedness, see, ante, §§ 567-568, then proceed as follows:]

And it further appearing that complainant has a mechanic's [or furnisher's, or laborer's, or other] lien to secure said indebtedness, upon the following lot of ground [or tract of land:] [Here describe it as described in the bill, or proof,] and that an attachment has been duly levied thereon.

It is therefore ordered, adjudged and decreed, that complainant has such a lien, and has the right to have said lot [or tract] sold in satisfaction of said lien, and in payment of said indebtedness; and that if the same is not paid and satisfied within sixty days from this day, the Clerk and Master will, after advertising according to law, sell said lot of ground [or tract of land] to the highest and best bidder [ &c., as in § 626, ante.]

§ 1041. **Forms of Bills to Enforce Contract Liens.**—Where a debt is secured by a mortgage with power of sale, or by a deed of trust, the bill should allege, and the proof show, some reason for coming into Court; or, while granting the relief prayed, a portion of the costs may be adjudged against the complainant.<sup>24</sup>

In drawing decrees it would be well, in case of any difficulty, to refer to what is said on the subject in the Chapter on Decrees.<sup>25</sup>

#### BILL TO ENFORCE A VENDOR'S LIEN.

[Address and commencement of the bill as in §§ 155; 164.]

The complainant respectfully shows to the Court:

##### I.

That on January 2, 1889, he sold to the defendant the following tract of land in Blount county. [Here describe it fully, by metes and bounds.] The consideration price for said land was one thousand dollars, five hundred dollars of which was paid cash in hand, and for the other five hundred dollars the defendant executed and delivered to complainant a note, payable with interest one year after said January 2, 1889. Said note is herewith filed as a part of this bill, and marked A.

##### II.

Complainant executed no deed to the defendant for said land, but gave him a bond for title [or, complainant made the defendant a deed for said land, but expressly retained a lien on the face of said deed to secure the payment of said five hundred dollars; or, complainant made the defendant a deed for the land, which deed shows on its face that said note was a part of the consideration price for said land; or, complainant executed and delivered to the defendant a deed for said land, said deed showing that the whole of said one thousand dollars was paid in hand on the day of sale, but in fact only five hundred dollars was then paid, and said note was given for the residue.]

##### III.

Said note for five hundred dollars has long been overdue, and is wholly unpaid, principal and interest. [If any part of it has been paid, so state, specifying the amounts and dates of the credit.]

<sup>24</sup> See, ante, § 587.

<sup>25</sup> See, ante, §§ 566-568.

## IV.

[If the defendant is cutting and removing valuable timber, is allowing the taxes to fall in arrears, is failing to keep the property insured when the building on it constitutes its chief value, or if, in any way, the security is greatly endangered by the defendant's misconduct or gross negligence, show the facts with fullness and particularity, so that the Court may see that the land is liable to become insufficient to secure the purchase-money.]

## V.

The premises considered, the complainant prays:

1st. That subpoena to answer issue [&c.: see, ante, § 164.]

2d. That he may have a decree against the defendant for the amount due him on said note, [or notes;] and a lien be declared to exist in his favor on said tract of land to secure the payment of this decree.

3d. That in enforcement of complainant's lien, and in satisfaction of this decree, said tract of land be sold on a credit [&c., as in the foregoing forms.]

4th. [If an injunction or receiver is necessary, then pray:] That an injunction issue by fiat of your Honor to inhibit and restrain the defendant, his agents and employees, from cutting or removing any trees or timber on or from said tract, [and that a receiver be appointed to take charge of said property, and to collect the rents and profits thereof, and to keep down the taxes, and see that the property is kept well insured.] This is the first application for an injunction [and receiver] in this case.

5th. That complainant may have such further and other relief as he may be entitled to.

WILL A. McTEER, Solicitor.

[Annex affidavit and jurat as in § 789, ante.]

### BILL TO ENFORCE A DEED OF TRUST.

To the Hon. B. M. Webb, Chancellor, holding the Chancery Court at Jamestown, for the county of Fentress:

John Brown, a resident of Fentress county, complainant,

vs.

William Johnson and George Smith, both residents of the same county, defendants. }

Complainant respectfully shows to the Court:

## I.

That on the 10th day of June, 1888, he loaned the defendant, Johnson, one thousand dollars, for which Johnson executed and delivered to complainant his note, due January 1, 1889, which note is made a part of this bill, and attached hereto, and marked A.

## II.

To secure the payment of said note, defendant Johnson executed a trust deed to his co-defendant, George Smith, conveying to him, in trust, the following tract of land in the 2d civil district of Fentress county, bounded as follows: [Here set out its bounds with precision.] containing one hundred acres, more or less. Said trust deed [or, a certified copy of said trust deed,] is herewith filed as an exhibit to the bill, and marked B.

## III.

If said note was not paid at maturity, said Smith was required by said deed to sell said land. Said note is the property of complainant, and overdue and wholly unpaid, but said Smith, who is thereby seeking to aid his co-defendant, Johnson, fails and refuses to sell said land, though often requested by complainant so to do. [Show why the trustee refuses to act, or that he does refuse or fail to act.]

## IV.

Therefore, the premises considered, complainant prays:

1st. That the defendants be made parties hereto by the service of process, and be required to answer this bill, but not on oath. [If the trustee has the trust deed in his possession, then add: Respondent Smith will file said trust deed with his answer; or complainant will, at the hearing, read a certified copy thereof.]

2d. That said trust deed be enforced, and the land therein conveyed be sold to satisfy complainant's said debt, and the interest thereon and the costs of this suit; and that said sale be on a credit of not less than six nor more than twenty-four months, and in bar of the equity of redemption.

3d. That complainant may, also, have such further and other relief as he may be entitled to.

LUTHER T. SMITH, Solicitor.

### BILL TO FORECLOSE A MORTGAGE.

[Address and commencement of bill, as in §§ 155; 164, ante.]

The complainant respectfully shows to the Court:

## I.

That on the 10th day of August, 1887, the defendant executed to him a mortgage on the following tract of land, in Marion county: [Here describe it fully, following the description in the mortgage, if it be full.] Said mortgage is herewith filed as an exhibit, marked A.

## II.

That said mortgage was made to secure to complainant the payment of a note for ten thousand dollars, executed to complainant by the defendant for money loaned him, on the

same day, and due one year thereafter, with interest from date. Said note is the property of complainant, and is overdue, and wholly unpaid, except the sum of eight hundred dollars, paid January 5, 1890. Said note is made a part of this bill, and is hereto attached, and marked B.

## III.

Said mortgage provides that in case said note was not paid at maturity, the said land should become absolutely the property of complainant, but he is advised that a Court of Equity regards such an instrument as a mere security for the debt.

## IV.

Said land is in possession of the defendant, who refuses to surrender it, and relies on his rights as a mortgagor in a Court of Equity. He is not properly caring for said land, and is allowing it to greatly deteriorate. He is having all the valuable timber cut off the land for railroad ties. The land is not now worth more than the mortgage debt. He has not paid the taxes thereon for the last year; and none of the buildings thereon are insured. He is wholly insolvent. [*Allege any facts showing that the value of the land is being lessened, or the security endangered, and showing the necessity of an injunction and a receiver.*]

## V.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*: see, ante, § 164.]

2d. That said mortgage be foreclosed, that said tract of land be sold to satisfy complainant's said debt, and the costs of this suit; and that said sale be on a credit of not less than six nor more than twenty-four months, and in bar of the equity of redemption. [*If the mortgage contains a power of sale, so show, and pray that the sale may be on the terms specified in such mortgage.*]

3d. That complainant have a decree for the amount due him on said note, principal and interest, and that if the proceeds of said sale do not satisfy this decree, that he may have an execution for the balance due thereon.<sup>26</sup>

4th. That an injunction be issued, by fiat of your Honor, to inhibit and restrain the defendant from cutting, removing, or selling any more of the trees or timber on said land; and that a receiver be appointed to take possession of said land, and apply its rents and profits, including the timber now cut, (1) to the payment of said taxes, (2) to the insurance of the buildings on said land [*if the buildings constitute a large proportion of the value of the security,*] and (3) to the discharge of the interest on said note. This is the first application for an injunction or a receiver in this case.

5th. That complainant may have such further and other relief as he may be entitled to.

BRIGHT & EARLEY, Solicitors.

[*Annex affidavit and jurat: see, ante, § 789.*]

## CHAPTER LVI.

## SUITS TO PROTECT AND RECOVER REAL AND PERSONAL PROPERTY.

- ARTICLE I. Suits to Protect Interests in Land.  
 ARTICLE II. Suits to Recover Interests in Land.  
 ARTICLE III. Suits to Recover Escheated Property.  
 ARTICLE IV. Suits to Recover Personal Property.

## ARTICLE I.

## SUITS TO PROTECT INTERESTS IN LANDS.

§ 1042. Suits *Quia Timet*.

§ 1043. Suits to Protect the Homestead.

§ 1044. Suits to Redeem.

§ 1042. **Suits Quia Timet.**—Bills *quia timet*<sup>1</sup> lie where a person has reasonable fears of being subjected to future inconvenience, probable or even possible to happen by the neglect, inadvertence or culpability of another, in which case the Court will quiet his apprehensions by removing the cause.<sup>2</sup> The main objects of such a bill are: 1, to guard against possible or prospective injuries, and 2, to preserve the means by which existing rights may be protected from future or contingent violations.<sup>3</sup> Under this jurisdiction the Chancery Court

1. Will cancel a void or voidable deed, bond, note or other instrument, that may be used in the future to complainant's detriment.

2. Will appoint a receiver, when there is danger of trust property being misused, or the trustee is insolvent, or his bond insufficient.

3. Will remove clouds from one's title, or prevent an act which will create a cloud.<sup>4</sup>

4. Will enjoin the establishment of a new county that will reduce an old county below its constitutional area.<sup>5</sup>

5. Where a surety is in danger of being injured by the creditor's delay in bringing suit, he may bring the creditor and principal debtor before the Court, and have a decree on the obligation in question in favor of the creditor against the principal.<sup>6</sup>

6. Where the principal is dead the surety may, by bill, compel his executor or administrator to exonerate him.<sup>7</sup>

7. In any case where the complainant is secondarily liable for any debt he may bring his principal and the creditor into Court, and have a decree against his principal and himself and in favor of the creditor for the debt, and if the creditor has any collateral security, or any lien of any sort, to secure such debt, the complainant may have such collateral or lien applied to the payment of the debt and satisfaction of said decree.<sup>8</sup>

8. Where a tenant for life, or other party in rightful possession of land, is

<sup>1</sup> Because he, [complainant,] fears [some injury to his rights.]

<sup>2</sup> *Anderson v. Talbot*, 1 Heisk., 407, 410.

<sup>3</sup> 2 Am. & Eng. Ency. of Law, 258; See, *ante*, Injunction, §§ 811-812; Exoneration of Sureties, § 962; Rescission, § 947.

<sup>4</sup> *Saunders v. Everett*, 3 Tenn. Ch., 520. See *ante*, § 812.

<sup>5</sup> *Bradley v. Commissioners*, 2 Hum., 428.

<sup>6</sup> See cases in the Digests under "Sureties." See, also, *ante*, §§ 805; 962.

<sup>7</sup> *Miller v. Speed*, 9 Heisk., 198.

<sup>8</sup> *Deckard v. Edwards*, 2 Sneed, 93, 102; *McNairy v. Eastland*, 10 Verg., 310; *Greene v. Starves*, 1 Heisk., 382; *Watson v. Sutherland*, 1 Tenn. Ch., 211. See, Subrogation, *ante*, § 964.

doing, or threatening to do, some act detrimental to the rights of the remainder man, the latter may, on a bill *quia timet*, enjoin the party in possession from doing such act.

§ 1043. **Suits to Protect the Homestead.**—A conveyance of the homestead without his wife joining therein as required by the statute is void so far as she is concerned; and she may, by next friend, file a bill in Chancery to have such sale declared a cloud upon her homestead, and the purchaser perpetually enjoined from attempting to enforce it. Her husband must be made a defendant along with the purchaser. So the husband, or any head of a family, may file a bill to protect his homestead when levied on illegally, or in any case when his right is put in jeopardy.

#### BILL BY WIFE TO PROTECT HER HOMESTEAD.

[For address and caption see, ante, §§ 155; 164.]

Complainant, Mary Doe, wife of the defendant, John Doe, suing by James Buck, her next friend, respectfully shows to the Court:

##### I.

That she is the wife of the defendant John Doe, and that down to April 1, 1905, she and her said husband were in possession of the following tract of land [or, house and lot; locating it and describing it: see, ante, § 172.]

##### II.

That said tract of land [or house and lot] was the only real estate owned by her husband on said April 1, 1905, and was then occupied by her husband and his family, herself included, as their homestead. On said day her husband sold and conveyed said tract of land [or house and lot] to his co-defendant, John Short. Complainant did not join in said conveyance, and in no way participated therein.<sup>9</sup> On the other hand, she positively refused to sign the deed, having regard to the fact that her husband owned no other land, and that she was the mother of six children, the oldest of them thirteen years old.

##### III.

That her husband has acquired no real estate since said conveyance by him, and if he and she should be dispossessed under said conveyance they would have no home or land of their own to go to.

##### IV.

That [If the defendant, Short, obtained said conveyance for an inadequate consideration, or in payment of old debts, or on any other unmeritorious consideration, state the facts. If he is threatening to take any legal steps to obtain possession, so state. If he has been endeavoring to persuade or pay complainant to sign and acknowledge said conveyance, state the circumstances.]

##### V.

Complainant is resolved never to voluntarily give up her said homestead until another is provided for her, and there is no prospect of another: therefore, she comes to your Honor and prays:

1st. That subpoena to answer issue [ &c.: see, ante, §§ 158; 164.]

2d. That said conveyance by her husband to his co-defendant, John Short, be declared null and void and of no effect, and a cloud on her homestead rights; and that said defendant, John Short, be perpetually enjoined at the hearing from in any way asserting, or attempting to assert, any claim to said tract of land under said conveyance, and that her right to said homestead be declared and quieted.

3d. That she have such further and other relief as her case may require, and your Honor may deem proper.

JAMES SEVIER, Solicitor.

§ 1044. **Suits to Redeem.**—Whenever the right to redeem land exists, whether by contract, decree, or operation of law, and the party in possession under the contract, decree or sheriff's deed refuses to surrender the possession on tender of the redemption money, or disputes complainant's right of redemption, the proper remedy is a bill in Chancery to enforce such right. The right to redeem land exists: (1) where the mortgagee, or his assignee, is in possession, and the mortgage debt has been duly paid or tendered; and (2) where the land has been sold subject to redemption, and the amount of the bid and interest has been duly paid, or tendered.

<sup>9</sup> The wife is not bound by any participation, unless she signed and acknowledged the deed as required by the statute.

## BILL TO REDEEM.

[For address and caption, see, ante, §§ 155; 164.]

## I.

That on the 19th day of April, 1901, he was the owner in fee of the following tract of land in the 4th civil district of Campbell county, adjoining the lands of William Allen, Alexander Lloyd, and others, and bounded as follows: Beginning on a stake at the northwest corner of the Baptist Church lot, [giving description by corners, courses and distances, or other adequate description: see, § 172, ante.]

## II.

That on said day said tract of land was sold [Here show how it was sold, whether by the Sheriff under an execution, or by the Clerk and Master of a Chancery Court, and not in bar of redemption, or by a County Trustee. If under execution or decree, specify the Court, and if by a County Trustee state of what county. If sold under a mortgage or deed of trust with power of sale, so state, and briefly describe the instrument.]

## III.

That at said sale the defendant became the purchaser at the price of six hundred dollars [If any one redeemed from the purchaser, so state, and give the facts, and make him the defendant. If the original purchaser has parted with his interest in the land state the facts and make his assignee or vendee the defendant, or one of the defendants.] The defendant is in possession of said land under his said purchase, and has so been in possession ever since the 2nd day of August, 1901, enjoying the rents and profits thereof [If the defendant is not in possession by self or tenant, omit this allegation.]

## IV.

That on the 2nd day of January, 1902, complainant tendered to the defendant the sum of [stating the amount of money tendered, which, of course, must be the full amount paid for the land at said sale, and interest thereon to the day of the tender. If the tender or payment is made to the Clerk of the Court under whose judgment or decree the land was sold, so state, and explain why not made to the purchaser,<sup>10</sup>] which he refused to receive, denying complainant's right to redeem and claiming that he owned the land free from any liability of redemption by complainant. [If the money was paid to the Clerk and refused by the defendant, so modify the above allegation.]

## V.

The premises considered, complainant now brings said redemption money into Court, principal and interest, and continues the tender thereof and prays:

1st. That subpoena to answer issue [*&c.*: see, ante, §§ 158; 164.]

2d. That complainant's right to redeem said tract of land be declared and enforced, and the title and possession thereof be restored to him as fully as though said sale had never been made.

3d. That the defendant be compelled to account for the rents and profits of said land while in his possession or under his control, and that a reference to the Master be had to ascertain the amount due.

4th. That complainant have such further and other relief in the premises as may be just and equitable.

W. A. OWENS, Solicitor.

If the defendant is committing any waste on the land, so charge in the bill, and specify the character and amount of such waste, and if it be considerable, and the redemption money insufficient to cover it, pray for an injunction against the waste, and also for a receiver. In such a case the bill must be verified.

<sup>10</sup> Acts of 1870, ch. 111. The party entitled to redeem has the right to pay the redemption money to the Clerk. If the money has been paid to the Clerk of the Court no tender is necessary; nor is any tender necessary where the complainant's right

of redemption is absolutely denied. *Rogers v. Tindell*, 15 Pick., 356. If the Clerk received the money, but the defendant refused it, and claims the land, denying complainant's right to redeem, so allege.

## ARTICLE II.

## SUITS TO RECOVER INTERESTS IN LAND.

- |  |   |
|--|---|
| <p>§ 1045. An Ejectment Bill.</p> <p>§ 1046. Form of an Ejectment Bill.</p> <p>§ 1047. What a Complainant in an Ejectment Suit Must Prove.</p> <p>§ 1048. Defences to an Ejectment Bill.</p> | <p>§ 1049. Frame and Form of Decrees in Suits to Recover Land.</p> <p>§ 1050. Orders and Bonds to Secure Rents in Case of Appeal.</p> |
|--|---|

§ 1045. **An Ejectment Bill.**—A bill may be filed in the Chancery Court (1) to recover land when the title of the complainant is disputed, or (2) to recover the possession of houses or lands when the complainant's right of possession is denied or disputed.<sup>1</sup> In drawing an ejectment bill it is, ordinarily, not necessary to do more than (1) to aver that the complainant is the owner in fee of, or has a present subsisting life-estate in, or has a leasehold estate, or has an undivided interest as tenant, in common, or has an easement, or some other specified valid subsisting legal interest, in the particular land described in the bill, and a right to the immediate possession thereof;<sup>2</sup> (2) to describe the land so as to identify it; (3) to show when and how the defendant obtained possession, or what acts of ownership he is exercising, what damage he is doing to the fee, if any, and, generally wherein and how he is interfering with the complainant's rights or interests in or to said land; (4) to specify what rents and profits the defendant has, or might have received, or is liable for, and what timber he has cut, coal mined, stone or marble quarried, buildings or fences removed, or other waste committed, and the value thereof;<sup>3</sup> (5) to pray to have the complainant's rights to said land declared and enforced, to have him put in possession thereof, to have the defendant's deed or other evidence of title, if any, declared a cloud on complainant's title, and removed, and the defendant perpetually enjoined from setting up any further claim to said land under said title, and (6) to pray for an account of the rents and profits received, and of the waste committed, by the defendant, and a decree therefor, and for general relief. If the defendant has any color of title, it may be prudent to specify it, and show its infirmity, and pray to have it declared a cloud. The land, lot, or house sued for should be described according to the complainant's title papers; and the suit must be brought in the county where the land, or some part of it, is situated. The bill need not be sworn to, unless it prays for some extraordinary process.

If the complainant is entitled to the immediate possession of the house, lot, or tract sued for, it is not necessary to allege title; or if he has title in common with others, or has a mere life-estate or a leasehold interest, it is not necessary

<sup>1</sup> In other words, whenever an ejectment suit or a forcible entry and detainer, or a forcible or unlawful detainer suit will lie in the Circuit Court, a bill will lie in Chancery for the same relief.

The jurisdiction of the Chancery Court to entertain an ejectment bill was well settled before the Act of 1877, ch. 97. *Almony v. Hicks*, 3 Head, 39; *Buck v. Williams*, 10 Heisk., 277; *Coal Creek M. & M. Co. v. Ross*, 12 Lea, 8; and *Ross v. Scott*, 15 Lea, 489; *Walsh v. Crook*, 7 Pick., 388. Now, under the Act of 1877, the jurisdiction of the Chancery Court is co-extensive with that of the Circuit Court in suits to recover possession of land. *Smith v. Taylor*, 11 Lea, 743. And the fact that the land is of less value than fifty dollars does not deprive

the Chancery Court of its jurisdiction. *Frazier v. Browning*, 11 Lea, 253.

<sup>2</sup> Code, §§ 3229; 3235.

<sup>3</sup> An ejectment bill in Chancery is more effective than an ejectment suit in the Circuit Court, because rents and the value of waste can be recovered, and waste and trespasses can be enjoined, in the same suit; whereas, in the Circuit Court, the value of the waste and the rents cannot be recovered in the ejectment suit. And tenants in common may recover the land by an ejectment bill, and by the same bill have the land partitioned. *Burks v. Burks*, 7 Bax., 357. But an ejectment bill by one tenant in common does not enure to the benefit of his co-tenants. *Williams v. M. & M. Co.*, 7 Cates, 578.



to define the extent or character of his title: it will be sufficient for him to allege that he is owner of, and entitled to the possession of, the tract sued for. Nevertheless, as a rule, it is better pleading to specify the character and extent of the complainant's title and interest, because, although when he sues for the whole, he can recover such a part and such an interest as he may be entitled to, nevertheless an excessive or general claim, when not justified by the proof, may cause such an increase of costs that the complainant may be taxed with a part thereof as a penalty for not specifying his title or claim more precisely.

If the bill be to recover possession alone, in the nature of a detainer bill, it need allege only (1) that the complainant is entitled to the immediate possession of the tract or lot of land, describing it, and (2) that the defendant unlawfully detains the same from him; and may pray for a decree for rents, as well as that the complainant be restored to the possession of the premises sued for.

The value of the land, or of the interest claimed, or of the use or rents of the land, is immaterial to the jurisdiction of the Court,<sup>4</sup> whether the bill seeks to recover the land on the strength of title, or seeks to recover the possession only.

§ 1046. Form of an Ejectment Bill.—The following form will help to illustrate the general requisites of an ejectment bill:

#### AN EJECTMENT BILL.

To the Hon. Henry R. Gibson, Chancellor, holding the Chancery Court at Huntsville:  
John Claimer, a resident of Scott county, complainant,

*vs.*

George Possessor, James Waster, and Henry Trespasser, all residents of Scott county, defendants.

The complainant respectfully shows to the Court:

#### I.

That he is the owner in fee of [*or, that he owns for and during the term of his natural life, or, that he owns for and during the term of the natural life of Sarah Brown, the widow of John Brown, or, during the term of the natural life of John Brown, tenant by courtesy of the lands of Sarah Brown, his deceased wife, or, that he owns an undivided one-fourth interest in fee, or for his life, as tenant in common with the said defendants; or, that he is the owner of a leasehold estate of five years in*] and entitled to the immediate possession of, the following tract of land, situated in the 2d civil district of Scott county: Beginning on a large walnut, [*and so on, describing the land precisely, according to the description by metes and bounds in the complainant's deed, or other evidence of title,*] to the beginning, containing two hundred acres, more or less, and adjoining the lands of Charles Brown and Henry White.

#### II.

Complainant further shows to the Court that, notwithstanding his ownership of said land [*or, of said interest in said land;*] and notwithstanding he is, and has ever since the 1st day of May, 1890, been entitled to the possession, use, and enjoyment of said land, and of the rents, profits, and fruits thereof, the defendant, George Possessor, on the 1st day of June, 1890, took possession of said land, and has continued in possession thereof ever since, using it as his own, and appropriating the rents and profits. And the defendants, James Waster and Henry Trespasser, have been, by agreement with said George Possessor, cutting valuable trees on said land, and are now engaged in cutting and destroying other trees on said land, and removing them therefrom. [*Specify all acts of waste or trespass committed by the defendants, or by any of them.*] The destruction of said trees is an irreparable injury to said land.

#### III.

The defendant, George Possessor, has recently obtained a grant from the State for five thousand acres of land. This grant covers complainant's said tract, and is a cloud on his title thereto. Complainant holds under an entry and grant thirty-six years older than defendant's, and complainant's privies had twenty years' possession under the grant from which complainant's title is derived. The other defendants are claiming to hold and act under their co-defendant, George Possessor.

#### IV.

The premises considered, complainant prays:

1st. That process issue [*&c., as in §§ 158; 164, ante.*]

2d. That the defendants be enjoined from cutting any trees, or committing any other waste, on said tract of land; and that they be enjoined from removing, selling, or in any way dis-

<sup>4</sup> The Chancery Court has jurisdiction even when | the land is of less value than fifty dollars. Frazier v. Browning, 11 Lea, 253.

posing of the trees already cut on said land; and that a receiver be appointed to sell the said trees already cut, and hold the proceeds subject to the order of the Court.

3d. That the title and right of possession to said tract of land be decreed to complainant, and that he be put in the possession thereof by decree of your Honor's Court.

4th. That complainant be given a decree for all the rents and profits of said land while in the defendants' possession, and for the value of all trees cut on said land by the defendants, or by any of them; and that full damages be allowed complainant for any and all waste and other injury done said land by the defendants, or any of them, and that an account be taken to ascertain the value of said rents and profits, the value of the said trees cut, and the amount of damages for waste and injury to said land.<sup>5</sup>

5th. That the said younger entry and grant of the defendant, George Possessor, be declared void, and a cloud on complainant's title, and removed as such; and that the defendants be perpetually enjoined from setting up any claim, or doing any acts whatsoever, under or by virtue of said entry or grant.

6th. And that complainant be given such other and further relief as he may be entitled to at the hearing.

This is the first application for an injunction or receiver in this case.

JIM F. BAKER, Solicitor.

JOHN CLAIMER.

[*Annex affidavit to the bill, as in § 789, ante.*]

Notice to the defendant:

At the hearing of this cause, I will introduce and read as proof the following documentary evidence:

1st. A grant for said land from the State of Tennessee to Thomas Chambers, No. 12,643, based on entry 819, by Dennis Angel, made in the entry taker's office in Scott county, on May 21, 1853. Said grant is dated July 1, 1854.

2d. A deed for said granted land from Thomas Chambers to James Williams, made September 3, 1860. This deed is registered in Scott county.

3d. A decree made March 30, 1869, by the Chancery Court of Scott county in the case of Henry Adkins *vs.* James Williams *et al.*, vesting the title of said land in me, the complainant. I will introduce the original record in the cause.

4th. A deed by J. M. Newport, C. & M., conveying said land to me by virtue of said Chancery decree. May 20, 1891.

JOHN CLAIMER,

By JIM F. BAKER, Solicitor.

§ 1047. **What a Complainant in an Ejectment Suit Must Prove.**—The complainant must show a valid subsisting legal or equitable interest in the real property sued for, and the right to the immediate possession thereof;<sup>6</sup> and, if the defendant is not in possession, must, also, show that he, the defendant, is claiming an interest therein, or was exercising acts of ownership thereon when the bill was filed.<sup>7</sup>

A legal title is ordinarily proved: 1, By a grant from the State; or 2, by connected conveyances from the grantee; or 3, by seven years' adverse possession under a color of title; or 4, by a decree divesting the title out of the defendant and vesting it in the complainant; or 5, by a deed from the defendant, or from a Sheriff or Court Commissioner, conveying the defendant's title, when so authorized; or 6, by a superior deed, or title-bond, from the party under whom the defendant claims; or 7, by proof that the defendant was a tenant whose term has expired, or been forfeited; or 8, by proof by the complainant mortgagor that the mortgage debt has been paid, when the mortgagee is defendant and in possession.<sup>8</sup>

§ 1048. **Defences to an Ejectment Bill.**—The complainant must introduce the same character and quantity of proof in support of an ejectment bill in Chancery, as is required in an ejectment suit in the Circuit Court; and, on the other hand, the defendant may make the same defences.<sup>9</sup>

The defendant may make defence by plea in abatement, motion to dismiss, demurrer, plea in bar or answer, or he may disclaim in whole or in part; or if

<sup>5</sup> See *Bains v. Berry*, 1 Lea, 37.

<sup>6</sup> Code, § 3229. The complainant in the Chancery Court can sue on an equitable interest coupled with the right of immediate possession. Thus, he can sue his vendee, in possession under an absolute deed, which is really a mortgage, and the mortgage debt paid; or he can sue a defendant holding under a sheriff's deed when the redemption money has been paid.

<sup>7</sup> Code, § 3231.

<sup>8</sup> See Digests for the decisions.

<sup>9</sup> An ejectment bill must not be confounded with bills to set up and enforce equitable rights to, or interests in, realty, or to remove clouds; the latter are strictly bills in Equity, and the character of the proof and of the relief are quite different, as is, also, the character of the defences made. An ejectment bill, ordinarily, seeks to enforce legal rights, only.

he is entitled to any affirmative relief against the complainant, or against the complainant and a co-defendant, he may file a cross bill. The defence on the merits is usually made by answer; or by answer as to so much of the land sued for as the defendant claims, and by disclaimer as to the residue.

The usual defences to an ejectment bill are: (1) a denial of the complainant's title; (2) the plea of title in the defendant;<sup>10</sup> and (3) the plea of the statute of limitations.<sup>11</sup> These pleas may be, and generally are, set up in an answer. The plea of innocent purchaser is not available against a pure ejectment bill.<sup>12</sup> The following forms will indicate how the foregoing defences are usually made in an answer:

#### ANSWER DENYING THE COMPLAINANT'S TITLE.<sup>13</sup>

Further answering, the [or, this] defendant denies that the complainant has any title whatever to the land described in his bill, or to any part thereof, or to any interest therein; and denies that the complainant has any right whatever to the possession of said land, or of any part thereof; and the [or, this] defendant will require the complainant to prove his title and right of possession by strict legal proof. The defendant denies, also, that he is guilty of unlawfully withholding the said tract of land, or any part thereof.<sup>14</sup>

#### ANSWER SETTING UP TITLE IN THE DEFENDANT.

Further answering, the [or, this] defendant says that the title to the land described in the bill<sup>15</sup> is in him; that he has been in peaceable continuous adverse possession thereof, [in person and by those through whom he claims,] for more than twenty years before the bill was filed, claiming title thereto in fee; and the [or, this] defendant relies on and pleads said twenty years' possession; and, also, pleads that he had had actual continuous adverse possession of said land for more than seven years before the complainant's bill was filed, and he pleads the statute of limitations of seven years in bar of said bill.<sup>16</sup>

#### ANSWER PLEADING SEVEN YEARS' POSSESSION UNDER COLOR OF TITLE.

Further answering, these defendants say that before the bill was filed in this cause, they, [by themselves and those through whom they claim, or, by those through whom they claim, as the case may be,] had had seven years' actual continuous adverse possession of the land described in the complainant's bill [or, of the following tract of land, describing it,] holding by conveyance [devise, grant, or other assurance of title, specifying his title-paper,] purporting to convey to these defendants an estate in fee; and these defendants say that they have a good and indefeasible title in fee to the land so described in their said conveyance, [devise, grant, or other assurance of title;] and they, also, plead and rely on the statute of limitations of seven years in bar of said bill.

If the defendant claims a part, only, of the land sued for, he must state distinctly in his pleadings the extent of his claim, or he will be taxed with all, or at least, a part of the costs of the cause even though he succeeds to the extent of his possessions, or actual claim. The defendant cannot, however, dispute the title of the complainant to the whole tract, and, in the same answer, disclaim as to a part of the tract.<sup>17</sup>

The following is the form of an answer and disclaimer to an ejectment bill, when the defendant claims only a part of the land sued for:

#### ANSWER AND DISCLAIMER TO AN EJECTMENT BILL.

John Doe,  
vs.  
Richard Roe, et al. } No. 423.—In the Chancery Court, at Kingston, Tenn.

This defendant, Romeo Roe, for separate answer and disclaimer to the bill filed against him and others, in this cause, says:

#### I.

That when the bill in this cause was filed he was, and now is, in possession of the following tract of land:<sup>18</sup> [*Here describe it by metes and bounds, according to the defendant's deed or other writing, if he have any; if none, describe it by natural objects, fences, or other sufficient description.*] This defendant then claimed, and now claims, said tract of land

<sup>10</sup> See Plea of Title in the Defendant, ante, § 327.

<sup>11</sup> See, ante, § 331.

<sup>12</sup> 1 Pom. Eq. Jur., §§ 743; 765.

<sup>13</sup> When the complainant's title is denied he must show a title against all the world; and the defendant can, in such a case, show an outstanding title without specially pleading it. *Bleidorn v. Pilot Mt. Coal Co.*, 5 Pick., 166; *Woods v. Bonner*, 5 Pick., 411.

<sup>14</sup> Code, § 3239.

<sup>15</sup> If the defendant does not claim the whole tract,

he must carefully and definitely specify the bounds of the tract he claims; and disclaim as to the remainder of the land sued for in the bill.

<sup>16</sup> It is prudent to add the plea of the statute of seven years to the defence of twenty years' possession; and, also, to the defence of seven years' possession under a color of title.

<sup>17</sup> See, ante, § 395.

<sup>18</sup> Code, §§ 3231; 3234.

as his own, and denies that the complainant has, or at the commencement of this suit, had, any title or just claim thereto whatever, or any right to the possession thereof whatsoever.

## II.

Further answering, this defendant says, that he had had the actual, open, notorious, and adverse, possession of the above described tract of land for more than seven whole continuous years before said bill was filed, and that such possession still continues and now exists; and he relies upon said adverse possession, for said term of seven years before this suit was brought, as a bar to this suit, and pleads the statute of limitations of seven years, in and for such case made and provided, as a defence to complainant's bill.

## III.

Further answering, this defendant says, that as to the remainder of the tract described in the bill, he is not in possession thereof, nor was he in possession thereof, or claiming any interest therein, or exercising any acts of ownership thereover,<sup>19</sup> at or before the bringing of this suit; and as to such remainder, this defendant says he never at any time claimed it, or any interest therein, and now disclaims all and every right, title and claim therein and thereto, legal and equitable.

## IV.

Further answering, this respondent says that he admits that he has had the use and benefit of the land described in the first paragraph of this answer, and has enjoyed the fruits, rents, and profits thereof; and says he was entitled so to do, the land being his.

And now, having fully answered, this defendant prays to be dismissed with his costs.

ROMEO ROE.

T. A. WRIGHT, Solicitor.

Where a defendant disclaims, his answer should be signed by him in person, and must be sworn to as in case of other answers, unless his oath is waived.<sup>20</sup>

§ 1049. **Frame and Form of Decrees in Suits to Recover Lands.**—As already stated in the Chapter on Decrees,<sup>21</sup> a decree for a complainant usually follows the special prayer of the bill: so a decree in a suit to recover land, if for the bill, will usually give the complainant what he specially prays for, and declares the nature and extent of his title and interest to and in the premises sued for, and awards him the possession. If the suit is for possession only the decree will declare him entitled to the possession. If complainant is, also, entitled to any rents and profits, and to damages for waste,<sup>22</sup> the decree may order the Master to report the amounts thereof.

#### DECREE ON AN EJECTMENT [OR RETAINER] BILL.

[For title, commencement and recitals, see, ante, § 567.]

On consideration whereof it is ordered, adjudged and decreed, by the Court:

1st. That complainant is the owner in fee of, [or has a life interest in, or is entitled to the possession of,] the tract of land described in the bill, [or, of the following portion of the tract of land described in the bill, describing it: see, ante, § 172,] and has the right to the possession thereof;<sup>23</sup> and a writ of possession will issue to put him in possession. Said land so adjudged to the complainant is described as follows: [Here give corners, courses, and distances, and location, if not before given in the decree. See, ante, § 172.]

2d. That the Master hear proof and report to the next term of the Court, the reasonable value of the rents and profits of said tract of land while in the possession of the defendant, or of those holding under him; and, until the incoming of such report, all other questions are reserved.

The defendant will pay all the costs of the cause, for which an execution will issue.

§ 1050. **Orders and Bonds to Secure Rents in Case of Appeal.**—If the decree is in favor of the complainant, he is put in possession at once, unless the defendant appeals and gives bond for double two years' rent of the premises. If the defendant appeals without giving bond, the complainant gives a like bond, and is put into possession. If the party giving the bond is finally defeated a decree is rendered against him and his sureties on said bond for the value of the accrued rents and the costs.<sup>24</sup>

The party appealing may take the pauper oath as to the costs, but not as to

<sup>19</sup> Code, § 3231. The complainant has the right to show, by proof, that this disclaimer is false, and thus onerate the defendant with the costs of the suit, and obtain a writ of possession. But no writ of possession can be had unless complainant shows that the disclaimer is false. *McDonough v. Prater*, 2 Shan. Cas., 114.

<sup>20</sup> See Article on Disclaimers to Bills, ante,

§§ 393-398.

<sup>21</sup> See, ante, §§ 566-568.

<sup>22</sup> The complainant would be entitled to damages for waste if in his bill he prayed an injunction to stay waste being committed. See, ante, §§ 36; 38.

<sup>23</sup> This clause will be omitted in a detainer decree.

<sup>24</sup> Acts of 1879, ch. 85.

the rents. If the bond by the party in possession at any time becomes deficient the Court in which the suit is pending will require new and sufficient security, or return the possession to the other party.<sup>25</sup>

The following would be the form of a prayer and grant of appeal in such a case:

From the foregoing decree the defendant prays an appeal to the next term of the Supreme Court to be held at Knoxville, and having given bond for rents and costs said appeal is granted. [Or, but having failed to give a bond for rents and costs, and the complainant having given such bond, a writ of possession will issue *instantly* to put him in possession of the premises described in the decree. Upon the defendant executing a bond for costs, or taking the pauper oath, his prayer is granted.]

#### BOND BY DEFENDANT TO COVER RENTS ON APPEAL.

John Doe,  
vs. } In Chancery at Nashville.  
Richard Roe. }

We, Richard Roe, John Jones, and Henry Long, acknowledge ourselves indebted to John Doe in the penal sum of ..... dollars, [*insert double the value of two years' rent of the premises;*] but this obligation to be void if said Richard Roe shall pay the costs and damages which said John Doe may sustain by his failure to obtain possession of the premises by him recovered in the above entitled cause, and will abide by and perform the judgment of the Supreme Court rendered on the final hearing of said cause.

[*Bond to be duly dated, signed and witnessed.*]

The following are forms of bonds to be given on an appeal in such cases:

#### BOND BY COMPLAINANT TO COVER RENTS ON APPEAL.

John Doe,  
vs. } In Chancery at Nashville.  
Richard Roe. }

We, John Doe, and Charles Brown and John Smith, acknowledge ourselves indebted to Richard Roe in the penal sum of ..... dollars: [*insert double the value of two years' rent of the premises;*] but this obligation to be void if said John Doe shall pay all costs and damages which may be sustained by said Richard Roe from said John Doe for wrongfully enforcing a writ of possession awarded him in the above entitled cause, and will abide by and perform the judgment of the Supreme Court rendered on the final hearing of said cause.

[*Bond to be duly dated, signed and witnessed.*]

#### BILL TO RECOVER LAND, TO HAVE A RECEIVER AND REMOVE A CLOUD.<sup>26</sup>

[*For address and caption, see, ante, §§ 155; 164.*]

Complainants respectfully show to the Court:

##### I.

That they are the owners in fee of the house and lot, No. 26, Home street, in the city of Nashville, said lot fronting 25 feet on said street and running due north between parallel lines about two hundred feet to Jones alley; and is bounded on the east by the lot of William Price and on the west by the lot of George Jones. This lot complainants inherited from their father, James Doe, who has recently died intestate, leaving no widow, and complainants are his only heirs at law.

##### II.

That said house and lot are in the possession of the defendant, Rachel Roe, who pretends that she bought the same from complainants' father, but complainants charge that there is no foundation in law for such pretence; and that if she has any writing of any sort, it was obtained by fraud, imposition or undue influence, while their father was unlawfully cohabiting with her, and was weak in mind and body, and completely in her power; and if she has any such writing, or deed, for said house and lot from their father, complainants call on her to produce and file it with her answer, and to state what consideration she paid therefor.

##### III.

That the rents of said house and lot are well worth ten dollars per month, and the defendant has had possession thereof ever since June 10, 1905, the date of their father's death, now nearly six months; and she is utterly insolvent, having no visible property except some cheap household and kitchen furniture, worth not exceeding fifty dollars.

##### IV.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*: see, *ante*, §§ 158; 164.]

2d. That the title and right of possession to said house and lot be decreed to complainants, and that they be given a decree against the defendant for the reasonable rents of said house and lot since the date of their father's death.

<sup>25</sup> *Ibid.*

<sup>26</sup> This bill is based on Vaughn v. Vaughn, 16 | Pick., 282; and for an answer and cross bill to it, | see, *ante*, § 405.

3d. That a receiver be appointed to take possession of said house and lot and collect the rents, pending this litigation; and that if the taxes are unpaid, and the house uninsured, he pay the taxes and insurance out of said rents.

4th. That if the defendant has any paper writing purporting to be a deed or conveyance of any interest in said house and lot, that it be declared fraudulent and void, and be cancelled as a cloud on their title.

5th. That they have such other and further relief as they may be entitled to.

This is the first application for a receiver in this case.

JAMES TRIMBLE, Solicitor.

[Annex affidavit: see, ante, §§ 164; 789.]

**ORDER IN REFERENCE TO A RECEIVER.**

The application for the appointment of a receiver in this case coming on for hearing at Chambers is continued until the incoming of the defendant's answer.

This November 22, 1905.

JOHN ALLISON, Chancellor.

It would have been not improper in this case if the Chancellor had appointed a receiver, as prayed, unless the defendant within five days gave bond and security for the rents.

**ARTICLE III.**

**SUITS TO RECOVER ESCHEATED PROPERTY.**

§ 1051. When Property Escheats to the State. | § 1052. Frame and Form of Bill to Have Property Declared Escheated.

§ 1051. **When Property Escheats to the State.**—The State has the *ultimum dominium*, or eminent domain, over all property within its territory;<sup>1</sup> and when any person dies intestate in the State, leaving no widow or relatives, all of his property, real and personal, escheats to the State, for the use of the common school fund;<sup>2</sup> and it is the duty of the District Attorney to file a bill in the Chancery Court of the County wherein the escheated land is situated, in the name of the State, and without security, to have the land declared escheated,<sup>3</sup> and to have it sold.<sup>4</sup>

§ 1052. **Frame and Form of Bill to Have Property Declared Escheated.** The District Attorney of the county in which the land lies in case of land, or in which the decedent resided at the time of his death in case of personal property, files the bill; and the following frame and form may aid him in formulating his bill:

**GENERAL FORM OF AN ESCHHEAT BILL.**

[For address and caption see the form next after this.]

Complainant, the State of Tennessee, suing by ....., her District Attorney, respectfully shows to the Court:

I.  
That [Here show that ..... has died intestate in ..... county, without issue, and leaving no widow, nor relatives entitled to his estate.]

II.  
That said ..... was at his death the owner of the following real and personal property in said county: [Here describe it.]

III.  
That, [Here show who, if any one, has been appointed administrator, and make him a defendant; and show what, if anything, has been done with the personal estate.]

IV.  
That, [Here show who is in possession of the real estate, and what profits or rents, if any, have accrued to him therefrom, and make him a defendant.]

1 Townsend v. Townsend, Peck, 17.  
2 Code, § 2138.

| 3 Code, (M. & V.) § 2144a; State v. Allen, 2 Tenn. Ch., 42.  
| 4 Code, (M. & V.) § 2144 d.

v.

The premises considered, complainant prays:

1st. That subpoena to answer issue [*&c.*, as in §§ 158; 164, *ante.*]

2d. [*For remainder of bill see the form following.*]

**BILL TO DECLARE AND ENFORCE AN ESCHEAT.<sup>5</sup>**

To Hon. F. H. Heiskell, Chancellor, holding the Chancery Court at Memphis:  
The State of Tennessee, complainant,

vs.

Thomas L. Beasley, a resident of Shelby county, and the unknown }  
heirs of Harris Goldberg, deceased, defendants. }

Complainant, The State of Tennessee, suing by George S. Yerger, her District Attorney, respectfully shows to the Court:

I.

That Harris Goldberg died intestate in Shelby county, January 17, 1897, leaving no widow or children, or other relative or heir, but seized and possessed of the following lot of land. [*Describing it.*]

II.

That the defendant, Thomas L. Beasley, is in possession of said lot, claiming it under a tax deed, which complainant charges is void, 1st, because such deed is based on a sale made after said Goldberg's death; 2d, because defendant, Beasley, when he made his said purchase and took said deed, was the agent of said Goldberg in possession of said lot; and 3d, he had funds in his hands as such agent sufficient to have paid said taxes, and it was his duty to have so applied them; and so complainant charges that his said purchase was fraudulent and void, and that said deed is a cloud on complainant's title to said land.

III.

That Richard Roe was appointed administrator of the personal estate of said Goldberg, and that all of his debts have been paid, leaving said lot free from all lawful claim by any creditor or other person; but defendant Beasley is in possession of said lot, enjoying its rents and profits, claiming under his deed as aforesaid.

IV.

That complainant has made diligent inquiry for the names and residences of the heirs and relatives of said Goldberg, if any, but has been unable to ascertain whether there be any, and so complainant charges that there are no such heirs nor relatives, and that therefore said lot of land is complainant's property by escheat, and was her property when said tax sale was made, whereby said sale was void, the tax lien having become merged into the complainant's fee title to the lot.

v.

The premises considered, complainant prays:

1st. That subpoena to answer issue against defendant, Beasley, requiring him to appear and answer this bill, but his oath to his answer is waived.

2d. That publication be made, as required by law, calling upon the unknown heirs of said Harris Goldberg, and all persons, claiming under him, in any manner or way whatever, to enter their appearance and answer this bill.

3d. That, if no lawful claimant to said lot of land appear, said tax deed be declared a cloud on complainant's title and removed, and the said lot be sold, and its proceeds applied under the statute in reference to escheats.

4th. That, in the meantime, a receiver be appointed to take charge of said lot, rent out the same, and account for the rents and profits thereof; and that the defendant, Beasley, be required to account for all rents and profits by him received from said lot since the death of said Goldberg.

5th. That complainant have such further and other relief as to your Honor may seem proper.

This is the first application for a receiver in this case.

GEORGE S. YERGER, District Attorney.

[*Annex affidavit; see, ante, § 789.*]

<sup>5</sup> This bill is based on the State v. Goldberg, 5. Cates, 298.

ARTICLE IV.

SUITS TO RECOVER PERSONAL PROPERTY.

§ 1053. A Replevin Bill.

§ 1055. Form of the Bond, and Writ of Replevin.

§ 1054. Form of a Replevin Bill.

§ 1056. Proceedings Upon a Replevin Bill.

§ 1057. A Detinue Bill: Its Frame and Form.

§ 1053. **A Replevin Bill.**—A replevin bill may be filed in the Chancery Court in any case where a replevin suit may be brought in the Circuit Court.<sup>1</sup> Formerly, a replevin bill would not lie in Chancery, unless the property possessed some peculiar extrinsic value as an heir-loom, a family relic, a picture, silver plate, a ring, or some other article of peculiar, uncommon, or unique character, or unless it possessed some other special value not to be compensated in damages; but under the Act of 1877,<sup>2</sup> the Chancery Court now has jurisdiction in a replevin suit in any case triable in the Circuit Court.

The bill in such a case should contain the substance of the affidavit for the writ, and the substance of the declaration, at law; and should aver 1, that the complainant is entitled to the possession of the property proposed to be replevied, describing it with reasonable certainty; 2, that the defendant has seized, or detains the same; and 3, that it was not subject to such seizure, detention or execution; and 4, should pray for a writ of replevin, and for the value of the hire or use of the property from a day named.<sup>3</sup> The bill must be sworn to by the complainant, his agent or attorney.<sup>4</sup>

§ 1054. **Form of a Replevin Bill.**—The following is the form of a replevin bill, omitting the address and commencement; which are in the usual form:

**A REPLEVIN BILL.**

[For address and caption, see, ante, § 164.]

Complainant respectfully shows to the Court:

I.

That he is the owner, and entitled to the immediate and exclusive possession, of a certain pair of bay horses, about eight years old, with a star in their foreheads and a small R branded on the left shoulder of each; and of a certain set of double nickle-plated harness worn by said horses; and of a certain two-horse family carriage, all now or lately in the stable and carriage-house, No. 27 Jockey street, in the city of Memphis, Shelby county.

II.

That said property is unlawfully detained from the complainant by the defendant; and has been so unlawfully detained for the period of twenty days, during which time the defendant has had the possession and use thereof. None of said property is subject to detention by defendant; and the detention thereof is wholly unlawful. Said property was bequeathed to complainant by his father; and for that reason has great extrinsic value to the complainant, not to be estimated in money.

<sup>1</sup> The fact that the property is of less value than fifty dollars is no objection to the jurisdiction. See *Frazier v. Browning*, 11 Lea, 253.

<sup>2</sup> Ch. 97. A replevin suit is not for any injury to the property, but merely to recover its possession, and the value of the hire or use thereof during the detention. *Colby v. Yates*, 12 Heisk., 267.

A replevin bill, before the Act of 1877, could be filed to enforce the specific delivery of property to the complainant when the property was of peculiar value and importance, and the loss could not be fully compensated in damages. 1 Sto. Eq. Jur., § 709. The Chancery Court has always had jurisdiction to compel the restoration, or delivery of possession, of specific chattels of such a peculiar, uncommon, or unique character that they cannot be replaced by

means of money, and not susceptible of being compensated for by any practical or certain measure of damages. 1 Pom. Eq. Jur., §§ 177; 185; *Womack v. Smith*, 11 Hum., 478.

A replevin bill in Equity is more effective than a replevin at law. At law, the defendant may so conceal the property that the officer may be unable to find it, while in Equity the Court will, by process of attachment, compel the defendant to surrender the property.

<sup>3</sup> Code, §§ 3374-3376.

<sup>4</sup> The affidavit must be before the Clerk of the Court in which the bill is filed; and such affidavit may be on the affiant's information and belief. Code, § 3376.



## III.

That said pair of horses is reasonably worth five hundred dollars; said harness is reasonably worth one hundred and twenty-five dollars, and said carriage is reasonably worth four hundred dollars; and the use of said horses, harness and carriage, is reasonably worth three dollars a day.

## IV.

The premises considered, complainant prays:

1st. That the defendant be brought into Court by the issuance and service of all necessary and proper process, and be required to answer this bill, but his oath to his answer is waived.

2d. That a writ of replevin be at once issued by the Clerk and Master [by command of your Honor,<sup>5</sup>] to have said property taken out of the possession of the defendant and delivered to the complainant.

3d. That the title of the complainant to said property, and his right to the immediate and exclusive possession thereof, be decreed, and duly enforced by all necessary orders.

4th. That complainant be given a decree for the value of the hire and use of said property while so detained from him as aforesaid.

5th. That complainant have such further and other relief as he may be entitled to, either in law or equity.

W. H. BUTTRAM, Solicitor.

A replevin bill must be sworn to by the complainant, his agent or attorney.<sup>6</sup> While the Clerk and Master may issue the writ of replevin without the fiat of a Chancellor or Judge, there may be cases when it might be prudent to obtain such a fiat, in which case the following form may be used:

## FIAT FOR A WRIT OF REPLEVIN.

To the Clerk and Master at Memphis:

Issue the writ of replevin prayed for in the foregoing bill, on complainant giving a proper replevin bond, in the penalty of twenty-two hundred dollars. [*Double the value of the property to be replevied.*<sup>7</sup>] July 3, 1890.

B. M. ESTES, Chancellor.

§ 1055. **Form of the Bond, and Writ of Replevin.**—Bond must be given in double the value of the property, conditioned to be void if the complainant abide by, and perform, the judgment of the Court.<sup>8</sup> The proceedings on a replevin bill are substantially the same as on a replevin suit in the Circuit Court. The Clerk will issue the writ of replevin in the usual form, upon the bill being sworn to and filed, and the proper bond given. No fiat of a Chancellor or Judge is, ordinarily, necessary to authorize the issuance of the writ. The following forms will serve as a guide both for the bond and the writ:

## REPLEVIN BOND.

We, John Doe and Henry Doe, acknowledge ourselves indebted to Richard Roe in the sum of twenty-two hundred dollars; but this obligation to be void if the said John Doe abide by and perform the decree of the Chancery Court at Memphis in the case of John Doe vs. Richard Roe. This July 8, 1890.

JOHN DOE,  
HENRY DOE.

## WRIT OF REPLEVIN.

The State of Tennessee,

To the Sheriff of Shelby county:

Summon Richard Roe to appear on or before the 1st Monday of August next, at the office of the Clerk and Master of the Chancery Court at Memphis, to answer the bill of John Doe; and have you then and there this writ.

Said bill prays that a writ of replevin issue to put the complainant in possession of a pair of bay horses, about eight years old [*and so on, describing the property exactly as it is described in the bill.*] Said property is alleged to be in the possession of the defendant Richard Roe. [And the Hon. B. M. Estes, Chancellor, having ordered me to issue said writ of replevin,<sup>9</sup>] you are, therefore, commanded to take said property out of the possession of said Richard Roe, and deliver it to the said John Doe; and make due return hereon of the manner in which you have executed this writ.

Witness my hand this July 8, 1890.

E. B. McHENRY, C. & M.

<sup>5</sup> The writ can probably be issued by the Clerk and Master, without any fiat by the Chancellor, as the Circuit Court Clerk issues it without any fiat.

<sup>6</sup> Code, § 3376.

<sup>7</sup> Code, § 3377.

<sup>8</sup> Code, § 3377. The complainant may pauper the

costs, but must give bond in double the value of the property, notwithstanding. *Creamer v. Ford*, 1 Heisk., 307. The Clerk will be liable for failing to take the bond. Code, § 3393.

<sup>9</sup> This will be omitted if there be no fiat.

§ 1056. **Proceedings Upon a Replevin Bill.**—The writ of replevin will issue and be executed in the same manner as in the Circuit Court; but the defendant will file his answers, or make other defence to the bill, and the parties will take their proof and try the cause, according to the practice in the Chancery Court. All of the provisions of the Code applicable to replevin suits in the Circuit Court<sup>10</sup> apply equally to replevin suits in the Chancery Court, subject to the modifications necessitated by the pleadings and practice in use in the latter Court; and the rights, duties and liabilities of the officers of the Court, and of the parties, are the same as in the Circuit Court, except that a Court of Chancery may, when necessary, use its extraordinary process to enforce its orders, and more fully effectuate the ends of justice.

§ 1057. **A Detinue Bill:**<sup>11</sup> **Its Frame and Form.**—The only difference between a detinue bill and a replevin bill is that the former does not seek to obtain the possession of the property in dispute until the end of the suit; therefore, if the foregoing bill is filed as a detinue bill the second prayer will be omitted.<sup>12</sup> A detinue bill need not be sworn to, and may be prosecuted on an ordinary cost bond, or on a pauper oath.

<sup>10</sup> Code, §§ 3374-3393.

<sup>11</sup> In a detinue suit the complainant must show a general or special property in the subject-matter, and the right to its immediate possession when the bill was filed. *Robb v. Cherry*, 14 Pick., 72.

<sup>12</sup> If complainant is given a decree for the property a writ of possession will be awarded. Code, § 2997.

## CHAPTER LVII.

## SUITS TO PARTITION LANDS, OR THEIR PROCEEDS.

ARTICLE I. Partition by Division.

ARTICLE II. Partition by Sale.

ARTICLE III. Gross Value of Life Estates.

## ARTICLE I.

## PARTITION BY DIVISION.

- |  |   |
|--|---|
| <p>§ 1058. When Land May be Partitioned, or Sold.</p> <p>§ 1059. Frame of a Bill for Partition, or Sale.</p> <p>§ 1060. Form of a Bill for Partition in Kind.</p> <p>§ 1061. Proceedings After the Filing of the Bill.</p> | <p>§ 1062. Duties of the Commissioners in Making Partition.</p> <p>§ 1063. Report of the Commissioners, and Action Thereon.</p> <p>§ 1064. Decree of Partition, on Report of Commissioners.</p> |
|--|---|

§ 1058. **When Land May be Partitioned, or Sold.**—The policy of the law is to give each person his own, in severalty, and not to force a person to continue in partnership with another. Hence, any person having an estate of inheritance, or for life, or for years, in lands, and holding, or being in possession thereof, as tenant in common, or otherwise, with others, is entitled to partition thereof, or sale for partition;<sup>1</sup> and the fact 1, that the premises are subject to a life estate by dower, or courtesy, or encumbered by mortgage, or otherwise; or 2, that some of the joint owners are infants, and that it is not to their interest that the property should be partitioned; or 3, that the several estates and interests of the parties are altogether different and distinct, does not affect the right of partition. The Court may set apart, to such of the parties as desire it, their shares in severalty, leaving the shares of others, if desired, in common; and may leave the shares of the minors in common, if to their interest.<sup>2</sup>

The Court will not partition a tract of land while the legal title to it is in dispute. In such a case, the bill should be filed by the tenants in common, or some of them, against the adverse claimants or possessors, making defendants of such tenants in common as do not join in filing the bill; and, on such a bill, pray first to have the legal title settled, and then for partition, or sale for partition, among those entitled.<sup>3</sup> Nor will the Court partition, or sell for partition, a tract when the title of the parties is purely equitable. But if, in such a case, the parties have a right to the legal title, the holder of the legal title may be brought before the Court, and the legal title divested out of him, and vested in the other parties; and partition, or sale for partition, thereupon decreed. The Court of Chancery, under the Act of 1877, and previous Acts, and under its inherent jurisdiction, has power to adjust all claims and titles, legal and equitable, and to determine the rights of all parties.<sup>4</sup>

<sup>1</sup> Code, § 3262. See *Bierce v. James*, 3 Pick., 538, where it was held that "holding *and* being in possession" should read "holding *or* being in possession."

<sup>2</sup> Code, §§ 3263-3265. Our statute on the subject of partition closely follows the statute of New York, and was, in part, copied from it. For this reason,

several New York decisions are referred to, in connection with our own Reports.

<sup>3</sup> *Hopkins v. Toel*, 4 Hum., 46; *Burks v. Burks*, 7 Bax., 357; *Carter v. Taylor*, 3 Head, 30; *Almony v. Hicks*, 3 Head, 39; *Dean v. Snelling*, 2 Heisk., 489.

<sup>4</sup> See cases above cited; and Code, § 3277; Acts of 1877, ch. 97; *Gass v. Hawkins*, 1 Thomp. Cases, 238.

Any person entitled to a partition of premises is equally entitled to have such premises sold for partition: 1, Where the premises are so situated that partition thereof cannot be made; or 2, Where the premises are of such description that it would be manifestly for the advantage of the parties that the same should be sold instead of partitioned.<sup>5</sup>

§ 1059. **Frame of a Bill for Partition, or Sale.**—The bill for partition in kind, or for sale for partition,<sup>6</sup> may be filed in the county in which the land or any part of it lies, or in which the defendants reside.<sup>7</sup> The bill should set forth as far as known: 1, the names of the owners; 2, their residence; 3, which of them are infants, or married women, and if married, to whom married; 4, the description of the property, and its situation; 5, the title by which it is held and possessed; 6, the interest of each of the parties; 7, in case any one or more of the persons interested, or the share or quantity of their interest, be unknown, or be uncertain, or contingent, or the ownership of the inheritance sought to be partitioned shall depend on an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth; 8, such other facts shall be stated as may be necessary to show the various rights and equities<sup>8</sup> of any and all parties; and 9, should pray for a division of the property by partition, if practicable or advisable, among the claimants, according to their respective rights and titles; and if partition is not practicable, or advisable, a sale may be prayed for.<sup>9</sup> If the land is adversely held the bill may be filed 1, to recover the possession and clear the title, and 2, to partition it, making, of course, all the tenants in common parties as well as the adverse claimants.<sup>10</sup>

Every person having any interest in the property, whether in possession or otherwise, and every person entitled to homestead, dower, courtesy, or other estate for life or for years, or having a mortgage or other lien on the property, should be made a party.<sup>11</sup> The decree of partition will, however, not affect any tenants, or persons having claims as tenants in dower, by the courtesy, or for life, to the whole of the premises,<sup>12</sup> unless their claims are expressly adjudged.

§ 1060. **Form of a Bill for Partition in Kind.**—All of the tenants in common may join in a bill for partition;<sup>13</sup> but, as a rule, the adults desiring a partition by the Court, join in the bill, and make all the other tenants in common, and other parties having any interest of any kind in the land, defendants. This is the correct practice, as it enables the Court the better to protect the interests of the minors, and to adjudicate the rights of all parties.<sup>14</sup> The following is a form<sup>15</sup> of a

#### BILL FOR PARTITION IN KIND.

To the Hon. J. Somers, Chancellor, holding the Chancery Court at Dresden :

<sup>5</sup> Code, § 3293. Exactly what is meant by its being manifestly for the advantage of the parties that the property be sold, is not so clear when it is considered that section 3296 allows a sale when partition is not *advisable*, and that section 3297 allows a sale for *satisfactory cause shown*. The spirit of the law seems to be that a sale will be ordered when plainly for the interest of the parties. Code, § 3293. See, *post*, § 1065.

<sup>6</sup> The bill may apply, in the alternative, for partition, if practicable or advisable; and, if otherwise, for sale. Code, § 3296. The form of a bill praying for a sale is given below, § 1066; and is adapted by foot-notes to a bill for partition.

<sup>7</sup> Code, § 3268. If all the claimants join in the petition, or assent to the partition, it may be filed in any county in the State. Code, § 3269.

<sup>8</sup> The statute providing for partition does not deprive the Chancery Court of the jurisdiction rightfully belonging to it over the subject of partition, and over sales of realty for the purposes of division. Code, § 3267. The Chancery Court can adjudicate and settle every question of law or equity between the various owners and claimants relative to the

ownership of the land, back rents, improvements, encumbrances existing, or discharged by any of the parties for the common benefit, can elect for infants, reinvest the shares of persons under disability, enforce the equities of married women, and determine and adjust every matter between the parties on principles of Equity, and in accordance with law.

<sup>9</sup> Code, §§ 3270-3272; 3296. For proper parties in a suit for partition, see, *ante*, § 126.

<sup>10</sup> Burks v. Burks, 7 Bax., 357.

<sup>11</sup> Code, §§ 3271; 3263; 3291.

<sup>12</sup> Code, § 3292.

<sup>13</sup> A minor can, by next friend, file a bill for partition. Freeman v. Freeman, 9 Heisk., 301; and minors may, by next friend, join as complainants in a partition suit. Burks v. Burks, 7 Bax., 353. Husband and wife may join as complainants, unless their interests are antagonistic, or unless she be of unsound mind. Winchester v. Winchester, 1 Head, 460; Kindell v. Titus, 9 Heisk., 744; Stephens v. Porter, 11 Heisk., 344.

<sup>14</sup> See, *ante*, § 101.

<sup>15</sup> For a form of a bill to sell land for partition, see, *post*, § 1066.

John Scott and Samuel Scott, both residents of Weakley county, complainants,  
*vs.*

Henry Scott, Charles Scott, a minor without guardian, George Jones, Mary Jones, and Franklin Pierce, all residents of Weakley county, defendants.

Complainant respectfully shows to the Court:

I.

That Winfield Scott died intestate in Weakley county, on July 4, 1884, the owner in fee of the following tract of land, in the 3d civil district of said county. Beginning on a large rock, George Jones' corner, [and then continuing the description by metes and bounds to the beginning.] containing eight hundred acres, and worth about four thousand dollars. His deed for said tract is herewith filed as an exhibit marked "A," and will be offered in evidence at the hearing.

II.

The said Winfield Scott left the following his only children and heirs at law: (1) John Scott, (2) Samuel Scott, (3) Henry Scott, (4) Charles Scott, a minor without regular guardian, and (5) Mary Jones, formerly Scott, wife of George Jones. Each of said children have an equal estate of inheritance in said land, by descent from said father. The said Winfield Scott left surviving him no widow; and there is no encumbrance on said land known to complainants. Franklin Pierce is made a defendant because he claims to own the share of the defendant Mary Jones.

III.

The said tract of land is capable of being advantageously partitioned among the parties entitled, and complainants therefore pray:

1st. That those named as defendants in the caption be made such by service of subpoena, and be required to answer the bill.

2d. That a guardian *ad litem* be appointed for Charles Scott, who is a minor without general guardian.

3d. That the rights, titles, and interests of the parties in the premises be declared, and especially the conflicting claims of the defendants, Mary Jones and Franklin Pierce; and that partition of said tract be made between the parties according to their respective rights.

4th. They, also, pray for general relief; and if a partition be impracticable, or unadvisable, they pray for sale of said land, and a partition of the proceeds.<sup>16</sup>

EMERSON ETHERIDGE, Solicitor.

The bill need not be sworn to, unless it prays for extraordinary process, or for publication, or for a guardian *ad litem*.

§ 1061. Proceedings After the Filing of the Bill.—The defendants may plead, demur, or answer to the bill. If any of them dispute complainant's right to a partition, or are minors, lunatics, or non-residents, the complainants must make such proof as would entitle him to a recovery in ejectment.<sup>17</sup> The complainants may have a reference to the Master to hear proof and report:

1. Whether the complainants, or any, and which of them, have such an interest in the land described in the bill as entitle them to a partition thereof; and if so,

2. What is the nature and extent of their respective interests;

3. What share or part of the premises belongs to each of the other parties to the suit.

4. Whether partition is practicable, or advisable.

The last head of reference will be impertinent, unless the bill pray for partition, or sale, in the alternative; or unless the answer of some of the defendants ask for a sale.<sup>18</sup>

If the Court is satisfied from the proof, or from the Master's report, that complainants and defendants are tenants in common, and are entitled to a partition in kind, a decree to that effect will be pronounced, declaring the rights of the parties, and the extent of their respective interests in the premises.<sup>19</sup> The following is a form of a

DECREE FOR PARTITION.

John Scott, *et al.*,

*vs.*

Henry Scott, *et al.*

This cause came on to be heard before the Hon. J. Somers, Chancellor, on this 4th day

<sup>16</sup> Code, § 3296.

<sup>17</sup> 2 Barb. Ch. Pr., 295. The statutes of New York in reference to partition are almost identical with ours.

<sup>18</sup> Code, §§ 3296-3297.

<sup>19</sup> Code, § 3277.

of June, 1885, on the pleadings and proof in the cause, including the answer of Charles Scott by his guardian *ad litem*, and the exhibit to the bill.

## I.

And it appearing to the Court that the complainants, John Scott and Samuel Scott, and the defendants, Henry Scott, Charles Scott, and Mary Jones, are the heirs at law of Winfield Scott, deceased, and as such are entitled, by descent, to equal undivided interests, as tenants in common in the tract of land described in the pleadings, to-wit: a tract lying in the 3d civil district of Weakley county, beginning on a large rock, George Jones' corner [and then continuing the description by metes and bounds to the beginning,] containing eight hundred acres, more or less, the rights of the parties are declared accordingly; and it is adjudged and decreed that partition of said tract be made in accordance with their rights and interests so declared, and so as to allot to each of them an equal one-fifth part of said tract, quality and quantity relatively considered.

## II.

And the Court appoints John Price, James Baker, and Richard Page, the county surveyor of Weakley county, each being a respectable freeholder, commissioners to make partition of said land among the parties according to their respective rights and interests, as hereinbefore declared.

## III.

The said commissioners, having first been duly sworn, will divide the said tract of land, and make the allotment of the several shares, according to the rights of the parties as adjudged in this decree, having due regard to the relative quality and quantity of the several shares. They will plainly designate the several shares by posts, stones, marked trees, or other permanent monuments. And if exact partition of said land cannot be made among said parties, agreeably to their rights aforesaid, without material injury to such parties, or some of them, the commissioners will make the partition as nearly equal as they can, and charge the larger shares for the benefit of the smaller shares, with the sums necessary to equalize all the shares, or, if they find that said tract cannot be partitioned without great prejudice to the owners, the commissioners may so report.

## IV.

The commissioners will be given a copy of this decree, and will report their action in writing to the next term of the Court, describing the land divided, and the shares of each party, by metes and bounds, or other sufficient designation, and filing a plat of the tract, as partitioned, with their report.

## V.

It is further adjudged and decreed that the defendant, Franklin Pierce, has no title to, or interest in, said tract of land.

## VI.

The adjudication of the costs, and all other questions, are reserved until the incoming of said report.

**§ 1062. Duties of the Commissioners in Making Partition.**—The Court appoints three or more respectable freeholders, any three of whom may perform the duty, to make the partition in accordance with the decree of the Court.<sup>20</sup> The commissioners before taking any step as such must be severally sworn to do justice among the parties, to the best of their skill and abilities, according to the directions of the Court.<sup>21</sup>

In making partition, the commissioners shall give each party such a proportion of the land, quality and quantity considered, as the decree adjudges him, and they will designate the several shares, by posts, stones, marked trees, or other permanent monuments, and they may employ a surveyor, with the necessary assistants, to aid therein.<sup>22</sup>

If exact partition cannot be made without material injury to the parties, or some of them, the commissioners may make partition as nearly equal as they can, and charge the larger shares with the sums necessary to equalize all the shares;<sup>23</sup> or they may abandon the partition, if satisfied that the premises, or any portion thereof, are so situated that a partition cannot be made without great prejudice to the owners.<sup>24</sup>

If homestead or dower has never been assigned to any party entitled thereto, the Court may order the same to be set apart by the commissioners; but such

<sup>20</sup> Code, § 3279. In some Divisions, the practice is to appoint three commissioners, one of them a surveyor. If the lands lie in different counties, the Court may appoint separate sets of commissioners for each county, or one set for all the lands. Code, § 3286.

<sup>21</sup> The Clerk, the officer summoning them, the

County Surveyor, his deputy, or any Justice of the Peace, may administer the oath. Code, § 3280.

<sup>22</sup> Code, § 3281. Stake corners are not in compliance with the statute.

<sup>23</sup> Code, § 3283.

<sup>24</sup> Code, § 3299.

assignment will not prevent the premises, including the part covered by the dower, being partitioned among the claimants.<sup>25</sup>

The Clerk should give the commissioners a copy of the decree, and a commission authorizing them to proceed. The following is a form of the

#### COMMISSION TO THE COMMISSIONERS.

To John Price, James Baker, and Richard Page:

You have been appointed by the Chancery Court of Weakley county commissioners to partition the land described in the decree of said Court in the case of John Scott, *et al.*, *vs.* Henry Scott, *et al.*, in accordance with the rights of the parties as declared in said decree. You are authorized to make said partition, to go upon the said land for said purpose, and to employ a surveyor, with necessary assistants, to aid you in making the partition.

You will make due report of your action in the premises, and a copy of the said decree is hereto annexed for your information and guidance.

June 20, 1885.

B. B. EDWARDS, C. & M.

Their commission, and the copy of the decree, should be delivered to them after they have been sworn.

§ 1063. **Report of the Commissioners, and Action Thereon.**—The commissioners must make a report in writing, signed by at least three of them, showing what they have done, describing the land divided, and the shares of each party, by metes and bounds, or other sufficient designation,<sup>26</sup> and showing how much each of the larger shares is charged with, if anything, and how much each of the smaller shares shall receive, if anything, in order to equalize all of the shares.<sup>27</sup>

#### REPORT OF THE COMMISSIONERS.

To the Hon. J. Somers, Chancellor, holding the Chancery Court at Dresden:

John Scott, *et al.*,

*vs.*

Henry Scott, *et al.* }

The undersigned, appointed by your Honor commissioners to make partition of the lands in this cause, respectfully report that, after having been duly sworn by the Clerk and Master, we went on the premises, and carefully examined the same, and made partition thereof between the parties according to their respective interests, as set forth in your Honor's decree, as follows:

1st. We set apart in severalty and allotted to John Scott, as his share, the tract numbered 1, on the annexed plat, and bounded as follows: Beginning on a large rock the beginning corner of the whole tract [*&c.*, *describing it by metes and bounds.*] to the beginning, containing sixty acres, more or less, which share we value at nine hundred dollars.

2d. We set apart in severalty and allotted to Samuel Scott, as his share, the tract numbered 2, on the annexed plat, and bounded as follows: Beginning [*giving the description by metes and bounds.*] to the beginning, containing one hundred acres, more or less, which share we value at eight hundred dollars.

3d. We set apart in severalty and allotted to Henry Scott, as his share, the tract numbered 3, on the annexed plat [*&c.*, *as in No. 2.*]

4th. We set apart in severalty and allotted to Mary Jones the tract numbered 4, on the annexed plat [*&c.*, *as in No. 2.*]

5th. We set apart in severalty and allotted to Charles Scott, as his share, the tract numbered 5, on the annexed plat, [*describing it by metes and bounds.*] which share we value at seven hundred dollars.

6th. We charge the share allotted to John Scott with the sum of one hundred dollars, to be paid by him to Charles Scott in order to equalize their shares with the others in value. John Scott's share has most of the buildings, and it was considered best to give him enough land to make a farm, which could only be done by charging him for the surplus.

7th. The said annexed plat is made a part of this report, signed by the surveyor, Richard Page, and marked exhibit A to this report. A bill of the costs of the partition is also annexed.

All of which is respectfully submitted, this July 20, 1886.

JOHN PRICE,  
JAMES BAKER,  
RICHARD PAGE,  
Commissioners.

<sup>25</sup> Code, §§ 3289-3290.  
<sup>26</sup> Code, § 3282. The Chancellor should not confirm any report, unless the shares are described by metes and bounds.

<sup>27</sup> Code, § 3283; Hardin *v.* Cogswell, 5 Heisk., 549; Burdette *v.* Harwood, 15 Lea, 491.

**BILL OF COSTS.**

John Price, three days,	\$3.00	
"    mileage, 20 miles,	1.00	\$4.00
James Baker, three days,		3.00
Richard Page, three days,	3.00	
"    two    "    as surveyor,	6.00	9.00
John Smith, chain-carrier, two days,		2.00

The report of the Commissioners has the force and effect of a special verdict when it sets out the reasons for giving some tenants more land and some less than an aliquot part.<sup>28</sup> The report of the commissioners may be excepted to by a party dissatisfied therewith, and for sufficient cause may be set aside, or corrected, or amended. If the report is set aside, a new set of commissioners may be appointed.<sup>29</sup>

§ 1064. Decree of Partition, on Report of Commissioners.—If the report of the commissioners is confirmed, the Court will, in the decree of confirmation, divest and vest title according to the terms of the report. The following will serve as a guide in drawing such a decree:

**DECREE CONFIRMING A PARTITION.**

John Scott, *et al.*, }  
           *vs.*      }  
 Henry Scott, *et al.* }

This cause, coming on this, January 9, 1887, to be finally heard before Chancellor J. Somers,

I.

Upon the whole record in the cause, and especially on the report of the commissioners appointed to make partition, which report is in the words and figures following:

*[Here set out the report, in full.]*

And said report being unexcepted to, is, by the Court, in all things confirmed, and said partition ratified and approved.

II.

It is, therefore, adjudged and decreed by the Court, that all the right, title, and interest, of each and all the parties to this suit, in and to each of said shares or lots of land, be divested out of them and each of them, and be vested in the respective parties to whom the commissioners have allotted them, in their foregoing report, to be by the said parties respectively held in severalty forever, as set forth in said report. And the Master will, on demand of any of the said parties, and the payment of the legal fee, execute, acknowledge for registration, and deliver to such party, a deed conveying to such party in severalty the particular share of land allotted to him in said report, as his muniment of title.

III.

It is further adjudged and decreed that the complainant, John Scott, pay into Court for the defendant, Charles Scott, the sum of one hundred dollars, in order to equalize their shares with the others; and a lien<sup>30</sup> is declared on the share of John Scott to secure the payment of said sum and interest from this day. This lien may be enforced by motion, if necessary, at the next or any subsequent term.

IV.

It is further ordered and decreed that each of the parties to this suit, except George Jones and Franklin Pierce, pay one-fifth of the costs of the cause. Charles Scott will pay his guardian *ad litem*, H. Clay James, Esq., a fee of twenty dollars.

V.

The said fee and the costs chargeable to Charles Scott will be paid out of said one hundred dollars when paid into Court. Executions are awarded to enforce this decree as to said one hundred dollars, and, also as to costs, unless the same are paid within sixty days.

<sup>28</sup> *Hardin v. Cogswell*, 5 Heisk., 549; *Burdette v. Norwood*, 15 Lea, 491.

<sup>29</sup> Code, § 3284; 2 Barb. Ch. Pr., 301. If the ground of the exception does not appear on the face of the report, or on the face of the exhibits thereto, the party excepting would be required to support his exceptions by affidavit, or by a sworn petition, corroborated by affidavits. The Court will not lightly regard the sworn report of three respectable free-

holders; and it has been decided that their report can be impeached only for fraud, partiality, mistake, or gross error of judgment. 2 Dan. Ch. Pr., 1159, note. The commissioners are regarded as having a character similar to arbitrators. 2 Dan. Ch. Pr., 1154-1156. The Court should require a strong case to be made out before setting aside the report.

<sup>30</sup> Code, § 3284.



## ARTICLE II.

## PARTITION BY SALE.

§ 1065. When Land Will be Sold for Partition.

§ 1067. Reference to the Master as to the Advisability of a Sale.

§ 1066. Form of a Bill for Sale of Land for Partition.

§ 1068. Report of the Master as to a Sale.

§ 1069. Decree for Sale, and Disposition of Proceeds.

§ 1065. **When Land Will be Sold for Partition.**—The cases wherein land will be sold for partition have been already considered.<sup>1</sup> These cases resolve themselves into two classes: 1, Cases where partition is impracticable; and 2, Cases where a sale is plainly for the advantage of the parties.<sup>2</sup>

1. **Where Partition is Impracticable.** Where the premises are so situated that partition thereof cannot be made, the parties are entitled to a sale for division. Thus, where the premises are a house and small lot, or a mill, mill-seat, mill-race, or a railroad, or a canal, or a lot containing a manufacturing plant, or a mine, or a quarry, or the like, partition in kind would be impracticable.

2. **Where a Sale is Plainly Advantageous.** Where the premises are of such description that it would be manifestly for the advantage of the parties that they should be sold, instead of partitioned, the Court will so decree. The test, whether it is manifestly for the advantage of the owners that a tract of land should be sold instead of partitioned, is whether it will bring more money when sold as a whole than the several shares would bring in the aggregate when sold separately to different purchasers, after a partition in kind.<sup>3</sup> If the tenants in common would, very probably, realize more money by having the tract sold as a whole, or sold in fewer parts than there are shares, than they would very probably realize by selling their respective shares after a partition, then it would be manifestly to their advantage that the land should be sold instead of partitioned in kind. The advantage the statute refers to is a financial advantage, and the money value of the whole tract as compared with the aggregate money value of the several shares after partition in kind, is the test of advantage.

When the land is adversely held or claimed, the bill can be so framed as to first settle the title and then sell for partition, making the adverse claimants defendants, and so praying.<sup>4</sup> And when some of the tenants in common have not received their proportion of the rents and profits they may have an accounting against those who have received more than their proportion, and the amount due may be paid out of the latter's share of the proceeds, on proper pleadings.<sup>5</sup>

The Chancery Court has inherent power to convert realty into personalty; and in so doing can bind the rights and interests, legal or equitable, vested or contingent, present or future, of all persons, whether *in esse*, or *in posse*, and whether *sui juris* or under disability, who are before the Court by service of process, or by virtual representation.<sup>5a</sup>

§ 1066. **Form of a Bill for Sale of Land for Partition.**—There is no difference between the form of a bill for partition in kind, and a bill for sale for

<sup>1</sup> See, *ante*, § 1058.

<sup>2</sup> Code, § 3293. As to what is meant by manifest advantage, see, Code, §§ 3296-3299.

<sup>3</sup> Or, will the probable price of the various shares, if laid off and separately sold, aggregate a greater

price than the land would probably sell for as a whole.

<sup>4</sup> *Burks v. Burks*, 7 Bax., 357.

<sup>5</sup> *Omohundro v. Elkins*, 1 Cates, 711.

<sup>5a</sup> *Ridley v. Holliday*, 22 Pick., 607.

partition, except that greater care should be manifested, both by the parties and by the Court, to have before the Court all the parties in any way interested in the land, or in its possession, use, or proceeds, or having any mortgage, trust, lien, or other encumbrance, or entitled to any estate for life, or for years, on the whole tract, or any part, or parcel, or share, thereof.<sup>6</sup> The following is a form of a

**BILL FOR SALE FOR PARTITION.**

To the Hon. Albert G. Hawkins, Chancellor, holding the Chancery Court at Jackson: James Todd and George Todd, both residents of Madison county, complainants,

*vs.*  
Edward Todd, Emily Todd, Jane Todd, William Brown. James Brown, Charles Johnson, George Johnson, a minor, Emily Jones, James F. Jones, and George Cash, all residents of Madison county. and Robert Todd, Henry Todd, John Todd, and Sarah Todd, non-residents of Tennessee, and residents of Texas, defendants.

Complainants respectfully show to the Court:

I.

That Edward Todd, senior, died about three months ago, seized and possessed in fee of the following tract of land, in the 2d civil district of Madison county: Beginning on a walnut, near [*&c.*, giving description by metes and bounds, according to his deed,] containing two hundred acres, more or less. His deed is herewith filed, marked exhibit A, and will be read at the hearing. The said Edward Todd, senior, left no widow, and there are no encumbrances<sup>7</sup> on said tract known to complainants, except a vendor's lien held by the defendant, George Cash, the exact amount of which is to complainants unknown; and said Cash is called on to establish said amount by proof.

II.

The said Edward Todd, deceased, had the following lawful children: (1) James Todd, (2) George Todd, (3) Edward Todd, (4) Emily Jones, formerly Todd, wife of James F. Jones, all of whom are living and parties to this suit, (5) Columbus Todd, who is dead, leaving as his sole heirs, Emily Todd and Jane Todd, (6) Susan Brown, formerly Todd, now dead, leaving as her sole heirs, William Brown and James Brown, (7) Catherine Johnson, formerly Todd, who has died since her father, leaving a husband, Charles Johnson, and an only heir, George Johnson, a minor, without a guardian, and (8) Houston Todd, who has died since his father, leaving a widow, Sarah Todd, and Robert Todd, Henry Todd, and John Todd, as his only heirs. The said Edward Todd, senior, deceased, had another son, William Todd, but he died many years before his father, unmarried, and without issue.

III.

The said parties are owners of said tract of land, or have interests therein, as tenants in common, or otherwise in the following proportions, or manner: (1) James Todd, (2) George Todd, (3) Edward Todd, (4) Emily Jones, and (5) George Johnson, each own an undivided one-eighth in the fee; (6) Emily Todd and James Todd, heirs of Columbus Todd, each own an undivided one-sixteenth; (7) William Brown and James Brown, heirs of Susan Brown, each an undivided one-sixteenth; (8) Robert Todd, Henry Todd, and John Todd, heirs of Houston Todd, each an undivided one twenty-fourth. Charles Johnson, as husband of Catherine Johnson, is tenant by the courtesy of the one-eighth that descended to his wife; and Sarah Todd is entitled to dower in the one-eighth that descended to her husband, Houston Todd. James F. Jones is made a party solely as the husband of Emily Jones, and George Cash claims a vendor's lien on the whole of said tract, and insists that it is superior in equity to the rights of all the other parties.

IV.

The said tract of land is worth about one thousand dollars, it is not near any town, and is adapted exclusively to farming uses; and it would be manifestly for the advantage of the parties that it be sold for partition, instead of partitioned in kind, there being on it only one house, one spring, and a small quantity of timber.<sup>8</sup>

V.

The residences of the various tenants in common and life tenants are as stated in the caption, and George Johnson is a minor without general guardian.

VI.

Therefore, the premises considered, complainants pray:

1st. That all those named as defendants in the caption be made such by service of subpoena on the residents, and by publication as to the non-residents, and that they all be required to answer the bill, but the oath of the defendant Cash to his answer is waived.

<sup>6</sup> Code, §§ 3309-3315. For the frame of a bill for partition, or sale, see, *ante*, § 1059.

<sup>7</sup> It is the duty of parties, when a sale is applied for, or ordered, to disclose any encumbrance upon the premises, or any part thereof. Code, §§ 3309-3315.

<sup>8</sup> If the bill seeks a partition in kind, this paragraph will be entirely omitted. With this exception, and with the exception of the prayer, bills for sale and bills for partition are alike.

2d. That a guardian *ad litem* be appointed for the minor defendant, George Johnson, to make defence for him.

3d. That the rights of the parties to said land be settled and declared by the decree of the Court, and that the said tract of land be sold, and the proceeds, after satisfying the said lien of the defendant Cash, if any, be divided among the parties in accordance with their respective rights;<sup>9</sup> and to this end that all necessary references to the Master be made.<sup>10</sup>

4th. That the tenancy by the courtesy of Charles Johnson, and the dower rights of Sarah Todd, in said land, be sold with the rest of the land, to the end that the purchaser may get an unencumbered title in fee, said Charles Johnson and Sarah Todd being willing, as complainants are informed and charge, to take the value of their respective interests in money.<sup>11</sup>

5th. That the defendant Cash may set up and establish by proper proof any lien he may have to said land, and show fully and clearly the nature and amount thereof.

6th. And complainants, also, pray for general relief.

T. C. MUSE, Solicitor.

The bill need not be sworn to unless it prays extraordinary process, or for publication, or for a guardian *ad litem*, or for a receiver.

§ 1067. Reference to the Master as to the Advisability of a Sale.—After the answers of the defendants are all in, or decrees *pro confesso* entered against those not answering, if the right of complainants to a sale is disputed, or there be minors, or persons of unsound mind, or non-residents, who are defendants, on motion of complainants the Court will order a reference to the Master.

#### REFERENCE TO THE MASTER AS TO A SALE.

James Todd, *et al.*,  
vs.  
Edward Todd, *et al.* } No. 816.

The bill in this cause praying a sale for partition, but the facts not sufficiently appearing, it is ordered by the Court that the Master hear proof, and report instanter, [or, to the next term of this Court.]

1st. Who are the owners of the premises sought to be sold, and the respective rights, titles, and interests, of the parties therein, and what share or part belongs to each.<sup>12</sup>

2d. Whether the premises are so situated that partition thereof cannot be equitably made, or whether they are of such description that it would be manifestly for the advantage of the parties that the same should be sold, instead of partitioned.

3d. Whether there are any encumbrances on the premises not disclosed in the pleadings; and if so, what, and to whom belonging.<sup>13</sup>

4th. What would be a reasonable minimum price for the premises. [This inquiry may be omitted if all the parties are *sui juris*.]

In ascertaining the necessity of a sale, the true question for the Master to decide is, whether the property sold as a whole, or sold in fewer subdivisions than shares, would bring a larger price than the various shares would bring in the aggregate.<sup>14</sup> In other words, whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed

<sup>9</sup> Code, § 3302.

<sup>10</sup> If the bill seeks a partition, this clause will be as follows: 3d. That the rights of the parties to said land be settled and declared by the decree of the Court, and the same be partitioned between the parties according to their respective rights, and that commissioners be appointed for that purpose.

<sup>11</sup> Code, §§ 3305-3307. This clause of the bill, and the one next following, will be omitted when partition alone is sought.

<sup>12</sup> This inquiry is necessary to enable the Courts to settle the rights, titles, and interests, of the parties to and in the property. Code, §§ 3277; 3302. Without this, the Court might sell property to which none of the parties had any title. In strict practice, a decree settling the title of the parties should precede the reference as to the advisability of a sale. *Jones v. Douglass*, 1 Tenn. Ch., 357; and the title of the complainant, if not admitted by the answer, should be such as would enable him to recover in ejectment. *Larkin v. Mann*, 2 Paige, (N. Y.) 27. If any of the parties claim under a will, or under a conveyance, the Master should require it to be filed; and he may require an abstract of the title to be furnished. 2 Barb. Ch. Pr., 307.

<sup>13</sup> Code, § 3309. It is the object of the law, and the duty of the Court, to give the purchaser a perfect title, discharged from all encumbrances, unless the decree otherwise specify on its face. The purchaser may, after sale, have a reference to ascertain whether there are any encumbrances on the premises; and, if

any are discovered, the Court may order them to be paid, or may relieve the purchaser of his purchase, if the encumbrance was not made known at the sale. Code, § 3309-3315. The Master should search the records for encumbrances, and should examine such persons as appear to be creditors. 2 Barb. Ch. Pr., 307.

<sup>14</sup> The following questions may be propounded to witness as to the expediency of a sale:

Q. 1. How near to said tract do you live; and what opportunities have you had to become acquainted with it? Answer fully.

Q. 2. Describe said land; and give the number and character of its improvements, houses, barns, stables, cribs, fences, cleared fields, and other improvements, if any; and show where they are situated.

Q. 3. What is said tract best adapted to, considering its character, location and quantity; to farming, manufacturing, building, mining, grazing, or timber? State why, fully.

Q. 4. What would be a reasonable price for said tract if sold as a whole? [or, if subdivided into two or three lots, and so sold?]

Q. 5. What would be a reasonable price for each of the shares in said land, if said tract should be subdivided into as many shares as there are tenants in common, and each share owned by a different person?

Q. 6. Would it be to the interest of the parties to sell said tract, or to divide it in kind? Give fully your reasons for your opinion.

among the different parties in severalty, be materially less than the value of the same property as a whole, or as subdivided into fewer parts than there are shares.<sup>15</sup>

If the realty held in common is 1, a house; or 2, a house and lot; or 3, a lot so small that any share would be too small to be readily salable; or 4, a farm so small that any share would be too small to support a family; or 5, a quarry, coal bank, iron or other mine; or 6, a manufacturing plant; or 7, property, otherwise partitionable, held under a long lease from the ancestors or previous owners,<sup>16</sup> or fitted up at great expense to be operated as a whole, a sale should be ordered, unless the other defendants are infants, or desire their shares to be left in common, and the complainant can have his share set apart in severalty without great prejudice to the others.<sup>17</sup> If there be any uncertainty as to the boundaries of the land, or the number of acres in it, it should be surveyed before sale, and if any party is under disability a minimum price for the land should be fixed.<sup>18</sup>

§ 1068. **Report of the Master as to a Sale.**—The Master should diligently inquire as to the facts, especially where persons under disability, non-residents, or unknown heirs, are interested, and where encumbrances are probable. He can call before him any witness he deems necessary for the discovery of the truth. The following is the form of a

**REPORT OF THE MASTER AS TO A SALE.**

James Todd, *et al.*, }  
*vs.* } No. 816.—Master's Report as to Sale.  
 Edward Todd, *et al.* }

The undersigned would respectfully report that, in obedience to a decree made in this cause, requiring him to report:

1st. As to the rights, titles and interests of the various parties in and to the land described in the bill;

2d, As to the manifest advantages of a sale, rather than a partition in kind; and,

3d, As to encumbrances, if any;

He has considered the proof, which has been taken in the cause, and reports as follows:

I.

1st. That Edward Todd, Senior, died intestate, seized and possessed in fee of the tract of land described in the bill; and that it descended to his heirs, in the manner and to the extent declared in the bill. [*Dep. of James Todd; pp. 4-5, qs. 8-10; and Exhibit A thereto.*]

2d. That said heirs and their respective interests or shares in said land are as follows: (1) James Todd, a son, (2) George Todd, a son, (3) Edward Todd, a son, (4) Emily Jones, a daughter, and (5) George Johnson, heir of Catherine Johnson, a deceased daughter of said Edward Todd, Senior, deceased, each own an undivided one-eighth ( $\frac{1}{8}$ ) of said land, (6) Emily Todd and James Todd, heirs of Columbus Todd, a deceased son, (7) William Brown and James Brown, heirs of Susan Brown, a deceased daughter of said Edward Todd, Senior, are each entitled to an undivided one-sixteenth (1-16) of said land; and (8) Robert Todd, Henry Todd and John Todd, heirs of Houston Todd, a deceased son of said Edward Todd, Senior, own each an undivided one-twenty-fourth (1-24) of said land.

3d. Charles Johnson as husband of said Catherine Johnson, deceased, is tenant by the courtesy of the one-eighth undivided interest belonging to said George Johnson.

4th. Sarah Todd is entitled to dower in the one-eighth undivided interest belonging to said heirs of her deceased husband, Houston Todd. [*Deps. of James Todd, pp. 8-9, qs. 14-16; and Sarah Todd, pp. 1-3, qs. 1-2 and 5.*]

II.

It would be manifestly to the advantage of the parties that the land should be sold instead

<sup>15</sup> Clason v. Clason, 6 Paige, (N. Y.) 541. Thus, if the property, taken as a whole, would be reasonably worth, say one thousand dollars, and if the various shares after partition would not be reasonably worth more than eight hundred dollars, in the aggregate, then a sale would be manifestly advantageous. Or, if the property when subdivided, into say two or three tracts, would aggregate a greater price than the several shares would aggregate, if sold after partition, then a sale would be advantageous. Oftentimes, a tract can be advantageously divided into a smaller number of tracts or lots than there are tenants in common, and a sale of the tract as thus subdivided will, often, produce a much larger

sum than the tract would sell for as a whole, or than the various shares would sell for after a partition. In all such cases, a sale is manifestly advantageous; and it, also, gives the tenants in common a fair chance to buy, if they desire; and, also, a chance to prevent the lots from selling too low. This plan often satisfactorily solves contests as to whether a tract should be sold, or partitioned.

<sup>16</sup> In such a case, the sale will be made subject to the rights of the lessee, who will become the tenant of the purchaser. Woodworth v. Campbell, 5 Paige, (N. Y.) 518.

<sup>17</sup> Code, §§ 3264-3265; 3299.

<sup>18</sup> Horn v. Denton, 2 Sneed, 126.

of partitioned.<sup>19</sup> [*Deps. of James Todd, p. 10, q. 17; George Harris, p. 2, q. 1; Charles Cooper, p. 4, q. 3.*] It is very probable that it would bring a larger price if subdivided into two lots, and so sold. [*Dep. of James Todd, p. 11, q. 18*]

III.

A reasonable minimum price for said tract of land is seventeen hundred dollars, and James Todd offers to start the bidding at that sum.

IV.

There appear to be no liens or encumbrances on said land, except:

1st. A lien for twenty-one dollars, State and county taxes for the years 1889 and 1890, [*Dep. of James Tolson, p. 1, q. 1;*] and

2d. A vendor's lien belonging to the defendant, George Cash, the principal and interest of which, down to this date, amounts to one hundred and twenty-three dollars. [*Dep. of George Cash, pp. 1-3, q. 2; and exhibit A thereto.*]

Respectfully submitted, Jan'y. 4, 1891.

R. A. HURT, C. & M.

**§ 1069. Decree for Sale, and Disposition of the Proceeds.**—The report of the Master is subject to exceptions, modifications, or recommittal, as in case of all other reports. If the report in favor of a sale is confirmed, a sale will be ordered; if the report should show no advantage or necessity of a sale, on confirmation thereof, the bill will be dismissed unless complainants amend their bill and pray for partition, or unless the defendants pray for a partition. The following is a form of a

#### DECREE FOR SALE.

James Todd, *et al.*,  
vs.  
Edward Todd, *et al.* }

This cause came on to be heard this January 15, 1891, before Chancellor Albert G. Hawkins,

I.

Upon the pleadings and proof, and the report of the Master, which report is as follows:

[*Here copy the report, in full.*]

And said report being unexcepted to, is, by the Court, in all things confirmed.

II.

And the Court being satisfied that the facts are as set out in said report, the respective rights and interests of the parties are adjudged and settled accordingly, the share of each party being as reported by the Master.

III.

It is, therefore, ordered and decreed by the Court, that said tract of land be sold for partition,<sup>20</sup> and that the Master sell the same according to law, on the premises, on a credit of six and twelve months, to the highest and best bidder, taking notes with security drawing interest from date, and retaining a lien on the land for further security. The Master will not sell said tract for less than seventeen hundred dollars. [*This minimum may be omitted when all the parties are sui juris.*] But will report the highest bid received. Said tract is described as follows: [*Here describe it, by metes and bounds.*]

IV.

The Master will report his action to the next term, until which time all further questions

<sup>19</sup> The Master may add the facts on which he bases his conclusion thus: The tract contains about two hundred acres, and is adapted especially to farming. There is only one house on it, one spring, and a small quantity of timber, all in one corner of the farm. The house is nearly as valuable as all the rest of the farm.

More opinions of witnesses as to the advisability of a sale are of no value, and are entitled to no consideration, except in so far as they are sustained by the facts and reasons given by the witnesses. Opinions are but little more than guesses. No decree can be founded on such incompetent testimony, and the Master should wholly disregard it. *Davidson v. Bowden, 5 Sneed, 129; Woodfolk v. N. & C. R. R. Co., 2 Swan, 429; Stretch v. Gowdey, 3 Tenn. Ch., 565.* Real estate dealers may give their opinions, they being experts.

<sup>20</sup> Often it is advantageous to subdivide a tract, and sell it by subdivisions. A tract may frequently be advantageously divided into two or more tracts, or lots, when it would not bear subdivision into as many lots as there are shares. In such cases, a sale is to the interest of the parties. If, in such a case, the land is ordered to be sold, both as a whole, and in lots, it should be sold as a whole first, for this will prevent combinations among bidders to buy it as a whole, and then subdivide it to suit themselves. If sold first in lots, the parties who desire the whole

will not bid on the lots, but will reserve their bids until the whole tract is offered; and thus the smaller bidders will be prevented from getting the lots desired by them, and for which they would, under proper competition, have given a larger sum in the aggregate than the tract sold for as a whole. When sold as a whole first, the larger bidders are forced to compete, both with themselves and with the smaller bidders, when the subdivisions are offered for sale.

In such a case, the foregoing decree would continue, in substance, as follows:

#### DECREE FOR SALE IN LOTS AND AS A WHOLE.

And it appearing to the Court from the proof [*or, from the Master's report; or, And it being suggested to the Court by the parties.*] that said tract of land may be advantageously sold in subdivisions, it is ordered by the Court that the Master employ a competent surveyor, and have him subdivide said tract into two or more lots, as may appear to the best interests of the parties, making a plat of the subdivisions, and describing them by metes and bounds. And at said sale, the Master, after selling said tract as a whole, will then sell it, on the same terms, as subdivided, and will adopt that sale which produces the largest sum. If sold in lots, he will describe said lots by metes and bounds in his report, and file said plat as an exhibit thereto.

are reserved, especially questions relative to the disposition of the proceeds of the sale, and the discharge of the encumbrances reported by the Master.

After the sale has been made and confirmed,<sup>21</sup> and the costs and encumbrances paid out of the proceeds, the shares of the adult parties, not under any disability, in the remainder of the proceeds will be paid over to them, or on their order.<sup>22</sup> The decree ordering the sale, or the decree confirming it, should specifically show the proportionate interests of the respective parties so the Clerk and Master may know how to distribute the proceeds of the sale. The Code explicitly provides for the method of paying out the shares of all parties, under any disability, and of reinvesting such shares, as well as the shares of parties unknown or non-resident.<sup>23</sup>

If the money of any infant, or person of unsound mind, is ordered to be paid to the guardian of such person, such payment should be on condition that the guardian execute a special bond in the Chancery Court to secure the proper accounting for such money. Such bond may be in the following form:

**GUARDIAN'S SPECIAL BOND.**

Know all men by these Presents:

That we, Roland Roe, John Smith, and Henry Brown, hereby obligate and bind ourselves to pay the State of Tennessee the sum of [*double the amount to go into the guardian's hands*] dollars.

But this obligation to be void if the said Roland Roe, who has been, by the County [*or, Chancery*] Court of Knox county, appointed guardian of Romeo Roe, a minor, [*or, person of unsound mind,*] shall faithfully discharge all of his duties as such guardian, and especially shall duly account for and pay over all moneys by him received belonging to his said ward from the Chancery Court of Knox county in the case of John Doe *vs.* Richard Roe, *et al.*, or in any other case in said Court; and shall perform any and all decrees of said Chancery Court in reference to said moneys.

Witness our hands, this August 12, 1881.

Acknowledged in open Court by all the makers, with  
 each of whom I am personally acquainted; and  
 accepted and approved. Aug. 12, 1881.  
 W. B. STALEY, Chancellor.

ROLAND ROE,  
 JOHN SMITH,  
 HENRY BROWN.

The following is the form of an order directing the money of the ward to be paid to the guardian:

**ORDER TO PAY MONEY TO GUARDIAN.**

John Doe, }  
*vs.* } 987.  
 Richard Roe, *et al.* }

In this cause, this day came Roland Roe, and presented his letters as guardian of the defendant, Romeo Roe, a minor [*or person of unsound mind*], and moved the Court to direct the Master to pay over to him the money in Court in this cause, belonging to his said ward, which motion the Court declined to allow, except on a bond being given in this Court to cover said fund.

Thereupon the said guardian, Roland Roe, presented the following bond:

[*Here copy the bond, in full.*]

And said bond having been acknowledged in open Court by said Roland Roe, John Smith and Henry Brown, to be their several acts and deeds, and the Chancellor having examined said sureties on oath as to their solvency, and being satisfied that they are solvent and fully worth, above all exemptions and liabilities, more than twice the penalty of said bond, said bond is by the Court approved and accepted, and ordered to be entered in full on the minutes of the Court, which is hereinabove done. And thereupon it was ordered that the Master pay to said Roland Roe, as guardian aforesaid, all the funds in this cause belonging to his said ward, and take and file his receipt therefor. Said receipt will be taken and entered on the Rule Docket, in full.

<sup>21</sup> For form of a decree of confirmation, see, *ante*, § 630.

<sup>22</sup> Code, § 3316.

<sup>23</sup> Code, §§ 3317-3322. As to the duties of Masters in paying out, see, *post*, §§ 1167-1168.

## ARTICLE III.

## GROSS VALUE OF LIFE ESTATES.

§ 1070. Value of a Life Estate, How Ascertained. | § 1071. Mortality Tables, and Their Value.  
 | § 1072. Annuity Tables, and Their Value.

§ 1070. **Value of a Life Estate, How Ascertained.**—The Court is often called on to fix a gross sum as the value of a life estate, either in lands or in personalty. The most frequent occasion for the exercise of this power is in suits to sell land encumbered by dower, homestead, a tenancy by the courtesy, or other estate for life.<sup>1</sup> In our State there is no arbitrary rule, based on the average expectancy of life, whereby the value of a life estate can be ascertained. Each case is determined on its own facts, the object being to ascertain the market value of the life estate in money, as practical business men would estimate it, if it were put on the market for sale.<sup>2</sup>

The principal facts entering into the estimate of this value are: 1, the age of the life-tenant; 2, his health generally, and at the time; 3, his habits affecting his health; 4, the longevity of his parents, and 5, the presence, or absence, of hereditary disease in his parents or their children. The witnesses examined should know the life-tenant, his age, health, habits, and constitution; and, having stated fully their knowledge on these points, should then give their estimate of the value of his life estate in the particular fund.<sup>3</sup> The witness, especially if he is the family physician, may also state how many years the life-tenant will probably live, considering his age, health, habits, and constitution; and whether the probable duration of his life is above or below the general average of persons of his age.

The testimony of life insurance agents may, also, be taken to show the average expectancy of life of persons of the same age as the life-tenant, according to the tables used by reputable life insurance companies. And proof as to the expectancy of life of the life-tenant, and of the general mortality of the community in which he lives, would also be admissible.

The Clerk and Master, or Court, after considering: 1, the mortality and annuity tables proved to be reputable, if any be introduced; 2, the evidence of the witnesses as to the age, health, habits, and constitution of the life-tenant; and 3, the opinion of the experts, if any, as to the probable duration of the life in question, will first determine the number of years the life-tenant will probably live, and then, on that probability, estimate the value of the life-estate in the fund.<sup>4</sup>

§ 1071. **Mortality Tables, and their Value.**—The expectancy of life is ascertained by the average mortality of large numbers; and, for convenience, these averages are gathered into tables. There are several such tables, English and American; and any of them, shown to be used by reputable insurance companies, would be admissible; with such other proof as the parties may offer, either as to the condition of the individual, or the general mortality of the community in which he lives.<sup>5</sup>

<sup>1</sup> Code, § 3307.

<sup>2</sup> *Carnes v. Polk*, 5 Heisk. 244.

<sup>3</sup> *Ibid.*; Washb. on Real Prop., 248; *Railroad v. Ayres*, 16 Lea, 729.

<sup>4</sup> See cases cited in preceding note.

<sup>5</sup> *Railroad v. Ayres*, 16 Lea, 729. There is comparatively little difference between the various life tables in general use. In *Carnes v. Polk*, 5 Heisk., 248, the Supreme Court says that the Carlisle Tables may be used in connection with other proof; and

Washburn, in his work on Real Property, Vol. I, page 248, says that the Carlisle Tables are generally used in the United States. The American Experience Mortality Table, and the Combined Experience, or Actuaries' Table are the ones generally used by American Life Insurance Companies, and have been adopted by the statutes and decisions of several of the States. The Portsmouth or Northampton Table is, also, recognized by the Courts.

The differences between these various tables are comparatively slight, thus mutually demonstrating their general accuracy. Four of the most valuable tables are here given:

MORTALITY TABLES.

SHOWING THE EXPECTATION OF LIFE AT VARIOUS AGES.

Age of Person Years	Actuaries' Mortality Table	American Experience Mortality Table	Carlisle Mortality Table	N'hampton Mortality Table	Age of Person Years	Actuaries' Mortality Table	American Experience Mortality Table	Carlisle Mortality Table	N'hampton Mortality Table
	Years	Years	Years	Years		Years	Years	Years	Years
10	48.36	48.72	48.82	39.78	54	17.50	18.09	18.28	16.06
11	47.68	48.18	48.04	39.14	55	16.86	17.40	17.58	15.58
12	47.01	47.44	47.27	38.49	56	16.22	16.72	16.89	15.10
13	46.33	46.82	46.51	37.83	57	15.59	16.05	16.21	14.63
14	45.64	46.26	45.75	37.17	58	14.97	15.39	15.55	14.15
15	44.96	45.50	45.00	35.51	59	14.37	14.74	14.92	13.68
16	44.27	44.75	44.27	35.85	60	13.77	14.09	14.34	13.21
17	43.58	44.29	43.57	35.20	61	13.18	13.47	13.82	12.75
18	42.88	43.53	42.87	34.58	62	12.61	12.86	13.31	12.78
19	42.19	42.97	42.17	33.99	63	12.05	12.26	12.80	11.81
20	41.49	42.20	41.46	33.43	64	11.51	11.68	12.30	11.35
21	40.70	41.53	40.75	32.90	65	10.97	11.10	11.79	10.88
22	40.09	40.85	40.04	32.39	66	10.46	10.54	11.27	10.42
23	39.39	40.17	39.31	31.88	67	9.96	10.00	10.75	9.95
24	38.68	39.49	38.59	31.36	68	9.47	9.48	10.23	9.50
25	37.98	38.81	37.86	30.83	69	9.00	8.98	9.70	9.05
26	37.27	38.11	37.14	30.33	70	8.54	8.48	9.19	8.60
27	36.56	37.43	36.41	29.82	71	8.10	8.00	8.65	8.17
28	35.86	36.73	35.69	29.30	72	7.67	7.54	8.16	7.74
29	35.15	36.03	35.00	28.79	73	7.26	7.10	7.72	7.33
30	34.43	35.33	34.34	28.27	74	6.86	6.68	7.33	6.92
31	33.72	34.62	33.68	27.76	75	6.48	6.28	7.01	6.54
32	33.01	33.92	33.03	27.24	76	6.11	5.88	6.69	6.18
33	32.30	33.21	32.36	26.72	77	5.76	5.48	6.40	5.83
34	31.58	32.50	31.68	26.20	78	5.42	5.11	6.12	5.48
35	30.87	31.78	31.00	25.68	79	5.09	4.74	5.80	5.11
36	30.15	31.07	30.32	25.16	80	4.78	4.38	5.51	4.75
37	29.44	30.35	29.64	24.64	81	4.48	4.04	5.21	4.41
38	28.72	29.62	28.96	24.12	82	4.18	3.71	4.93	4.09
39	28.00	28.90	28.28	23.69	83	3.90	3.39	4.65	3.80
40	27.28	28.18	27.61	23.08	84	3.63	3.08	4.39	3.58
41	26.56	27.45	26.97	22.56	85	3.36	2.77	4.12	3.27
42	25.84	26.72	26.34	22.04	86	3.10	2.47	3.90	3.19
43	25.12	25.99	25.71	21.54	87	2.84	2.19	3.71	3.01
44	24.40	25.27	25.09	21.03	88	2.58	1.91	3.59	2.86
45	23.69	24.54	24.46	20.52	89	2.35	1.66	3.47	2.65
46	22.97	23.80	23.82	20.02	90	2.11	1.42	3.28	2.41
47	22.27	23.08	23.17	19.51	91	1.89	1.19	3.26	2.09
48	21.55	22.36	22.50	19.00	92	.....	.98	3.37	1.75
49	20.87	21.63	21.31	18.49	93	.....	.80	3.48	1.37
50	20.18	20.91	21.11	17.99	94	.....	.64	3.53	1.05
51	19.50	20.20	20.39	17.50	95	.....	.50	3.53	.75
52	18.82	19.49	19.68	17.02	96	.....	0	3.46	.50
53	18.16	18.79	18.97	16.54	.....	.....	.....	.....	.....

§ 1072. Annuity Tables, and their Value.—Annuity tables are of great value in ascertaining what a life estate in a particular fund is worth. In some of the American States they are implicitly followed. In Tennessee, they are merely evidence. The Carlisle Annuity Table is one of admitted merit, and often followed. Dr. Wigglesworth's Table has been followed in Massachusetts and Kentucky. In New York, and other States, the Northampton Table has been preferred. All three of these Tables are here given:



## ANNUITY TABLES,

SHOWING THE VALUE OF AN ANNUITY OF ONE DOLLAR, AT SIX PER CENT.,  
ON A SINGLE LIFE, AT ANY AGE FROM TWENTY TO  
NINETY-SIX YEARS, INCLUSIVE:

Age of Person	Carlisle Table	Northampton Table	Wigglesworth Table	Age of Person	Carlisle Table	Northampton Table	Wigglesworth Table
Years	\$ Mills	\$ Mills	\$ Mills	Years	\$ Mills	\$ Mills	\$ Mills
20	13.835	12.398	12.178	59	8.529	7.999	8.972
21	13.769	12.329	12.148	60	8.304	7.820	8.763
22	13.697	12.265	12.114	61	8.108	7.637	8.541
23	13.621	12.200	12.082	62	7.913	7.449	8.307
24	13.541	12.132	12.052	63	7.714	7.253	8.070
25	13.456	12.063	12.024	64	7.502	7.052	7.797
26	13.368	11.992	11.987	65	7.281	6.841	7.517
27	13.275	11.917	11.938	66	7.049	6.625	7.317
28	13.182	11.841	11.890	67	6.803	6.405	7.110
29	13.096	11.763	11.843	68	6.546	6.179	6.898
30	13.020	11.682	11.797	69	6.277	5.949	6.680
31	12.942	11.598	11.752	70	5.988	5.716	6.546
32	12.860	11.512	11.708	71	5.704	5.479	6.226
33	12.771	11.423	11.665	72	5.424	5.241	5.991
34	12.675	11.331	11.625	73	5.170	4.781	5.751
35	12.573	11.236	11.587	74	4.944	4.565	5.518
36	12.465	11.137	11.529	75	4.760	4.354	5.284
37	12.354	11.035	11.472	76	4.579	4.154	5.038
38	12.239	10.929	11.416	77	4.410	3.952	4.793
39	12.120	10.819	11.360	78	4.238	3.742	4.550
40	12.002	10.705	11.306	79	4.040	3.514	4.315
41	11.890	10.589	11.253	80	3.858	3.281	4.093
42	11.779	10.473	11.201	81	3.655	3.155	3.860
43	11.668	10.356	11.152	82	3.474	2.926	3.633
44	11.551	10.235	11.105	83	3.286	2.713	3.439
45	11.428	10.110	11.052	84	3.102	2.551	3.301
46	11.296	9.980	10.942	85	2.909	2.402	3.265
47	11.154	9.846	10.827	86	2.739	2.266	3.075
48	10.998	9.707	10.707	87	2.599	2.138	2.777
49	10.823	9.563	10.583	88	2.515	2.031	2.615
50	10.631	9.417	10.453	89	2.417	1.882	2.542
51	10.422	9.273	10.317	90	2.266	1.689	2.731
52	10.208	9.129	10.175	91	2.248	1.422	2.422
53	9.988	8.980	10.027	92	2.237	1.136	2.052
54	9.761	8.827	9.872	93	2.440	0.806	1.683
55	9.524	8.670	9.709	94	2.492	0.518	1.327
56	9.280	8.509	9.539	95	2.522	.....	1.022
57	9.027	8.343	9.359	96	2.48	.....	.734
58	8.772	8.173	9.171	.....	.....	.....	.....

## RULE FOR COMPUTATION.

The foregoing three tables are each on the basis of an annuity of one dollar. To ascertain what a person's life estate in any given sum is worth in gross: (1) calculate the interest on the given sum at six per cent. for one year; (2) multiply the amount of this interest by the value of an annuity of one dollar at the life-tenant's age, being the amount set opposite his age in the table; and (3) the product is the gross value of the life-estate of such person in the given sum.

## EXAMPLES.

1. *In Case of the Tenancy by the Courtesy, or Other Owner of the Whole Life-Estate.* Suppose the land is worth, or has realized by sale, the net sum of \$1,000, and that the life-tenant is 40 years old. The interest on \$1,000.00 for one year at six per cent. is \$60.00. By the Carlisle table an annuity of one dollar on a life at 40 years is worth 12.002 mills. Multiply 12,002 by 60, and the product is \$720.12, which is the gross value of a life-estate in \$1,000.00 by the Carlisle table when the life-tenant is 40 years old. By the Northampton table, the gross value would be 10,705 multiplied by 60, or \$642.30; and by Wigglesworth's table the gross value of the life-estate would be 11,306 multiplied by 60, or \$678.36.

2. *In Case of Dower.*—Suppose the widow's age is 37, and that she is entitled to dower in

a tract of land worth \$300.00. Her dower would be one-third of this amount, or \$100.00. Interest on \$100.00 for one year is \$6.00. Multiply \$6.00 by 11,035 mills, the value of an annuity of one dollar at 37 years by the Northampton table, and the product is \$66.21, which is the gross value of her right of dower in said land, or in \$300.00. By the Carlisle table, her dower would be worth 12,354 mills multiplied by \$6.00, or \$74.12; while by the Wigglesworth table her dower would be worth 11,472 mills multiplied by \$6.00, or \$68.83.

## CHAPTER LVIII.

## SUITS IN CHANCERY IN CASES ACTIONABLE AT LAW.

- |   |  |
|---|--|
| <p>§ 1073. Frame of Bills in Suits Based on Matters Actionable at Law.</p> <p>§ 1074. Suits on Common Law Counts.</p> <p>§ 1075. Suits to Recover Money Agreed to be Paid as Liquidated Damages.</p> <p>§ 1076. Suits to Recover Unliquidated Damages.</p> <p>§ 1077. Suits to Recover Money Due on a</p> | <p>Judgment, Decree, Award, Stated Account, Fine, or Penalty.</p> <p>§ 1078. Suits on Accounts From Another County, or State.</p> <p>§ 1079. Forms of Bills in Other cases Actionable at Law.</p> <p>§ 1080. Forms of Decrees in Cases Actionable at Law, Where There is a Money Recovery.</p> |
|---|--|

§ 1073. **Frame of Bills in Suits Based on Matters Actionable at Law.**—In suits based on matters actionable in the Circuit Court, the material allegations of the Bill will correspond in substance and in verbiage with the material allegations of a declaration at law on the same cause of action.<sup>1</sup> The Code forms of declarations<sup>2</sup> can be incorporated almost bodily into a bill on the same ground of suit, striking out the words "The plaintiff sues," at the beginning of the declaration, and inserting in lieu:

The complainant respectfully shows to the Court:

I.

That he sues the defendant for [*&c.*, using the balance of the Code form of declaration, and then adding prayers for process, for a decree for the amount claimed, and for general relief.]

Thus, as an illustration, take Code form No. 1,<sup>3</sup> in a suit by an endorsee against an acceptor of a bill of exchange; the bill, omitting the address and caption, would be as follows:

Complainant respectfully shows to the Court:

I.

That he sues the defendant for five hundred dollars, and says that sum is due him on a bill of exchange here to the Court shown, drawn by E F, on the....day of....19.... [at...., if a foreign bill] upon the defendant [at....] and accepted by him, payable to one G H, on the ...day of....19...., and by him and one J K, endorsed to complainant. The said bill not being paid at maturity, was duly protested for non-payment; and the amount thereof, with interest and protest fees, is unpaid.<sup>4</sup>

II.

Complainant therefore prays:

1st. That subpoena to answer issue [*&c.*, see, ante, §§ 158; 164.]

2d. That complainant be given a decree against the defendant for, [or that the complain-

<sup>1</sup> Mr. Daniel says: Although the rules of pleading in Courts of Equity, especially in case of bills, are not so strict as those adopted in Courts of law, yet in framing pleadings in Equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of common law pleadings, whenever such rules are applicable to the case which he is called upon to present to the Court: for there can be no doubt that the stated forms of description and allegation which are adopted in pleadings at law have all been duly debated under every possible consideration, and settled upon solemn deliberation; and that, having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the Court; and if this be so at law, there appears to be no reason why they should not be considered as equally applicable to pleadings in Courts of Equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary Courts [of law]. \* \* \* And where it is to express things for which adequate legal or technical expressions have been adopted in pleadings at law, the use of such expressions will be desirable as best conducing to brevity and clearness. <sup>1</sup> Dan.

Ch. Pr., 362. In pleadings in Equity the same form of words as are used in pleadings at law, may generally be introduced with advantage. *Ibid.*, 363.

In drawing bills to enforce a legal cause of action, the declaration proper at law in such a case can easily be transformed into a bill in Chancery, as the forms given in this section clearly show. Where a bill is a mere pleading, it should, in its essential averments, be as concise and direct as a declaration at law; but when it is both a pleading and an affidavit, it should clothe the skeleton of the pleading with the muscles, flesh, and features of the real case, and infuse into it all the breath, energy, and passion of life. The failure to keep this distinction in mind results in many bills being so drawn as to possess many of the elements of an affidavit when none of them are at all necessary in the particular cases to be brought before the Court. See, ante, §§ 141; 170; and *post*, § 1079.

<sup>2</sup> Code, § 2939.

<sup>3</sup> *Ibid.*

<sup>4</sup> So far, as will be seen by comparison, the bill follows the declaration, word for word; and the only additions are prayers for process and for special and general relief.

ant have and recover of the defendant, or that the defendant be required to pay complainant,<sup>5</sup> said sum of five hundred dollars, and all the costs of the cause.

3d. That complainant may have such further and other relief, as he may be entitled to, and as to your Honor may seem meet.

H. Y. HUGHES, Solicitor.

§ 1074. **Suits on Common Law Counts.**—Suits brought in a Court of law on an open account, or on an account stated, or for money loaned the defendant, or for money paid by the plaintiff for the defendant, at the latter's request, or for money received by the defendant for the plaintiff's use, or for work and labor done by the plaintiff for the defendant at the latter's request, or for goods, wares and merchandise sold and delivered to the defendant by the plaintiff, are called suits on the common courts. Such suits may now be brought in the Chancery Court by bill. The following form of bill can easily be adapted to all suits of this character, and all similar suits:

**GENERAL FORM OF BILL ON COMMON COUNTS.<sup>6</sup>**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That the defendant is indebted to him in the sum of five hundred dollars due on the... day of...19.... [insert date] by account; [or, for money loaned by complainant to him on the ...day of...19...., [insert date]; or, on an account stated between complainant and defendant on the...day of...19...., [insert date]; or, for goods wares and merchandise, (or specific articles naming them) sold to defendant by complainant on the...day of...19...., [insert date]; or, for money paid by complainant for the defendant at the latter's request, on the...day of...19...., [insert date], or for work and labor done for the defendant by complainant at the defendant's request, on the ... day of ....., 19...., [insert date], which sum of money with the interest thereon from said day is now justly due.

II.

That [If there be any grounds for an attachment, allege them here as shown in suits by attachment, ante, § 873].

III.

Complainant therefore prays:

1st. That Subpœna to answer issue [ &c., see, ante, §§ 155; 164.]

2d. That he be given a decree against the defendant for the amount due by reason of the premises and interest thereon.<sup>7</sup>

3d. That complainant may have such further and other relief as the nature of his case may require.

H. N. CATE, Solicitor.

§ 1075. **Suits to Recover Money Agreed to be Paid as Liquidated Damages.** Whenever the parties to a contract agree that in the event of its breach a certain amount shall be paid, it is sometimes difficult to tell whether this amount is to be treated as liquidated damages, or as a penalty. If it be liquidated damages, then it can be recovered as in the nature of a fixed liability; if it be a penalty, then only enough of it can be recovered to indemnify complainant against the loss sustained by breach of the contract. In either event, suit can be brought on the agreement, and the Court will determine whether the contract is to be construed as liquidating the damages, or as fixing a penalty; and will decree accordingly. The court will peer through the form of the contract into its heart, and see whether the amount specified to be paid was really intended as a mere security for the contract, or as a fixed, definite and unchangeable sum to be paid without diminution. If the injured party can be adequately compensated by damages, and these damages can be reasonably well ascertained, the Court will incline to regard the amount specified as a penalty, and will allow so much of it to the party injured as will make good his loss.

<sup>5</sup> Either of these three forms of decreeing may be used: the 1st is most common, the 2d most like a common law form, and the 3d most like a Chancery form.

<sup>6</sup> Any one or more of these counts may be joined in one bill if against one defendant. Indeed, on a bill against one defendant as many distinct and unconnected matters of suit may be united as the complainant has against him, not including any matters

of which the Court has no jurisdiction. See, Code, § 4327; ante, § 149.

<sup>7</sup> For form of a decree on common counts, see, post, 1080.

<sup>8</sup> The Code form of declaration in the Circuit Court in suits on the common counts, joins a demand for interest as well as principal. See Code, § 2939, form 8. See "Interest," ante, § 563.

**BILL TO COLLECT LIQUIDATED DAMAGES.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That he and the defendant on the....day of....19...., [insert the true date,] entered into an agreement to [here specify with particularity the details of the agreement.]

II.

That complainant was very solicitous to have said work done [in the manner, or] on or before the date specified in said agreement [Show the reasons in full why the agreement specified the payment of damages for the default, but beware of using the word "penalty" anywhere in the bill.]

III.

That the defendant realized the importance to complainant of [state what the damages were intended to effect,] and readily agreed to pay said damages as a liquidated debt, on his default.

IV.

That the amount of said damages so agreed to be paid was intended as a reasonable liquidation of the loss that would accrue to complainant in case of defendant's failure to comply with said agreement; and the defendant having failed to complete said building in the time and manner specified in said agreement [or having failed to do the thing specified in said agreement, stating what it was] said amount has become due and payable to complainant.

V.

Complainant therefore prays:

1st. That subpoena to answer issue [ &c., see, ante, §§ 158; 164.]

2d. That your Honor give complainant a decree against the defendant [if there are several bound, say defendants] for the amount of said liquidated damages, and interest thereon from the....day of....19...., the date of said breach of agreement.

3d. That complainant have such other, further and general relief as the nature of his case may require.

C. T. RANKIN, Solicitor.

**§ 1076. Suits to Recover Unliquidated Damages.**—The Chancery Court has jurisdiction to award unliquidated damages for breach of any contract, obligation or duty, or for any injuries resulting from negligence. The following is a form of

**BILL FOR UNLIQUIDATED DAMAGES FOR BREACH OF CONTRACT.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That on the....day of....19...., [give the date] he made a certain contract with the defendant [if in writing, so state] whereby for the consideration of [specify the consideration] the defendant contracted and bound himself to [here set out what the defendant was bound to do, using the very words of the contract.]

II.

That notwithstanding the terms of said contract the defendant failed to [here specify wherein the defendant failed to comply with the contract: give particulars.]

III.

That in consequence of defendant's said breach of said contract, complainant was greatly injured and suffered great loss in this. [Here state fully and particularly wherein complainant's damages consist.] And he, therefore, sues for.....thousand dollars for said damages.

IV.

That [If complainant made any efforts to induce defendant to comply with the contract, so state. If there be any aggravating circumstances connected with defendant's conduct in reference to said contract, so state; and in each case give the particulars.]

V.

Complainant therefore prays:

1st. That subpoena to answer issue [ &c., see, ante, §§ 158; 164.]

2d. That complainant may be awarded said sum of.....thousand dollars as damages for said breach of contract [It may be well to remember that Chancery very seldom awards punitive damages; as a rule, damages are compensatory in Chancery.]

3d. That complainant may have such other and further relief as he may be entitled to, and as your Honor may deem meet.

J. WILL TAYLOR, Solicitor.

**§ 1077. Suits to Recover Money Due on a Judgment, Decree, Award, Stated Account, Fine or Penalty.**—The ordinary way of enforcing a judgment or decree for money is by an execution based on such judgment or decree; but when a judgment or decree is about to be barred by the statute of limitation,

8 The Chancery Court is loth to enforce a penalty, even under the Act of 1877. Courts with none but Equity jurisdiction will not enforce a penalty. See, ante, § 296.

or has been rendered in some other state or country, or some obstacle to its enforcement exists, or where the complainant desires to reach equitable assets for its satisfaction, in any of these cases, it may become important for the owner of such judgment or decree, whether he be the judgment creditor or own the judgment by assignment, to bring suit on such judgment or decree; and he may do so by bill in Chancery. So, an award of money may be enforced in the Chancery Court. An account that has been agreed to, or signed by the parties, or that has been acquiesced in by the defendant, is regarded as a stated account, and the amount shown by it to be due may be recovered by a bill in Chancery. Fines imposed by law or in accordance with some law, or ordinance, and pecuniary penalties imposed by law for its violation, and all money due on a *qui tam* action, may be recovered in Chancery. In all such cases the law implies a promise to pay the amount adjudged, awarded, stated or imposed.

**BILL TO RECOVER MONEY DUE UNDER THIS SECTION.**

[Far address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.  
That on the...day of...19... he recovered a judgment [or decree, or obtained an award, against the defendant, or stated an account with him, or a fine or penalty was imposed on him] in the sum of...dollars, [stating exact amount] all of which is unpaid.

II.  
That [state any circumstances attending the award, or the stating of the account, to show that the defendant participated, or that he agreed to the award or to the account, or acquiesced therein.]

III.  
That [state any efforts to collect said judgment, or decree, or award, and give the reasons, if any, why efforts have not been made to collect the same, and explain any delay.]

Complainant therefore prays:

- IV.  
1st. That subpoena to answer issue [*&c.*, see, ante, §§ 158; 164.]  
2d. That complainant may have and recover of the defendant the amount due on said judgment [decree, award, account stated, fine or penalty,] and interest thereon.  
3d. That he have such further and other relief as his case may require, and may be just.

O. T. TINDELL, Solicitor.

§ 1078. **Suits on Accounts From Another County, or State.**—When suit is brought on a sworn account coming from another county, or State,<sup>9</sup> the bill should explicitly aver that the suit is brought on the account, that the account comes from another county or State, and that it is duly verified; and *profert* should be made of the account by making it an exhibit to the bill.<sup>10</sup> The allegations may be substantially as follows:

**AVERMENTS OF A BILL ON A SWORN ACCOUNT.**

Complainant respectfully shows to the Court:

That the defendant is justly indebted to him in the sum of one hundred dollars (100.00.) due on an account coming from another county of this State, to-wit: Morgan county, [or, coming from the State of Missouri.] Said account was duly verified in said county [or, State] by the affidavit of complainant to its correctness, and said affidavit is certified according to law. Complainant brings this suit on said account to recover the amount due thereon, and herewith exhibits said account and marks it "A," and makes it a part of this bill.<sup>11</sup>

When such an account is the foundation of the suit, the defendant must deny the account in his answer, and must swear to that denial, otherwise the account will be conclusive upon him.<sup>12</sup> If the defendant's oath to his answer is waived, that does relieve him from the necessity of denying the account on oath, as already shown.<sup>13</sup> He may, however, limit his affidavit to such denial, if he so desires, thus:

**AFFIDAVIT DENYING AN ACCOUNT.**

State of Tennessee, }  
County of Roane. }

Richard Roe, the defendant, makes oath that so much of his foregoing answer as denies

<sup>9</sup> Code, § 3780; M. & V.'s Code, § 4529. | <sup>12</sup> Code, § 3780; Williams v. Lenoir, 8 Bax., 399.  
<sup>10</sup> Hunter v. Anderson, 1 Heisk., 1. | <sup>13</sup> Ante, § 374.  
<sup>11</sup> Hunter v. Anderson, 1 Heisk., 1; Wilkhorn v. Gillespie, 6 Heisk., 329.

the account sued on by the complainant is true; and that said account is not just or correct in whole, or in part.

RICHARD ROE.

[*Annex a proper jurat: see, ante, § 789.*]

**§ 1079. Forms of Bills in Cases Actionable at Law.**—The Chancery Court now having statutory jurisdiction of most of the cases actionable at law, it may be of importance to the inexperienced pleader to know that any good declaration at common law can readily be transformed into a good bill in Chancery. This is especially true of declarations on awards, in assumpsit, on bills of exchange and promissory notes, against common carriers, on covenants, in debt, and on insurance policies.<sup>14</sup> As illustrations of how this may be done, the following bills are given, each of which is based on a declaration at law, for the same cause of action as is set forth in the bill:

#### BILL TO ENFORCE AN AWARD.

[*Address and commencement, as in §§ 155; 164, ante.*]

The complainant respectfully shows to the Court:

I.

That there were divers controversies between the complainant and the defendant concerning their mutual accounts, debts, and dealings; and, thereupon, they on the 8th day of August, 1890, by their mutual agreement in writing, submitted and referred said controversies, [and all other mutual demands between them,] to the final award and determination of A, B, and C, [*naming the arbitrators;*] and in and by said writing further agreed [*here set out any other material parts of the agreement,*] that the award of the said A, B, and C, or any two of them, being duly made in the premises, [in writing, *or,* and duly notified to the parties, *as the case may have been,*] should be final and binding.

II.

And complainant avers that the said A, B, and C, after duly hearing both complainant and defendant, did, on August 15, 1890, make and publish their award [in writing,] and did thereby award and finally determine, that there remained a balance due from the defendant to the complainant of five hundred dollars, to be paid to the complainant [on demand.]

III.

Notwithstanding said agreement and award, the defendant has failed to pay said sum of five hundred dollars, or any part thereof, and refuses to pay any part thereof, though often thereunto requested.

IV.

The premises considered, complainant prays:

1st. [*For process, as in § 164, ante.*]

2d. [*For a decree for the amount due on said award, as in § 159, sub-sec. 7.*]

3d. For such further and other relief as complainant may be entitled to.

CLEM J. JONES, Solicitor.

#### BILL AGAINST A COMMON CARRIER.

A hailer, who delivers goods to be transported, }  
*vs.*  
 A common carrier who fails to deliver. }

[*Address and commencement, as in §§ 155; 164, ante.*]

I.

That complainant, on January 8, 1888, delivered to the defendant in the city of Memphis, Tenn., two hundred bales of cotton, worth three hundred dollars a bale, on a contract that the defendant would deliver said cotton to complainant in the town of Newport, Tenn., in good order, the defendant, for a valuable consideration, contracting so to do, in a reasonable time. The defendant was a common carrier for hire at the time he [*ar, it*] made said contract.

II.

That none of said cotton has ever been delivered, although the time for so doing has long since expired; and complainant is damaged two thousand dollars thereby.

III.

The premises considered, complainant prays:

1st. [*For process, &c., as in § 164, ante.*]

2d. That complainant have a decree against the defendant for the value of said cotton at Newport at the time it should have been there delivered, and for interest on the amount from that date, and for all damages he has suffered by the breach of said contract.

3d. For general relief.

H. N. CATE, Solicitor.

#### BILL TO RECOVER A DEBT DUE BY NOTE, OR ACCOUNT.

[*Address and commencement, as in §§ 155; 164, ante.*]

The complainant respectfully shows to the Court:

<sup>14</sup> Declarations in all these cases may be found in the notes to 2 Greenleaf on Evidence.

I.

That the defendant is indebted to him in the sum of one hundred and ten dollars due by note, dated May 1st, 1891, and due one day after date, and herewith filed as a part of this bill, and marked exhibit 1;<sup>15</sup> [or, due on account for goods, wares and merchandise; or, on an account for work and labor done, herewith filed as a part of this bill, and marked exhibit 1; or, due for money paid out for the use and benefit of defendant in payment of taxes on a tract of land in Knox county, of which complainant and defendant are owners as tenants in common; or, due for professional services as physician, or attorney at law, or, for the rent for the year 1890, of the tract of land on which the defendant lived in said year, [*describing it briefly.*]

II.

Complainant therefore prays:

1st. That the defendant be made a party to this suit by the service of subpoena to answer, [or by publication, *if he is a non-resident;*] but his oath to his answer is waived.

2d. That complainant be given a decree against the defendant for the amount due on said note, [or account,] including the interest thereon from the maturity thereof, [or from the filing of the bill, *in case of an account.*]

3d. That complainant may have such other and general relief as he may be entitled to at the hearing.

B. L. RISEDAN, Solicitor.

**BILL BY ENDORSEE AGAINST THE MAKER OF A NOTE.<sup>16</sup>**

[*Address and commencement, as in §§ 155; 164, ante.*]

The complainant respectfully shows to the Court:

I.

That the defendant, on August 8, 1890, by his promissory note in writing, for value received, promised one E F to pay him, or his order, one thousand dollars in ninety days from said date. Said note is herewith filed as a part of this bill, and marked A.

II.

That the said E F duly endorsed said note to the complainant, in due course of trade, for value, and before the maturity thereof; [*if such be the fact and it is important to so allege, or, waiving demand, protest and notice, if such be the fact.*]

III.

That all of said note, principal and interest, is due and unpaid, and that although the defendant has often promised to pay said note, he yet fails so to do.

IV.

The premises considered, complainant prays:

1st. [*For process as in § 164, ante.*]

2d. For a decree in his favor for the amount due him on said note, principal and interest.

3d. For such further and other relief as he may be entitled to.

F. D. OWINGS, Solicitor.

**BILL AGAINST THE MAKER OF A NOTE.**

The administrator of the payee of a note, }

*vs.*

The executor of the maker of the note. }

[*Address and commencement, as in §§ 155; 164 ante.*]

Complainant respectfully shows to the Court:

I.

That A B, [*the maker,*] on June 4, 1888, for a valuable consideration, executed and delivered to C D, [*the payee,*] a promissory note for five thousand dollars, payable to the said C D, ninety days after date, with interest from date, all of which is unpaid and now due. Said note is herewith filed as part of this bill, marked A.

II.

That since the delivery of said note the said A B has died testate, and the defendant is his executor; the said C D has also died, but intestate, and the complainant is his administrator.

III.

[*The prayers are the same as the preceding bill. See, ante, §§ 158; 164.*]

**BILL AGAINST THE ENDORSER OF A NOTE.**

The endorsee or a note, }

*vs.*

An endorser of the note. }

[*Address and commencement, as in §§ 155; 164, ante.*]

Complainant respectfully shows to the Court:

I.

That on March 4, 1889, A B [*the maker*] made and delivered his promissory note for eight

<sup>15</sup> The following is a fuller form, but, perhaps, no better:

I. That the defendant, on May 1, 1891, for a valuable consideration, executed and delivered to complainant a promissory note for five thousand dollars,

payable to complainant ninety days after the date thereof, with interest from date, all of which note, principal and interest, is unpaid and now due. Said note is made a part of this bill, and filed herewith, marked A.

<sup>16</sup> This bill is based on 2 Green. Ev., § 155, note.



hundred dollars to the defendant, due ninety days after date; and that on the same day [or, thereafter,] the defendant endorsed and delivered said note to complainant, for value and in due course of trade, waiving demand, protest and notice, [if such be the fact.]

II.

That said note was presented to said A B, [maker,] at maturity and payment demanded: it was not paid, and due notice of its dishonor was given the defendant, but he has failed to pay the same or any part thereof. Said note is filed herewith as part of this bill, and marked A. [If demand, protest and notice were waived by the defendant endorser, they need not be averred.]

III.

Complainant therefore prays:

1st. For process [as in § 164, ante.]

2nd. For a decree against the defendant for the amount due on said note, principal and interest.

3rd. For general relief.

HENRY T. COOPER, Solicitor.

#### BILL ON A WRITTEN CONTRACT.

[Address and commencement as in §§ 155; 164, ante.]

Complainant respectfully shows to the Court:

I.

That, on August 9, 1889, the defendant contracted with him in writing to deliver to him at his storehouse in Sevierville, within one month from that day, two thousand bushels of good merchantable wheat, in good sacks.

II.

That as part consideration complainant paid the defendant two hundred dollars in cash on said day, and agreed to pay him eighteen hundred dollars more when said wheat was all delivered according to said contract. Said contract is filed herewith as part of this bill, and marked A.

III.

That the defendant has failed to deliver any of said wheat to complainant, although the time agreed upon for so doing has expired; and said failure has damaged complainant five hundred dollars.

IV.

The premises considered, complainant prays:

1st. [For process as in § 164, ante.]

2d. For a decree against the defendant both for said two hundred dollars and for the damages he, complainant, has sustained by reason of the breach of said contract.

3d. For general relief.

JAMES R. PENLAND, Solicitor.

#### BILL ON A POLICY OF INSURANCE.<sup>17</sup>

[Address and commencement, as in §§ 155; 164, ante.]

The complainant respectfully shows to the Court:

I.

That he owned [or, had a lease on] a certain dwelling [or, store] house in Sevierville, Tenn., on July 1, 1891, worth one thousand dollars; and he continued to own [or, have a lease on] said house until the destruction of said house by fire, as hereinafter shown.

II.

That the defendant Company, on said July 1, 1891, in consideration of a premium in money then and there paid to it therefor by the complainant, made and delivered to complainant a policy of insurance upon said house, and thereby promised the complainant to insure five hundred dollars thereon from said July 1, 1891, until July 1, 1892, against all such immediate loss or damage as should happen to said house by fire to the amount aforesaid, to be paid to complainant in sixty days after notice and proof of the same; upon condition that complainant in case of such loss should forthwith give notice thereof to the defendant Company. [And so on, specifying the terms of the policy on this subject.<sup>18</sup>] All of which will more fully appear by reference to said policy, which is hereto exhibited marked A.

III.

That after the execution and delivery of said policy, and before the expiration thereof, to-wit, on September 4, 1891, the said house was accidentally burned, and by misfortune totally consumed; of which loss the complainant forthwith gave notice to the defendant Company, and made the proofs, required of him by said policy of insurance, and in all particulars complied with his part of said contract.<sup>19</sup>

IV.

That, though requested, and though sixty days after such notice and proof of said loss

<sup>17</sup> This bill is based on a declaration in 2 Greenl. Ev., § 404, note.

<sup>18</sup> The bill should show what complainant was required by his policy to do to entitle him to the insurance money, following the conditions set forth on the face of the policy.

<sup>19</sup> If the policy specifies any acts to be done by the complainant as a condition precedent to payment, such as notice of the loss, and proofs of the loss, the bill must aver a performance of such conditions.

have elapsed, the defendant Company has never paid said sum of five hundred dollars to the complainant, or any part thereof.

v.

The premises considered, complainant prays:

1st. That all proper process issue to bring the defendant Company before the Court, and to require it to answer this bill.

2d. That the complainant have a decree against the defendant for the amount due him on said policy, and for interest thereon after the lapse of said sixty days.

3d. That complainant may have such further and other relief as he may be entitled to.

GEO. L. ZIRKLE, Solicitor.

**§ 1080. Forms of Decrees in Cases Actionable at Law Where there is a Money Recovery.**—The following forms of decrees will, along with what has already been said, sufficiently indicate the form of a decree in cases actionable at law where there is a mere money recovery:

**DECREE FOR DEBT ON A LEGAL DEMAND.**

John Doe,  
vs. } No. 642.—Final Decree.  
Richard Roe, et al. }

This case came on to be heard, this May 27, 1895, before Hon. H. B. Lindsay, Chancellor, upon the original [and amended] bills, the answer of the defendant, Richard Roe, the judgment *pro confesso* as to the other defendants, the exhibits to the bill and the other proof in the cause, from all which it appearing that the defendants are indebted to the complainant on the promissory note [or on the account, or on the contract sued on,<sup>20</sup>] in the sum of eight hundred and ten dollars, principal and interest.

It is therefore ordered, adjudged and decreed by the Court that the complainant have and recover of the defendant said sum of eight hundred and ten dollars and all the costs of the cause, for which execution is awarded.

**SHORTER FORM OF DECREE FOR DEBT.**

John Doe,  
vs. } No. 642.—Final Decree.  
Richard Roe, et al. }

This cause was heard this day on the pleadings, [*pro confesso*] and proof, on consideration whereof it was adjudged and decreed that the complainant have and recover of the defendants the sum of eight hundred and ten dollars, and all the costs of the cause, for which execution is awarded.

This form contains all the essentials of a valid decree, and is expressly authorized by the Code.<sup>21</sup>

**DECREE ON AN AWARD.**

[For title, commencement and recitals, see, ante, §§ 567.]

On consideration whereof the Court is of opinion that complainant is entitled to the relief prayed for in his bill, and it is therefore ordered, adjudged and decreed that he have and recover of the defendant the sum of five hundred dollars, the principal of the award sued on, and the further sum of forty dollars as interest thereon from [stating the day when the award began to draw interest,] making in all the sum of five hundred and forty dollars, and, also, the costs of the cause, for all of which an execution will issue. On motion of James C. Ford, complainant's Solicitor, a lien is declared on the recovery in this decree to secure his reasonable fee.

**DECREE FOR DEBT ON A COMMON COUNT.**

[For title, commencement and recitals, see, ante, § 567.]

On consideration whereof the Chancellor is of opinion that the complainant is entitled to the relief by him prayed for in his bill. It is therefore decreed that he have and recover of the defendant [or defendants] the sum of five hundred dollars, the principal of the claim sued on, and the further sum of eighty dollars as interest<sup>22</sup> thereon from May 1st, 1891, the day it was due, [or from the filing of the bill.] making in all the sum of five hundred and eighty dollars, and also the costs of the cause, for all of which let an execution issue.

<sup>20</sup> It is not necessary to specify in the decree the particular ground on which the decree is based. It would be sufficient to say "from all of which it appearing that the defendant owes the complainant eight hundred and ten dollars, principal and interest. It is therefore decreed that the complainant have and recover," &c., as above. See next form.

<sup>21</sup> Code, § 4476.

<sup>22</sup> Interest will, of course, be calculated from the date fixed by the Chancellor, if any is allowed. When interest will be allowed, see, ante, § 563.

## CHAPTER LIX.

## SUITS IN THE NATURE OF A QUO WARRANTO PROCEEDING.

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| <p>§ 1081. Suits Against Corporations, Public Trustees and Usurpers.</p> <p>§ 1082. Frame of a Bill Against Corporations, Trustees, and Usurpers.</p> | <p>§ 1083. General Form of Bill Against Corporations, Trustees and Usurpers.</p> |
|---|--|

§ 1081. **Suits Against Corporations, Public Trustees and Usurpers.**—The Chancery Court, both inherently and by statute, has extensive jurisdiction over corporations, and also over persons acting as officials without authority. A bill will lie against the person or corporation offending in the following cases:

1. Whenever any person unlawfully holds, or exercises, any public office or franchise within this State, or any office in any corporation created by the laws of this State;

2. Whenever any public officer has done, or suffered to be done, any act which works a forfeiture of his office;

3. When any persons act as a corporation within this State without being authorized by law;

4. Or, if being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation;

5. Or exercise powers not conferred by law;

6. Or fail to exercise powers conferred by law, and essential to the corporate existence.<sup>1</sup>

A bill will, also, lie (1) to bring the directors, managers and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of property intrusted to their care, (2) to remove such officers or trustees on proof of misconduct, (3) to prevent malversation, speculation and waste, (4) to set aside and restrain improper alienations of such property or funds, and to secure them for the benefit of those interested; and (5) generally to compel faithful performance of their duty.<sup>2</sup>

A bill will not lie by citizens in their own names to discharter an incorporated town; the suit must be in the name of the State, by her local Attorney General, on their relation.<sup>3</sup> But citizens and taxpayers may maintain a bill to have a charter declared void when antecedent essentials were not complied with.<sup>4</sup>

The provisions of the Code, § 3410, in reference to suits against the officers of corporations, and against public trustees, do not limit the jurisdiction of the Chancery Court over such matters, but confirms and enlarges that jurisdiction; and in suits in that Court against said officers and trustees, there is plenary jurisdiction to make all such orders, either in Court or at Chambers, and all such decrees, and issue all such process, as may be necessary to prevent or remedy wrongs threatened or done, to restore what has been wasted, and to effectually enforce the full and faithful performance of every duty.

§ 1082. **Frame of a Bill Against Corporations, Trustees and Usurpers.** The bill is filed in the county in which the office is usurped or held, or the corporation or supposed corporation holds its meetings, or has its principal place of business;<sup>5</sup> or, if against public trustees, in the county where one or more of

<sup>1</sup> Code, § 3409. The chapter of the Code containing this section covers matters in the nature of a *quo warranto*. *State v. McConnell*, 3 Lea, 337; *State v. Johnson*, 8 Lea, 74.

<sup>2</sup> Code, § 3410.

<sup>3</sup> *Hooper v. Rhea*, 3 Shan. Cas. 145; *State v. White's Creek Turnpike Co.*, 3 Tenn. Ch., 166; *State v. McConnell*, 3 Lea, 334.

<sup>4</sup> *Hooper v. Rhea*, 3 Shan. Cas., 145.

<sup>5</sup> Code, § 3411. The Code says the suit is to be

them may be found;<sup>7</sup> and should set forth briefly, and without technical forms, the grounds upon which the suit is instituted.<sup>8</sup> Inasmuch as the proceeding is supposed to be in the interest of the public, and in furtherance of public justice, the State must file the bill; or the consent of the State must be had, if a private citizen should wish to file the bill. When the State sues alone the bill is brought in her name as complainant by the Attorney General<sup>9</sup> for the circuit containing the county in which the suit is to be instituted. When he sues he must be directed so to do by the General Assembly of the State. The bill may also be brought by the State alone, when the Governor and the Attorney General of the State concur. When a private citizen sues, the bill is still in the name of the State, by her Attorney General for the proper circuit, on the relation of such citizen.<sup>10</sup>

When the bill is filed against a person for usurping an office or a franchise, in addition to the other necessary allegations, the name of the person rightfully entitled to the office, or franchise, with a statement of his right thereto, may be added, and he made a defendant, if he is not the relator; and the trial should, if practicable, determine the right of the contesting parties.<sup>11</sup> If there be several claimants to the office or franchise, they may all be made defendants, so the Court may in one suit determine their respective rights.<sup>12</sup> But the validity of any election which may be contested under the Code by the party who seeks this remedy cannot be tried in this proceeding.<sup>13</sup>

It would seem that, in view of the enlarged jurisdiction of the Chancery Court, the bill, in case of usurpation of office, might well be entertained not only to oust the usurper and put the complainant in possession of the office, but would also be sustained if it went further and sought to recover the fees of the office and the damages the complainant has sustained by reason of the acts of the defendant.<sup>14</sup>

Under the jurisdiction of the Chancery Court to award a mandatory injunction, a peremptory mandamus, and all necessary writs to oust usurpers, or officers who have forfeited their offices,<sup>15</sup> and in view of the fact that in Chancery names and forms are immaterial, the Court has plenary power, on one and the same bill, regardless of its technical name,<sup>16</sup> 1st, to compel an officer or usurper to put things in *statu quo*, or do any other act the rights of the complainant or of the public require; 2d, to put the complainant, or the rightful person, in his place; and 3d, to make against the defendant a decree for such damages as complainant may be entitled to. But such a bill must be brought by the District-Attorney and signed by him.

**§ 1083. General Form of Bill Against Corporations, Trustees and Usurpers.** The following general form will aid in drawing a bill under this Chapter :

brought in "the county or district," meaning that, when there is a Chancery Court for the county, the bill is filed in the county, but where a Chancery Court is held in a district composed of two or more counties the bill is filed in the district. See, *ante*, § 177, note 15.

<sup>7</sup> See, *ante*, § 178, sub-sec. 15.

<sup>8</sup> Code, § 3415.

<sup>9</sup> The statutes sometimes denominate this officer, "District Attorney." See, Code, § 519, 527, 669, 715, 716, 719, 900, 981 (Shan.) 1026, (Shan.) 1445, (Shan.) 1557, 1629 (Shan.) 1903a, 214<sup>o</sup>n. 37<sup>8</sup>, 3952c, 3961, 5090a, 5568, 5596, 5597, and 5598. This seems to be the better designation, and avoids all confusion. There should be but one Attorney General, and his jurisdiction co-extensive with the State. See Shannon's Supplement to the Code, pp. 198, 211, 763, and 764.

<sup>10</sup> Code, §§ 3411, 3412. As to the meaning of the word "District," in these two sections, see *ante*, § 177, note 15.

<sup>11</sup> Code, §§ 3419-3420.

<sup>12</sup> Code, § 3422.

<sup>13</sup> Code, § 3423; *State ex rel. v. Wright*, 10 Heisk., 237; *Anderson v. Gossett*, 9 Lea, 644.

<sup>14</sup> *Ante*, Code, § 3421, does not prohibit such a pro-

ceeding. It merely prevents the adjudication in the suit for ouster being pleaded in bar of a second suit for damages, based on the same cause of action. If the original suit was in the Circuit Court a second suit for damages might be necessary, but no reason is apparent why there should be two suits in the Chancery Court about the same matter.

The dictum in *State ex rel. v. Wright*, 5 Heisk., 612, is not conclusive of this question, the decision not being on the point whether the damages may not be recoverable in the original suit. Besides, the decision was made in 1871, and before the passage of the Acts of 1877 enlarging the jurisdiction of the Chancery Court over matters previously of legal cognizance. *Boni iudicis est lites dirimere, ne lis ex lite oriatur.* (It is the duty of a good judge to put an end to litigation, and not to allow one suit to beget another.) See, *ante*, §§ 36; 38.

<sup>15</sup> Code, §§ 3409; 3419-3420.

<sup>16</sup> The persistent spirit of technicality, though constantly forbidden to enter the portals of Equity, still frequents its Courts, and often prompts its decrees. But its malign influence there is always on the wane; and the disposition to do complete justice in every suit is constantly increasing.

BILL AGAINST CORPORATIONS, TRUSTEES AND USURPERS.

To the Honorable Hugh G. Kyle, Chancellor, holding the Chancery Court at Huntsville: The State of Tennessee, which sues by W. H. Buttram, her Attorney-General, on the relation of A B, a resident of Scott county, complainant,

v.s.

C D and E F, residents of the same county, defendants.

The complainant, the State of Tennessee, which sues by W. H. Buttram, her Attorney-General, on the relation of A B, a resident of Scott county, respectfully shows to the Court:

I.

That, [Here set forth the particular act of usurpation or forfeiture, or other improper conduct complained of.]

II.

That, [Here set forth the title of the relator to the office or franchise, or his rights in the premises, if any. If no relator, show wherein the usurpation consists, or how the interests and rights of the public are jeopardized; and, in case trustees are sued, specify the particular wrong conduct complained of.]

III.

That, [Here set forth the facts, if any, that require an attachment of property, or an injunction, or a receiver, or two or all of these, or any other extraordinary preliminary proceeding.]

IV.

Complainant therefore prays:

1st. That subpoena to answer issue [ &c., see, ante, §§ 155; 164.]

2d. That the defendant be enjoined from [doing the act or acts complained of; that their property be attached, if an attachment, statutory or equitable, be necessary and allowable; and that a receiver be appointed, if a proper case for such action.]

3d. That an account be taken [when trustees are sued, to show how the trustees have managed the estate, what disposition they have made of the trust funds, and money, and other property which are or should be in their hands. Specify any special acts of mismanagement, malversation, speculation, waste, improper alienations, or other misconduct, for which an accounting should be had.]

4th. That, at the hearing [Here specify the substantial final relief desired, keeping in mind the Code sections on the subject as well as the general powers of the Chancery Court.]

5th. That, [in the event the relator is shown to have been injured by the conduct of the defendant, and to be entitled to an accounting for fees and moneys and property by him received, or should have been received, that] an account be taken thereof, and complainant be given a decree for all damages by him sustained by reason of the acts or omissions of the defendant.

6th. That complainant have such other and further relief as the nature of the case may require.

This is the first application for an injunction, attachment, or receiver, in this case.

W. H. BUTTRAM, Attorney General.

If the bill is filed on the relation of a private individual, he is liable for such costs as are not adjudged against the defendant, and may be required to give a bond for costs. If he obtains an attachment, or injunction, or both, he must give a bond or bonds to cover damages. If the bill is by the State alone no bond is required for costs.

The bill must be sworn to if any extraordinary process is sought, the relator making the affidavit when the bill is on relation. The bill in all cases on relation must be signed by the District Attorney.

17 Code, § 3417.

18 Code, § 3410.

19 Under the Code sections governing this proceeding, and its jurisdiction to award a mandamus, or a mandatory injunction, and to enforce its decrees by attachment of the person, the Court's powers are all sufficient for every emergency. See, ante, §§ 36; 38.

20 See preceding section.

21 Code, § 3414.

22 The State ex rel. v. Campbell, 8 Lea, 74. And the District Attorney may dismiss the bill without the consent of the relator. State ex rel. v. Turnpike Co., 4 Cates, 615; State ex rel. v. Agee, 21 Pick., 588.

CHAPTER LX.

SUITS FOR WRITS OF MANDAMUS.

§ 1084. Suits for *Mandamus* Generally Considered.

§ 1086. Form of Bill for a Writ of *Mandamus*.

§ 1085. Pleadings in Suits for *Mandamus*, and Proceedings Thereon.

§ 1087. Forms of Writs of *Mandamus*.

§ 1084. **Suits for Mandamus Generally Considered.**—The Chancery Court has full jurisdiction to issue writs of *mandamus* upon bill or petition, making the necessary allegations, and duly sworn to.<sup>1</sup> The object of a *mandamus* is to compel the defendant to do some specific ministerial act, which the law requires him to do, but provides no adequate and specific remedy in case of his non-performance. It is usually resorted to where an official refuses to do some specific ministerial act which it is his duty to do, and there is no other adequate and specific remedy for his default or refusal.<sup>2</sup> The Courts are more liberal in granting this writ than formerly, the remedy being freely applied when necessary.<sup>3</sup>

It is a general rule that whenever a statute gives power to, or imposes an obligation on, a particular person to do some particular act, or perform some particular duty, and provides no specific remedy for non-performance, a *mandamus* will be granted.<sup>4</sup>

While originally a *mandamus* suit was strictly a common law proceeding, our Code has greatly changed the pleadings and practice and made them conform to those in Chancery;<sup>5</sup> and now the Chancery Court has jurisdiction to award the writ, it would seem that the Court after awarding and enforcing the *mandamus*, might well go further, the bill so praying, and decree to complainant any damages he might be entitled to by reason of the wrongful conduct of the defendant in the premises.<sup>6</sup> The statute giving the Chancery Court jurisdiction does not convert that Court into a law Court, but merely enlarges its jurisdiction, *pro tanto*, as a Court of Equity, and enables it in addition to its powers as a Court of Equity, to administer justice in cases where a *mandamus* is necessary; and the rule in Chancery is that where the Court has jurisdiction for one purpose it will take jurisdiction for all purposes, and determine the entire controversy.<sup>7</sup>

§ 1085. **Pleadings in Suits for Mandamus, and Proceedings Thereon.**—The bill is in the name of the State, on the relation of the person interested, who is treated as the real complainant, so far as the pleadings and procedure are concerned, and must give a prosecution bond. The rules of pleading and practice in the Chancery Court are proper in a *mandamus* proceeding. Indeed in many respects the pleadings and practice in a suit for a *mandamus*, under our Code, resemble those in the Chancery Courts in a suit for a mandatory injunction<sup>8</sup>

<sup>1</sup> *Hawkins v. Kercheval*, 10 Lea, 535. And the writ may be brought in Chancery when the amount claimed is under fifty dollars. *State ex rel. v. Alexander*, 7 Cates, 156.

<sup>2</sup> See Digests, under the title "Mandamus," for cases where the writ will and will not be granted.

<sup>3</sup> *Mobile & Ohio R. R. Co. v. Wisdom*, 5 Heisk., 125, 152.

<sup>4</sup> *Winters v. Burford*, 6 Cold., 328; *M. & O. R. Co. v. Wisdom*, 5 Heisk., 152.

<sup>5</sup> *State, ex rel. v. Williams*, 2 Cates, 549. In this case the practice in a *mandamus* suit is fully treated.

<sup>6</sup> Because damages are not awarded in a *mandamus* suit at law is no conclusive reason why they may not be awarded in Chancery. The *mesne* profits cannot

be recovered in an ejectment suit at law, but are recoverable in an ejectment suit in Chancery. The present *mandamus* bill in Chancery is as different from a *mandamus* proceeding at common law as an ejectment suit in Chancery is different from an ejectment suit at common law.

<sup>7</sup> See, *ante*, §§ 36; 38. It is a maxim of the Chancery Court that Equity will not decree a suit where it may decree a remedy. *Fran. Max.*, p. 42. Indeed the jurisdiction and practice in *mandamus* is almost identical with mandatory injunctions. See *Condon v. Maloney*, 24 Pick., 82; *Hawkins v. Kercheval*, 10 Lea, 535.

<sup>8</sup> There are a bill, a fiat, an alternative writ, an answer, issues of fact for a jury, third parties allowed

or for a specific performance.<sup>9</sup> On the bill being duly sworn to and presented to the Chancellor,<sup>10</sup> he will endorse his fiat thereon for an alternative *mandamus* as on a bill for an injunction or attachment. On the writ being served on the defendant he will do the act required of him, or show cause in his answer at the next term of the Court, or at the next rule day required by the practice of the Court, why he should not be compelled to do what the writ requires. If an issue of fact is made by the pleadings the Court may determine it or submit it to a jury. If a third person is interested, he may, on being notified by the defendant, become a party defendant, and file an answer upon giving security for costs.<sup>11</sup> It would seem from sections 3571 and 3573 of the Code that the defendant may disclose in his answer a third person claiming title to, or interest in, the matter in controversy; and that if such third person fails to have himself made a party by answering, it would be proper for a subpoena to issue requiring him to answer, and if he is a non-resident or unknown,<sup>12</sup> publication must be made against him, and in either case *pro confesso* taken against him if he fail to appear and answer. So, it would seem that the complainant might make such interested person a party defendant to the petition, if aware of his interest before the petition is filed.

If the defendant desires to take advantage of any defect in the application for a *mandamus*, or in the form or substance of the bill, he should do so before filing his answer, by a motion to dismiss, or by a demurrer, or such defect will be waived.<sup>13</sup>

If the defendant makes default by not answering the bill, or fails to make other effective defense by motion to dismiss or demurrer, or if a decision is made against him after appearance, the Court will direct a peremptory *mandamus* to issue against him.

It is ordinarily unnecessary to actually issue a peremptory writ, as the defendant either submits to the decree awarding it, or appeals. If the writ should issue, however, it will be similar in form to the alternative writ, but will peremptorily command the defendant to do forthwith what the decree requires of him, and to return the writ showing he has fully complied with its commands. If the defendant fail to comply with a peremptory writ of *mandamus*, an *alias* writ is the proper remedy, and in addition the delinquent may be punished for contempt.<sup>14</sup> If upon the incoming of the answer the complainant deems it insufficient, he may move for a peremptory writ, which motion would be, in effect, a demurrer to the return, the answer under our Code being the return required by the alternative writ.<sup>15</sup> If the answer shows on its face sufficient cause why the peremptory writ should not issue, complainant must prove its falsity, and the issues made by the pleadings will be determined by the Chancellor, or by a jury, as in other cases in the Chancery Court.<sup>16</sup>

Great particularity is required in the answer to the bill, and if the answer fail to deny important facts alleged in the bill, every intendment will be made

to intervene, publication as to non-residents, *pro confesso*, a peremptory command, and costs discretionary, all as in Chancery proceedings. Code, §§ 3567-3575. Indeed the two proceedings are practically identical, the only material difference being that a bill for a *mandamus* is in the name of the State, on the relation of the complainant, and even this difference is not required by the statute, and perhaps not necessary; and, in any event, is purely technical, and absolutely without substance, as the writs in both instances (injunction and *mandamus*), run in the name of the State.

<sup>9</sup> On a bill for a specific performance, or for a mandatory injunction, as on a bill for a *mandamus*, the defendant is coerced into doing a particular act he is under obligation to do, and the proceedings in each suit are almost identical. So a petition for *mandamus* in Chancery is entirely at home in that Court. *Condon v. Maloney*, 24 Pick., 82; *Hawkins v. Kercheval*, 10 Lea, 535.

<sup>10</sup> In the sight of our Tennessee jurisprudence an alternative writ of *mandamus* may be considered extraordinary process grantable by any Judge or Chancellor. Code, §§ 3946; 4434.

The bill may be presented in open Court, and instead of a fiat thereon, an order of record made awarding the alternative writ.

<sup>11</sup> Code, § 3571.

<sup>12</sup> Code, § 3573. Perhaps for the word "unknown," we should read "his residence unknown." for the Court would hardly proceed against an unknown person by *mandamus*.

<sup>13</sup> The State, *ex rel. v. Board of Inspectors*, 6 Lea, 12. See, *Waiver, ante*, § 71.

<sup>14</sup> State, *ex rel. v. Memphis*, 2 Shan. Cas., 185.

<sup>15</sup> Code, § 3570; State, *ex rel. v. Williams*, 2 Cases, 549. Or the complainant may set the cause down for hearing on bill and answer, which is the same in substance. *Ibid.*

<sup>16</sup> Code, § 3570, 3572.

against it: allegations of the bill not denied, nor confessed and avoided, will be taken as true.<sup>17</sup>

§ 1086. **Form of Bill for a Writ of Mandamus.**—There is nothing technical about the form of this bill except that it is in the name of the State, on the relation of the petitioner. Practically, the entire litigation is on the lines of Chancery pleadings, practice and procedure.

**BILL FOR A MANDAMUS.**

To the Honorable H. B. Lindsay, Chancellor, holding the Chancery Court at Jacksboro:

The State of Tennessee, on the relation of John Jones, <sup>18</sup> a resident of Campbell county, vs. John Smith, a resident of the same county, defendant.	}	Bill for a <i>Mandamus</i> .
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The State of Tennessee, suing on the relation of John Jones, respectfully shows to the Court:

I.

That, [*Here show what right or office defendant is withholding from the complainant. Be particular to state fully and clearly the rights of complainant, and if any notice, or other preliminary act is required to mature these rights, show that these requirements have been fully complied with. The essential facts must be positively averred.*]

II.

That, [*Here show that demand has been made upon defendant to do the act the complainant insists upon, stating time and place of the demand, and that the defendant refused, and still refuses, to do the act.*]

III.

That complainant has no adequate remedy for the wrongs he complains of except the State's writ of *mandamus*, and he therefore prays your Honor,

1st. To order an alternative writ of *mandamus* to issue requiring the defendant to [*Here specify fully and particularly the act required to be performed—the precise thing the complainant wishes the defendant to do;*] or show cause at the next term of your Honor's Court, [*or, at the next rule day after the service of the writ,*] why he has not done so, and upon his failure so to do, or upon a decision against him at the hearing, that a peremptory writ of *mandamus* issue.

2d. That complainant be given a decree against the defendant for damages for wrongfully withholding from him. [*Here specify the right or office withheld, and any special damage or other wrong done by the defendant to the complainant, in connection with the subject-matter of the litigation.*]

3d. That he have such other and further relief as he may be entitled to.

WILLIAM J. BRYAN, Solicitor.

[*Annex affidavit: see, ante, §§ 161; 789.*]

The bill must be sworn to before a Judge, Justice of the Peace or Clerk of the Circuit Court.<sup>19</sup>

**FIAT FOR AN ALTERNATIVE MANDAMUS.**

To the Clerk and Master of the Chancery Court at Jacksboro:

File this bill and issue the writ of alternative *mandamus* as prayed, on the complainant giving bond for costs, or taking the pauper oath in lieu.

This April 1, 1895.

H. B. LINDSAY, Chancellor.

<sup>17</sup> State, *ex rel. v. Williams*, 2 Cates, 549. This is the true rule of both law and logic; and should be applied and enforced as to all answers in Chancery. See, *ante*, § 455, note. As to the necessity of a full and emphatic answer, see, State, *ex rel. v. Alexander* 7 Cates, 156.

<sup>18</sup> The person, on whose relation the bill is filed, is generally termed the "*relator*," but the Code terms him the "*petitioner*." Code, 3574. Indeed, it would seem that this proceeding is largely statutory, and that the Code did not contemplate that the petition should be in the name of the State, at all; and, therefore, did not contemplate any relator. See *Hawkins v. Kercheval*, 10 Lea, 535, which was a bill treated as a *mandamus* suit. No one should have any right to sue in the name of the State, without express authority from the State. This authority has been given generally in suits on official bonds. (Code, § 2797;) and specially in case of (1) motions on official bonds against Sheriffs, Clerks and other officers (Code, § 3584;) (2) suits against administrators and executors on their bonds, (Code § 2231;) and (3) proceedings against corporations, usurpers, and public trustees, (Code, § 3409;) but is not given in case of bills or petitions for a *mandamus*. Nevertheless, in *Whitesides v. Stuart*, 7 Pick., 710, it is

said that the suit must be in the name of the State on the relation of the party complaining. In nearly all of the reported cases prior to *Whitesides v. Stuart*, the suits were brought directly in the name of the petitioners. In *Hawkins v. Kercheval*, 10 Lea, 542, a bill in Chancery in the nature of a *mandamus* suit was sustained; in *Brannon v. Wright*, 5 Cates, 692, it was held that the State was not a necessary party in a suit in Chancery on a guardian's bond. What interest has the State in a suit by a teacher to collect her salary? *Arrington v. Cotton*, 1 Bax., 316. When a *mandamus* suit is instituted in the Chancery Court, under our statutes, it should not be smothered by the effete technicalities of the common law. Let us favor precedents which make for simplicity and equity, and not bow down to those technical rules which once drove Justice from her native seat in the Courts of common law. The ruling in *Whitesides v. Stuart*, 7 Pick., 710, is anachronistic and savors of the medieval: it is an addition to the statute, but not an improvement.

<sup>19</sup> *Whitesides v. Stewart*, 7 Pick., 710; Code, § 3567. But an affidavit before a Chancellor or a Clerk and Master is probably within the equity and intendment of the Act of 1877.



§ 1087. **Forms of Writs of Mandamus.**—For the information of the Clerks and Masters the following forms of writs of *mandamus* are given:

**ALTERNATIVE WRIT OF MANDAMUS.**

State of Tennessee, }  
Campbell County. }

To John Smith:<sup>20</sup>

Whereas, John Jones, as relator, on the 1st day of April, 1895, presented his bill to the Hon. H. B. Lindsay, Chancellor, alleging that you [*Here give a brief but clear statement of the specific act the defendant has failed to do,*] as will more fully appear by reference to the copy of said bill herewith served upon you; and whereas the said Chancellor has ordered an alternative writ of *mandamus* to issue as prayed in said bill.

You are therefore commanded to [*Here state what complainant, in his bill, prays the defendant be compelled to do, using substantially the special prayer of the bill,*] or appear at the next term of the Chancery Court at Jacksboro, to be held on the ..... Monday in ....., 1895, [*or, at the next rule day of said Court,*] and show cause why you have not done so; and that you then and there return this writ along with your answer to said bill.<sup>21</sup>

This April 1, 1895.

WINSTON BAIRD, C. & M.

If the defendant's answer fails to show sufficient cause why the peremptory writ should not issue, complainant will move that the writ be issued. This motion is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defence.<sup>22</sup>

**MOTION AND ORDER FOR PEREMPTORY WRIT OF MANDAMUS.**

The State of Tennessee, on the relation of John Jones, }  
vs. }  
John Smith. }

In this cause the complainant this day moved the Court for a peremptory writ of *mandamus*, and argument having been heard, and the Court being of the opinion that the answer of the defendant fails to show cause, it is therefore ordered and decreed by the Court, that a peremptory writ of *mandamus* issue commanding the defendant forthwith to [*Here show what the defendant is required to do, following substantially the prayer of the bill for special relief.*] The defendant will return this writ on or before [*specifying the time,*] showing thereon, or therewith, how he has executed the same. He will also pay all the costs of this cause, for which an execution will issue.

If the complainant so desires, and the Court deems it proper, a reference may be made to the Master for an account to show what debt, or damages, the complainant is entitled to by reason of the wrong done.<sup>23</sup>

**PEREMPTORY WRIT OF MANDAMUS.**

State of Tennessee, }  
County of Campbell. }

To John Smith:

Whereas, in the case of John Jones against you in the Chancery Court of said county it was ordered and decreed by said Court that you [*Here set out so much of the decree as specifies what the defendant John Smith is to do, and when and how he is to do it,*] all of which more fully and at large appears in said decree.

Now, therefore, you are hereby commanded and enjoined forthwith to do and perform what is required of you by said decree, and that you especially and immediately [*Here set out what the defendant is required to do as shown in the preamble of this writ.*] And you are further commanded to answer this writ at the next term of the Chancery Court of said county to be held at the Court House in Jacksboro on the ..... Monday of ....., 1895, and show in your answer how you have executed this writ.

This July 1, 1895.

WINSTON BAIRD, C. & M.

The Sheriff executes the writ by serving a copy of it on the defendant, and making a return on the original that he has so done, giving the date of such service.

<sup>20</sup> The writ is addressed to the defendant. Formerly writs of injunction were, also, addressed to the defendant. See, *ante*, § 834, note 43.

<sup>21</sup> Code, § 3569. The alternative writ must be

returnable to the Court, and not to the Chancellor at Chambers. *Whit-sides v. Stewart*, 7 Pick., 710.

<sup>22</sup> State, *ex rel.*, v. Williams, 2 Cates, 549.

<sup>23</sup> See, *ante*, § 1084.

CHAPTER LXI.

SUITS FOR DIVORCE AND ALIMONY.

ARTICLE I. Matters Relating to the Jurisdiction.

ARTICLE II. Pleadings and Procedure.

ARTICLE III. Trial, Orders, and Decrees.

ARTICLE I.

MATTERS RELATING TO THE JURISDICTION.

§ 1088. Marriage and Divorce Generally Considered. | § 1090. Local Jurisdiction of the Court.

§ 1089. Grounds of Divorce. | § 1091. Restoration of Conjugal Rights.

§ 1088. **Marriage and Divorce Generally Considered.**—The relation of husband and wife is not only a personal relation, depending on the consent of the parties for its continuance, but it is, also a *status*, which is established and enforced by law, and can only be changed, or abrogated by law. A divorce suit, in consequence, not only involves the persons to it, but it also involves a thing, a *status*, the marriage relation; and it is, therefore, a proceeding partly *in personam* and partly *in rem*. And it is on this latter ground that a divorce can be granted, and the children of the marriage given to a resident, when the other party is a non-resident, each State having the right to determine the *status* of its own citizens.<sup>1</sup>

So far as a divorce suit relates to the *status* of the parties, or their children, it is a proceeding *in rem*; and so far as it relates to alimony, it is a proceeding *in personam*. And for this reason, while a valid decree of divorce can be pronounced in favor of a resident against a non-resident defendant, no valid decree for alimony can be rendered against a non-resident defendant, unless he is before the Court by service of subpoena, or by voluntary appearance,<sup>2</sup> or unless he has property within the jurisdiction of the Court; and in the latter case, only to the extent of such property: indeed, the proceeding against such property is, in effect, a proceeding *in rem*, also, when the Court has no jurisdiction of the person of the defendant.

As parties cannot marry in this State without the consent of the State, such consent being manifested by a license issued by a County Court Clerk, so they cannot unmarry, or divorce themselves, without the consent of the State. This consent our Constitution authorizes the Legislature to grant, through the Courts, for such causes as may be specified by law.<sup>3</sup> And before a Court has authority to give this consent for the State, the complainant must allege and prove one of the causes of divorce, specified by the law of the State.

§ 1089. **Grounds of Divorce.**—The jurisdiction to grant divorces is statutory; and the grounds of divorce are statutory;<sup>4</sup> and, in consequence of the interest the community has in the enforcement of all marital obligations, the Court is always careful, not only to keep within the limits of its jurisdiction, but to require the complainant to allege and prove everything necessary to clearly justify the divorce prayed. The following are the causes of divorce from the bonds of matrimony:

1 5 A. & E. Ency. of Law, 746; 751.  
 2 5 A. & E. Ency. of Law, 762.  
 3 Const. of Tenn., Art. XI, § 4. All marriages in this State must conform to our statutes, and  
 common law marriages are void. *Smith v. Bank*, 7 Cates, 12.  
 4 5 A. & E. Ency. of Law, 749.

1. That either party, at the time of the contract, was, and still is, naturally impotent, and incapable of procreation.
2. That either party has knowingly entered into a second marriage, in violation of a previous marriage still subsisting.
3. That either party has committed adultery.
4. Wilful or malicious desertion, or absence, of either without a reasonable cause, for two whole years.<sup>5</sup>
5. Being convicted of any crime, which, by the laws of the State renders the party infamous.
6. Being convicted of a crime, which, by the laws of the State, is declared to be a felony, and sentenced to confinement in the penitentiary.
7. That either party has attempted the life of the other, by poison, or any other means showing malice.
8. Refusal, on the part of a wife, to remove with her husband to this State, without a reasonable cause, and wilfully absenting herself from him for two years.
9. That the woman was pregnant at the time of the marriage by another person, without the knowledge of the husband.<sup>6</sup>
10. Habitual drunkenness of either party, when the husband or wife has contracted the habit of drunkenness after marriage.<sup>7</sup>

The following are causes of divorce from bed and board, and from the bonds of matrimony, at the discretion of the Court:

1. That the husband is guilty of such cruel and inhuman treatment or conduct toward his wife, as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control.
2. That he has offered such indignities to her person as to render her condition intolerable, and thereby forced her to withdraw.
3. That he has abandoned her, or turned her out of doors, and refused or neglected to provide for her.<sup>8</sup>

But in either of the three next preceding cases the defendant may justify his conduct by proving the ill conduct of the complainant.<sup>9</sup>

A divorce may be granted for any of the foregoing causes, though the acts complained of were committed out of the State, or the petitioner resided out of the State at the time, no matter where the other party resides, if the petitioner has resided in this State two years next preceding the filing of the petition.<sup>10</sup> But where the grounds of divorce arise within the State no term of prior residence in the State is required.<sup>11</sup>

**§ 1090. Local Jurisdiction of the Court.**—The bill may be filed either: (1) in the county where the defendant resides, or (2) in the county where he is found, or (3) in the county where the complainant resides, if the defendant is a non-resident, or a penitentiary convict, or (4) in the county where the parties resided at the time of their separation.<sup>12</sup> If the defendant is a resident, he will be brought before the Court by service of subpoena; if he is a non-resident, or a convict confined in the penitentiary, he may be brought before the Court by publication.<sup>13</sup> If the wife is complainant, and the defendant lives in the county where the bill is filed, the suit may be tried and a divorce granted, without service of subpoena or publication, if the bill was filed, and subpoena for the defendant placed in the hands of the Sheriff of the county in which the suit was instituted, three months before the time when the subpoena is returnable; but the officer having the subpoena shall execute it if he can.<sup>14</sup> Where no sub-

<sup>5</sup> The original act read "wilful and malicious." See, *post*, § 1095. But a supplemental bill of divorce for two years' absence will not lie when the original bill was filed for other causes before the two years' absence. *Thomas v. Thomas*, 2 Cold., 126.

<sup>6</sup> Code, § 2448.

<sup>7</sup> Acts of 1867-8, ch. 62; M. & V.'s Code, § 3306.

<sup>8</sup> Code, § 2449.

<sup>9</sup> Code, § 2466.

<sup>10</sup> Code, § 2450.

<sup>11</sup> *Carter v. Carter*, 5 Cates, 509.

<sup>12</sup> Code, §§ 2451-2451 a.

<sup>13</sup> Code, § 2454.

<sup>14</sup> Code, § 2456. This section applies only when the defendant is a resident of the county in which the suit is brought. *Temple v. Temple*, 13 Lea, 160. The officer's return must show that the subpoena was in his hands three full months before the return day, and that he tried to execute it, thus: "Came to hand, March 1, 1893. Search made, but the de-

pœna is served upon the defendant, the complainant must prove the facts on which the local jurisdiction of the Court depends.<sup>15</sup> If the bill is filed in the wrong county the Court has no jurisdiction to try the case.<sup>16</sup>

§ 1091. **Restoration of Conjugal Rights.**—If upon a false rumor, apparently well founded, of the death of one of the parties, who has been absent two whole years, the other party marries again, the party remaining single, may, upon returning, insist upon a restoration of conjugal rights, or upon a dissolution of the marriage; and the Court shall sentence and decree accordingly, to-wit: that the first marriage shall stand, and the second be dissolved; or, *vice versa*; but such bill must be filed within one year after the return.<sup>17</sup>

The bill will make the party who has remarried, and the husband or wife of such party defendants, for the latter has a right to be heard, and must, besides, be made a party in order to be bound by the decree. The bill should allege (1) the fact of the first marriage, (2) the absence of complainant for two whole years, (3) the rumor of complainant's death, (4) the second marriage, and (5) the reasons why the complainant prefers a restoration of his conjugal rights, or why he prefers a dissolution of the first marriage, and (6) should pray accordingly. The Court will be governed largely by the wishes of the parties to the first marriage in determining the case.

## ARTICLE II.

### PLEADINGS AND PROCEDURE.

- § 1092. The Procedure in a Divorce Suit.
- § 1093. Frame of a Divorce Bill.
- § 1094. General Form of a Divorce Bill.
- § 1095. Special Form of a Divorce Bill.

- § 1096. Answer, and Cross Bill.
- § 1097. Alimony *Pendente Lite*.
- § 1098. Petition for Alimony *Pendente Lite*, and Proceedings Thereon.

§ 1092. **The Procedure in a Divorce Suit.**—A divorce suit is commenced in Chancery by a bill, filed by the party seeking a divorce against the other party. On such bill being filed, and security for costs given, or pauper oath taken,<sup>1</sup> a subpoena to answer the bill will issue, if the defendant is a resident of the State; if the defendant is a non-resident, or convict confined in the penitentiary, publication will be made.<sup>2</sup>

The defendant on appearing may move to dismiss the bill, or may demur to it, or may plead to it, or may answer it; he may, also, file his answer as a cross bill, and set up therein any ground of divorce he may have, and pray for a decree of divorce. On such answer and cross bill being filed, the same steps must be taken, as on an original bill, to compel an answer to it.

If either the original or the cross bill is not answered in due time after process served, it may be taken for confessed. The cause stands for trial at the first term after service of subpoena, and the proof may be made by depositions, or by witnesses examined in open Court. At the hearing, the issues of fact may be tried by the Chancellor, or by a jury; and a divorce may be granted the complainant on the original bill, or, if there be a cross bill, the party filing it may be granted a divorce, or both bills may be dismissed, as the justice of the case may require.

The decree of the Court, in so far as it grants or refuses a divorce, can be revised only by an appeal;<sup>3</sup> but a writ of error will lie to so much of the decree

defendant, Richard Roe, not to be found in my County, June 12, 1893. J. K. Lones, Sheriff." As to service of subpoenas, see, *ante*, § 192.  
<sup>15</sup> *Majors v. Majors*, 1 Tenn. Ch., 265.  
<sup>16</sup> *Walton v. Walton*, 12 Pick., 25.  
<sup>17</sup> Code, § 2461.

<sup>1</sup> Persons suing for an absolute divorce cannot sue under the pauper oath. See, *ante*, § 182, sub-sec. 1.  
<sup>2</sup> Code, § 2454.  
<sup>3</sup> Code, § 3158. It cannot be reviewed by a writ of error *coram nobis*. *Willis v. Willis*, 20 Pick., 382.

as allows alimony, and to so much of the decree as affects other parties to the suit than the husband and wife.<sup>4</sup>

§ 1093. **Frame of a Divorce Bill.**—A bill for divorce should conform to the rules of Chancery pleading,<sup>5</sup> and should show on its face every fact that is essential to the jurisdiction of the Court to pronounce the decree prayed. It should allege,

1. The marriage of the complainant and defendant.
2. One or more of the statutory causes of divorce particularly and specially set forth, giving circumstances of time and place with reasonable certainty.<sup>6</sup>
3. If the cause of divorce originated outside of the State the bill should allege that the complainant has resided in this State at least two years next preceding the bringing of the suit.<sup>7</sup>
4. A statutory ground of local jurisdiction in the Court where the bill is filed
5. And should pray for a divorce, or for a divorce and other and further relief.<sup>8</sup>
6. And the bill must be verified,<sup>9</sup> by the affidavit of the complainant in person, that the facts stated in the bill are true to the best of the complainant's knowledge and belief, and that the complaint is not made out of levity, or by collusion<sup>10</sup> with the defendant, but in sincerity and truth, for the causes<sup>11</sup> mentioned in the bill.

A divorce bill may be amended as freely as any other bill;<sup>12</sup> but if the amendment consists in the averment of a fact, such amendment must be verified by the complainant's oath.

A divorce bill is filed in the proper person and name of the complainant. If the wife is complainant, she files the bill in her own name, as though she were a single woman.<sup>13</sup>

§ 1094. **General Form of a Divorce Bill.**—In order to illustrate the foregoing section, and to show the various parts of a bill, in their orderly connection, the following general form of a divorce bill is given:

#### GENERAL FORM OF A DIVORCE BILL.

To the Honorable [insert name of] Chancellor, holding the Chancery Court at [insert name of town where the bill is to be filed.]

A B, a resident of [insert name of county where A B resides] com-  
plainant,

v.s.

C B, a resident of [insert name of county where defendant resides, if  
a resident of the State; if a non-resident, so state.] defendant.

The complainant respectfully shows to the Court:

I.

That she [or he] and the defendant, C B, were married on the — day of [insert day, month, and year, of the marriage,] in — County, Tennessee, in which State they have

<sup>4</sup> Parmenter v. Parmenter, 3 Head, 225; Owens v. Sims, 3 Cold., 544; McBee v. McBee, 1 Heisk., 538.

<sup>5</sup> Divorce causes are in the nature of Chancery Suits, and the proceedings in them are according to the course of practice in Chancery, except where a difference is made by statute. *Richmond v. Richmond*, 10 Yerg., 343; *Hawkins v. Hawkins*, 4 Sneed, 105.

<sup>6</sup> Code, § 2452; *Stewart v. Stewart*, 2 Swan., 591; *Horne v. Horne*, 1 Tenn. Ch., 259. The cause for divorce must be averred in the very words of the statute, or in words fully equal to the very words of the statute, and definite in their meaning. *Ibid.* *Rutledge v. Rutledge*, 5 Sneed, 554; *Ward v. Ward*, 1 Tenn. Ch., 262; *Dismukes v. Dismukes*, 1 Tenn. Ch., 267. These cases show the importance of the bill alleging the cause of divorce in the very words and manner required by the Code, § 2452.

<sup>7</sup> Code, § 2450; *Carter v. Carter*, 5 Cates, 509.

<sup>8</sup> Code, § 2452. No divorce can be granted unless specially prayed for. *Pillow v. Pillow*, 5 Yerg., 420.

<sup>9</sup> Code, § 2453.

<sup>10</sup> Collusion is the agreement of the parties to make up a case for the purpose of obtaining a divorce: this agreement may be (1) to commit adultery, or to appear so to do, or (2) to do any other

act made a cause of divorce, or (3) to suppress facts that would defeat the divorce. 5 A. & E. Ency. of Law, 819-820.

<sup>11</sup> The causes mentioned in the bill should be one or more of the statutory causes of divorce, and the attending circumstances of time and place. Code, § 2452. It is no uncommon thing for the draftsman to substitute the word "purposes" for the word "causes;" this is a fatal error. "Causes" is the vital word in the affidavit. Of course, the bill is filed for the purposes mentioned in the bill. See *DeArmond v. DeArmond*, 8 Pick., 41.

<sup>12</sup> The prayer may be amended, and the bill sworn to, even after the trial commences. *Hackney v. Hackney*, 9 Hum., 452.

<sup>13</sup> Code, § 2451; *Hawkins v. Hawkins*, 4 Sneed, 105. If the complainant, whether husband or wife, be an infant, it would seem that according to the strict rules of Equity pleading, he, or she, should sue by next friend. *Wood v. Wood*, 2 Paige, (N. Y.) 108. The practice, however, has been otherwise, on the principle that one who is old enough to marry, is old enough to sue, or be sued, for a divorce, in her or his own name. 5 A. & E. Ency. of Law, 767-768.

lived ever since. [If the parties were married out of Tennessee, so state. If the causes for divorce originated outside this State, be careful to show that complainant has resided in the State at least two years<sup>14</sup> next preceding the filing of the bill.]

II.

That [Here set out particularly, and specially, the statutory cause of divorce relied on, using the very words of the statute, and then state the circumstances of time, and place, of the act or acts complained of, with reasonable certainty; and if adultery is charged, give the name of the person with whom it was committed, and the place and time, with reasonable certainty; or, give a sufficient reason for not so doing.<sup>15</sup>]

III.

That [If it be necessary to allege a second ground of divorce, the allegation should here be made, observing all the rules next above stated.<sup>16</sup>]

IV.

That [Here show the ground of the local jurisdiction of the Court, such as that the defendant, if a resident, resides, or is temporarily staying, in the county wherein the bill is filed; or if defendant is a non-resident, or penitentiary convict, show that the complainant lives in the county wherein the bill is filed, or that the parties, at the time of their separation, resided in the county wherein the bill is filed.<sup>17</sup>]

V.

That [If there be children, the fruit of said marriage, and complainant desires the exclusive custody of them, or any of them, so allege, and give their names, sex, and ages, and show why complainant should have their custody.]

VI.

That [If alimony is sought, here specify the real and personal property owned by the defendant, itemizing it; and show what property the wife owns, or owned at the time of her marriage, in her own right, if any. If any of the defendant's estate is in the hands of a third party, or consists of debts, so state, naming the third party, and making him a defendant.]

VII.

That [If the defendant is attempting to take any of the children, or any of his property out of the jurisdiction of the Court, or is about to fraudulently dispose of his property, or is doing or threatening any other act that will justify an injunction, or an attachment, allege all such acts and threats, giving time, place, and circumstance, with considerable minuteness. Follow the precise language of the statute in alleging the grounds for an attachment.]

VIII.

That [If the defendant has conveyed away any of his property, to hinder and delay complainant in her efforts to obtain alimony, and to defraud her of the same, so allege, specifying the property, and fully describing it, and giving the name of the fraudulent vendee, and making him a co-defendant to the suit.]

IX.

The premises considered, complainant prays:

1st. That the proper process issue to compel the defendant to appear, and answer the bill;<sup>18</sup> but his oath to his answer is waived.

2d. That at the hearing the bonds of matrimony uniting complainant and defendant be absolutely and perpetually dissolved, and that complainant be forever freed from the obligations thereof,<sup>19</sup> and be restored to all the rights and privileges of an unmarried person; [and if the complainant be the wife, she may add to this prayer, "and that her maiden name (stating it in full, both the given and the surname,) may be restored to her."<sup>20</sup>]

3d. That [If complainant be the wife, she will, also, pray for alimony pendente lite, and for the suitable support and maintenance of herself and children, out of the defendant's property.<sup>21</sup>]

4th. That [If the complainant be the husband, he may pray to have his rights to his wife's property, real and personal, declared according to the statute,<sup>22</sup> in which case he should, in his bill, specify and describe her said property.]

5th. That the exclusive custody of all of said children [or of such of them as is desired,] be committed to complainant.

14 Allegation and proof of the two years' residence are essential to the jurisdiction of the Court. See *Fickle v. Fickle*, 5 Yerg., 203; 5 A. & E. Ency. of Law, 757. But this allegation and proof is necessary only when the causes of divorce originated outside of this State. *Carter v. Carter*, 5 Cates, 509.

15 Code, § 2452. *Stewart v. Stewart*, 2 Swan, 591; *Horne v. Horne*, 1 Tenn. Ch., 259; *Rutledge v. Rutledge*, 5 Sneed, 554. The bill must allege a statutory ground of divorce; and the prudent draftsman will employ the very words of the statute in all-giving the particular ground he relies on, and then follow up this general statement of the ground of divorce by a specification of the circumstances and particulars, including the time and place, avoiding all displays of indignation, disgust, or other sentimentality; and using no poetry, rhetoric, or indecent or profane language. Divorce bills are not the

proper papers for sensational literary displays. See, *ante*, § 410, sub-sec. 7.

16 A second ground of divorce, if it exists, should be alleged with the same definiteness and particularity, as if it were the only ground; and should not be mixed up in a miscellaneous manner with the first ground. The bill may fail as to the first ground, but be sustainable as to the second ground, if it be properly averred.

17 Code, §§ 2451-2451 a. The bill must show on its face that the Court has local jurisdiction, or it may be dismissed on motion, or on demurrer, for want of jurisdiction of the defendant.

18 Code, § 2454.

19 Code, § 2465.

20 Code, §§ 3636-3639.

21 Code, § 2468.

22 Code, § 2472.

6th. That an injunction issue to restrain the defendant from removing said children, or any of them, from the State, [if such injunction be necessary.]

7th. That an attachment issue and be levied on enough of the property, real and personal, of the defendant, to satisfy complainant's claim for alimony, maintenance and support, and she says that — dollars [stating a reasonable sum,] is justly due her on said claim.<sup>23</sup> [Omit this if an attachment is not obtainable, or is not desired.]

8th. That the said conveyance to hinder and defraud complainant be set aside, and for nothing held; and the property so attempted to be conveyed be subjected to the satisfaction of complainant's right to alimony. [Insert this prayer if any fraudulent conveyances have been alleged in the bill.]

9th. And that complainant have such further and other relief as she [or, he,] may be entitled to. [If any extraordinary process is prayed, add:] This is the first application for extraordinary process in this case.

State of Tennessee, }  
County of ———, }

G H, Solicitor.

A B, being duly sworn, makes oath that the facts stated in his [or, her,] foregoing bill are true to the best of his [or, her,] knowledge and belief; and that the complaint is not made out of levity, or by collusion with the defendant, but in sincerity and truth, for the causes<sup>24</sup> mentioned in the bill.

A. B.

Sworn to and subscribed to }  
before me, Sept. 3, 1890. }

I K, C. & M. }

§ 1095. **Special Form of a Divorce Bill.**—In drawing a bill for a divorce, the essential requirements set forth in the preceding section should be rigidly observed, for, if the bill does not allege a statutory cause of divorce, proof becomes irrelevant and useless, and no decree of divorce can be made.<sup>25</sup> The following is a form of a

#### BILL FOR DIVORCE.

To the Hon. William B. Staley, Chancellor, holding the Chancery Court at Huntsville, for the County of Scott:

Jane Doe, a resident of Scott county, complainant,

vs.

John Doe, a resident of the State of Kansas, and William Brown, a resident of Scott county, defendants.

The complainant respectfully shows to the Court:

I.

That she and the defendant, John Doe, were married in Scott county, Tennessee, on the 31st day of August, 1880, and that she has been a resident of said county ever since.

II.

That more than two whole years ago, the defendant, John Doe, wilfully<sup>26</sup> deserted complainant without a reasonable cause, and has continued said desertion ever since. Complainant and the said defendant, Doe, were, in the year 1881, living with complainant's mother in said county, and defendant became very angry because her mother suggested to him that he ought to be looking out for a home of his own, and left, declaring he would never live with complainant any more. He, on or about October, 1881, went to Kansas, and has never been back since, and has never written to complainant, nor sent her any message or money, or in any way provided for the support of complainant, and her two infant children. He left complainant, and their two infant children, Mary and Charles, wholly dependent on her parents, and on her own labor. He has written to friends living near complainant, and his letters show that he is passing himself off as a single man, and that he is making love to single women, and that he is spending a great deal of money on them. Complainant has written him several loving letters, none of which has he answered, but has written to a third person to tell complainant to keep her love, and her letters, to herself.

III.

That the defendant, Doe, in addition to the foregoing wrongs, committed adultery with one Sallie Fox, on or about the 5th day of June, 1881, at or near the house of said Sallie, in the 4th civil district of Scott county; and, since he has been in Kansas, has sent affection-

<sup>23</sup> Code, § 3469.

<sup>24</sup> Code, § 2453. That is, for the statutory causes of divorce relied on in this bill. Code, 2452. This statutory affidavit cannot be materially departed from. *DeArmond v. DeArmond*, 8 Pick., 41. See, *contra*, *Hackney v. Hackney*, 9 Hum., 453. Sometimes the word "purposes" is substituted for "causes," but in such cases the affidavit is fatally defective, the meaning of the two words being wholly dissimilar, as already shown. There is no need of an affidavit to satisfy the Court that the complaint is for the purpose of obtaining a divorce! See preceding section, note 11.

<sup>25</sup> *Stewart v. Stewart*, 2 Swan, 591; *Ward v. Ward*, 1 Tenn. Ch., 262.

<sup>26</sup> The language of the old statute was "wilful and malicious." The Code says, "wilful or malicious;" hence, the effect of the cases of *Stewart v. Stewart*, 2 Swan, 591; and *Rutledge v. Rutledge*, 5 Sneed, 254, must be somewhat modified. Nevertheless, the Court will require proof to show that the desertion was intentional, and prompted by feelings of ill will, or indifference, towards the complainant; and accompanied by a reckless disregard of complainant's welfare, and of defendant's duty towards the complainant.

ate messages, and some presents, to said Sallie. Complainant never learned of said adultery until about two weeks ago.

IV.

Complainant avers that she has been true to her marriage vows, and has lived chastely, and has given defendant no cause, or just excuse, for his said misconduct, and has not condoned<sup>27</sup> the same.

V.

The defendant, Doe, has by the death of his father, recently become the owner of a farm in the 2d civil district of this county, described as follows: Beginning on a rock, in William Jones' north line, thence [*describing it by metes and bounds,*] to the beginning, containing about forty acres, and worth less than one thousand dollars. This tract complainant claims for her homestead. The house on said farm contains an assortment of household and kitchen furniture, and said farm is well stocked with poultry, hogs, sheep, horses, cows and calves, all of which defendant's father left him by will duly probated. Defendant now, by like devise, has a valuable farm in Kansas, and considerable personal estate there.

VI.

The defendant, Doe, also purchased from his father, in the latter's lifetime, a house and lot in the town of [*here locate and describe it,*] worth about one thousand dollars. This lot he has fraudulently conveyed to his co-respondent, William Brown, to hinder and delay complainant in obtaining a divorce and alimony, the said Brown aiding and abetting in said fraud; and defendant, Doe, is about fraudulently to dispose of the balance of his property in this State.

VII.

The premises considered, complainant prays:

1st. That proper process issue to compel the defendants to appear and answer this bill, and that publication be made as to the defendant, John Doe, he being a non-resident of this State. Both defendants are excused from answering on oath.

2d. That alimony *pendente lite* be allowed her, for her support, and to enable her to defray the expenses of this suit, including a reasonable fee to her Solicitor.

3d. That an absolute divorce be granted her, that her maiden name, Jane Jones, be restored to her, and that she be given the exclusive custody of her two children by said marriage, Mary Doe, and Charles Doe, both being very tender infants.

4th. That alimony be decreed her, including said homestead, and all the personal property on it, and in the house.

5th. That an attachment issue, and be levied on all the foregoing property of the defendant, Doe, real and personal, and upon said house and lot conveyed to the defendant, Brown; to secure the amount justly due the complainant as alimony, which amount is two thousand dollars, as she verily believes; and that a receiver be appointed to take charge of said farm of forty acres, and all of the personal property in the house, or on the land, and to apply the rents and profits thereof to the support of complainant, pending this suit.

6th. And that she may have such further and other relief as the justice of her case may require.

This is the first application for an attachment or receiver in this case.

JANE DOE.

DANIEL JEFFERS, Solicitor.  
State of Tennessee, }  
County of Scott. }

Jane Doe, being duly sworn, makes oath that the facts stated in her foregoing bill are true, to the best of her knowledge and belief, that her complaint is not made out of levity, or by collusion with the defendant, but in sincerity and truth, for the causes mentioned in the bill.<sup>28</sup>

JANE DOE.

Sworn to and subscribed before }  
me, September 6, 1884. }

REUBEN HURTT, Clerk of the Circuit Court.

§ 1096. **Answer and Cross Bill.**—The defendant may plead in abatement, or move to dismiss the bill, or he may demur, or plead in bar, or answer, or answer and file a cross bill.<sup>29</sup> If the bill does not allege a statutory cause of divorce, or does not allege the two years' residence in the State when necessary, as above shown;<sup>29a</sup> or, if the bill shows on its face that it is not filed in the proper county, the defendant may demur. If the bill shows all these essentials, the

<sup>27</sup> Condonation will be implied, if the parties willingly cohabit, after the injured party has obtained full knowledge of the wrong. But there is an implied condition to every condonation, the condition being that the injury will not only not be repeated, but that the injured party will be treated with conjugal kindness in the future. If the implied condition be violated, the rights of the injured party are

revived, and the wrong done ceases to be forgiven, and may be relied on. 5 A. & E. Ency. of Law, 820-824.

<sup>28</sup> This affidavit cannot be varied. See, *ante*, § 1093, note 11.

<sup>29</sup> See Index, for references to these various defenses.

<sup>29a</sup> See, *ante*, § 1093, sub-sec. 3.



defendant must answer, if he or she disputes the truth of the bill. If the bill be false, and the defendant have a good cause of divorce, he or she may answer, and file a cross bill, or may file the answer as a cross bill, making in such answer the same allegations as would be contained in a separate cross bill. The usual practice in such cases is to file the answer as a cross bill.

Supposing the original bill to be filed by the wife under section 2449 of the Code the following will serve as a form of

**ANSWER AND CROSS BILL.**

A B, }  
*vs.* } In the Chancery Court at Blountville, Tennessee.  
 C D. }

The answer of C B to the bill in said cause, the answer being filed as a cross bill against said A B.

The defendant, C B, for answer to said bill, says:

I.

That he admits his marriage to the complainant, at or about the time and place stated; and that they have lived in Tennessee over two years next preceding the filing of her bill; and that she is the mother of three children by defendant.

II.

Defendant denies the charges of cruel and inhuman treatment set forth in the bill, and denies that she had any just cause, or excuse, for leaving his home, and denies that he refused, or neglected, to provide for her, as she alleges in her said bill.

III.

Defendant admits that he owns the personal property described in the bill, and admits that he is in possession of the farm mentioned in the bill, the legal title to which is in complainant, but he is now tenant thereof by the courtesy.

IV.

Defendant denies every allegation in the bill not herein expressly admitted; and avers that the conduct of the complainant was such that, to his great grief, he was obliged to remonstrate, and to deny her some privileges he would have been glad otherwise freely to have accorded her. She is very fond of gay company, and delights in the society of fast young men; and her whole heart is set on fine dress, picnics, theaters, base-ball contests, dances, and all manner of public amusements; so that her name is being bandied to and fro, with winks, and hints, and insinuations, reflecting upon her virtue and general character as a matron. In short, her conduct has been exceedingly unbecoming, for a married woman, the mother of three children. Defendant's remonstrances and reproofs resulted in the altercations she complains of, and the defendant avers that the said ill conduct of the complainant was the cause thereof, and he pleads said ill conduct in justification of all he said or did.<sup>30</sup>

V.

And now by way of cross bill against the said A B, the defendant, C B, respectfully shows to the Court, in addition to the facts hereinabove by him expressly admitted, or alleged:

VI.

That the complainant has, since she left defendant's home, and in the month of September, 1889, committed adultery with one George Sly, in the boarding house where she now lives, in the town of Bristol, and that her conduct is emphatically that of an unchaste woman; and that she has been guilty of other adulteries with said Sly, in said town.

VII.

Respondent avers that he has not been guilty of like crime, that he has not condoned complainant's conduct, and that he is in no way responsible therefor.

VIII.

The premises considered, the defendant prays:

1st. That this answer be filed and treated as a cross bill,<sup>31</sup> and that subpoena issue to compel the complainant, the said A B, to answer the same.

2d. That absolute divorce be granted him from the said A B, and that his right to the rents and profits of her said farm be decreed to him during his life,<sup>32</sup> and that the custody of said three children be committed to him.

3d. And that he have such further and other relief as he may be entitled, and as to your Honor may seem proper.

C. B.

State of Tennessee, }  
 Sullivan County. }

C B being duly sworn, makes oath that the facts stated in his foregoing answer and cross bill are true to the best of his knowledge and belief, that the complaint in his cross bill is

<sup>30</sup> Code, § 2466.

<sup>31</sup> It will not be deemed a cross bill, unless a prosecution bond be given, and process issue. If the defendant to the cross bill answers it, however,

without objection for want of bond or process, the Court may decree relief on the cross bill. See, *ante*, § 736, note 55.

<sup>32</sup> Code, § 2472.

not made out of levity, or by collusion with A B, the defendant to said cross bill, but in sincerity and truth, for the causes mentioned in the cross bill.

C. B.

[Add a proper jurat, as above.]

If the defendant sustains his cross bill the Court will dismiss the original bill, and grant divorce and other proper relief on the cross bill. The wife when sued for a divorce by her husband may, in like manner file a cross bill and obtain a divorce, if the facts justify it.

§ 1097. **Alimony Pendente Lite.**—When the wife is a party to a divorce suit, she is entitled to alimony pending the litigation, whether she be complainant or defendant; for, in either case, she is still the wife of the other party; and as such, is, if not possessed of sufficient means of her own, entitled to a reasonable allowance for her support, and for the expenses of the suit, including reasonable counsel fees.<sup>33</sup> The granting of such an allowance is discretionary with the Chancellor; and, in exercising this discretion, he will consider the financial ability of the husband, and the conduct and necessities of the wife as disclosed in the pleadings, or in affidavits,<sup>34</sup> or in both. An allowance *pendente lite* should be put at a low figure, and proportioned to the husband's income and property; and where her suit is without any just or reasonable foundation, no allowance will be made.<sup>35</sup> Alimony *pendente lite* ceases upon the dismissal of her suit by the wife,<sup>36</sup> or upon the death of her husband.<sup>37</sup> To entitle the wife to alimony *pendente lite* it should appear,

1. That, if complainant, her bill shows a *prima facie* case, entitling her to a divorce; or, if defendant, her sworn answer discloses a good defence, or contains positive and specific denials of the material charges of the bill.

2. That she has no means of her own, or no sufficient means, if any, to pay for her support, and the expenses of the litigation.

3. What means she has, and what means her husband has, should be made to appear by affidavit, or by the wife's pleading.

4. She must show diligence in preparing for trial, or alimony will be refused; or, if already allowed, will be discontinued.<sup>38</sup>

The Court may discontinue the payment of alimony *pendente lite*, in its discretion. An appeal will not lie from an interlocutory order allowing alimony *pendente lite*,<sup>39</sup> but will lie from a final decree allowing alimony.

The usual mode of ascertaining the amount of alimony *pendente lite* is by a reference to the Master; but the Court may act without a reference.<sup>40</sup> Where the facts, on which the motion for alimony *pendente lite* is based, do not appear in the pleadings, they should be brought forward by petition, or affidavit; but on such motion, the question of the guilt or innocence of the wife will not be inquired into, beyond what appears in her own pleading, petition or affidavit, under the rules heretofore given. Counter affidavits will not be heard on applications for alimony *pendente lite*.<sup>41</sup>

§ 1098. **Petition for Alimony Pendente Lite, and Proceedings Thereon.**—If the wife is the complainant, either in the original bill, or in a cross bill, she

<sup>33</sup> *Thompson v. Thompson*, 3 Head, 527; *Lishey v. Lishey*, 2 Tenn. Ch., 3; *Shy v. Shy*, 7 Heisk., 125. The wife is entitled to alimony *pendente lite*, if her bill shows a *prima facie* case, and she has no adequate means of her own. *Lishey v. Lishey*, 2 Tenn. Ch., 1. In this case, one hundred dollars was allowed for counsel fees; thirty dollars a month, from the filing of the bill until the next term, was allowed for alimony, and forty dollars for incidental expenses, making five hundred dollars in all; and execution was awarded therefor, if the whole amount was not paid within twenty days. The defendant's estate was valued by the Court at twenty thousand dollars, and his income from ten to twelve hundred dollars. In *Shy v. Shy*, 7 Heisk., 125, two Solicitors were held not to be too many, and one hundred dollars were allowed each; and it was held that the Chancery Court had jurisdiction to allow counsel fees for services in the Supreme Court, also.

<sup>34</sup> *Lishey v. Lishey*, 2 Tenn. Ch., 1. It is almost

a matter of course to allow alimony *pendente lite*, when (1) the wife, if complainant, shows in her bill a meritorious cause of action, and good ground for a divorce; or when (2) if defendant, her sworn answer emphatically denies the charges in the bill, or discloses other adequate defence to the suit. 2 Barb. Ch. Pr., 265-268.

<sup>35</sup> *Lishey v. Lishey*, 2 Tenn. Ch., 3.

<sup>36</sup> *Persons v. Persons*, 7 Hum., 183.

<sup>37</sup> *Swan v. Harrison*, 2 Cold., 534. After the dismissal of her suit by the wife, it is too late for the Court to allow alimony, or counsel fees. *Thompson v. Thompson*, 3 Head, 527.

<sup>38</sup> See, *Lishey v. Lishey*, 2 Tenn. Ch., 1; *Burrow v. Burrow*, 6 Lea, 499.

<sup>39</sup> *Pearson v. Pearson*, Peck, 27. But would not a supersedeas lie in a proper case? Code, § 3933.

<sup>40</sup> *Lishey v. Lishey*, 2 Tenn. Ch., 1.

<sup>41</sup> 2 Barb. Ch. Pr., 268.

may pray in her bill, or cross bill, for alimony *pendente lite*; but if she neglect to do so, or if she be the defendant and has filed no cross bill, she may petition the Court for an allowance to her for her support and expenses during the pendency of the litigation. Such petition may be in the following form :

**PETITION FOR ALIMONY PENDENTE LITE.**

John Doe, }  
vs. } In the Chancery Court, at Loudon.  
Jane Doe. }

To the Honorable William B. Staley, Chancellor :

Your petitioner, the above named Jane Doe, respectfully shows to the Court :

I.

That the complainant has filed in this Court against her a bill for divorce, alleging that she has willfully deserted him without reasonable cause, [*setting forth the ground of divorce alleged in the bill,*] as will more fully appear by reference to said bill.

II.

To said bill your petitioner has [this day] filed her answer, showing that the complainant drove her from his home after the most cruel treatment on his part, and that he has since persecuted her, and slandered her; and that she did not desert him, but that he cast her off without cause and without excuse, [*stating the substance of the answer;*] all of which will more fully appear by reference to her said answer, which is made a part of this petition; and she avers that every statement in her said answer is true.

III.

Petitioner further shows to your Honor that she is in destitute circumstances, having no means of support, and no means to pay her Solicitor in this suit, or to defray any of its expenses, she being dependent on her parents for food and clothing, and being feeble in health, and having a young child. [*Stating the facts as they are.*] The complainant owns a good farm, fairly well stocked, worth about one thousand dollars, and is out of debt, so far as petitioner knows, or is informed. [*State the property the husband possesses, and show fully his ability to support his wife, not by general allegations, but by specifying the property he owns.*]

IV.

Petitioner, therefore, prays that your Honor will make her a reasonable allowance out of her husband's estate for her support and maintenance during this litigation, and for the support and maintenance of their said child, and to enable her to employ and pay counsel to aid her in this suit, and to defray the other necessary expenses of the suit. She, also, prays for general relief as to the matters aforesaid.

JANE DOE.

J. E. CASSADY, Solicitor.

[*Annex an affidavit and jurat, as in § 797, ante.*]

The Chancellor may hear oral proof, in open Court, and adjudicate the allowance to be made the petitioner, or he may refer the matter to the Master, as follows :

**REFERENCE TO THE MASTER AS TO ALIMONY PENDENTE LITE.**

John Doe, }  
vs. } No. 345.  
Jane Doe, }

This cause came on to be heard upon the petition of the defendant for alimony *pendente lite*, and for expenses. And the bill and answer having been read, and argument heard on behalf of the respective parties, the Court ordered the Master to hear proof, and report instantler :

I.

What property the complainant is possessed of, specifying its kind, and the value of each kind, and what income he has from it, and from other sources.

II.

What means of support the defendant has, if any, and how she and her child are supported.

III.

What would be a reasonable allowance for the support and maintenance of the defendant and her child, until the next term of this Court.

IV.

What would be a reasonable allowance for her Solicitor's fees, and for the other necessary costs and expenses of this suit.

V.

The Master will report any other matter that will aid the Court in coming to an equitable conclusion in reference to any of the foregoing matters.

Until the coming in of said report all other matters are reserved.

If the Court should determine the matter without a reference, as it will ordinarily do, the order of allowance would be as follows:

**ORDER ALLOWING ALIMONY PENDENTE LITE.**

[Following the foregoing order down to "read,"] and the testimony of witnesses having been heard, and the matters having been argued by counsel for the respective parties, the Court is of opinion that the prayer of the petitioner should be granted.

I.

It is, therefore ordered by the Court that the complainant pay into the office of the Clerk and Master of this Court within thirty days the sum of seventy-five dollars, for the support and maintenance of the defendant and her child, until the next term of the Court; and will pay in the further sum of fifty dollars to pay her Solicitors' fees, and the other necessary costs of this litigation. And if both of said sums are not paid as herein ordered, an execution will issue against the complainant for so much as has not been paid in.

**ARTICLE III.**

**TRIAL, ORDERS, AND DECREES.**

- |  |   |
|--|---|
| § 1099. Trial of a Divorce Suit.           | § 1103. Other Relief Granted.               |
| § 1100. Kinds of Divorce Granted.          | § 1104. Frame of a Divorce Decree.          |
| § 1101. Alimony on Final Decree.           | § 1105. Rights of Creditors of the Husband. |
| § 1102. Wife's Remedies to Secure Alimony. |   |

§ 1099. **Trial of a Divorce Suit.**—If the subpoena to answer be served upon the defendant, the cause may be tried at the first term of the Court thereafter;<sup>1</sup> and either party may take proof by depositions, or have the witnesses examined in open Court.<sup>2</sup> The issues of fact raised by the pleadings may be determined by the Chancellor, or, at the request of either party, may be tried by a jury.<sup>3</sup> Neither the Chancellor, nor the jury, can, however, act on the admissions of the defendant, or on a judgment *pro confesso*, but must hear the proof of the facts charged, and determine the case upon such proof.<sup>4</sup> If the defendant is required to answer under oath, and so answers, such answer has no greater weight than an unsworn answer, and only serves to make up an issue.<sup>5</sup>

If the statute sets out any acts the complainant must do in order to be entitled to a divorce, such acts must be proven. Thus, if the husband sue for divorce on the ground of the wife's refusal to remove with him to this State, and of her wilful absence for two years without reasonable cause, he must prove endeavors to induce her to live with him after the separation, and that he did not remove from the State where she resided for the purpose of obtaining a divorce.<sup>6</sup> And when a divorce is sought upon the ground of adultery, it must be shown affirmatively, by satisfactory proof, that the complainant has not been guilty of like crime, and has not condoned the offense; and, if the complainant is the husband, that he did not connive at, or allow, his wife's prostitution, or expose her to lewd company.<sup>7</sup>

1 Code, § 2455. It is no uncommon practice to try divorce causes at the first term after publication made; but this section does not seem to warrant a trial at the first or appearance term, except when the defendant is brought into Court by service of subpoena.

2 Code, § 2462.

3 Code, § 2453.

4 Code, § 2459. The Court cannot divorce the parties on their consenting to such a decree, because the proceedings is *in rem*, as well as *in personam*. Consenting to a divorce sometimes savors of collusion, and may bar a divorce. Neither have arbitrators any power to grant a divorce or alimony. *Swan v. Harrison*, 2 Cold., 534. The Court must hear the evidence, and be satisfied therefrom that the complainant is entitled to a divorce, before a decree of divorce can be granted. Nothing will satisfy the

statute except proof, by witnesses, of the facts charged in the bill. Code, § 2459. The Court may, however, decree alimony by consent, being careful to see that the wife is not over-reached, and her children not deprived of their homestead rights.

5 *Richmond v. Richmond*, 10 Yerg., 347. Such an answer would, when responsive, probably be evidence for the defendant, on the question of alimony.

6 Code, § 2463; *Lanier v. Lanier*, 5 Heisk., 463.

7 Code, § 2460; *Cameron v. Cameron*, 2 Cold., 375; *Majors v. Majors*, 1 Tenn. Ch., 264; *Dismukes v. Dismukes*, 1 Tenn. Ch., 266. Marriage is not only a personal relation, but a public institution, on the purity and integrity of which the welfare of society depends; and for this reason, not only cannot marriages be dissolved by the consent of the parties, but it is the duty of the Court to see that a cause of divorce is duly alleged and fully proved, and that

§ 1100. **Kinds of Divorce Granted.**—If the cause of divorce be any of those specified in section 2448 of the Code, relief may be granted either by pronouncing the marriage null and void, from the beginning, or by dissolving it forever, and freeing each party from the obligation thereof, or by a separation for a limited time.<sup>8</sup> If the cause of divorce be any of those specified in section 2449 of the Code, the Court may grant relief according to the prayer of the bill by annulling the marriage, or by ordering a separation, perpetual or temporary, or such other decree as the nature and circumstances of the case may require.<sup>9</sup> It will thus be seen that, for any cause of divorce, the Court may separate the parties for months, or for years, or forever, as the pleadings and proof may warrant; or may declare the marriage null and void from the beginning,<sup>10</sup> when the nature of the case so requires; or may grant a divorce from bed and board, with a reservation of the power to grant an absolute divorce at a subsequent term.<sup>11</sup>

§ 1101. **Alimony on Final Decree.**—When a divorcee is granted a wife, it is usual to allow her alimony also, when prayed for. The amount of alimony should be in proportion, (1) to the husband's estate, after his debts are paid; (2) to the amount of the property he acquired through his wife; (3) to the number of children committed to the wife's custody, and (4) to the wife's station in society.<sup>12</sup> In general, not more than half of the husband's estate, after deducting his indebtedness, will be allowed as alimony; but each case must be governed by its own circumstances.<sup>13</sup> Where a divorce from bed and board is decreed, the Court should make a monthly or quarterly allowance to be paid the wife by the husband, and in such case, his subsequent earnings, including his official income, and even the proceeds of his personal labor, are all charge-

there has been no imposition upon the Court. The consent of the State must be obtained before a divorce can be obtained; and the Court having jurisdiction of the cause is given jurisdiction to consent for the State. The Court should, then, carefully scrutinize the evidence, listen to the suggestion of third parties, cross-examine the witnesses, require an explanation of suspicious circumstances, and even postpone the case, and endeavor to reconcile the parties, where it seems proper and desirable. 5 A. & E. Ency. of Law, 771-772; *Swan v. Harrison*, 2 Cold., 534; *Dismukes v. Dismukes*, 1 Tenn. Ch., 266. 8 Code, § 2465; *ante*, § 1089.

9 Code, § 2467; *ante*, § 1089. A decree of absolute divorce forever dissolves the bonds of matrimony, and totally destroys the *status* of the parties. After such a decree, the complainant and defendant become strangers in law, in rights, in relations and in duties, as though neither had ever been married to the other: they become single persons, and may contract with each other, sue each other, and may again marry each other; and may marry whomsoever and whosoever they please, except the person with whom the decree shows the adultery was committed, for which the divorce was granted. Code, § 2475. Where the husband obtains a divorce, his rights to the rents and profits of the wife's lands, and to her personality in possession, or in action, continue as though the divorce had not been granted; Code, § 2472; and the wife forfeits all rights of alimony, dower, and distribution out of her husband's estate. Code, § 2473. And if the divorce is granted for adultery on the part of the wife, and she afterwards openly cohabits with the adulterer, she is thereby incapacitated to convey, or devise, any of her lands. Code, § 2474.

If, however, a marriage is declared to have been *absolutely void*, (not voidable), from the beginning, it would seem, on principle, that neither party would have any property rights against the other growing out of the void marriage; and that all their rights of property would be exactly the same as though no marriage ceremony had ever been performed; and that the Court would have no right to decree alimony. For a void marriage is no marriage, and hence no legal rights or duties could result from such a marriage. The Court could declare the marriage absolutely void from the beginning; and could adjudge costs; but could go no further. 5 A. & E. Ency. of Law; *Allen v. McCullough*, 2 Heisk., 185.

A decree of temporary divorce, or divorce from bed and board, does not dissolve the marriage relation: and the parties continue husband and wife, and their rights and duties, as such, continue, except cohabitation and its incidents, and the wife's right of support. During such a divorce, the wife has no claim on her husband for maintenance, other than such as is set forth in the decree separating them. On the husband's death, in such a case, the wife has a right to dower, homestead, a year's support, the exempt property, and a distributive share of his personal estate; and on the wife's death, the husband has the same rights to her personality and realty as though no decree of temporary separation had ever been made. In short, on the death of either party to a decree of temporary separation, the rights of the other are the same as though no divorce from bed and board had ever existed. See *Chenault v. Chenault*, 5 Sneed, 248.

10 A marriage is void from the beginning, (1) when either party was already lawfully married; or (2) when either of the parties is white and the other a negro, or of negro descent; or (3) when the parties are within the prohibited degrees of kinship; or (4) when, for any other reason, the marriage was prohibited by law, and its continuance is in violation of law. A marriage is voidable from the beginning: (1) when either party was insane; or (2) the complainant was under duress; or (3) was under the age of consent; or (4) when the consent was obtained by force, or fraud, and was given by mistake; or (5) when the defendant was impotent; or (6) when the woman was pregnant by another man without the knowledge of the complainant; or (7) when, for any other reason, the marriage was not binding on the complainant.

Where a marriage is voidable for want of a binding consent, it will become valid if the parties live together as man and wife, voluntarily, after the party becomes capable of a binding consent. A voidable marriage can, ordinarily, be nullified only on the complaint of the party injured.

11 *McAlister v. McAlister*, 10 Heisk., 345.

12 Code, §§ 2468-2469; *Stillman v. Stillman*, 7 Bax., 183.

13 *Stillman v. Stillman*, 7 Bax., 183. Where the husband's estate is small, and the wife is burdened with the children, they being very young, she should be given his entire estate.

able with such allowance.<sup>14</sup> But where the divorce is absolute, the Court will not bind the husband's future earnings.<sup>15</sup>

As a rule, on a divorce from the bonds of matrimony being granted the wife, she will be decreed all the lands of which she is owner, and also all goods, chattels, or choses in action, in her possession and acquired by her own industry, or otherwise.<sup>16</sup> And by express statute, the title to the homestead must be vested in her for her life, and after her death it will pass to their children.<sup>17</sup> If the husband's property is in another State, the Court may give the wife a money decree for alimony, if subpœna has been served on him, or he has voluntarily appeared; the amount of such alimony, however, in case of absolute divorce, must be based on the amount of the defendant's present estate, and not upon his future earnings.<sup>18</sup> All right to alimony ceases upon the death of the husband.<sup>19</sup>

§ 1102. **Wife's Remedies to Secure Alimony.**—The wife's right to alimony is viewed by the law as a debt due her from her husband, contingent upon her obtaining a divorce; and she has every remedy to secure and enforce her right to alimony that any other creditor has. As a result, she may have a conveyance, made to defeat her right to alimony, set aside;<sup>20</sup> she may have an attachment against her husband's estate to secure her alimony; she may enjoin him from transferring or encumbering his estate; she may have a receiver appointed when necessary to enforce payment of her alimony.<sup>21</sup>

Where a divorce from bed and board is decreed, the Court may secure the alimony allowed by declaring it a lien upon all the defendant's real estate.

§ 1103. **Other Relief Granted.**—The custody of the children may, in the discretion of the Court, be awarded to either party; or some to one, and some to the other;<sup>22</sup> or the Court may decline to make any disposition of them. In disposing of the children, their welfare alone will be considered, and not the wishes of the child, or of either parent.<sup>23</sup>

The maiden surname of the wife will be restored to her, if she so pray in her bill, upon obtaining an absolute divorce.<sup>24</sup>

If the husband is interfering with her person, or her property, or the children in her custody, or invading her peace, or disturbing her retreat, or threatening and likely so to do, she may obtain an injunction against him, or upon her application in a proper case, the Court, or Chancellor at Chambers, will order his arrest and require of him sureties to keep the peace.<sup>25</sup>

<sup>14</sup> *Chenault v. Chenault*, 5 Sneed, 248.

<sup>15</sup> *Boggers v. Boggers*, 6 Bax., 300.

<sup>16</sup> Code, § 2471. See, also, M. & V.'s Code, §§ 3338-3353; (Old Code, §§ 2481-2488); *Aiken v. Suttle*, 4 Lea, 111.

<sup>17</sup> Code, § 2121 a.

<sup>18</sup> *Boggers v. Boggers*, 6 Bax., 299. 5 A. & E. Ency. of Law, 762. If the Court has jurisdiction of the defendant by service of subpœna, it may compel him, by process of contempt, to make the necessary conveyances to his wife. See, *ante*, §§ 651-652.

<sup>19</sup> *Swan v. Harrison*, 2 Cold., 534. But her right then begins to homestead, dower, a year's support, the exempt property, and her distributive share of the husband's personality. *Ibid.*

<sup>20</sup> *Brooks v. Caughan*, 3 Head, 465; *Nix v. Nix*, 10 Heisk., 546; *Roils v. Roils*, 1 Cold., 284.

<sup>21</sup> Code, § 2470. Where the husband is within the jurisdiction of the Court, and his property outside the State, and he is threatening to leave the State, the Chancellor might grant a *ne exeat*. *Denton v. Denton*, 1 Johns. Ch. (N. Y.), 364. See, Chapter on *Ne Exeats*, *ante*, §§ 864-865, note 10.

<sup>22</sup> The Court will not make any disposition of the children, unless they are too young to choose discreetly for themselves. Their custody is ordinarily awarded to the complainant, but this rule is often departed from, when the child is very young, the mother then being generally preferred. The decree of the Court disposing of the children is binding upon the parties, and cannot be collaterally impeached or inquired into, by them, but may be inquired into by the children, by next friend. If the Court make no disposition of the children, or if the children themselves, by next friend, object to such

disposition, the right to their custody may be adjudicated upon a *habeas corpus*; in such a case, the Court will consider the interests of the children, exclusively. The Court may prohibit the party entrusted with the children from removing them out of its jurisdiction. 5 A. & E. Ency. of Law, 835-837.

<sup>23</sup> *Lyle v. Lyle*, 2 Pick., 372. The mother may be appointed the guardian of her children, if she is granted a divorce. Code, § 2490. As to the disposition of the children, see *Payne v. Payne*, 4 Hum., 535; *Ward v. Raper*, 7 Hum., 111; *Robinson v. Robinson*, 7 Hum., 440. If the children are very young, and the mother is a proper person to have the custody of them, she should be preferred. *Lyle v. Lyle*, 2 Pick., 373. The parent not given the custody of a child should be given the right to visit it. *McAllister v. McAllister*, 10 Heisk., 345. Courts should not divorce parent and child, unless the welfare of the child imperatively requires it. The temporary grief attendant upon the parting of parent and child should not, however, be allowed to stand in the way of the permanent welfare of the child. 5 A. & E. Ency. of Law, 832-836. The head of the Chancellor must be kept above his heart, at all times.

<sup>24</sup> Code, §§ 3637-3639. The Chancery Court has the same jurisdiction in this matter as has the Circuit Court. Acts of 1877, ch. 97; *ante*, page 22. A divorced woman may resume her maiden name, if she so desire, without any decree to that effect. There should not be two women entitled to the name of the same husband. 5 A. & E. Ency. of Law, 842.

<sup>25</sup> *High on Injunc.*, §§ 1387-1398. *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; Code, § 4943.

§ 1104. **Frame of a Divorce Decree.**—A decree of divorce should show that the defendant answered, or that a *pro confesso* was duly entered against him for want of an answer, and that one or more of the statutory causes of divorce were charged in the bill and were established by the proof; and that, therefore, a divorce was granted the complainant. If alimony is allowed it should be specifically decreed, and the manner of possessing her of it should be adjudged. If the wife obtain a decree, her rights to her own property, real and personal, should be declared in order to prevent future litigation; and so, if the husband obtain a divorce, his rights to the rents and profits of his wife's lands should be declared, for the same reason. The custody of all the children under fourteen years of age should be determined; and the right of the parent, deprived of the children, to visit them, at certain times and places, should be provided for in the decree, if such right be granted.

If a divorce from bed and board, only, be decreed, full and particular provision should be made for the suitable support and maintenance of the complainant, and of the children committed to her custody, out of the husband's property. The payments should be made quarterly, or monthly, and be enforced by execution; or, in a proper case, a receiver of the husband's real and personal estate may be appointed, and the proceeds from time to time applied to the use of the complainant, and her children.<sup>26</sup>

In all divorce decrees, where there is any likelihood that further orders may be necessary to enforce the adjudications made, especially in reference to the payment of alimony, or to the custody of the children, or to the protection of the wife, the decree should, on its face, especially retain the cause in Court for such purposes, and either party given leave to apply. This reservation is almost always necessary, when only a temporary divorce is granted, or when maintenance alone is granted.<sup>27</sup>

The decree should always adjudge the costs. The Court may decree costs against either party, except a wife in whose favor a decree is made.<sup>28</sup> If any estate is in the power of the Court, or in the hands of a receiver, the costs may be ordered to be paid out of such property.<sup>29</sup> The following is a form of a

#### DECREE OF DIVORCE AND ALIMONY.

Jane Doe, }  
vs.  
John Doe. }

This cause came on to be heard this September 6, 1880, before Chancellor W. B. Staley, upon the bill of the complainant, Jane Doe, and the answer of the defendant, John Doe, [or, the *pro confesso* heretofore entered against the defendant,] and the depositions on file, and the oral testimony of witnesses examined in open Court.

##### I.

And it satisfactorily appeared to the Court from the proof that the facts charged in the bill are true; that the defendant had wilfully deserted the complainant, without a reasonable cause, for more than two whole years before the filing of the bill, as charged; and that he had, also, committed adultery with one Sallie Fox, after his marriage to the complainant, and gave the filing of the bill, as charged; and that the complainant is a chaste woman, and gave defendant no cause or just excuse for his said misconduct, and has not condoned the same.

##### II.

It is, therefore, ordered, adjudged and decreed by the Court, that the bonds of matrimony subsisting between the complainant and the defendant be absolutely and forever dissolved, and that complainant be vested with all the rights of an unmarried woman; and that her maiden name, Jane Jones, be restored to her.

##### III.

It is further ordered, adjudged and decreed, that the title to the homestead be divested out of the defendant, and vested in complainant during her life, and after her death it shall pass to, and be vested in, Mary Doe and Charles Doe, the children of complainant by defendant.<sup>30</sup> Said homestead is situated in the 2d civil district of Scott county, and is described

<sup>26</sup> Code. §§ 2468-2470.

<sup>27</sup> McAllister v. McAllister, 10 Heisk., 345.

<sup>28</sup> A wife is liable for costs when her bill is dismissed. Payne v. Payne, 12 Pick., 59; Brasfield v. Brasfield, 12 Pick., 580.

<sup>29</sup> Code, § 2477.

<sup>30</sup> Code, § 2121 A.

as follows: Beginning on a rock in William Jones' north line, thence [*describing it by metes and bounds,*] to the beginning, containing forty acres, more or less, and shown by the proof to be worth seven hundred dollars. Complainant is, also, given as alimony, all the household and kitchen furniture in the family residence on said homestead, and any two cows with their calves, and any one horse, she may select out of those belonging to the defendant. She is, also, given all the hogs, sheep and poultry on said homestead. The title to all of said personal property is divested out of defendant and vested in complainant.

IV.

The defendant will pay Daniel Jeffers, Esq., the Solicitor of complainant, fifty dollars, his fee in this cause, for services to this date, and will pay into Court, for the use of the complainant, the sum of five hundred dollars. He will, also, pay all the costs of the cause. Execution will issue to enforce the payment of said sums of money and said costs; and a writ of possession will issue to put complainant in possession of all the property, real and personal, decreed to her.

V.

The exclusive custody of Mary Doe and Charles Doe, the infant children of the parties, is committed to the complainant; but she is enjoined from removing them out of this county, without the consent of the Court. The defendant may visit his said children once every two weeks, at some place in their neighborhood, and on a day to be named by the Clerk and Master of this Court, on application of the defendant; but he is enjoined from tampering with them, or endeavoring to prejudice them against their mother during said visits.

VI.

This cause will be retained in Court for the enforcement of this decree, whenever necessary, and either party has leave to apply. The bill as to the defendant, William Brown, is dismissed, the conveyance to him being free from any fraud on his part.

§ 1105. **Rights of Creditors of the Husband.**—The rights of the husband's creditors are superior to those of the wife for alimony, except as to exempt property; and where it appears that the husband is indebted, it is proper to retain the cause in Court, and advertise for the creditors of the husband to present and prove their claims, before decreeing alimony to the wife.<sup>31</sup> If the husband has absconded, or is acting fraudulently, the Court may appoint a receiver to collect the debts due the husband, and may apply the proceeds to the payment of the creditors, and to alimony.<sup>32</sup>

<sup>31</sup> McGhee v. McGhee, 2 Sneed, 221; Brooks v. Caughan, 3 Head, 464; Greene v. Starnes, 1 Heisk.,

582; Wilhoit v. Castell, 3 Bax., 419; Allen v. McCullough, 2 Heisk., 174.

<sup>32</sup> Smith v. Johnson, 2 Heisk., 225.



CHAPTER LXII.

SUITS WHERE NO RECOVERY IS SOUGHT.

- ARTICLE I. Suits for an Interpleader.
- ARTICLE II. Suits for a Discovery.
- ARTICLE III. Suits to Perpetuate Testimony.
- ARTICLE IV. Suits to Take Testimony *De Bene Esse*.

ARTICLE I.

SUITS FOR AN INTERPLEADER.

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| <p>§ 1106. When a Bill of Interpleader Will Lie.</p> <p>§ 1107. What a Bill of Interpleader Should Show.</p> <p>§ 1108. The Character of the Conflicting Claims.</p> <p>§ 1109. Interpleader in Case of Tenants and Agents.</p> | <p>§ 1110. Essentials of a Bill of Interpleader.</p> <p>§ 1111. Frame of a Bill of Interpleader.</p> <p>§ 1112. Form of a Bill of Interpleader.</p> <p>§ 1113. Defences to a Bill of Interpleader.</p> <p>§ 1114. Proceedings Upon a Bill of Interpleader.</p> <p>§ 1115. Bills in the Nature of Bills of Interpleader.</p> |
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§ 1106. **When a Bill of Interpleader Will Lie.**—A bill of interpleader is ordinarily filed, when two or more persons claim the same debt, or duty, or other thing, from the complainant by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, and fearing that he may suffer injury from their conflicting claims, files a bill against them; and prays that they may be compelled to interplead, and state their several claims, so that the Court may adjudge to whom the same debt, duty, or other thing belongs.<sup>1</sup> The complainant is not required to wait for legal proceedings to be commenced against him: a mere liability to be called on, by different persons for the same demand, gives the right to file the bill; and it is no objection to such a bill, that the right of one of the parties is actionable at law and that of the other actionable in Equity, or that a suit is pending between the claimants.<sup>2</sup>

§ 1107. **What a Bill of Interpleader Should Show.**—In a bill of interpleader, it is necessary that the complainant should state his own rights, and thereby negative any interest in, or claim to, the thing in controversy; and he should, also, state the several claims of the opposing parties.<sup>3</sup> If the bill does not show that each of the defendants, whom it seeks to compel to interplead, claims a right, both of the defendants may demur; one, because the bill shows no claim of right in him; the other, because the bill, showing no claim of right in the co-defendant, shows no cause of interpleader. A mere pretext of a conflicting claim is not sufficient; the Court must see that there is a real question to be tried. An objection equally fatal will be, that the complainant shows no right to compel the defendants to interplead, whatever rights they may claim.<sup>4</sup> Nor can a bill be filed after a judgment of garnishment against complainant at law, his remedy at law being clear.<sup>5</sup> The bill should not be delayed until after a verdict or judgment has been obtained.<sup>6</sup>

The bill should show that there are proper persons *in esse*, capable of interpleading, and of setting up opposite claims; for, otherwise, the object of the bill would be unattainable. The bill would be equally defective, if it did not admit, and show, a claim by each of the defendants.<sup>7</sup> The allegations of a title or claim

<sup>1</sup> Sto. Eq. Pl., § 291.  
<sup>2</sup> 2 Dan. Ch. Pr., 1560.  
<sup>3</sup> *McEwen v. Troost*, 1 Sneed, 186; *State I. Co. v. Gennet*, 2 Tenn. Ch., 82; 2 Dan. Ch. Pr., 1561.

<sup>4</sup> Sto. Eq. Pl., § 292.  
<sup>5</sup> *Carroll v. Parkes*, 1 Bax., 269.  
<sup>6</sup> 2 Dan. Ch. Pr., 1561.  
<sup>7</sup> Sto. Eq. Pl., § 295.

by each of the defendants must be made with positiveness. If the bill fail to show, with certainty, that each defendant is claiming the property, or debt, it will be fatally defective;<sup>8</sup> but the complainant need not state the character or foundation of the hostile claims; indeed, he may aver that he is ignorant of the rights of the respective parties.<sup>9</sup> The complainant should, also, show in his bill, that he claims no interest himself; for it is, in truth, the very foundation of his bill, that he is a mere holder of the stake, which is equally contested by the defendants, and that he is wholly indifferent between them,<sup>10</sup> and not under any liability to any of the defendants.<sup>11</sup>

To justify a bill of interpleader, there should be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in privity of estate, make claim, and the person filing the bill should be a mere stakeholder, having no interest in the matter; so that when the Court decrees an interpleader the complainant can step out of the case altogether.<sup>12</sup>

**§ 1108. The Character of the Conflicting Claims.**—The claims, if known, may be specifically set forth, so that they may appear to be of the same nature and character, and the fit subject of a bill of interpleader; for bills of interpleader do not ordinarily lie, except in cases of privity of some sort between all the parties; such as privity of estate, or title, or contract, and where the claim by all is of the same nature and character. Where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is wholly unobtainable. Thus, if an estate is put up for sale at auction, and A becomes the purchaser, and pays his deposit; and then, by order of the same owner, it is set up again for sale, and B becomes the purchaser, and pays his deposit; such a case is not a proper case of interpleader, if each demands his deposit from the stakeholder; for A and B do not claim in privity, and their deposits are distinct;<sup>13</sup> but a bill in the nature of a bill of interpleader would probably lie in such a case.<sup>14</sup>

The complainant should admit that he has no title to the property or debt as against either of the defendants; but it is not incumbent on him, if indeed it is proper, to state the cases of the interpleading defendants: these should be stated by the defendants themselves in their answers, the complainant contenting himself by showing in his bill the fact that each defendant is setting up a claim, without giving the history, ground, or circumstances, of either claim, leaving these matters to be set up by the defendants themselves.

**§ 1109. Interpleader in Case of Tenants and Agents.**—The complainant should show a clear right in himself to maintain the bill; for, otherwise, the bill will be dismissed, however proper in other respects the case might be for an interpleader. Thus, for example, if the bill should show that the complainant is an agent of one of the parties only, and had received money by the authority of his principal, and for his use, he would be bound to pay over the money to his principal, notwithstanding any intervening claims of a third person; for, a mere agent to receive for the use of another, cannot be converted into an implied trustee by reason of an adverse claim, since his possession is the possession of his principal.<sup>15</sup>

A tenant, liable to pay rent, may file a bill of interpleader, where there are several persons claiming title to it in privity of contract, or of tenure, to compel them to ascertain to whom it is properly payable. But if a mere stranger should set up a claim to the rent by a title paramount, and not in privity of contract, or tenure; or, if he should set up a claim of a different nature, such as a claim

<sup>8</sup> State I. Co. v. Gennett, 2 Tenn. Ch., 82.

<sup>9</sup> 2 Dan. Ch. Pr., 1561.

<sup>10</sup> Sto. Eq. Pl., § 297; Hely v. Lee, 24 Pick., 715. If, however, when the complainant claims some interest in the subject-matter, no demurrer is interposed on that account, the objection will be considered waived. Read v. Street Ry. Co., 2 Cates, 316.

<sup>11</sup> 2 Dan. Ch. Pr., 1560.

<sup>12</sup> 2 Dan. Ch. Pr., 1560. The notes in Daniel give many illustrations of cases where a bill of interpleader will, and will not, lie.

<sup>13</sup> Sto. Eq. Pl., § 293; 2 Dan. Ch. Pr., 1564.

<sup>14</sup> Post, § 1109; and see 2 Dan. Ch. Pr., 1565, note 4.

<sup>15</sup> Sto. Eq. Pl., § 296.

to the mesne profits, in virtue of his title paramount; in either case, no bill of interpleader would lie in behalf of the tenant; for the debt or duty is not the same in nature or character.<sup>16</sup> The stranger cannot demand rent as such; but if he succeeds in an ejectionment, he has only a right to damages for use and occupation, whereas the landlord claims the rent as such, in privity of contract, tenure, and title. Besides, the tenant is under contract to pay the rent to his landlord, and is not allowed to dispute his title either to the land, or to the rent.<sup>17</sup>

Property put into the hands of a private agent by his principal, is not the subject of an interpleader, on the assertion of a claim to it by a third person under an independent adverse title; but the agent must deliver it to the principal; for the possession of the agent is the possession of the principal. And the like doctrine would prevail in favor of a third person to whom the principal, after the bailment, had transferred the right to the property, where the transfer had been recognized and assented to by the agent. But if the principal has created an interest in, or a lien on, the funds in the hands of the agent, in favor of a third person, and the nature and extent of that interest or lien is controverted between the principal and such third person, there an interpleader will lie.<sup>18</sup>

**§ 1110. Essentials of a Bill of Interpleader.**—The essentials of a bill of interpleader are, in brief, as follows:

1. Two or more persons must be claiming, adversely to each other, from the same person the same thing, debt, or duty.

2. This thing, debt, or duty, must be specific and definite, and the holder thereof must have no title, claim, or interest, in or to it.

3. The holder must be so situated that, if he comply with the demands of either claimant, he is in danger of being held liable therefor by the other.

4. The holder must not be under any special liability to either claimant with reference to the thing in dispute, but must be absolutely indifferent between them.

5. And there must be annexed to the bill an affidavit of non-collusion, unless the bill avers non-collusion and is sworn to.

**§ 1111. Frame of a Bill of Interpleader.**—There is no set form for this bill. The draftsman usually begins by describing the debt, duty, or other thing, for which the defendants are rival claimants. The fact that each of the defendants is setting up an exclusive claim to this debt, duty, or other thing, will then be clearly stated, and if either or both of the defendants have made any demand, served any notice, made any threats of suit, or brought any suit, these facts will be specifically and fully set forth. The complainant will then show the danger he is in of being held twice liable in the event he complies with the demands of either defendant; and will aver that he does not claim the debt, duty, or other thing, and is willing to pay the debt or duty, or deliver the property, to whichever of the defendants is lawfully thereunto entitled. The bill should offer to pay the money or property into Court, to the end that it may be adjudged to that defendant entitled to it.

As every such bill is founded upon the admitted want of interest in the complainant, and is, at the same time, susceptible of being used collusively to give an undue advantage to one of the contending parties, two things are required as precautions to prevent any abuse of the proceeding. In the first place, the plaintiff must annex an affidavit, that there is no collusion between him and any of the parties; in the next place, if there is any money due, he must bring it into Court, or at least offer to do so by his bill. If he does not do so, it is in strictness a good ground of demurrer.<sup>19</sup> The defendants by answering the bill

<sup>16</sup> Sto. Eq. Pl., § 294.  
<sup>17</sup> 2 Dan. Ch. Pr., 1565; Smith's Eq. Jur., 402.

<sup>18</sup> Smith's Eq. Jur., 402-404.  
<sup>19</sup> Sto. Eq. Pl., § 291.

may waive their right to object because of the want of the proper affidavit, or because the money is not paid into the Court.<sup>20</sup>

If the bill is filed by an officer of a company on behalf of the company, he must not only swear that he does not collude, but, also, that to the best of his knowledge and belief, the company does not collude, with either of the defendants.<sup>21</sup>

The bill prays that the defendants may set forth their several titles, and may interplead, and adjust and settle their claims between themselves. The bill, also, generally prays for an injunction to restrain the claimants, or either of them, from proceeding at law; and, whenever this is done, the bill should offer to bring the money into Court; and it must be brought into Court before the Court will ordinarily act upon this part of the prayer.<sup>22</sup>

§ 1112. **Form of a Bill of Interpleader.**—The following general form will illustrate what has already been said in reference to the bill:

**GENERAL FORM OF AN INTERPLEADER BILL.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

[Here show that the complainant owes a debt or duty, or has in his possession a particular sum of money, or piece of property, describing the debt, duty, sum of money, or piece of property.]

II.

[Here show that each of the defendants claims said debt, duty, sum of money, or piece of property, and is demanding the same, or suing therefor, or threatening to sue. If any demand in writing has been made, or notice served, so state with particularity.]

III.

[Here show that the complainant admits that he, himself, does not deny that he owes said debt, or that he does not own said money or property; but that, on the other hand, he admits that it belongs to one of the defendants, but which one he does not with certainty know, and cannot afford to run the risks of a decision.]

IV.

And complainant further shows that he does not in any respect collude with either the said Richard Roe, or said Peter Poe, touching the matters in question; that he has not exhibited this bill at the request of either of them, and that he has not been indemnified by said defendants, or any or either of them, but merely of his own free will, and to avoid being molested and injured, touching the matter contained in said bill.

V.

The premises considered, complainant comes into your Honor's Court for relief, and prays:

1st. That process issue to compel the said defendants to appear and answer this bill; but their answer on oath is waived.

2d. That said defendants be required to interplead and settle their rights to [said debt, duty, sum of money, or property;] and that complainant may be at liberty to pay the same into Court; which he hereby offers to do for the benefit of the defendant thereunto entitled.

3d. That the said Richard Roe be enjoined from further proceeding in said suit at law; and that said Peter Poe be, also, enjoined from commencing any suit against complainant, touching the premises, or in any other way, than in this suit, demanding said [money, or property.]

4th. That complainant upon payment of said [debt, duty, sum of money, or property,] into Court, and upon the said defendants being required to interplead, according to the course of this Court, may be decreed to be discharged from all liability to said defendants in the premises, and may have all his costs herein, and that said injunctions may be made perpetual.

5th. And that such further and other relief may be granted to complainant as the nature of his case may require, and as may be according to good conscience.

And complainant further states that this is the first application for an injunction in this case.

State of Tennessee, }  
Roane County. }

T. A. WRIGHT, Solicitor.

John Doe makes oath that the statements in his foregoing bill, made as of his own knowledge, are true, and those made as on information and belief, he believes to be true.

[Annex jurat: see, ante, § 789.]

JOHN DOE.

20 Daniel v. Fain, 5 Lea, 258.  
21 Sto. Eq. Pl., § 297; 2 Dan. Ch. Pr., 1562.

22 Sto. Eq. Pl., § 297.

As a further guide to Solicitors in drawing bills of interpleader, the following special form is given :

**BILL OF INTERPLEADER.**

[For address and caption, see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That on November 18, 1905, he purchased from the defendant, Richard Roe, two hundred and fifty tons of coal for one thousand dollars, five hundred dollars of which have been paid, and the remainder has not been paid, but is due and owing.

II.

That at the time of said purchase and payment complainant supposed the defendant, Richard Roe, was the true and sole owner of said coal, and fully entitled to sell, and receive payment for the same. But so it is, on December 1, 1905, an attachment by garnishment was served on complainant in a suit for six hundred dollars before James M. King, Esq., a Justice of the Peace of Knox county, by the defendant Henry Jones, against the defendant William Smith, said Jones claiming that said coal bought by complainant as aforesaid was really the property of said William Smith, and that the defendant Roe was either his agent or his fraudulent vendee.

III.

That on December 2, 1905, a bill in the Chancery Court at Knoxville was filed by the defendant, George Smithson, against complainant, and the defendant Richard Roe, claiming a debt of eight hundred dollars as due from said Roe, and attaching said unpaid five hundred dollars, as the property of defendant Richard Roe; and on the same day the defendant Richard Roe sued complainant for said five hundred dollars before William Knabe, Esq., a Justice of the Peace of Knox county.

IV.

Complainant has always been willing to pay the balance due on said coal to such person as shall be lawfully entitled thereunto, but the multiplicity of claimants thereto, and their conflicting interests, so perplex complainant that he does not know to whom to make such payment, and is afraid that he may suffer loss by the complications of the case.

V.

Complainant therefore comes unto your Honor's Court for relief in the premises, and prays:

1st. That the defendants be all required, by subpoena, to answer this bill, and interplead and settle their respective rights and claims, among themselves, to said sum of five hundred dollars due from him as aforesaid, and that he be allowed to pay the same into Court for the benefit of whomsoever of the defendants your Honor may decree to be entitled thereunto.

2d. That each and all of the defendants, their agents and attorneys, be enjoined from proceeding any further against complainant in the said several suits already instituted as aforesaid, and from instituting any other or further proceedings, at law or in equity, against complainant in reference to said sum of five hundred dollars, or any part thereof.

3d. That complainant have such other and further relief as he may be entitled to.

This is the first application for an injunction in this case.

T. A. R. NELSON, Solicitor.

State of Tennessee, }  
County of Knox. }

John Doe, the above complainant makes oath that the statements in the foregoing bill made as of his own knowledge are true, and those made as on information and belief he believes to be true; and that he does not collude with any of the defendants touching the matters in question, nor is he in any manner indemnified by any of the defendants, nor does he file this bill at the request of either of them, but entirely of his own free will, and to avoid being sued, molested, or injured, touching the matters contained in his said bill.

[Annex jurat: see, ante, § 789.]

JOHN DOE.

So much of the above affidavit as does not verify the bill may be included in the body of the bill, as has been done in the preceding general form; and this is, perhaps, the better practice; but the old precedents include it in an affidavit to the bill. The absence of an averment of non-collusion in the affidavit, or in the body of the bill, is a ground of demurrer. This affidavit as to non-collusion is an antiquated relic of the days when Chancery was loth to interfere with matters that might be litigated at law.

§ 1113. **Defences to a Bill of Interpleader.**—The same defences can be made to a bill of interpleader that will lie to any bill seeking a recovery: the defendants, or either of them, can plead in abatement, demur, or answer; and in their answer can deny or confess and avoid. The most usual defence is by demurrer.

**DEMURRER TO A BILL OF INTERPLEADER.**

[For title, commencement and conclusion, see, ante, § 310.]

1. Because the bill is filed for an interpleader and yet the complainant has not annexed to his bill an affidavit, nor inserted therein an averment, that he does not collude with any of the defendants touching the matters in question in the bill.
2. Because the bill is filed as an interpleader bill and yet does not contain the affidavit specially required to such a bill as to non-collusion and non-indemnity, nor does the body of the bill contain such averments.
3. Because the bill is filed as an interpleader bill and yet the complainant claims an interest in the subject-matter.
4. Because the bill is filed as an interpleader bill and yet the complainant disputes the amount due the defendants.

§ 1114. **Proceedings Upon a Bill of Interpleader.**—In an interpleader bill, if the defendants do not deny the statements of the bill, the ordinary decree is, that the defendants do interplead; and the complainant then withdraws from the suit.<sup>23</sup> But the defendants, or either of them, are at liberty to contest and deny the allegations in the bill, or to set up distinct and independent facts in bar of the suit; and, in such a case, the complainant must contest the answer, and take proof in the usual manner, before he can bring the cause to a hearing between himself and the defendants; and at the hearing only, in such a case, can he insist upon a decree, that the defendants do interplead.<sup>24</sup>

If the bill shows that either of the defendants is setting up no claim; or if it shows that the complainant is the agent, or trustee, or tenant, of either of the defendants; or, if it fails to show that it is not filed in collusion with either of the defendants; in any of such cases, either one of the defendants may demur. Or the bill may be dismissed on motion, on any of the grounds heretofore specified, on which such a motion may be based.<sup>25</sup>

If the bill is sustained by the Court, an order will be made to that effect, substantially as follows:

**DECREE FOR AN INTERPLEADER.**

John Doe,  
vs.  
Richard Roe and Peter Poe. }

This cause coming on this day to be heard upon the bill of interpleader and the demurrer thereto, [or, the motion to dismiss,] on consideration thereof the Court is of opinion that the bill is well filed, and that the demurrer is not well taken.

It is, therefore, ordered and adjudged that the demurrer be overruled and disallowed; and the defendants not desiring to further contest the bill, it is adjudged<sup>25a</sup> that said bill of interpleader is properly filed, and is sustained; and that the defendants do interplead and settle the matters in controversy in this suit between themselves.

The complainant is dismissed with his costs to this time accrued; said costs to be paid out of the fund by the complainant heretofore paid into Court. All other matters are reserved.

§ 1115. **Bills in the Nature of a Bill of Interpleader.**—Although a bill of interpleader, strictly so called, lies only where the complainant claims no interest in the subject-matter, yet there are many cases where a bill, in the nature of a bill of interpleader, will lie by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a complainant is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants, in the nature of a bill of interpleader, for relief. So, it seems, a purchaser may file a bill in the nature of a bill of interpleader against the vendor, or his assignee, and any creditor who seeks to avoid the title of the assignee, and pray the direction of the Court as to whom the purchase-money shall be paid. So, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons, as to their title to the mortgage-money, he may bring them before the Court, to ascertain their rights, and to have a decree for a redemption, so that he may

<sup>23</sup> State I. Co. v. Gennett, 2 Tenn. Ch., 100.

<sup>24</sup> Sto. Eq. Pl., § 297 a.

<sup>25</sup> See, ante, §§ 266-274; 523-525.

<sup>25a</sup> If the demurrant desires to contest the bill he will be ordered to answer it, on his demurrer being overruled, as in case of other bills.

make a secure payment to the party entitled to the money. In these cases, the complainant seeks relief for himself; whereas, in an interpleading bill, strictly so called, the complainant only asks that he may be at liberty to pay the money, or deliver the property, to the party to whom it of right belongs, and may thereafter be protected against the claims of both. In the latter case, the only decree to which the plaintiff is entitled, is a decree that the bill is properly filed; or, in other words, that he shall be at liberty to pay the money, or bring the property into Court, and have his costs, and that the defendants interplead, and settle the conflicting claims between themselves. So, a bill, in the nature of an interpleading bill, will lie by a bank which has offered a reward for the recovery of money stolen, and a proportionate reward for a part recovered, where there are several claimants of the reward, or a proportion thereof, one or more of whom have sued the bank. And, in such a bill, all the claimants may be made parties, in order to have their respective claims adjusted.<sup>26</sup>

## ARTICLE II.

### SUITS FOR A DISCOVERY.

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| <p>§ 1116. The Origin and History of Bills of Discovery.</p> <p>§ 1117. The Object of a Bill of Discovery.</p> <p>§ 1118. The Nature of the Discovery Required of the Defendant.</p> <p>§ 1119. The Discovery and Production of Documents.</p> <p>§ 1120. The Frame of a Bill of Discovery.</p> | <p>§ 1121. The Form of a Bill for Discovery and Relief.</p> <p>§ 1122. The Statutory Petition for a Discovery.</p> <p>§ 1123. Defences to Bills of Discovery.</p> <p>§ 1124. Proceedings Upon a Bill of Discovery.</p> |
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§ 1116. **The Origin and History of Bills of Discovery.**—Bills of discovery were invented by the Chancellors of England to prevent a failure of justice, at that period in English jurisprudence when, in a Court of law, neither party to a suit could be a witness. It often happens that the essential facts of a controversy are known only to the immediate parties thereto, and if the Court will not allow the injured party to be a witness, and the wrong-doer cannot be compelled to testify, much injustice will inevitably result. The Courts of law not only rigidly closed the mouths of both parties to a civil suit, but looked with horror upon every attempt to make them witnesses. The result was that crafty men availed themselves of this state of the law to obtain unconscientious advantages of unsuspecting men, and to obtain possession of deeds, mortgages, receipts, notes, contracts, and other valuable writings belonging to others, under circumstances incapable of being proved by third persons. And suits were often brought in the Courts of law to enforce these unconscientious advantages, and to obtain the benefits resulting from the possession of the deeds, or other writings, thus unconscientiously obtained, or withheld.<sup>1</sup>

To remedy these great wrongs, and prevent the Courts of law becoming the instruments of injustice, the Court of Chancery allowed the injured party to file a bill against the wrong-doer, stating therein the rights of the complainant, and the facts constituting the injury complained of, and calling on the defendant thereto to answer fully, on his oath, a series of searching interrogatories intended to draw forth the full history of the transaction complained of, and to bring to light the papers and other evidence sought for. These papers the Chancellor required the defendant to produce, if he admitted that they were in his possession, or under his control; and these interrogatories

<sup>26</sup> Sto. Eq. Pl., § 297 b; 2 Dan. Ch. Pr., 1571.  
<sup>1</sup> Before the adoption of the system of registration, the possession of title papers, mortgages and wills

often became necessary in order to show a party's rights or title, and many such papers were wrongfully withheld from their true owners.

the defendant was required to answer with great minuteness and particularity; and this answer, and the writings, thus obtained, the complainant filed as evidence in his behalf in the Court of law where the suit was pending, whether such suit was by the complainant for the redress of said wrongs, or was brought against the complainant to obtain the benefit of the wrong.<sup>2</sup>

This circuitous procedure was formerly the only way in which the evidence of the opposite party could be obtained in a suit at law. Now, however, that parties are witnesses in our Courts of law, bills of discovery, technically so called, are no longer necessary, and are seldom filed. Indeed, before the passage of the Act allowing parties to testify, there had long been a statute, allowing either party to a suit at law to obtain a discovery from the other party, by a petition and interrogatories filed in the suit at law.<sup>3</sup> This statute is a short, cheap, and effective substitute for a bill of discovery.<sup>4</sup>

Bills for discovery *and relief*<sup>5</sup> are, however, daily filed in our Courts; and the rules and practice in reference to a discovery continue to be of great practical importance, and will, therefore, be fully considered in the following sections of this Chapter.<sup>6</sup>

**§ 1117. The Object of a Bill of Discovery.**—It sometimes happens that in a suit at law, a plaintiff or defendant may be unable to successfully maintain or defend the suit, without obtaining the evidence of the other party, or the use of deeds, writings, or other documents, in his possession, or under his control. In such a case, a Court of Equity will, on a bill filed for that purpose alone, aid him in obtaining such evidence, or documents.

Every bill for relief is, in part, a bill of discovery when it asks from the defendant, an answer upon oath as to the matter charged in the bill, and seeks from him a discovery of all such matters. But a bill of discovery, emphatically so called, of which we are now treating, is a bill (1) for the discovery of facts, resting in the knowledge of the defendant; or (2) the discovery of deeds, or writings, or other things, in his custody or power; and (3) in either case seeking no relief in consequence of the discovery, although it may pray for the stay of the proceedings at law, until the discovery is made. The bill is commonly used in aid of the jurisdiction of some Court of law, to enable the party who prosecutes, or defends an action at law, to obtain a discovery of the facts which are material to the prosecution or defence thereof.<sup>7</sup> When a discovery is sought from a corporation, it is allowable to make a principal officer or agent of the corporation a party to the bill in so far as it seeks a discovery,<sup>8</sup> even when no relief is sought against such officer, or agent, but a discovery, only.<sup>9</sup>

**§ 1118. The Nature of the Discovery Required of the Defendant.**—If the discovery sought is one that the Court will enforce, the following general rules determine the manner and extent of this discovery:

1. Assuming that the matters called for are proper subjects of a discovery; that they belong to the complainant's case, and not to the defendant's; that they are not privileged, or are not exempt within the operation of any other doctrine then the defendant must disclose all material facts; in other words, if he answers at all, he must answer fully. The Court will, however, in the exercise of its discretion, judge of the materiality of the discovery sought, and guard him against oppressive, vexatious, or impertinent inquiries.

2. The answers of the defendant must be complete, so that the information which they give will be of substantial use to the complainant, and must be to

<sup>2</sup> See, generally, 1 Pom. Eq. Jur., §§ 191-230.

<sup>3</sup> Code, §§ 3891-3900; *post*, § 1122.

<sup>4</sup> This statutory right to a discovery at law renders a bill of discovery unnecessary when complainant has an adequate remedy at law. *Ducktown Co. v. Fain*, 1 Cates, 56.

<sup>5</sup> Where the defendant's oath is waived to his answer, the bill is for relief only; where his oath is required to his answer, the bill is for both relief and discovery.

<sup>6</sup> For illustrations of pure bills of discovery, see *Hinkle v. Curran*, 1 Hum., 74; and *Elliston v. Hughes*, 1 Head, 225.

<sup>7</sup> Sto. Eq. Pl., § 311.

<sup>8</sup> 1 Pom. Eq. Jur., § 199; *Lindsay v. James*, 3 Cold., 485.

<sup>9</sup> In such a case a corporation cannot be coerced into making a discovery, but its officers or agents may be, and they are made parties as witnesses only. Sto. Eq. Pl., § 235.



the best of the defendant's knowledge, remembrance, information, and belief.<sup>10</sup> A defendant is bound to obtain information from all means reasonably within his power. If documents are ordered to be produced, it is no excuse for non-production that they are in possession of a third person, or even that a third person has a lien upon or an interest in them. But if documents belong wholly, or in part, to a third person, not a party to the suit, their production will not be compelled.

3. The answers must be distinct, positive in their statements, not leaving facts to be inferred argumentatively, and specific replies must be given to specific questions; but they must not be unnecessarily minute and prolix, especially in setting forth accounts.<sup>11</sup>

§ 1119. **The Discovery and Production of Documents.**—Bills of discovery, and bills for both discovery and relief, are often filed to compel the discovery and production of documents in, or supposed to be in, the defendant's possession or power. The following rules and general principles will be found of value in determining when and what documents the defendant is bound to discover and produce.

The production of documents rests wholly on the defendant's own admissions, contained either in his answer to the bill, or in his answers to interrogatories. If his answers are evasive or insufficient, he may be called upon to make them more specific, and to admit or deny; but when he has once directly denied the possession of documents, or their materiality to the complainant's case, the Court will not compel their production. The admission authorizing an order to produce must cover two facts: (1) the possession of the documents, and (2) their materiality. Manual possession is not essential. It is enough if the documents are either in the actual possession of the defendant, or are under his control; that is, are in the custody of an attorney, agent, or other third person, whose custody of them the defendant can, by the exercise of his lawful powers, control, or from whom he can, by the exercise of such powers, obtain the possession himself. The rule is the same even when the third party has some lien on the papers. But if the documents belong wholly, or in part, to a third person not a party to the suit, or if they are in the joint possession of the defendant and of some third person not a party to the suit, by virtue of the latter's separate interest or right in them, their production will not be compelled without the consent of such third person.<sup>12</sup>

It should be carefully borne in mind that the doctrine concerning the production and inspection of documents relates entirely to their disclosure for the purpose of being used as evidence, or to aid in the trial of a pending or contemplated litigation, and has no connection whatever with the ownership of, or final right of possession to, the documents in question. In most instances, the ownership of the documents sought to be produced will not be at all in issue. But even in an action expressly brought to establish the complainant's title to documents, and to recover their possession, the production of them before the hearing must be governed by settled rules as to discovery. The complainant has otherwise no right to possess or to see them until a decree is rendered in his favor; for such right is the very matter in issue, and to decide that it existed would be to decide the whole merits of the controversy upon a preliminary application. It is well settled, therefore, that the matter of the production and inspection of documents depends upon the same principles and doctrines which govern discovery in general.<sup>13</sup>

§ 1120. **The Frame of a Bill of Discovery.**—A bill of discovery in aid of a suit at law, or in aid of a defence to a suit at law, should (1) set out in full the facts of the controversy; (2) should show why and wherein the discovery is necessary, detailing the facts; and, if a suit at law has been begun, (3) should

<sup>10</sup> Sto. Eq. Pl., § 854.  
<sup>11</sup> Pom. Eq. Jur., § 204.

<sup>12</sup> Pom. Eq. Jur., § 206.  
<sup>13</sup> Pom. Eq. Jur., § 205.

recite the institution of the suit, and the parties thereto, and so show the issues involved that the Court of Chancery can see the materiality of the discovery sought.<sup>14</sup> The bill must state that a suit at law has been brought, or is intended to be brought, and that the discovery is to aid complainant in such suit; and, if such suit is not yet brought, the nature of the controversy, and with whom, must be set forth with reasonable certainty.<sup>15</sup>

In regard to the frame of a bill of discovery, it may be generally stated that it must clearly show that it is brought by persons, and for objects, and under circumstances, entitling it to be maintained by the Court. One of the fundamental rules of this branch of Equity jurisprudence is, that the complainant is entitled only to a discovery of what is necessary to maintain his own title; as, for example, a discovery of deeds under which he claims. But he is not entitled to have a discovery of the title of the other party, from whom he seeks the discovery.<sup>16</sup> Hence, as a general rule, the bill must show such a case, as renders the discovery material to the complainant in the bill, to support or defend a suit.<sup>17</sup> The bill should, also, show that the complainant has a title and interest, and what that title and interest are, in the subject-matter, respecting which the discovery is sought; for a mere stranger cannot maintain a bill for the discovery of another's title. So the title and interest must be shown to be present and vested.

The bill must not only show an interest in the complainant in the subject-matter, to which the required discovery relates, and such an interest as entitles him to call on the defendant for the discovery; but it must, also, state a case which will constitute a just ground for a suit, or a defence, at law. The object of the Court in compelling a discovery, is to enable some other Court to decide on matters in dispute between the parties, the discovery of which is material. If the bill does not show such a case as renders the discovery material to support or defend a suit, it is plainly not a case for the interposition of the Court. A bill must, also, set forth with reasonable certainty the title of the complainant; and, if it seeks the discovery of deeds and accounts it must, also, describe them with reasonable certainty.<sup>18</sup>

A bill of discovery cannot waive the oath of the defendant to his answer; and should the oath be waived, and the defendant submit to answer, no exception can be taken to the answer for insufficiency.<sup>19</sup>

A bill for discovery alone, prays for no relief<sup>20</sup> outside of the discovery sought, unless an injunction is necessary to stay the suit at law until a discovery is had, in which case the injunction may be prayed for.<sup>21</sup>

When the bill seeks to remove the final determination of a cause from a Court of law to the Chancery Court, on the ground of the necessity of a discovery from the defendant, it must aver that the facts cannot be proved by other evidence than that of the defendant:<sup>22</sup> such a bill, however, is not a bill for discovery, in the technical sense of this Article: it is a bill for discovery *and relief*. A bill for discovery alone, in aid of a suit at law, need not so aver, for such a bill can be maintained in aid of other proof, or because of the uncertainty of other proof, or even to save the expense of other proof.<sup>23</sup>

**§ 1121. Form of a Bill for Discovery, and Relief.**—A pure bill of discovery prays for *no relief*, unless an injunction is prayed for to stay the suit at law until the discovery can be obtained. Every bill that prays for relief, and that

<sup>14</sup> Sto. Eq. Pl., § 321.

<sup>15</sup> Pom. Eq. Jur., § 201.

<sup>17</sup> Sto. Eq. Pl., §§ 317-318; 2 Sto. Eq. Jur., § 1490.

<sup>18</sup> Sto. Eq. Pl., §§ 319-320; 2 Sto. Eq. Jur., § 1493 a.

<sup>19</sup> Sheppard v. Akers, 1 Tenn. Ch., 326; Payne v. Berry, 3 Tenn. Ch., 154.

<sup>20</sup> But it would seem, that, under our liberal practice, a prayer for general relief, would, in a bill for discovery, be construed to mean all the relief necessary in obtaining the discovery. Elliston v. Hughes, 1 Head, 227.

<sup>14</sup> The bill need not recite the pleadings in the suit at law. Hinkle v. Currin, 1 Hum., 74.

<sup>21</sup> 2 Dan. Ch. Pr., 1556-1557; Sto. Eq. Pl., § 315.

<sup>22</sup> Lindsley v. James, 3 Cold., 477; Mann v. Bamberger, 4 Heisk., 486.

<sup>23</sup> 1 Sto. Eq. Jur., § 74 c; Elliston v. Hughes, 1 Head, 225; 1 Pom. Eq. Jur., §§ 197; 229, notes; Sto. Eq. Pl., § 322, note 2; Dan. Ch. Pr., 570; 1557, notes. Judge Coover, in his note to the syllabus of Whitesides v. Lafferty, 9 Hum., 27, points out the distinction. See, also, 1 Sto. Eq. Jur., § 64 k-74 c; Gleaves v. Morrow, 2 Tenn. Ch., 597.

calls for an answer on oath, is, also, a bill of discovery in so far as it requires the defendant to discover facts, or produce documents.<sup>24</sup> A bill for discovery *and relief* differs in no respect in form from a bill praying relief without discovery, except in that it particularizes the facts and documents charged to be in the defendant's possession, and calls on him specifically to make the facts known; and to produce the documents. The following form will illustrate the

#### ORDINARY PRAYERS FOR A DISCOVERY.

1st. That the defendant be made a party hereto by the issuance and service of a subpoena, requiring him to answer this bill, and upon his corporal oath to make a full and true disclosure and discovery of each and all of the several matters aforesaid, according to the best of his knowledge, remembrance, information, and belief; and especially

(1) That he set forth and discover: whether said testator, Robert Roe, ever made or attempted to make any last will and testament, or any paper of like form or character; and if so, that he produce the same, or else state its entire contents and explain fully what became of it, and where it now is;

(2) That he, the said defendant, set forth a list, or schedule, and description of every deed, book, account, letter, paper, note, memorandum, or other writing, relating to the matters aforesaid, or to any of them, now in his possession or power, or ever in his possession or power, or known to him; and if not now in his possession or power, let him state and fully discover where and in whose possession or power said writings or papers, or any and which of them are, or have been; and the full description and character of said writings or papers;

(3) That the defendant set forth in his answer a full, true, and particular account of all rents, profits, and fruits of said tract of land, [*or*, of all moneys, notes, choses in action, evidences of debt, goods, wares, merchandise and other things of value belonging to the complainant, or belonging to said firm,] received or collected by him, or by any person acting for him, specifying each item and date thereof;

(4) That the defendant set forth and disclose fully the exact amount of money [*or*, other property,] by him received from said Robert Roe, deceased, and in what said money was invested, and how much he now has in his possession, and what became of that not invested and not now in his possession;

(5) That the defendant file with his answer the receipt executed by him to said Robert Roe referred to in the bill, and, if it is not in his possession or control, that he disclose and make known what became of said receipt, and where it now is; and he will answer whether he ever saw, or ever executed, such receipt, or any similar writing, and if a similar writing, he will file the same, if in existence, or give a perfect copy thereof if it be destroyed, lost, misplaced, or otherwise out of his reach; and, if he give a copy, he will explain why he cannot, or does not, file the original.

And the defendant will full, true, direct, and perfect answers make, according to the best of his knowledge, remembrance, information, and belief, to all and singular the matters, charges, and interrogatories aforesaid.

2d. [*Then will follow the usual prayers for extraordinary process, if any, and for special and general relief, also, if the bill seeks both discovery and relief.*]

On a bill for discovery and relief being sustained, and answered, the complainant, if his bill so prays, may have relief not only as to the equitable matters involved, but, also, as to any legal matter; for, when the Chancery Court has jurisdiction for one purpose, such as a discovery, or an injunction, it will take jurisdiction for all purposes, and will award damages where recoverable at law.<sup>25</sup>

The following is a form of a pure bill of discovery:

#### BILL OF DISCOVERY.

[*For address and caption, see, ante, §§ 155; 164.*]

Complainant respectfully shows to the Court:

#### I.

That a suit is now pending against him by the defendant in the common law Court at Bath,<sup>26</sup> in the State of Maine: in this suit defendant claims that complainant owes him three

<sup>24</sup> 2 Barb. Ch. Pr., 101.  
<sup>25</sup> 1 Pom. Eq. Jur., §§ 224-229; 1 Sto. Eq. Jur., § 64 *b*; Pearl v. Nashville, 10 Yerg., 179, 185. See, also, *ante*, §§ 36; 38.

<sup>26</sup> This bill is based on the supposition that the old common law practice prevails in the Court at Bath, and that parties cannot be witnesses, and that a bill of discovery in Chancery is the only method whereby a defendant at law can obtain the testimony of the plaintiff. Both parties reside in Memphis, Tennessee. The plaintiff sues in Bath in order to

attach complainant's town lots there. As the Tennessee Chancery Court has jurisdiction of the person of the defendant this Court could have been called on to enjoin and prohibit the defendant from further prosecuting his lawsuit in Bath, and this, perhaps, would have been the wiser course, but he was not so advised! A bill of discovery will lie in our Chancery Courts in aid of a suit, or a defense to a suit, in another State, or in a foreign country. 2 Barb. Ch. Pr., 102.

thousand dollars for lumber purchased from him by complainant in said State, and defendant has obtained an attachment on Complainant's town lots in said city of Bath.

## II.

That on or about the 24th day of December, 1905, complainant and defendant, who both reside in the city of Memphis, Tennessee, met at the Gayosa House in Memphis, and amicably, and as complainant thought, satisfactorily, adjusted all their accounts against each other, including said claim of three thousand dollars for lumber, and they exchanged receipts in full of all demands, but by some accident, due perhaps to the festivities of the Christmas season, complainant mislaid said receipt, and after diligent search has been unable to find it.

## III.

That complainant charges that the defendant took the receipt he gave complainant, and put it in his pocket, perhaps by mistake, as complainant put the receipt he had given defendant in his pocket, but discovering it next day, handed it to the defendant, with apologies.

## IV.

That complainant has no way of proving said settlement or the existence of the said receipt in full of all demands, given to him by the defendant at said Gayosa Hotel in Memphis, as aforesaid, or that he has fully paid said lumber claim, except by the testimony of the defendant himself.

## V.

Complainant therefore prays:

1st. That subpoena to answer issue requiring the defendant to appear and answer the bill, and upon his corporal oath to make a full, true, direct and perfect disclosure and discovery of each and all of the several matters aforesaid, according to the best of his knowledge, remembrance, information and belief, and especially that he answer, set forth and discover:

(1.) Whether at said Gayosa House, on December 24, 1905, or at any other near time and place, he and complainant entered into a settlement of all their mutual demands, including said Maine lumber bill, on which said lawsuit at Bath has been brought.

(2.) Whether any and what receipts, or other papers, were then and there, or at any other near time and place, signed by complainant and defendant, or by either of them covering said lumber among other matters.

(3.) What was the purport and tenor or substance and object of the papers so signed.

(4.) Whether the papers so signed did or not cover all outstanding and unsettled matters and demands each party at that time held against the other, and if not, state fully and particularly what they did cover, and what were their purpose and purport.

(5.) Let the defendant answer on his corporal oath as aforesaid, and to the best of his knowledge, remembrance and belief whether at said place and time, or at some other place and time thereabout, he signed, or put his name to, a writing purporting to be a receipt in full of all demands he at this time held against complainant.

(6.) And if he did not sign, or put his name to such a writing, let him answer on his oath, as aforesaid, the character and purport of the writing he did then and there or thereabouts sign or put his name to.

(7.) Let the defendant file with his answer the paper or papers, receipt or receipts, writing or writings, he so signed as aforesaid; and if not in his possession, or under his control, he will state what became of the same, and where the same now is or are, or is or are supposed to be; and if the same is or are mislaid, lost or destroyed, he will state which, and give the date and substance thereof to the best of his knowledge, recollection and belief.

(8.) If there be any other matter in defendant's knowledge, or in his memory or belief, relating to said settlement or writings, not set forth or alluded to in his answers, let him here state it as fully as though specially and particularly called on so to do by complainant.

(9.) Let defendant answer directly on his corporal oath, whether he has, or has ever seen, or has any remembrance, or recollection of ever having had, or ever having seen, any receipt in any way resembling the one referred to in the body of the bill; and if so, let him give its date and substance.

(10.) Let defendant answer directly on his corporal oath whether said lumber account, on which said lawsuit at Bath has been brought, has in any way, at any place, ever been paid.

And the defendant will full, true, direct and perfect answer make, according to the best of his knowledge, remembrance, information and belief, to each and all of the matters, charges, and interrogations aforesaid.

2d. Complainant also prays that an injunction<sup>27</sup> issue to restrain and prohibit the defendant from the further prosecution of said lawsuit at Bath until the further order of your Honor in the premises.

And complainant will ever pray as aforesaid.

This is the first application for an injunction in this case.

EUGENE WEBB, Solicitor.

[Annex affidavit,<sup>28</sup> see, ante, §§ 161; 789.]

<sup>27</sup> While a bill for discovery only, prays no relief, a prayer for an injunction is allowable and not considered as relief, the object of the injunction being merely to stay the lawsuit until the defendant has fully answered the bill, for otherwise the discovery would be fruitless. 2 Barb. Ch. Pr., 108.

<sup>28</sup> When no injunction is prayed, and the bill does not seek to draw the jurisdiction of the whole controversy from the law Court into Chancery, no affidavit to the bill is necessary. Parsons & Wilson v. Stephens, 2 Tenn., 260.

§ 1122. **The Statutory Petition for a Discovery.**—But now, by the Code, either party to a suit at law is entitled, by means of a sworn petition in the cause, to a discovery, from the other party, of any matters material to the issue of such suit, in all cases where the same party would, by the rules of Equity, be entitled to a discovery in aid of such suit.<sup>29</sup> The contents of such petition for a discovery and the procedure thereon are fully detailed in the Code; and this method of obtaining a discovery is so simple, speedy and convenient, that it has practically superseded the method by a bill in Equity in aid of a suit at law.<sup>30</sup> But this statute does not affect the jurisdiction of the Chancery Court,<sup>31</sup> unless the complainant has had the benefit of a discovery in the law Court under the statutory proceedings by petition, in which case a bill for discovery will not lie in Equity.<sup>32</sup>

§ 1123. **Defences to Bills of Discovery.**—The defence to a bill of discovery is usually made by demurrer or by plea in bar, and if not so made, as a rule, the defendant must answer the bill.<sup>33</sup> The following are the principal grounds of demurrer:

1. **Demurrer Because the Discovery May Subject the Defendant to a Penalty, or a Forfeiture.** The defendant cannot be compelled to answer what *may* subject him to a penalty, or forfeiture, or criminal accusation.<sup>34</sup> But the fact that his answer may reflect on his moral character, or show that he has been guilty of fraudulent dealings not indictable, will not excuse him from answering.<sup>35</sup>

2. **Demurrer Because the Discovery Would be Immaterial.** The defendant cannot be compelled to discover anything immaterial to the relief prayed.<sup>36</sup>

3. **Demurrer Because the Discovery Would Involve a Breach of Professional Confidence.** A Solicitor cannot be required to discover any fact derived from his client. Public policy forbids such disclosures.<sup>37</sup>

4. **Demurrer Because the Discovery Relates Only to the Defendant's Title.** A complainant has no right to pry into the title of his adversary: he may demand a discovery only in so far as is necessary to establish his own case as set out in his bill.<sup>38</sup>

5. **Defences by Plea and by Answer.** If any of the grounds, for which a demurrer would lie if apparent on the face of the bill, really exist, but are not disclosed by the bill, the defendant may bring such matters forward by a plea in bar.

The same matters that would be proper for a plea in bar, may be incorporated in an answer. On exceptions to such an answer, for insufficiency, the Court will determine whether the defendant is bound to make the discovery he resists. The defendant cannot, however, demur to a part of the bill of discovery, and answer to a part, the rule being well settled that if he answers at all, he must answer fully, except as to matters which the Court will not require to be answered.<sup>39</sup>

§ 1124. **Proceedings upon a Bill of Discovery.**—Upon a bill of discovery being filed, if it be demurrable the defendant may have it dismissed on demurrer: if it be not demurrable, or his demurrer is overruled, he must answer; and in his answer he must admit or deny every material allegation in the bill, and must directly and fully respond to every interrogatory propounded in the bill,

<sup>29</sup> Code, 3891-3900.

<sup>30</sup> See *Fort v. Orndoff*, 7 Heisk., 174; *Ducktown Co. v. Fain*, 1 Cates, 56.

<sup>31</sup> *Elliston v. Hughes*, 1 Head, 227; 2 Sto. Eq. Jur., § 1481, note 3. In some other States, however, the contrary ruling prevails. See, 2 Dan. Ch. Pr., 1556, note 10; 1 Pom. Eq. Jur., §§ 193; 197; 230.

<sup>32</sup> *Bumpass v. Reams*, 1 Sneed, 595. See, *Spurlock v. Fulks*, 1 Swan, 289, where a bill of discovery was sustained, after the enactment of the statutory remedy by petition.

<sup>33</sup> 2 Barb. Ch. Pr., 109. Where the bill is for discovery and relief, the defendant may, if he pleases,

demur to the relief and answer to the discovery. But he cannot demur to the discovery alone, and not to the relief, when the discovery is merely incidental to the relief; for that would be to demur, not to the thing required, but to the means by which it was to be obtained.

<sup>34</sup> 34 Sto. Eq. Pl., §§ 521; 575-576; 1 Dan. Ch. Pr., 563.

<sup>35</sup> 1 Dan. Ch. Pr., 565; Sto. Eq. Pl., §§ 595-596.

<sup>36</sup> Sto. Eq. Pl., § 565; 1 Dan. Ch. Pr., 570.

<sup>37</sup> Sto. Eq. Pl., § 599.

<sup>38</sup> 1 Dan. Ch. Pr., 579; Sto. Eq. Pl., § 572.

<sup>39</sup> 2 Barb. Ch. Pr., 112-114.

and discover every matter inquired about in the bill to the best of his knowledge, information, remembrance, and belief.

As a bill of discovery prays for no relief, except a temporary injunction, the defendant is entitled to be dismissed with his costs, and to have the injunction dissolved, as soon as he files a perfect answer. If his answer is not excepted to in twenty days after complainant's Solicitor is notified of its filing, or if the exceptions to it have all been finally disposed of, the answer is deemed to be full and perfect; and the costs are adjudged, and the injunction dissolved as a matter of course.<sup>40</sup>

A bill of discovery may be amended, or a supplemental bill of discovery filed by leave of the Chancellor, as in case of bills praying relief, especially where the ground of the amendment is furnished by the answer.<sup>41</sup>

**DECREE ON A BILL OF DISCOVERY.**

John Doe, }  
*vs.* } Order of Dismissal.  
 Richard Roe. }

In this cause, the defendant having fully and perfectly answered, on his motion the injunction is dissolved, and the costs of the cause are adjudged against the complainant and A B, and C D, his prosecution sureties, for which an execution will issue.

The bill in this cause being for discovery only, and, therefore, no further proceedings in the cause necessary, the cause will be discontinued from the docket.

**ARTICLE III.**

**SUITS TO PERPETUATE TESTIMONY.**

- § 1125. The General Nature of a Bill to Perpetuate Testimony.
- § 1126. What the Bill Must Show as to the Subject-Matter.
- § 1127. As to the Necessity for Perpetuating the Testimony.
- § 1128. The Prayer of the Bill, and the Affidavit Thereeto.

- § 1129. Form of a Bill to Perpetuate Testimony.
- § 1130. The Defences to the Bill and Subsequent Proceedings.
- § 1131. Statutory Petition to Perpetuate Testimony.
- § 1132. Form of a Petition to Perpetuate Testimony.

**§ 1125. The General Nature of a Bill to Perpetuate Testimony.**—The object of a bill to perpetuate testimony is to preserve evidence, when it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. Thus, (1) when the complainant's title is in remainder, or (2) when he himself is in actual possession of the property, or (3) when he is in present possession of the rights which he seeks to perpetuate by proofs, he may be unable to bring his disputed interest into immediate judicial investigation; and, therefore, Courts of Equity will entertain a suit to secure the proofs on which his title depends; for, otherwise, such proofs might be lost by the death of his witnesses, and the adverse party might purposely delay his suit with a view to that very event.<sup>1</sup> The bill may be maintained whether the matter in controversy be a title, or claim, to real or to personal estate, or mere personal demands; or whether the testimony is to be used in support of the complainant's action, or as a matter of defence.<sup>2</sup>

**§ 1126. What the Bill must Show as to the Subject-Matter.**—The sole object of a bill to perpetuate testimony is, to assist other Courts, and to preserve evidence to prevent future litigation. In order to maintain such a bill, it is necessary to state on its face all the material facts, which are necessary to maintain the jurisdiction. It must, in the first place, state the subject-matter, touching

<sup>40</sup> 2 Barb. Ch. Pr., 115.

<sup>41</sup> *Ibid.*, 116.

<sup>1</sup> Smith's Eq. Jur., 486-487; 2 Sto. Eq. Jur.,

§§ 1505-1510. A bill will sometimes lie, however, to have the cloud removed from the complainant's title.  
<sup>2</sup> 2 Sto. Eq. Jur., 1509.

which the complainant is desirous of perpetuating evidence. Thus, for example, if the object of the bill is to perpetuate the testimony of the witnesses to a deed respecting real estate, the deed should be properly described, and the names of the witnesses, who are to prove the same, set forth. And if the object of the bill is to perpetuate the evidence of witnesses to facts *in pais*, it is not sufficient to state generally that they can give evidence as to certain facts; but the bill must state specially what these facts are. The bill should also show that the complainant has some interest in the subject-matter, which may be endangered if the testimony in support of it is lost; for, unless he has some interest, he is not entitled to maintain the bill. A mere expectancy, however strong, is not sufficient; the party must have a positive interest. But if there be any vested interest, however slight, that is sufficient, and whether it be absolute, or contingent, whether it be present, or remote and future in enjoyment, is wholly immaterial.<sup>3</sup>

On the other hand, it seems equally indispensable to a bill of this kind that it should state, that the defendant has, or pretends to have, a title to, or that he claims the right to contest the title of the complainant in, the subject-matter of the proposed testimony. For, unless the defendant has, or claims some interest, it is utterly fruitless to perpetuate the testimony, since it can have no operation upon those who are really the parties in interest.<sup>4</sup>

§ 1127. **As to the Necessity for Perpetuating the Testimony.**—The bill must also show some ground of necessity for perpetuating the evidence; as that the facts, to which the testimony of the witnesses proposed to be examined relate, cannot be immediately investigated in Court; or, if they can be so investigated, that the right of action belongs exclusively to the other party; or that the other party has interposed some impediment, such as an injunction, to an immediate trial of the right in the suit at law; so that, before the investigation can take place, the evidence of a material witness is likely to be lost, by his death or departure from the country.<sup>5</sup> In the former case, the bill must allege that the complainant is in possession of the property, or the right, without any disturbance by the other party, upon which an action at law can be founded. In the latter case, the bill must allege the specific facts on which the complainant puts his case; and also that the witnesses are old, or infirm, or in ill health, and not likely to live; or, that he has no present right to maintain an action; as if he have a title in remainder, or reversion only, after a present existing estate for life. Without such allegations, the bill will be clearly demurrable; since, if the subject-matter is capable of being immediately investigated at law, there is no ground to perpetuate the testimony; but it will be the party's own *laches* not so to try his right.<sup>6</sup>

§ 1128. **The Prayer of the Bill, and the Affidavit Thereto.**—The prayer of the bill also requires attention. It should pray leave to examine witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated. It should also pray the proper process of subpœna. But it should not pray that the defendant may abide such order and decree as the Court shall think proper to make, for that will turn it into a bill for relief, which is inconsistent with the nature of a bill to perpetuate testimony. If the bill should pray relief, it will of course be demurrable, and may be dismissed for this cause. Care should be taken not to mix up in the bill other matters not pertinent.<sup>7</sup>

Where a bill is framed on the ground that the testimony of a witness may be lost by his death, or departure from the State before the case can be investigated in a Court of law, it seems proper, also, in order to avoid any objection,

<sup>3</sup> Sto. Eq. Pl., §§ 300-301; 2 Dan. Ch. Pr., 1572;  
<sup>1</sup> Pom. Eq. Jur., § 211; 2 Sto. Eq. Jur., § 1511.

<sup>4</sup> Sto. Eq. Pl., § 302.

<sup>5</sup> 2 Dan. Ch. Pr., 1572; Sto. Eq. Pl., § 303.

<sup>6</sup> Sto. Eq. Pl., § 303.

<sup>7</sup> Sto. Eq. Pl., § 306.

to annex to it an affidavit of the circumstances, by which the evidence, intended to be perpetuated, is in danger of being lost.<sup>8</sup>

§ 1129. **Form of a Bill to Perpetuate Testimony.**—Bills to perpetuate testimony continue to be filed in our Courts, notwithstanding the statutory remedy by petition, hereafter more fully referred to. The following form will illustrate the foregoing requirements as to the frame of the bill.

**BILL TO PERPETUATE TESTIMONY.**

To the Hon. W. S. Bearden, Chancellor, holding the Chancery Court at Shelbyville, for the County of Bedford:

Jane Doe, a resident of Bedford county, complainant, }  
*vs.*  
 John Doe, a resident of the same county, defendant. }

The complainant respectfully shows to the Court:

I.

That she is the sole heir and devisee of David Doe, who died in the said county of Bedford on July 13, 1891, seized and possessed of the following tract of land: [*Describing it by metes and bounds, or other accurate description.*]

II.

The said David Doe left a last will and testament wherein and whereby he devised to complainant said tract of land, in fee. Said will has been duly probated in common form in the County Court of Bedford county. A certified copy of said will is herewith filed as an exhibit to this bill, marked "A," and will be read as evidence at the hearing.

III.

David Doe was an Englishman, and complainant was born in England. Complainant's mother, whose name was Jenny Doe, was the lawful wife of said David Doe; and she died soon after giving birth to complainant. The defendant charges that complainant is not the daughter of said David Doe, and that said David Doe never was married to complainant's said mother, Jenny Doe. He, also, charges that said will is a fraud and forgery, concocted by complainant and her two uncles, Daniel Doe and Donald Doe, who witnessed and proved said will. The defendant maintains and avers that he is the sole heir, and only living and lawful child of said David Doe.

IV.

Complainant further shows and alleges, that said Daniel Doe and Donald Doe are residents and citizens of England, and are here on a temporary visit only, and expect to sail for England within the present year. By them she can prove that David Doe was lawfully married in England to said Jenny Doe, whose maiden name was Jenny Davis, that complainant was born of said Jenny Doe more than a year after her said marriage to the said David Doe, and that complainant is the lawful child and heir of said David Doe.

V.

Complainant further alleges and shows, that she can prove by said Daniel Doe and Donald Doe, who are the sole witnesses to said will, that her said father was of sound mind and disposing memory when said will was by him executed, that he signed and acknowledged it before them, and declared it to be his last will, and that they witnessed it in his presence, and at his request, and that neither of them is interested in any devise or legacy under said will, and that no fraud, deception, or undue influence was practiced upon said David Doe by them, or by complainant, or by any one.

VI.

Complainant further shows to the Court that the defendant, John Doe, is a son of her father by a second wife; and that he is very hostile to complainant, and threatens to institute suit to have said will set aside, and to recover said farm, as soon as said Daniel Doe and Donald Doe sail for England. Complainant fears that she will not be able to prove the facts charged in this bill, if she should lose the testimony of said Daniel Doe and Donald Doe; and she avers that their testimony cannot be supplied by any evidence within the jurisdiction of the State.

VII.

The premises considered, complainant prays:

- 1st. [*For proper process and for the defendant to answer, in the usual form.*]
- 2d. That the testimony of said Daniel Doe and of said Donald Doe be taken and perpetuated; and duly enrolled.
- 3d. That complainant may be given the liberty to read and make use of said testimony on all future occasions, as she shall be advised.
- 4th. That all orders be made necessary to effectuate fully the prayers and object of this bill.

IVIE & IVIE, Solicitors.

While there seems to be no rule requiring such a bill to be verified, neverthe-



less, out of abundant caution, a prudent Solicitor will require his client to make oath to it, and thus avoid the question.

§ 1130. **Defences to the Bill, and Subsequent Proceedings.**—The defendant may have the bill dismissed, or may file a demurrer to the bill, in any case where such defences will lie to an ordinary bill for relief.

The bill is never brought to a hearing, but after the bill is sustained, either on a *pro confesso*, or an answer, the Court makes an order to have the depositions of the witnesses taken and perpetuated, on due notice to the defendant.

§ 1131. **Statutory Petition to Perpetuate Testimony.**—The Code provides for a more summary method of perpetuating testimony;<sup>9</sup> and this method has almost entirely superseded the method in Equity, above given. The petition required by the Code should contain the substance of a bill in Equity in a like case: it should set forth the reasons for the application, the subject-matter of controversy, the names of the parties interested, and the names of the witnesses, and should pray that the depositions of the witnesses be taken and perpetuated.<sup>10</sup> The proceedings under the Code, down to the taking of the depositions, are substantially the same as those on a bill in Equity to perpetuate testimony; and the defence to such a bill would equally avail against the petition. The main differences between the proceeding under the Code and a bill in Equity are, that the former may be resorted to in a *pending*<sup>11</sup> litigation, and is, also, more summary and less formal. It must not, however, be supposed that the statutory provisions for perpetuating evidence in any way repeal, or otherwise affect, the jurisdiction of the Chancery Court; such jurisdiction continues unimpaired, and a bill to perpetuate testimony will lie in that Court as formerly.<sup>12</sup> Such a bill may be filed in this State, in aid of a suit in another State, when the jurisprudence of the latter allows such a procedure.

§ 1132. **Form of a Petition to Perpetuate Testimony.**—The form of a petition to perpetuate testimony must conform to the statutory requirements already given. The following form will serve as a guide:

**PETITION TO PERPETUATE TESTIMONY.**

To the Hon. Thomas M. McConnell, Chancellor of the Third Chancery Division:

Your petitioner, John Den, a resident of Hamilton county, respectfully shows to your Honor:

I.

That there is now pending in the Supreme Court of Tennessee, at Knoxville, a suit brought against him, in the Chancery Court at Chattanooga, by Richard Fen, to recover the following tract of land situated in Hamilton county: [*describing it fully*]. Said suit was dismissed by said Court on motion [*or, on demurrer*], and complainant Fen appealed to said Supreme Court.

II.

Said Fen's supposed cause of action is based on a deed for said tract he fraudulently procured from your petitioner, on or about the month of January, 1890. Petitioner can prove the fraud by John Doe and Richard Roe, both residents of Chattanooga, who were present and witnessed the deed. John Doe is an old man in very feeble health, and Richard Roe expects soon to go as a missionary to Japan. Without the testimony of these two witnesses, your petitioner will be unable to prove the fraud by which said Fen obtained said deed.

III.

It will be more than six months before the said Supreme Court will pass on said appeal. If the decree of the said Chancery Court is affirmed, the said Fen declares that he will bring another suit; and if the said decree is reversed the suit will be remanded to be proceeded in. Thus, in either event, the testimony of said two witnesses is of great importance to your petitioner.

IV.

Your petitioner, therefore prays that the depositions of said two witnesses may be taken and perpetuated as provided by the statute for such case made; and that your Honor will make all orders necessary to that end.

JOHN DEN.

[*Annex affidavit*<sup>13</sup> as in § 789, *ante*.]

<sup>9</sup> Code, §§ 3876-3888.

<sup>10</sup> Code, § 3877. For the form of the petition, see the next section.

<sup>11</sup> The Code remedy is a substitute both for a bill to perpetuate testimony, and for a bill to take testimony *de bene esse*. If a suit be pending, however,

the depositions of the witnesses may be taken on mere notice. See, *ante*, § 474.

<sup>12</sup> See, *ante*, § 37.

<sup>13</sup> The Code does not expressly require the petition to be sworn to; but it is prudent to verify it.

**THE CHANCELLOR'S ORDER.**

Upon consideration of the foregoing petition, it is ordered by me that said Richard Fen appear before me, in the Clerk and Master's office in Chattanooga, on July 20, 1891, and that he then and there show cause, if any he have, why the prayer of the said petition should not be granted; and that a copy of said petition, and of this order, be served on him at least five days before said July 20, 1891.

THOS. M. McCONNELL, Chancellor.

If the opposite party fail to appear, or appearing, show no sufficient cause to the contrary, the Chancellor will make the following further order, on the petition, or on a paper annexed thereto:

**ORDER TO PERPETUATE THE TESTIMONY.**

Upon further consideration of said petition, and of said notice, and no sufficient cause to the contrary being shown, after due notice to said Richard Fen, service of such notice duly appearing, it is ordered by me that the depositions of said John Doe and Richard Roe be taken by J. B. Ragon, Clerk and Master of the Chancery Court at Chattanooga, on July 25th, 1891, and succeeding days if necessary, at his office in Chattanooga; and that, when taken, said petition, the notice and the orders made thereon, and said depositions be registered in Hamilton county, and that the petitioner pay all the costs incident to this proceeding.

July 20, 1891.

THOMAS M. McCONNELL, Chancellor.

**ARTICLE IV.**

**SUITS TO TAKE TESTIMONY DE BENE ESSE.**

§ 1133. The Object of the Bill.  
 § 1134. The Frame of the Bill.

§ 1135. Statutory Substitute for the Bill.

§ 1133. **The Object of the Bill.**—This species of bill bears a close analogy to bills to perpetuate testimony, and is often confounded with the latter: but they differ materially. Bills to perpetuate testimony can be maintained only when no present suit can be brought at law, by the party seeking the aid of the Court to try his right. Bills to take testimony *de bene esse*, on the other hand, are sustainable only in aid of a suit already pending. The latter may be brought by a person who is in possession, or who is out of possession, and whether he is complainant or defendant,<sup>1</sup> or whether the suit concerns rights and property, or grows out of a contract, or even a tort.<sup>2</sup>

The object of the bill is to take the testimony of witnesses for the trial at law, where the testimony may otherwise be lost; where the witnesses are aged, or infirm, or about to depart from the country. So, if a witness is the only witness to the matter to which he is to be examined, a bill will lie, on account of the general uncertainty of human life, to take his testimony *de bene esse*, notwithstanding he is neither aged nor infirm. In general, a witness is not treated as being aged in the sense of the rule, unless he is seventy years of age. But if he is infirm, or in ill health, to an extent likely to endanger or destroy his life, or to prevent his attendance at the trial, his testimony may be taken at any age. If a witness is going out of the jurisdiction of the Court, although only into a state or country under the same general sovereignty, his testimony may also be taken; as, for example, if he is going from England to Scotland; or in America, if he is going from one State to another.<sup>3</sup>

§ 1134. **The Frame of the Bill.**—In framing the bill, therefore, care should be taken to allege all the material facts, upon which the right to maintain the bill depends, whether it is dependent upon the age, or the infirmity of the wit-

<sup>1</sup> 2 Sto. Eq. Jur., § 1513; 1 Pom. Eq. Jur., § 213;  
 Sto. Eq. Pl., § 307.  
<sup>2</sup> 2 Sto. Eq. Jur., § 1515.

<sup>3</sup> Sto. Eq. Pl., § 308; 2 Sto. Eq. Jur., § 1514; 1 Pom. Eq. Jur., § 213.

ness, or upon his being about to depart from the country, or upon his being a sole witness. And there should be annexed to the bill an affidavit of the circumstances, by which the evidence, intended to be perpetuated, is in danger of being lost, as by death, departure from the country, or otherwise. The affidavit should be positive as to the material facts. Thus, for example, if it relies upon the fact, that the witness is the only witness to a material fact, it will not be sufficient that the affidavit states, that he is so *in the belief* of the party; but it must be positively stated, that he is the only witness who knows the fact.

In other respects, the general rules, already stated in regard to bills to perpetuate testimony, are for the most part applicable to bills to take testimony *de bene esse*; and therefore it is unnecessary to repeat them in this place.

**§ 1135. Statutory Substitute for the Bill.**—The Code provides a method of taking testimony *de bene esse*, so simple and efficacious, that a bill in Equity for that purpose has become practically almost obsolete; and the main purpose of considering the remedy in Equity has been to present all the sorts of bills known to Equity pleading, as well as to throw light upon the statutory substitute for the bill. Under the Code, depositions of witnesses may be taken at any time after action brought, in the following cases:

1. When the witness from age, bodily infirmity, or other cause, is incapable of attending to give testimony at the trial.
2. When he is under the necessity of leaving the State before the cause is tried, or even before it is at issue.
3. When he is about to leave the county in which the suit is pending, and will probably not return until after the trial.
4. When he is the only witness to a material fact.<sup>4</sup>
5. When he is going out of the Chancery division, or does not reside in such division.<sup>5</sup>

In any and all of the foregoing cases, the depositions of the witnesses are taken, on the same notice, and in the same manner, as though the cause was duly at issue.<sup>6</sup>

Testimony *de bene esse* may, also, be taken in the manner pointed out in the previous Article,<sup>7</sup> the Code expressly providing that evidence may be taken under sections 3876-3888, "to be used in *pending*, or expected, litigation." And if any case should arise for the taking of evidence *de bene esse* not included in section 3838 of the Code, application could be made by petition, under sections 3876-3888 of the Code, or a bill *de bene esse* might be filed.

Where a case is appealed to the Supreme Court before proof is taken, and where an action in the Circuit Court is enjoined before the trial, it often becomes highly important to take the testimony of witnesses *de bene esse*; and if there be any danger of the depositions getting lost, or destroyed, it would be safer to have the evidence perpetuated, under the statute, by registration.<sup>8</sup>

<sup>4</sup> Code, §§ 3836; 3838.

<sup>5</sup> Code, § 4462.

<sup>6</sup> A full consideration of the method of taking

depositions will be found in the Chapter on Depositions. *Ante*, §§ 474-513.

<sup>7</sup> *Ante*, § 1131.

<sup>8</sup> Code, §§ 3882-3885.

PART IX.

THE OFFICERS AND RULES OF THE CHANCERY COURT.

CHAPTER LXIII.

THE CHANCELLOR: HIS POWERS AND DUTIES.

ARTICLE I. The Qualifications and Powers of the Chancellor.

ARTICLE II. Duties of the Chancellor.

ARTICLE III. Provisions when the Chancellor is Incompetent.

ARTICLE IV. Etiquette of the Chancery Court.

ARTICLE I.

THE QUALIFICATIONS AND POWERS OF THE CHANCELLOR.

<p>§ 1136. Qualifications and Disqualifications of Chancellors.</p> <p>§ 1137. Appointment of Clerk and Master.</p>	<p>§ 1138. Appointment of Special Terms</p> <p>§ 1138a. Powers at Chambers.</p>
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§ 1136. **Qualifications and Disqualifications of Chancellors.**—Every Chancellor must be at least thirty years old; and must at the time of his election or appointment, have been a resident of the State for five years, and of his Chancery Division for one year.<sup>1</sup> Before entering upon the duties of his office, the Chancellor must take an oath, or affirmation, to support the Constitution of the United States, and that of the State; and to administer justice without respect of persons, and impartially to discharge all the duties incumbent on him as Chancellor to the best of his skill and ability;<sup>2</sup> he must also take the oath against duelling.<sup>3</sup>

The Chancellor is incompetent except by consent of all parties:

1. Where he is interested in the event of any cause;<sup>4</sup>
2. Or connected with either party, by affinity or consanguinity within the sixth degree, computing by the civil law;
3. Or has been of counsel in the cause;
4. Or has presided on the trial in an inferior Court;
5. Or, in criminal cases for felony, where the person upon whom, or upon whose property, the felony has been committed, is connected with him, by affinity or consanguinity, within the sixth degree, computing by the civil law.<sup>5</sup>

The Chancellor is required to reside in the Chancery Division for which he was elected or appointed, and a removal therefrom will create a vacancy in the office.<sup>6</sup>

The Chancellor cannot practice law, or perform any of the functions of attorney or counsel in any of the Courts of this State, except in cases which he may have been employed as counsel previous to his election or appointment.<sup>7</sup>

§ 1137. **Appointment of Clerk and Master.**—The Chancellor appoints the Clerks and Master's for the various Courts of his Division. This is a most

1 Const. of Tenn., Art. VI, § 4.  
 2 Code, §§ 309; 3911.  
 3 Code, §§ 752; 3911.  
 4 *Neeley v. State*, 4 Bax., 182.  
 5 Code § 3913.  
 6 Code, § 3914.  
 7 Code, § 3911. No Chancellor should appear as Solicitor in any cause after his election or appointment; even in cases where he has been previously employed. On his election, he should consider himself consecrated to his new and higher duties; and should do nothing that partakes of the character or duty of a Solicitor. By such conduct he will greatly

elevate himself in the estimation of the bar, and the people; whereas, by engaging in the disputations and altercations incident to trials in Court, he greatly lowers himself in the estimation of honorable men, tarnishes the lustre of his judicial robes, and is deemed so greedy of pelf as to be anxious to obtain the fees of a Solicitor and the salary of a Chancellor at the same time. Casuistry may justify a Chancellor in appearing in behalf of clients employing him before his election, but a Chancellor should never descend to casuistry; for no casuist is fit to be a Chancellor.

responsible duty, and one attended with many trials and embarrassments, and hedged about by many difficulties and perplexities.

In appointing a Clerk and Master the Chancellor should keep in mind: 1, that a public office is a public trust, and that the people of the county are the persons to be benefited by the appointment; 2, that in appointing a Clerk and Master he is executing a public trust, and is bound so to execute it that the beneficiaries, the people of the county having business in the Court, shall derive the greatest possible benefit from his execution of that trust; and 3, that this benefit can be derived only by appointing to the office of Clerk and Master a man who is worthy of the office, and capable of discharging its duties, and who will discharge them, in person, diligently, honestly, impartially and courteously.<sup>26</sup>

The appointment of the Clerk and Master should be in writing, somewhat as follows:

#### APPOINTMENT OF CLERK AND MASTER.

Knoxville, Tenn., Oct. 1, 1882.

Mr. S. P. Evans:

Having full confidence in your ability, integrity, and diligence, I hereby appoint you Clerk and Master of the Chancery Court of Knox county for the full term of six<sup>27</sup> years.

Respectfully,

W. B. STALEY, Chancellor.

§ 1138. **Appointment of Special Terms.**—The Chancellor of any Court may appoint a special term thereof whenever he may deem it necessary for the dispatch of business. This appointment may be made either (1) at the regular term by an entry on the minutes to that effect, designating the time, or (2) in vacation, by publication in some newspaper in the division, and giving notice thereof in writing to the Clerk and Master, at least thirty days before its commencement.<sup>28</sup> If the appointment is made on the minutes, it may be as follows:

#### APPOINTMENT OF A SPECIAL TERM.

A special term of this Court being necessary for the dispatch of business, is hereby appointed to begin on the second Monday of March next, to which time this Court doth now adjourn.

If the appointment is made in vacation, the newspaper notice may be as follows:

#### SPECIAL TERM OF THE CHANCERY COURT.

A special term of the Chancery Court for Greene county being necessary for the dispatch of business, is hereby appointed to be held in the Court House in Greeneville on the 1st Monday of April next.

February 24, 1891.

JOHN P. SMITH, Chancellor.

And the notice to the Clerk and Master may be as follows:

To the Clerk and Master, at Greeneville:

You are hereby notified that a special term of the Chancery Court for Greene county is appointed to be held, in the Court House in Greeneville, on the 1st Monday in April next.

February 24, 1891.

JOHN P. SMITH, Chancellor.

At such special terms the Chancellor has and may exercise the same powers, and all the business of the Court, of every nature and kind, shall be conducted in the same manner, as at the regular terms.<sup>29</sup> Special terms are not, however, mere continuations of the regular term, even when appointed at the regular term by an entry on the minutes thereof: they are distinct terms, and no order can be made at a special term in any way changing the orders of the previous regular terms, nor can any order be made, or any act be done, at a special

<sup>26</sup> No man should be appointed Clerk and Master, and no man should accept such an appointment, who does not expect to perform the duties of the office in person.

<sup>27</sup> The Clerk and Master holds for the full term

of six years from the date of his appointment. State v. Anderson, 16 Lea, 325.

<sup>28</sup> Code, §§ 3940-3941.

<sup>29</sup> Code, § 3945.

term which would not be lawful at the next regular term.<sup>30</sup> The following is the

**CAPTION OF THE RECORD FOR A SPECIAL TERM.**

State of Tennessee,  
First Chancery Division. }

Be it remembered that, at a special term of the Chancery Court for Greene county, begun and held in the Court House in Greeneville, on the 1st Monday of April, 1891, being the 6th day of said month, in pursuance of an appointment duly made, present and presiding Hon. John P. Smith, Chancellor of said division, the following proceedings were had:

§ 1138a. Powers at Chambers.—The Chancellor exercises many powers at Chambers, which have hereinbefore been fully considered.<sup>31</sup>

**ARTICLE II.**

**DUTIES OF THE CHANCELLOR.**

§ 1139. Duties of the Chancellor.

§ 1140. Suggestions When Pleadings or Proofs are Inadequate.

§ 1141. Suggestions as to Other Matters.

§ 1139. Duties of the Chancellor.<sup>1</sup>—The Chancellor must not do any official act until after he has taken the oath of office; nor must he remove out of his Chancery division, as shown in the preceding section. He must also discharge the following duties:

1. Duties as to the Bonds of the Clerk and Master. The Chancellor must (1) examine and attest the bonds required by law to be given by the Clerks and Masters of his division; (2) must cause the bonds to be recorded in the minutes of the Court, and a certificate of such recording to be endorsed upon them by the Clerks and Masters giving them; and (3) he must forward the Clerks and Masters' revenue bonds to the Comptroller, and their other bonds to the Secretary of State.<sup>2</sup>

The Chancellor must, also, on the first day of each term, examine the bonds of the Clerks and Masters, and see that they are in conformity to law; and that the sureties thereon are good and solvent, and worth the penalties of the bonds. If the Chancellor, in any manner, ascertains that the bonds of any Clerk and Master, within his Chancery division, are from any cause insufficient, it is his duty forthwith to make an order on the minutes of the Court, requiring such Clerk and Master, within thirty days, to make his bonds sufficient, by executing new bonds or giving additional security, and complying with any other order of the Chancellor in regard to such bonds. If the Clerk and Master fail to comply with such order, it is the imperative duty of the Court to remove him, and appoint a new Clerk and Master.<sup>3</sup>

2. Duty to Remove a Clerk and Master, When. It is the duty of the Chancellor, in Court, to remove the Clerk and Master from office (1) when he is convicted of making a false financial report;<sup>4</sup> or (2) when he repeatedly fails to

<sup>30</sup> Thus, a bill of exceptions as to matters tripping at a regular term cannot be prepared and signed, and made a part of the record, at a special term, even when leave so to do is given at the regular term. *Staggs v. State*, 3 Hum., 372. It would seem that a cause cannot be tried, *in invitum*, at a special term unless it was at issue at the preceding regular term. *McKinley v. Beasley*, 5 Sneed, 170. See, *ante*, §§ 531, 533.

<sup>31</sup> See, *ante*, §§ 770-783.

<sup>1</sup> The Judges, like all other public officers, under our form of government, are mere servants of the People; not, however, the servants of any particular man, or set of men, or of any particular part or number of people; but the servants of the whole People in their organized and collective character and capacity as a State. Hence, no man, or set of men, however numerous or influential, have any right or authority to issue any commands to the Judges: the Judges are not their servants or subordinates, and cannot heed their orders. The Judges take their

orders from the People as a whole, acting in their constitutional capacity as a State. These orders are contained in the Constitution and statutes of the State; and to loyally obey these the Judges not only impliedly contract, but, also, solemnly swear in writing, and subscribe their names to their oaths. Hence, the sole measure of a Judge's duty as a public servant is the Constitution and laws of the State, and an unceasing disposition to apply this Constitution and these laws, intelligently, conscientiously, impartially, and inflexibly, in the determination of all matters lawfully submitted to him for his official adjudication. And in making such determinations it is most prudent to follow in the footsteps of his best predecessors, and not try to be wiser. *Boyd v. McClern*, 1 Johns. Ch., 587. See, *ante*, § 62, subsec. 4, note 6.

<sup>2</sup> Code, §§ 720-721; 326-331.  
<sup>3</sup> Code, §§ 335 a-335-g; 778-784.  
<sup>4</sup> Code, § 335 j, (M. & V.)

make a report upon a reference;<sup>5</sup> (3) when he is convicted of failing or refusing to issue an execution, or of failing to make the proper endorsements upon an execution, or the proper entries upon his execution docket;<sup>6</sup> or (4) when he is convicted of any other misdemeanor in office, or of a felony; or (5) when he removes from the county in which his Court is held; or (6) when he fails to give security as required by law; or (7) when he fails to pay over public moneys, or moneys collected officially; or (8) when he is incapable of discharging the duties of his office, or neglects his duties, or misbehaves in office; or (9) for any other cause to which the penalty of removal is attached by law.<sup>7</sup>

**3. Duties in Reference to His Courts.** He is required to hold the terms of his Court at the regular times appointed by law, unless prevented by sickness of himself or family, or by some other unavoidable necessity.<sup>8</sup>

He is, also, required to have the minutes of his Court read each morning in open Court, and to sign them.<sup>9</sup>

**§ 1140. Suggestions When the Pleadings or Proofs are Inadequate.**—It not unfrequently happens that, at the hearing, it is discovered that the merits of the controversy, as shown by the evidence, are with the complainant; but that the averments or prayer of his bill are not such as to justify the Court in granting him full relief, or even any relief. It, also, often happens that one side or the other, generally the complainant, fails at the hearing in consequence of some manifest slip of counsel, or some oversight in supplying a connecting link in the chain of evidence, or some unexpected exceptions to evidence, or some failure to produce or properly prove a deed or other writing, or some other error, or omission, or defect in evidence, which can almost certainly be supplied or cured without much, if any, delay or additional cost.<sup>10</sup>

In such and similar cases, the question arises: What is the duty of the Chancellor? It is true, he is sworn to be impartial, but is he not, also, sworn to "administer justice;" and must he be so "impartial" as not to "administer justice?" In other words, must a Chancellor, presiding over a Court that was originally established to rescue justice from the deadly clutch of forms, and the arbitrary and technical rules of other Courts, sit dumb and motionless while justice is being outraged in his own Court, before his own eyes, and within reach of his own arms?<sup>11</sup>

The authority and duty of the Chancellor to allow, or even suggest, amendments in all cases when manifestly necessary to the administration of justice, is well settled. In such cases, the Supreme Court often remands causes on its own motion in order that the proper amendment may be made, or that additional proof may be made.<sup>12</sup>

But the Chancellor, while thus open-eyed to see that justice is done to one party, should not be blind to the rights of the other party; and if any amendment or delay is the result of negligence, or increases costs, or causes a continuance, such amendment or delay should only be allowed on the payment of

<sup>5</sup> Code, § 4473.

<sup>6</sup> Code, §§ 3013-3017.

<sup>7</sup> Code, §§ 4061; 4065; 4473-4475.

<sup>8</sup> Code, § 3937.

<sup>9</sup> Code, § 4101.

But he may leave the minutes of the last day of the term unsigned until the next term. See, *ante*, § 546, and note 43 to § 571, *ante*.

<sup>10</sup> See, *ante*, §§ 427-429; and, *post*, § 1318.

<sup>11</sup> "Must Courts sit like fangless lions while fraud and falsehood prowl within their precincts, and defiantly taunt their helplessness to uphold the majesty and power of the law to do right and justice?" Turney, Ch. J., in *Butler v. Kinzie*, 6 Pick., 31.

Courts are not mere arenas for the display of skill in juridical dialectics, or forensic fence; nor are Judges mere umpires to enforce fair play between gladiatorial combatants at their bars, and to bestow the rewards of victory upon the shrewdest, the most eloquent, or the most skilful. Judges have affirmative duties to discharge: they are sworn to "administer justice;" and are bound by that oath to see that justice is done.

Nevertheless, Judges should not become advocates, nor undertake the duties of a Solicitor. In doing justice, they must do it according to the rules and practice of their Courts; and, if they are in doubt, the better course is to take no step or make no order in the particular case, on their own motion, leaving it to the party, or his Solicitor, to act, or ask the Court to act, as such party or Solicitor may deem best. A Judge should not be too indignant at what appears to be wrong, nor too enthusiastic for what appears to be right; but should keep his emotions in due subjection so that his judgment may reign supreme in a cool and serene mind.

<sup>12</sup> See 9 Lea, 69; 1 Sneed, 619; 6 Cold., 382; 3 Cold., 316; 1 Heisk., 530; 16 Lea, 527; 7 Bax., 586; 8 Bax., 291; 3 Heisk., 526; 581; 2 Meigs' Dig., § 952; Code, § 3170. See Sto. Eq. Pl., § 333, note, to the effect that the Court will sometimes direct a supplemental bill to be filed. See, also, *post*, § 1318, note.

heavy costs. He who seeks equity should be required to do equity. Forms and correct pleadings are necessary to the safe and orderly administration of justice, and a Chancellor fails to measure up to the full stature of his office when he ignores the rules of pleading and practice; and yet he cannot always afford to sacrifice a party in order to punish his Solicitor. The best he can do in many cases is to allow amendments on costs.<sup>13</sup>

§ 1141. **Suggestions as to Other Matters.**—There are various other matters which the Chancellor will be called on to consider in connection with the discharge of his various duties, among which the following may be specially noted:

1. **As to Amendments.** He should be very liberal in allowing meritorious amendments, but very rigorous in requiring a big price to be paid for them. A Chancellor has no right to grant favors to one party at the expense of the other party. It is not selling justice to require a party to pay costs in such cases, because the party is in default, and is merely paying costs as a penalty in order to be relieved from such default. A Chancellor who allows his heart to control his rulings has forgotten both his oath and his duty.

2. **As to Continuances.** Continuances after the lapse of six months, should never be granted without terms, such terms to include a large part of the costs, unless the continuance is based on accident or mistake, unmixed with negligence, or on the fraud or misconduct of the other party, or of some of the officers of the Court. Special affidavits should support every motion for a continuance, unless the facts are admitted in writing, or the continuance consented to by the adverse party. Continuances should seldom be granted at the term next preceding the meeting of the Supreme Court.<sup>14</sup>

3. **As to Pleas and Demurrers.** Pleas and demurrers should not be encouraged. The matter of a plea in bar can generally be as well set up in an answer as in a plea, and unless the ground of a plea is unquestionably decisive, the plea should be overruled, with leave to rely upon it in the answer. Demurrers are often filed merely for delay. If a demurrer is frivolous, and has also caused delay, the demurrant should, on his demurrer being overruled, not only be taxed with all the costs of the cause then accrued, but should be required to file his answer within two days, if not instant; and certainly before the end of the term; or if Court is not in session, before the next rule day.

4. **Agreements Should be in Writing.** The Chancellor should have a rule requiring all agreements between counsel or parties, intended to be brought to the attention of the Court, as a ground of action, or as evidence, to be reduced to writing, and duly signed by the agreeing parties, or their Solicitors, or agents. This rule will prevent those unseemly wrangles that inevitably arise at the bar from imperfect or discordant memories, or an imperfect understanding of oral agreements in reference to evidence, continuances, and compromises.<sup>15</sup> After the adoption of the rule, it should be rigorously enforced, and the moment an agreement is disputed the gavel should fall, and the rule be enforced, without allowing either Solicitor to say another word in reference to the supposed agreement.

5. **As to the Testimony of the Parties.** It is the experience of Judges and Chancellors that often the real merits of the controversy can be best ascertained by a careful consideration of the statements and admissions of the parties themselves, where the transaction in question was immediately between them.<sup>16</sup> Besides, a Chancellor cannot well avoid feeling that if his decision is based on the admissions of a party, such party is, at least, in no condition to complain. When, therefore, the transaction was between the parties, and they have testified, the Chancellor, after reading the pleadings, should next carefully and dis-

<sup>13</sup> See, *ante*, §§ 427-429.

<sup>14</sup> But reasonable opportunity to prepare for trial should not be denied, and expedition in disposing of suits must not be at the expense of justice. *Reinshagen v. Larezzo*, 2 Shan. Cas., 139.

<sup>15</sup> See the case of *Humphreys v. McCloud*, 3 Head, 235, as illustrating the importance of such a rule.

<sup>16</sup> *Gres. Eq. Ev.*, 456.



criminatingly read their depositions, using the balance of the proof rather as a means of correcting and interlining, as it were, the depositions of the parties, than as independent evidence of the facts. Where the transaction in question was between the agents or servants of the parties, the same rule will apply. The Chancellor can consider admissions made orally by counsel, but such admissions should be recited in the decree *in hæc verba*, or reduced to writing and signed and filed.

6. **As to Sales of Land.** The Chancellor should jealously guard the interests of those so unfortunate as to be forced to submit to a Court sale of their lands, especially of their homesteads; and in no case allow the rapacity of Solicitors, greedy for their fees, to bring about sales for part cash, when a cash payment is not required by law, and is sure to diminish the price.<sup>17</sup>

7. **As to Preparing and Reading Orders and Decrees.** All orders and decrees should be read in open Court before their entry on the minutes. This practice has several good results: (1) It notifies all concerned of the exact nature of the order or decree made, and thus gives opportunity to object, or to obviate objections, if ground therefor exist; (2) It enables the Chancellor, or the adverse side, to make any corrections before the order or decree is entered, and thus avoids unseemly erasures and alterations and interlineations on the minutes after entry; (3) If the Solicitor is an expert draftsman, the younger members of the bar become familiarized with the proper forms of orders and decrees; and if he is an inexperienced draftsman, the Chancellor is thus enabled to ascertain whether the proposed entry needs correction or amendment at his hands.

8. **As to Allowing Appeals.** Wherever the granting of an appeal will probably hasten the final determination of the suit, or lessen the costs, the Chancellor should exercise his discretion in favor of appeals, but not otherwise. Therefore, when the Supreme Court will meet before another term of the Chancery Court, an appeal should ordinarily be allowed from a decree determining the principles involved, and ordering an account or a sale or partition, before the account is taken, or the sale or partition is made; and, under like circumstances, an appeal should, as a rule, be allowed on overruling a demurrer when the question involved is largely or exclusively one of law, and its solution is not manifest.

Where the suit is one that will probably be appealed, the Chancellor should require the parties, and especially the complainant, to be diligent in preparing the case for hearing, to the end that it may go to the Supreme Court at the earliest day possible.

9. **As to Signing Bills of Exceptions.** One of the sacred rights of every litigant is to have a true record of everything done by a Court or a Judge thereof during the course of a litigation; and a Judge is as much violating his oath and his duty who fails or refuses to sign a bill of exceptions in which the truth of the case is fairly stated, as he would be in refusing to grant an injunction, or attachment, or a final decree to a party clearly entitled thereto. No Chancellor should ever make a ruling, or do an act, in the progress of a suit that he would have any hesitancy in having the Supreme Court review; and if he should have such hesitancy, he should either promptly undo what he has done, or, if out of his power, should by signing a truthful bill of exceptions put it in the power of the Supreme Court to correct his error. A proper sense of judicial honor would be satisfied with no alternative.

Chancellors should not be sensitive when a bill of exceptions to their rulings

<sup>17</sup> See, *ante*, § 623, note 11. Every homestead is sacred, especially when it belonged to our ancestors, and has been long in our possession. We were made of its dust; our fathers and mothers sleep in its bosom; and we expect to repose by their side. Our dearest memories cluster about it; it was our father's kingdom, and the home of our youth where we were princes. To sell it away from us is like a sacrilege, and to turn us out of possession is like driving us out of our Eden, and forcing us forever from our

holy land. And all this is true, whether the home be a cabin on a mountain side, a cottage in a valley, or a palatial mansion in the midst of a princely estate; for home is home, and there is no place on earth so dear to the human heart, be that home humble, or be it grand; for, after all, it is our *home*. Fortunately for the unfortunate, the homestead laws, like the Cherubim of Eden, protect the home in very many cases.

fairly states the truth of the case; nor should any false pride or any feeling of false dignity cause them to put any obstacles in the way of an exceptant in obtaining a bill of exceptions that fairly states the facts of the case. They should rather cheerfully aid the exceptant, and not allow the opposite party to thwart or retard him in the preparation of his exceptions. The path of every party to the Supreme Court should be made as clear and smooth as possible, and the Chancellor should, in every legitimate way, promptly and gladly aid an appellant in getting his case into such a shape that, as nearly as possible, it shall appear to the Supreme Court exactly as it appeared in the Chancery Court, to the end that any error committed by the Chancellor may be corrected, and full justice be done.

10. **Summary of Rules Governing a Chancellor in Deciding a Suit.** A Judge, as Judge, has no ears to hear anything as to the merits of a suit before him except in open Court, or at Chambers, and in presence of the parties; no eyes to see anything except the record in the cause; no heart to feel anything except the inspiration of duty, and no tongue to speak anything except what the law or Equity requires.<sup>18</sup>

The following rules will be found of some service to Chancellors, and perhaps, of more service to Solicitors, as showing the latter how Chancellors proceed in reaching a conclusion:

1. **The Chancellor Looks into the Bill,** and cross bill if any, to see what matters are submitted to him for his decision.

2. **He Looks at the Answer** to see what defence the defendant sets up; and what matters in avoidance, or for affirmative relief, are brought forward, if any. The pleadings absolutely limit his powers of adjudication; and if he decides any matter not submitted by the pleadings, his decision is, to that extent, *coram non judice*, and absolutely void, unless consented to.

3. **He Looks at the Evidence**<sup>18a</sup> to see whether the case charged in the bill is made out; or whether the matters in avoidance set up in the answer are sustained by the proof.

4. **He Looks at the Prayers of the Bill,** and of the cross bill, if any, to see what he is specially asked to do. He can ordinarily do no more than he is asked to do:<sup>19</sup> but, on a prayer for general relief, he may grant such relief as the complainant would, ordinarily, be entitled on the pleadings and proof.

5. **In Determining Questions of Fact,** he is governed by the preponderance of probabilities, treating presumptions as witnesses, and using an intellectual discernment as dispassionate as scales of iron.<sup>20</sup>

6. **In Determining Questions of Law,** he is governed by the Constitution of the State, the statutes, and the adjudications of our own Supreme Courts, if they apply; if not, he considers the common law as evidenced by reputable text books and the decisions of other Courts.

7. **In Determining Questions of Equity,** he is governed by our statutes and the decisions of the Supreme Court, if they apply; if not, he considers the doctrines, principles, rules and maxims<sup>21</sup> of Equity jurisprudence, as evidenced by reputable text books and the decisions of other Courts.<sup>22</sup>

8. **In Reaching His Conclusions,** he has no more sympathy for one side, nor prejudice against the other, than has the book in which the law is printed;

<sup>18</sup> *Franklin v. McCorkle*, 16 Lea, 629. The question before a Court of law is not what is morally right, but what is legally right. *State v. Crutchfield*, 3 Head, 116; the question before a Court of Equity when no statute clearly forbids, is what do good reason and good conscience require. See, *ante*, § 58.

<sup>18a</sup> See, *ante*, § 62, sub-sec., 1. *Judicis est judicare secundum allegata et probata*. (It is the duty of a Judge to decide according to the pleadings and the proofs.)

<sup>19</sup> *Judex non reddit plus quam quod petens ipse requirit*.

<sup>20</sup> When a question of fact appears doubtful to a prejudiced Solicitor, it generally appears wholly free

from doubt to an unprejudiced Chancellor. Hence, counsel should not be surprised when they lose what is to them a doubtful case.

<sup>21</sup> What compasses are to mariners, maxims are to Chancellors; they will point the way out of many perplexing labyrinths of the law. See, *ante*, §§ 31-64.

<sup>22</sup> The decisions of the Chancery Court of New York, especially those contained in Johnson's and Paige's Reports, are next in authority to those of our own Supreme Court. Our Equity system was modelled upon that of New York, and our own Reports are full of references to the adjudications of the New York Chancellors.

but is moved by a cool and dispassionate reason, and governed by a conscientious intelligence, absolutely oblivious of the sex, color, creed, rank, politics, or condition in life, of any of the parties.<sup>23</sup>

9. **In Making His Adjudications**, he seeks to determine all the material issues, and leave no roots out of which a fresh crop of litigation may arise.<sup>24</sup>

10. **In Announcing His Decisions**, he is under no obligations to give his reasons therefor,<sup>25</sup> and it is often prudent not to do so.<sup>26</sup> The losing party will not be satisfied with his reasons, and the winning party will be satisfied without them.

## ARTICLE III.

### PROVISIONS WHEN THE CHANCELLOR IS INCOMPETENT.

§ 1142. When the Chancellor is Incompetent to Decide.

§ 1143. Provisions in Case of the Chancellor's Incompetency.

§ 1144. Provisions in Case of the Chancellor's Inability.

§ 1145. Other Provisions for the Chancellor's Incompetency, or Inability.

§ 1146. When Chancellors May Interchange.

§ 1147. Provisions for the Chancellor's Incompetency During Vacation.

§ 1142. **When the Chancellor is Incompetent to Decide.**—A Chancellor is incompetent, except by consent of all parties, to sit in the following cases: 1, where he is interested in the event of any cause; 2, or is connected with either party by affinity or consanguinity within the sixth degree, computing by the civil law; or 3, has been counsel in the cause; or 4, has presided on the trial in an inferior Court; or 5, in criminal cases for felony, where the person upon whom, or upon whose property the felony has been committed, is connected with him by affinity or consanguinity within the sixth degree, computing by the civil law.<sup>1</sup>

§ 1143. **Provisions in Case of the Chancellor's Incompetency.**—Where the regular Chancellor is incompetent in any civil case, the parties may by consent select some member of the bar to preside as Chancellor in the case, and this consent entered of record, shall vest the person so selected with the full power and authority of the regular Chancellor in the particular case.

When any Chancellor is incompetent to try any cause in his Court, he may notify the Circuit Judge, whose duty it shall be at the next term of the Circuit Court in the county in which the incompetency exists, and while holding said Court, to hear and determine the cause as Chancellor, for which purpose the Clerk of the Chancery Court shall bring before him all the papers in the cause, and the necessary entries shall be made on the minutes of the Chancery Court, and signed by the Circuit Judge presiding.

Any Circuit Judge may, also, during the sittings of a Chancery Court, upon notification of a cause in which the Chancellor is incompetent, as provided in the foregoing paragraph, take the place of the Chancellor on the bench, and hear and determine the cause as Chancellor, the necessary entries being made on the minutes of the Chancery Court and signed by him.<sup>2</sup>

And when the Chancellor is incompetent from any cause to try any case pend-

<sup>23</sup> If a Chancellor wishes to display his benevolence towards widows, the poor and the unfortunate, he should do so privately at his own expense, and not publicly at the expense of others. There is no Equity in stripping one party of his rights to clothe another not entitled to them. To dispense Equity not charity, is the sworn duty of a Chancellor.

<sup>24</sup> See, *ante*, §§ 36; 38.

<sup>25</sup> *Judices non tenentur exprimere causam sententia sua.* (Judges are not bound to give the reason for their decision.)

<sup>26</sup> *McGuire v. Gallagher*, 11 Pick., 349; *Halfacre v. State*, 4 Cates, 614.

Socrates said that four things belong to a Judge: 1, To hear courteously; 2, To answer wisely; 3, To consider soberly; and 4, To decide impartially.

<sup>1</sup> Code, § 3913. A judgment rendered by an incompetent Judge or Chancellor is not void, but voidable only, and cannot be called in question collaterally. *Holmes v. Eason*, 8 Lea, 754, and cases there cited; *Posey v. Eaton*, 9 Lea, 500; *Hume v. Bank*, 10 Lea, 1.

<sup>2</sup> Code, §§ 3921-3923.

ing in his Court, and the parties thereto cannot agree upon some member of the bar to try the same, it is made the duty of the Chancellor, upon the application of either of the parties to said suit, to cause the same to be transferred to the nearest Chancery Court where the like incompetency does not exist, and the same shall be there tried as though it had originated in such Court. In such case the original papers, with a certified copy of all orders, including entries on the rule docket, shall be immediately transmitted to the Court to which the venue is changed.<sup>3</sup>

§ 1144. **Provision in Case of the Chancellor's Inability.**—If the Chancellor is unable from sickness or other physical debility to hold any of his Courts at the time and place required by law, the Governor is required to commission a special Chancellor to hold said Courts. The special Chancellor has all the power and authority of the Chancellor in whose place he is appointed, including the power to interchange, and continues to hold the Courts and exercise the duties of the regular Chancellor, until notified by the latter that he is in a condition to resume his functions.<sup>4</sup>

§ 1145. **Other Provisions for the Chancellor's Incompetency, or Inability.** When from any cause the Chancellor fails to attend, or being in attendance cannot properly preside in any cause or causes pending in his Court, or shall be unable to hold a term of his Court, the Solicitors present, who are residents of the State, are authorized to elect one of their number to hold the Court for the occasion. The Solicitor thus elected Chancellor *pro tempore* must have all the qualifications of the regular Chancellor, and, during the period in which he acts, shall have all the powers and be liable to all the responsibilities of a regular Chancellor.<sup>5</sup> These qualifications are: 1, the age of thirty; 2, five years' residence in the State; 3, one year's residence in the Chancery division.

In case the election of a Chancellor is contested, the Governor is authorized to appoint a temporary Chancellor to hold the office until the contest is judicially determined, and the regularly elected Chancellor duly commissioned.<sup>6</sup>

§ 1146. **When Chancellors May Interchange.**—Chancellors may interchange with each other, or with the Judges of the Circuit, Criminal, and other special Courts: 1, when causes<sup>7</sup> exist making an interchange necessary; and 2, where it is mutually convenient. In case of the absence of the Chancellor of any Division, or of his death or inability to hold Court, any other Chancellor may hold his Court in his stead. When a Chancellor is presiding by interchange, he has the same power and jurisdiction as the Chancellor in whose place he is acting.<sup>8</sup>

While a Chancellor is holding a Chancery Court by interchange with another Chancellor, the latter may hold any other Courts in his Chancery Division.<sup>9</sup>

§ 1147. **Provisions for the Chancellor's Incompetency During Vacation.**—Whenever the Chancellor of the Division in which a cause is pending, is incompetent in vacation: 1, to issue any process; or 2, to dissolve, restore, or modify any injunction; or 3, to appoint a receiver; or 4, to hear and determine any motion; or 5, to make any interlocutory order to speed a cause; or 6, to appoint a commissioner to take an account; or 7, to appoint persons to serve original, mesne, or final process; or 8, to regulate and control, set aside, modify, or alter any proceeding in the Master's office; or 9, to do and perform any other duty that may be performed by such Chancellor in vacation, the statute provides that the Chancellor, of any adjoining Division shall have power in vaca-

<sup>3</sup> Code, §§ 3924-3924 b, and statutes there quoted.

<sup>4</sup> Code, §§ 3927-3929.

<sup>5</sup> Code, § 3930 a; Brewer v. State, 6 Lea, 198. The authority of a special Chancellor ends with the term at which he was elected. Low v. State, 3 Cates, 81.

<sup>6</sup> Code, § 3930 e.

<sup>7</sup> Such causes as incompetency, sickness, or unavoidable absence.

<sup>8</sup> Code, §§ 3916-3918. And may appoint a special

term. Eims v. State, 10 Hum., 128. The Judges and Chancellors of the several Circuits and Divisions are Judges and Chancellors for the State at large; and, as such, may, upon interchange, and upon other lawful grounds, exercise the duties of such office in any other judicial Circuit or Division of the State. Code, § 3915; Stuart v. State, 1 Bax., 178; Chadwell, *ex parte*, 7 Heisk., 630.

<sup>9</sup> Code, § 3918 c.

tion, on proper application, to make all such orders, and do all such acts. But in such case the party making the application shall show, by affidavit, that the regular Chancellor is incompetent, and shall notify the opposite party of the application, such notice to be the same as to time and place as is prescribed for taking depositions.<sup>10</sup>

## ARTICLE IV.

## THE ETIQUETTE OF THE CHANCERY COURT.

§ 1148. The Court and the Bar.

§ 1149. Department of the Solicitors Towards the Court.

§ 1150. Department of Solicitors Towards Each Other.

§ 1151. Department of the Chancellor Towards the Bar.

§ 1152. Department of the Chancellor While Hearing a Cause.

§ 1148. **The Court and the Bar.**<sup>1</sup>—There are certain proprieties in the conduct of Solicitors toward each other, and in the relation of the Chancellor and the Solicitors of his Court which, if duly observed, will greatly promote that good feeling and manly courtesy so necessary to the proper conduct of Court business, as well as to that dignity which should characterize a temple of justice. The Chancellor should ever remember that he was once a member of the bar, and will probably become one again; and he should endeavor to discharge his official duties in the way he would have liked to have seen them discharged while he was at the bar; and should carefully avoid doing, or omitting to do, anything that he, while at the bar, deemed below the high standard of a perfect Judge. On the other hand, the Solicitors should keep in mind that while the Chancellor was once in their ranks, he is now their official superior, and is entitled to that measure of deference, respect, and courtesy they would like to have accorded to them should they at any time occupy his place; and they should, also, consider that they are the trusted officers of the Court, and that not only are the dignity and decorum of the proceedings of the Court mainly dependent on them, but that everything which lowers the standard of the Court necessarily lowers the standard of the law, and tends to degrade the bar.<sup>2</sup>

Solicitors should always speak respectfully of all Courts, and of the Legislature and of the Governor, and of Congress, and the President, and of the laws of the land. Abuse of our officials, laws, and institutions, while at times, perhaps, pardonable in political arenas, is execrable at the bar.

The Chancellor and the Solicitor should each magnify their respective offices, and conscientiously endeavor to make incarnate in themselves their respective ideals of official perfection, making diligence, courtesy, dignity, and good faith their tests of excellence, as well as the true means of attaining it.

§ 1149. **Department of the Solicitors Towards the Court.**—While Court is in session, and the Chancellor is on the bench, Solicitors should not fail to keep in mind that the interval between the bench and the bar tables is the line of demarcation, and should not be crossed without special leave of the Court. If there be papers to be passed from the bar to the bench, or from the bench to the bar, let the officer waiting on the Court, or the Clerk, perform this task.

Remarks of a personal nature should be sparingly passed between members of the bar and the Chancellor on the bench, and exchanges of wit should be studiously avoided. As a rule, and a rule to which the exceptions are few, and

<sup>10</sup> Code, §§ 4416 a-4416 b.

<sup>1</sup> If any Solicitor objects to the ethics laid down in this Article, he should, at once, examine himself, and see if his standard of professional deportment is not too low.

<sup>2</sup> *Is ordo vitio careto, ceteris specimen esto.* (Let this class of men be free from fault, and an example to all others.) This was one of the laws of the XII Tables.

those few very questionable, a Solicitor should never address any remark to the Chancellor on the bench, except (1) from his place behind the bar tables, and (2) in reference to some suit in Court, or to some matter proper to be brought to the attention of the Court.

Solicitors should always stand behind the bar tables when addressing the Chancellor on the bench, or when reading pleadings, or proof, or decrees, or orders. It is in exceedingly bad taste for a Solicitor to stand alongside the bench, or lean on it, while addressing the Court, or reading any paper to the Court. He is standing on forbidden ground, and it would be the duty of the Chancellor to command him to retire to his proper place behind the bar tables.<sup>3</sup>

Solicitors should refrain from holding any private conversation with the Chancellor while Court is in session, unless leave has been first publicly asked and obtained. Bystanders, litigants, and jealous Solicitors are sometimes inclined to suspect that the object of private conversation with the Court is to obtain some unfair advantage, or to tamper with the Chancellor, or to tell tales on an adversary, or else that the Chancellor has favorites among the Solicitors to whom he grants especial privileges and secret audiences, and with whom he exchanges especial confidences and tokens of mutual partiality. The opposite side look with ill-concealed distrust upon a Chancellor who engages in secret conversation with a Solicitor during the trial of a cause. However innocent such conversation may be, and however foreign to the cause pending, adverse parties are prone to suspect that it has direct reference to their suit, and that it is evidence of partiality on the part of the Chancellor. Solicitors and parties should never embarrass the Chancellor by making little presents in open Court, such as fruit, flowers, cigars, and the like. The Chancellor is coerced by common courtesy to accept these evidences of good will; and while, as a man, he appreciates these tokens of friendliness, nevertheless, as a Chancellor, he realizes that there are Solicitors and parties who regard such acts with jealousy and suspicion, and deem them attempts to tamper with the Court. To avoid all such suspicions and heart-burnings, let Solicitors and parties forego all such little tokens of courtesy and good will.

**§ 1150. Deportment of Solicitors Towards Each Other.**—Nothing does so much to elevate a Solicitor in the estimation of the Court and his fellows as uniform courtesy to the other members of the bar. Bystanders of the ruder sort may consider a bullying, domineering disposition an evidence of greatness;<sup>4</sup> and in criminal and police courts displays of rudeness and incivility are sometimes overlooked; but in a Court of Chancery the deportment of Solicitors towards each other should constantly exhibit chivalric courtesy, and the punctilious observance of all of those proprieties that adorn and distinguish honorable, refined, and educated men, and true gentlemen.

**§ 1151. Deportment of the Chancellor Towards the Bar.**—The intercourse between the Chancellor and the members of the bar should be such as to inspire (1) unlimited confidence in his integrity, (2) an absolute assurance of his perfect impartiality, (3) a certain knowledge of his industrious investigation of the facts of the cases tried before him and of the law applicable thereto, (4) a feeling, without misgivings, that all legitimate argument is heard without indifference, weariness or reluctance, and (5) an undoubting faith that he is prompted by an invariable and unswerving disposition to determine all matters submitted to him according to the law and the facts, and without fear, favor, or affection.

The Chancellor's deportment should be such that, while not cold or indifferent, it will not invite fawning, or flattery, or undue familiarity. There are sometimes those who take undue advantage of a Judge's courtesy, and endeavor to make him believe that their good will is necessary to his success,

<sup>3</sup> This duty is privately recognized by the Chancellor, even when he forbears to publicly exercise it.

<sup>4</sup> The Chancellor should nip altercation in the bud.

and endeavor to make others believe they own the Court, and that a wink or hint from them is more influential than facts, law, and sound argument from other Solicitors not so favored. The fact that such things take place should be conclusive proof to the Chancellor that his familiarity is bringing him into contempt, and should remind him that parasites seldom cling to what is pure and sound.

Nevertheless, there should be no iciness in the atmosphere surrounding the Chancellor, but a gentle warmth of respectful courtesy, assuring to the timid and not too encouraging to the presumptuous. Every lawyer, litigant, or official having intercourse with him on official business, should receive the full measure of considerate attention requisite for the proper discharge of the particular duty he is called on to perform; and should never be made to feel that they are trespassing upon his time, or consuming too much of his attention. The Chancellor is a public official, and his time is not his own, but belongs to his duties, and to those who have official business with him. When a Chancellor forgets this fact, he forgets that he is a public servant, and is in danger of becoming a public master.

§ 1152. **Deportment of the Chancellor While Hearing a Cause.**—While the evidence is being read, or argument is being made, the Chancellor should studiously avoid any appearance of impatience or partiality; and should keep constantly in mind that the first duty of a Judge is to hear.<sup>5</sup> He will find it a good rule not to express any opinions during the argument, because such an expression may embarrass the Solicitor, or it may turn out that the Chancellor was in error, and then he will be embarrassed by his prejudgment.

<sup>5</sup> *Patientia, quæ pars magna justitiæ est.*

CHAPTER LXIV.

THE CLERK AND MASTER: HIS POWERS AND DUTIES.

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| <p>§ 1153. The Office of Master Generally Considered.</p> <p>§ 1154. His Appointment and Induction Into Office.</p> <p>§ 1155. Powers and Duties of the Master in Relation to the Institution of a Suit.</p> <p>§ 1156. Powers and Duties of the Master in Relation to the Prosecution of a Suit.</p> <p>§ 1157. Powers of the Master to Make Orders on Rule Days.</p> <p>§ 1158. Powers of the Master to Make Orders on Other Than Rule Days.</p> <p>§ 1159. Powers of the Master in Reference to Depositions.</p> <p>§ 1160. Powers and Duties of the Master in Making Reports.</p> <p>§ 1161. The Master's Financial Report.</p> <p>§ 1162. The Master's Book Report.</p> | <p>§ 1163. Powers of the Master in Relation to the Revivor of a Suit.</p> <p>§ 1164. Powers and Duties of the Master in Making Deeds.</p> <p>§ 1165. When the Clerk and Master May Adjourn the Court.</p> <p>§ 1166. Powers and Duties of the Master in Receiving and Paying Out Money.</p> <p>§ 1167. How Married Women are to be Paid.</p> <p>§ 1168. How Moneys Belonging to Infants and Lunatics are Paid Out.</p> <p>§ 1169. The Books the Master is Required to Keep.</p> <p>§ 1170. Other Duties of the Clerk and Master.</p> <p>§ 1171. Duties of the Master During the Sitting of the Court.</p> <p>§ 1171a. Additional Rules for the Guidance of the Clerk and Master.</p> <p>§ 1172. The Deputy Clerk and Master: His Powers and Duties.</p> |
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§ 1153. **The Office of the Master Generally Considered.**—By the Code, the Clerk of the Chancery Court, in addition to all the duties and powers conferred upon Clerks of Courts generally, and in addition to various other special duties and powers, is “authorized to perform all the functions of Masters in Chancery, unless restrained by the provisions of law;”<sup>1</sup> so that he is both Clerk and Master.

There is a wide difference between the Clerk of a Court and a Master in Chancery. The duties of a Clerk are almost exclusively clerical; and his powers are strictly defined by law, or the orders of the Court; he exercises no judicial functions, and has but little discretion.<sup>2</sup> The Master, on the contrary, is a judicial officer, and is clothed with many of the powers of the Chancellor himself;<sup>3</sup> and an examination of the Chancery Reports, and of works on Chancery Practice, will show that the prompt and proper administration of justice requires that large powers, and no little discretion, be vested in the Master.

The matters referred to the Master for his action are almost as numerous as the matters subject to the jurisdiction of the Court.<sup>4</sup> Among the duties he may be called upon to discharge are the following: 1, To determine whether it is necessary to sell a decedent's land to pay his debts; 2, whether a tract of land should be sold rather than partitioned; 3, whether it is to the interest of a minor or married woman to sell her property, real or personal; 4, whether any taxes are due on land sold, or any other encumbrances exist; 5, what are the assets and liabilities of a decedent, a partnership, a corporation, or other person, whose assets are in the custody of the Court; 6, the amount of any particular liability; 7, the relative rights or priorities of various creditors, or claim-

<sup>1</sup> Code, §§ 4085-4086. There seem to be no restraining provisions of special importance, and it will be seen by a careful study of the English Chancery Practice prior to 1858, that our Masters in Chancery have nearly all the powers exercised at that time in England by the Masters in Chancery. The Clerk and Master has various duties to perform as Clerk of a Court, and various other and more responsible duties to perform as a Master in Chancery; hence, in speaking of him in connection with his duties as Clerk, he is generally termed Clerk; and in speaking of him in

reference to his duties as Master in Chancery, he is generally termed Master.

<sup>2</sup> When matters are referred to a Clerk to be reported on, or when any discretion is vested in him, or when he is required by the Court to make sales, or to discharge any *quasi* judicial duty, he, to that extent, is clothed by the statute, with the powers of a Master in Chancery. Code, § 4051.

<sup>3</sup> 1 Smith's Ch. Pr., 9-11.

<sup>4</sup> 1 Smith's Ch. Pr., 9; 1 Barb. Ch. Pr., 468.



ants; 8, the state of the account between a guardian, executor, administrator, receiver, or other trustee, and the beneficiaries, or between persons having mutual dealings; 9, the validity and amount of a particular claim; 10, to sell property, real and personal, and take the sale money, or the secured notes of the purchaser; 11, to invest money belonging to persons under disability, or to persons who fail to draw the same out of Court; 12, to loan out money on security; 13, to investigate the title to lands; 14, to fix the compensation of guardians, personal representatives, receivers, trustees, guardians *ad litem*, Solicitors and others; 15, to determine the proper allowance for the maintenance of married women, infants, or persons of unsound mind, or for the education of infants; 16, to inquire for heirs, next of kin, and legatees, whose estates are in Court; 17, to hold documents, securities, or other personal property involved in a litigation; and 18, to ascertain the amount of damages in any case where damages are claimed. Indeed, it may be stated that in general, there is no question of law, or Equity, or disputed fact, which the Master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the Court.<sup>4a</sup>

Besides these duties, there are others specially devolved upon the Master by statute, most of which are of a judicial nature, and call for the exercise of discretion. Among these duties are the following: 1, to appoint guardians *ad litem*; 2, to take and set aside orders *pro confesso*; 3, to hear proof of a party's death, issue process to revive, and order a revivor; 4, to extend the time for taking proof, or filing an answer; 5, to award attachments against witnesses and defendants for default; 6, to determine whether an answer is sufficient; 7, to ascertain what, if any, matter in a pleading, petition, or deposition, is scandalous, impertinent, or unnecessarily prolix; 8, to pass on exceptions to depositions, or to answers; 9, to make orders for taking depositions; 10, to restrict or enlarge the time of notice to take depositions; 11, to allow witnesses to be re-examined; 12, to appoint commissioners; 13, to take depositions; 14, to rule a complainant to take steps in a cause; 15, to order a non-resident party to answer interrogatories; and 16, to open and adjourn Court, in the absence of the Chancellor.

The foregoing enumeration of powers and duties clearly show that the office of Master is one of great authority, and large and varied responsibility, requiring for its efficient discharge, a good judgment, great diligence, an inflexible impartiality, an enlightened conscience, and a thorough acquaintance with the practice of the Court, coupled with good, clerical qualifications, and a large executive capacity.

**§ 1154. His Appointment and Induction Into Office.**—The Clerk and Master is appointed by the Chancellor of the Court, and holds his office for the full term of six years from his induction into office.<sup>5</sup> The appointment is usually made in writing.<sup>6</sup> There should be a record of his appointment and qualification and induction entered on the minutes of the Court. The following form is suggested:

**INDUCTION OF THE CLERK AND MASTER INTO OFFICE.**

Appointment and Induction of }  
 J. B. Ragon as Clerk and Master. }

On this 17th day of October, 1888, came J. B. Ragon, in his own proper person, into open Court, and presented the following letter of appointment as Clerk and Master of this Court, and tendered the three following bonds, and offered to take and subscribe the necessary oaths of office as such appointee, and moved the Court to induct him into said office of Clerk and Master:

<sup>4a</sup> 1 Smith's Ch. Pr., 11.  
<sup>5</sup> Const. of Tenn., Art. VI, § 13; State v. Anderson, 16 Lea, 325.

<sup>6</sup> See, *ante*, § 1137.

**LETTER OF APPOINTMENT.<sup>7</sup>**

[Here copy it in full.]

**CLERK AND MASTER'S OFFICIAL BOND.**

[Here copy it in full. This is the bond for the safe-keeping of the records, and for the faithful discharge of the duties of the office. Code, § 326.]

**CLERK AND MASTER'S REVENUE BOND.**

[Here copy it in full. This is the bond to account for taxes, fines, and forfeitures. Code, § 327.]

**CLERK AND MASTER'S SPECIAL BOND.**

[Here copy it in full. This is the bond to cover property or funds which may come into the Master's hands as special commissioner or receiver. Code, § 328.]

And each of said three bonds being found by the Chancellor to be correct in form and in penalty, and each of the obligors having unconditionally acknowledged each of said three bonds in open Court before the Chancellor,<sup>8</sup> and the Chancellor being satisfied that they are jointly worth largely more than the aggregate penalties of said three bonds, said three bonds were by him approved and accepted, and said acknowledgment and approval by him endorsed on each of said bonds.

Thereupon the following oaths of office were by the Chancellor administered to, and taken and subscribed by, said J. B. Ragon:

**OATHS OF OFFICE.**

[Here copy them in full. These oaths are, 1, The oath of office; Code, § 332; and 2, The oath against duelling, Code, § 752; Acts of 1859-'60, ch. 56. These oaths should be endorsed on the official bond of the Master first above set out. Code, § 756.]

Whereupon, the said motion was allowed, and said J. B. Ragon was then and there inducted into the office of Clerk and Master of this Court, for the full term of six years from this day; and he at once entered upon the discharge of the duties of his said office.

**§ 1155. Powers and Duties of the Master in Relation to the Institution of a Suit.**—All of the steps relative to the institution of a suit, except where extraordinary process or preliminary relief is sought, are taken in the Master's office. These steps are the following:

1. **Filing of the Bill and the Taking of Bonds.** The first step in the institution of an ordinary suit is the filing of the bill, and giving the required security for costs, or taking the pauper oath, in lieu.<sup>8a</sup> All papers and documents referred to in the bill as exhibits, must be filed in the Master's office at the time the bill is filed, unless, by special order of the Chancellor or Master, it is otherwise ordered.<sup>8b</sup>

2. **Issuance of Process.** The next step is the issuance of a subpoena to answer, and any attachment, injunction, or other extraordinary process ordered.<sup>9</sup>

3. **Ordering and Making Publication.** If the bill show a case where personal service is dispensed with, and the bill is sworn to, or the requisite facts appear by a separate affidavit, or by the return on the subpoena, the Master will forthwith make a publication order upon his rule docket, and publish the same.<sup>10</sup>

4. **Granting Attachments of Property.** The Clerk and Master may grant and issue an attachment in any case in his Court where an attachment may be issued by the Clerk of the Circuit Court.<sup>11</sup>

**§ 1156. Powers and Duties of the Master in Relation to the Prosecution of a Suit.**—After the bill has been filed, and process issued, or publication made, various duties and powers devolve on the Master, connected with the prosecution of the suit, and the preparation of the same for a hearing before the Chancellor, among which are the following:

<sup>7</sup> See, ante, § 1137.  
<sup>8</sup> The following is a form of probate:  
 State of Tennessee, }  
 County of Knox. }

Personally appeared before me each and all of the makers of this bond, to-wit: A, B, C, and D, with each and all of whom I am personally acquainted, and acknowledged that they severally and unconditionally signed the foregoing bond for the purposes therein expressed.

This Oct. 17, 1884. W. B. STALEY, Chancellor.  
<sup>8a</sup> §§ 178-183. The Master may swear the proposed prosecution sureties. State v. Wilson, 3 Pick., 693; ante, § 181.  
<sup>8b</sup> Code, § 4339; Ch. Rule, 1, §§ 2-3; post, § 1190  
<sup>9</sup> Ante, § 191.  
<sup>10</sup> For fuller particulars as to publication, see, ante, §§ 196-200.  
<sup>11</sup> See, ante, § 875.

1. **Entering and Setting Aside Judgments Pro Confesso.** It is the duty of the defendant to enter his appearance before the Master, on the return day, by filing with him the pleading containing his defence to the suit, and all the exhibits thereto, if any. If he fail so to do, the Master may, on motion of the complainant, order the bill to be taken for confessed. If, thereafter, the defendant show good cause, and tender a sufficient answer, the Master may set aside the order *pro confesso*, as already fully shown.<sup>12</sup> The Master may, before a *pro confesso*, grant the defendant, upon good cause shown, further time within which to file an answer.<sup>13</sup>

2. **Appointing Guardians ad Litem.** If a sworn bill, or a separate affidavit, show that a defendant is an infant without a general guardian, the Master may, upon motion of complainant, appoint a guardian *ad litem* for such infant. Who should be appointed, and the powers, duties, and liabilities of the person appointed, have heretofore been stated.<sup>14</sup>

3. **Acting on Exceptions to Pleadings.** He must act on all exceptions to answers, and give the requisite notices to the proper parties in reference to answers,<sup>15</sup> so that the parties aggrieved may take an appeal to the Chancellor.<sup>16</sup> The Master also acts on exceptions to bills, petitions, or other pleadings, when referred to him for revision because of scandal, impertinence, or prolixity.<sup>17</sup>

4. **Appointing Commissioners.** The Master may appoint commissioners to take depositions,<sup>18</sup> or to swear a defendant to his answer,<sup>19</sup> or to take an injunction bond in another county.<sup>20</sup>

5. **Issuing Attachments for Failure of a Witness to Appear, or Failure of a Defendant to Answer.** If a witness, after having been duly summoned, fails to appear, the Master may issue an attachment for him.<sup>21</sup> So, where the time for answering has expired, the Master may, on application of the complainant, issue an attachment against the defendant for want of an answer.<sup>22</sup>

6. **Extending the Time for Answering, or for Taking Proof.** The Master may grant a defendant further time in which to answer, on good cause shown, even after he has been attached for contempt.<sup>23</sup> He may also extend the time of either party for taking proof, on good cause shown by affidavit, and on terms. But in these cases, the Master is expected to act with legal discretion, just as the Chancellor would, and not grant every application indiscriminately, merely because requested so to do. The Master should be diligent himself, and should require diligence of all others.

7. **Making Orders in Relation to Proof.** The Master has large powers relative to the taking of proof. Thus, he may extend a party's time for taking proof after his time has expired; he may allow a witness to be re-examined to the same facts by the same party; he may restrict or enlarge the notice for taking proof; he may authorize the deposition of a witness to be taken before a cause is at issue; he may make a peremptory order on a party to answer interrogatories filed: he may determine whether notice to take depositions shall be given to each of several parties, and if not, to which of them notice shall be given.<sup>24</sup> In all these matters the Master should exercise the same discretion as the Chancellor would under the same circumstances; and he may condition his orders and rules upon the payment of such costs as the Chancellor may impose in the particular case. As a rule, a party asking a favor should pay costs.

8. **Steps Taken by Parties in the Master's Office.** A defendant may make a rule on the complainant to take any step necessary to the progress of a cause; notice of this rule shall be immediately given to the party interested, or his

<sup>12</sup> *Ante*, §§ 206-207.

<sup>13</sup> Code, § 4368. But the Master cannot set aside a *pro confesso* after a final decree: that can only be done by the Chancellor, in open Court.

<sup>14</sup> *Ante*, §§ 106-108.

<sup>15</sup> Code, §§ 4400-4403.

<sup>16</sup> Code, § 4404.

<sup>17</sup> Code, § 4316; *ante*, § 150.

<sup>18</sup> *Ante*, § 478.

<sup>19</sup> Code, § 4399.

<sup>20</sup> Code, § 4441.

<sup>21</sup> *Ante*, § 923.

<sup>22</sup> *Ante*, § 201.

<sup>23</sup> Code, § 4368; *ante*, § 203.

<sup>24</sup> Code, § 3850.

counsel, by the Master.<sup>25</sup> The complainant may set a plea or demurrer down with the Master to be argued.<sup>26</sup>

9. **Giving Notice of Rules, Orders and Other Proceedings.** The Master must give the opposite party, or his Solicitor, notice of any rule, order, or other proceeding, taken at his office affecting such party,<sup>27</sup> in order that the latter may take such step as he may desire in the premises, or may take an appeal to the Chancellor. He must, also, notify the complainant or his Solicitor of the filing of answers and pleas, and notify the defendant's Solicitor to file a sufficient answer.<sup>28</sup> Notice of a rule to take steps must be immediately given to the complainant, or his counsel.<sup>29</sup>

10. **Setting Causes for Hearing.** Formerly, a cause was set for hearing when the time for taking proof had expired; but this practice is now obsolete; and the only way in which a cause is now set for hearing is by entering it on the trial docket, and this the Master is required to do so soon as the cause is at issue.<sup>30</sup>

§ 1157. **Powers of the Master to Make Orders on Rule Days.**—The Master holds a sort of Court on the first Monday of every month at his office, when and where various rules and orders are made by him, for the preparation of causes for hearing; and other proceedings take place in reference to suits. These first Mondays are called rule days because on these days rules are made.<sup>31</sup> Each day of the term is also a rule day; but Solicitors generally prefer to make their motions and obtain their orders and rules from the Chancellor in open Court,<sup>32</sup> rather than from the Master, when the Court is in session.<sup>33</sup>

The memorandum book the Master is required to keep<sup>34</sup> is his office docket, and the rule docket is to his office what the minute book is to the Court: these two books contain a full history of every motion made, every paper filed or issued, every rule or order made, every original or mesne writ issued, and every other proceeding in the Master's office of which a minute is required to be made, except rulings on exceptions, and entries on the execution docket.

While motions, orders, and rules can, as a rule, be made on any day in the Master's office, there are some orders and rules that can only be made on rule days, and it is important to keep the distinction in mind. The following are the principal and, perhaps, the only orders and rules that must be made only on rule days:

1. **Orders Pro Confesso.** As a defendant is not bound to appear before the Master and make defence, except on a rule day, it seems that he is not in default on any other day: hence a *pro confesso* cannot be entered against him on any other day.<sup>35</sup> But it would seem that if a defendant has actually appeared and made defence, and that defence has been declared insufficient, or stricken from the files for any good reason, a *pro confesso* may be entered against him

<sup>25</sup> Code, § 4389.

<sup>26</sup> Code, § 4393.

<sup>27</sup> Code, § 4423. The Supreme Court has decided that this section of the Code is directory. *Shea v. Mabry*, 1 Lea, 327. The Chancellor, however, would not allow a party to lose any right, or be otherwise injured by the failure of the Master to give such notice. The Master would, also, be liable on his bond for any loss resulting from such failure. Some Masters are remiss in giving these notices; they are often of great importance to the parties interested, and Chancellors should require their Masters to faithfully and promptly give all the notices required by law: any negligence in this respect should be reprehended. Courts, whose duty it is to enforce the duties of others, should not tolerate any breach of duty by its own officers.

<sup>28</sup> Code, §§ 4400-4403; 4422; Ch. Rule, I, § 5.

<sup>29</sup> Code, § 4389.

<sup>30</sup> Code, §§ 4431; 4328; *ante*, § 464.

<sup>31</sup> There is a constantly increasing disposition to make all orders and rules, except orders *pro confesso*, orders appointing guardians *ad litem*, and orders reviving suits, on any day, whether a rule day or not; and as this disposition contravenes no positive law, and is very convenient, as well as promotive of dis-

patch, it is not to be discouraged. Indeed, it is exceedingly uncertain what orders and rules other than the three above named, must be made on rule days. Code, § 4418. Any order improperly made on a day not a rule day would, no doubt, be valid unless appealed from to the Chancellor, and by him set aside. Such appeals are seldom taken, and hence the growing disposition to disregard rule days.

<sup>32</sup> *In presentia majoris cessat potentia minoris.*

<sup>33</sup> Prior to the Act of 1851-2, Code, § 4421, only the first Mondays of the month and the first day of the term were rule days, and it was held in *Lannum v. Steele*, 10 Hum., 280, that rules proper to be made by the Master, including judgments *pro confesso*, could not be made, even by the Court, except on these rule days. This decision, which was made in 1849, probably caused the Act of 1851-2, (Code, § 4421,) making each day of the term, as well as the first Monday of every month in vacation, a rule day. *Lannum v. Steele* is often cited, without reference to the Act of 1851, which, in effect, overruled the case as an authority.

<sup>34</sup> *Post*, § 1169.

<sup>35</sup> *Lannum v. Steele*, 10 Hum., 280; *Seay v. Seay*, 1 Tenn. Ch., 2. But see note 33, *supra*.

on other than a rule day.<sup>36</sup> It is the practice to set aside a *pro confesso* on any day.

2. **Appointment of Guardians ad Litem.** Inasmuch as parties are bound to appear and make defence only on rule days, in theory an infant is not before the Master except on a rule day: hence the Master cannot appoint a guardian *ad litem* for him on any other day, as the infant must be present in law when the appointment is made.<sup>37</sup> A temporary guardian of a person found to be of unsound mind by a jury may, however, be made by the Master on any day after the verdict.<sup>38</sup>

3. **Revival of Suits.** The revival of suits in the Master's office is in the nature of an order *pro confesso*, and must be made on a rule day, for the reason above given.<sup>39</sup> The Master may, however, issue the writ of *scire facias* to revive, or file a bill of revivor and issue process thereon, at any time.<sup>40</sup>

4. **Rules to Take Steps.** It would seem that a rule by the defendant on his adversary to take a necessary step in a cause should be made on a rule day.<sup>41</sup>

§ 1158. **Powers of Master to Make Orders on Other Than Rule Days.**—As has been mentioned in a note to the preceding section, the distinction between what orders must be made, and what may not be made, by the Master on rule days, does not clearly appear in our practice. The Code says that the rules, orders and other proceedings made with, or by, the Clerk and Master shall be made at the rule days, unless otherwise authorized by the Code;<sup>42</sup> but so many are expressly or impliedly authorized by the Code to be made on other days that great uncertainty results, and in practice nearly, if not quite, all rules, orders and other proceedings, except as stated in the preceding section, are made on any day the Master can be found in his office.<sup>43</sup>

§ 1159. **Powers of the Master in Reference to Depositions.**—The Clerk and Master has all the powers of a Commissioner in taking depositions; and has, in addition, other and much greater powers. These will be here considered, for convenience, in connection with some of his other powers in reference to depositions:

1. **He Can Determine the Length of the Notice.** The Master may, upon good cause shown by affidavit, either restrict or enlarge the usual time of notice for taking depositions.<sup>44</sup>

<sup>36</sup> Code, §§ 4369; 4400-4407; 4395; 4464. See note to the next section.

<sup>37</sup> In strict law, neither the Chancery Court nor the County Court has jurisdiction to appoint a guardian for an infant who is not before the Court in person, or by service of some process.

<sup>38</sup> Code, § 3700.

<sup>39</sup> See, also, Code, § 4429; *Foster v. Burem*, 1 Heisk., 783.

<sup>40</sup> Code, §§ 4426; 4429.

<sup>41</sup> If, however, such a rule should be made on any other than a rule day, and the complainant notified thereof, and failed to appeal, the Chancellor would, no doubt, treat the rule as valid. Chancellors regard substance, not ceremony.

<sup>42</sup> Code, §§ 4417-4418.

<sup>43</sup> It would seem from a consideration of Code, sections 4418-4421, that the rules and orders referred to in section 4420 are all required to be made on rule days, but when other sections of the Code are considered, this conclusion is found to be erroneous. (1) § 4420, sub-section 1, is modified by § 4426, which says imperatively, the "Clerk and Master shall issue *scire facias*, or notice, at any time, upon motion of complainant, entering the same upon his rules." (2) § 4420, sub-section 2, is modified by §§ 4354-4355, which require the Clerk to make the order for publication upon the rule docket "as soon as the necessary affidavit is made," and this affidavit may be made whenever the bill is filed, and the bill may be filed at any time. See, also, Code, §§ 3518-3520, which show that in attachment cases, the order of publication may be made and entered on the rule docket "at any time." (3) § 4420, sub-section 3, seems to be modified by § 4369, sub-section 5, and by §§ 4400-4407, so that a *pro confesso* might be entered at the end of thirty days after notice of exceptions allowed, even if the thirtieth day came on other than a rule day.

By § 4395, it would seem that a bill may be taken for confessed at the end of the time prescribed by the Court for answering, although other than a rule day; and it would seem from § 4464 that when interrogatories are not answered by the given day, a *pro confesso* may be entered at once, without waiting for a rule day. § 4420, sub-section 3, seems, also, to be modified as to setting aside orders *pro confesso*, by §§ 4375-4376, which authorize the Master to set aside a *pro confesso* "at any time." Besides the delays that would be occasioned by waiting for rule days to set aside *pro confessos* would be intolerable. (4) § 4420, sub-section 5, seems to be modified, by § 4462, which authorizes the Clerk and Master "at any time after the bill is filed" to make an order to take depositions in certain cases, being, perhaps, the only cases, "where such orders are necessary." (5) § 4420, sub-section 6, gives the Master authority to open causes for proof "in the same way as the Chancellor might do." This would seem to imply that there is no restriction as to rule days; and, under Chancery Rule, II, § 4, the practice is to extend the time for taking proof on any day the Master or Chancellor, can be found. And, thus, the making of the orders and rules specified in Code, § 4420, except the one in reference to guardians *ad litem*, is seen not to be confined to rule days. It may be said that the various sections of the Code, giving authority to make these rules "at any time," mean on any rule day; but such a construction is contrary to usage, and too narrow. It may be safely said that the only orders absolutely required to be made on rule days, are: 1st, Orders *pro confesso* for failure to make any defence; 2d, Orders appointing a guardian *ad litem*; 3d, Orders reviving a suit; and, perhaps, 4th, Rules to take steps in a cause.

<sup>44</sup> Code, § 4460. If the witness is present, or in easy reach, the time of notice should be reduced to

2. **He May Allow a New Examination.** The Master may, upon good cause shown by affidavit, give a party leave to have a witness again examined in chief or cross-examined, after his deposition has been finally closed.<sup>45</sup>

3. **He May Attach a Witness for Failing to Appear.** If a witness, after having been duly summoned, fails to appear before the Master, upon the return of an officer or proof by affidavit showing that the witness has been summoned, the Master shall issue an instanter attachment for such witness, and designate therein the penalty of the bond conditioned for his appearance before the Chancellor at a time and place to be specified if practicable, or before the Court at the next succeeding term, if it be not then in session, to show cause why he should not be fined or committed according to law.<sup>46</sup>

4. **He May Commit a Stubborn Witness.** If a witness should appear and refuse to answer legal interrogatories, he shall be committed by the Master, until he consent to give his testimony.<sup>47</sup>

§ 1160. **Powers and Duties of the Master in Making Reports.**—When the Master is directed to make a report, he must make and file it within the time prescribed by the order or decree, or give a satisfactory written excuse to the Chancellor.<sup>48</sup> If the Court does not fix the time within which the account shall be taken, and the report made, the Master shall fix the time, and give five days' notice thereof to the parties, and the Solicitors, also, if both reside in the county, and if not he will notify the one, party or Solicitor, who does reside in the county. If the parties are numerous, notice shall be served on such of them as the decree or Master may designate.<sup>49</sup> The law requires the Master to be diligent in taking accounts, making sales, and making reports, and he must proceed with the least practicable delay to comply with the terms of the reference.<sup>50</sup> For each neglect he is subject to a fine of fifty dollars, and for repeated neglect may be removed from office.<sup>51</sup>

§ 1161. **The Master's Financial Report.**—The Master is required to report on the first day of each term the amount of money in his office, and the causes to which the several sums belong, excepting costs, but including State revenues. This report is not only for the inspection of the Court, but for the benefit of Solicitors and parties interested. It is made the duty of the Court to have this report inspected, the money counted, and to see that the report is in every respect correct.<sup>52</sup> This report should include, not only all the moneys actually in Court, except costs, but, also, the moneys loaned out by order of the Court, on note, or mortgage, or trust deed, giving the name of the security, its date, when due, and the names of the sureties. Money loaned out by order of the Court, is in the eye of the law, money in Court. The following is a form of the report:

**MASTER'S FINANCIAL REPORT.**

To the Hon. Thomas M. McConnell, Chancellor:

I submit the following report of the amount of money in my office, and the causes to which the several sums belong, not including costs:

one or two days; and, if both parties are present, taking depositions, and the witness is present, the time should be reduced to one hour. If the parties, while taking proof, refuse to take the deposition of any witness or witnesses present, or in easy reach, the Master should, on application, promptly authorize instanter notice to be given. He should endorse his action on the affidavit for restricted notice, and file it with the deposition thus taken.

<sup>45</sup> Code, 4461; Ch. Rule, II, § 6; *post*, § 1191.  
<sup>46</sup> Ch. Rule, VII, § 3; *post*, § 1196. Masters should promptly comply with this rule: it is imperative, and the effect is good. Justice cannot be done, if witnesses refuse to attend and give in their evidence. The Master should have the witness carried, or bound to appear, before the Chancellor instanter, if possible, so that his evidence may be had in time for the next term of the Court. Witnesses must be taught to respect the process of the Court. He who

will not testify for another deserves to suffer himself for want of the evidence of another. To bear witness to the truth is a sacred duty; and the administration of justice would become impossible if witnesses should withhold their testimony. To conceal material evidence is to aid in the perpetration of injustice, and is akin to crime.

<sup>47</sup> Ch. Rule, VII, § 4, *post*, § 1196. A witness cannot be compelled to answer a question that (1) will criminate him, or subject him to a penalty or forfeiture; or (2) that will involve a breach of professional confidence toward his client. 1 Dan. Ch. Pr., 942-943.

<sup>48</sup> Code, § 4471.

<sup>49</sup> Ch. Rule, IV, §§ 2-5; *post*, § 1193.

<sup>50</sup> Code, § 4474.

<sup>51</sup> Code, §§ 4472-4473; Ch. Rule, VII, § 6; *post*, § 1196.

<sup>52</sup> Code, §§ 335 i-335 j, (M. & V.)

John Doe <i>vs.</i> Richard Roe, <i>et al.</i> , - - -	\$ 192.82
This sum belongs to the heirs of Roland Roe.	
Richard Fen <i>vs.</i> John Den, <i>et al.</i> , - - -	500.00
This sum was paid in by Richard Fen, on a tender.	
George Jones <i>vs.</i> Henry Brown, <i>et al.</i> , - - -	613.92
\$600.00 of this amount has been loaned out by order of the Court on note, which is exhibited hereto.	
James Smith <i>vs.</i> John Johnson, <i>et al.</i> , - - -	987.42
This sum belongs to the parties, proceeds of land sold for partition.	
	\$2,294.16

Respectfully submitted, this Aug. 10, 1891.

T. N. SHERMAN, C. & M.

§ 1162. **The Master's Book Report.**—It is the duty of the Clerk and Master to keep at all times in his office the Reports of the Decisions of the Supreme Court; and at the first term of his Court each year to file a report showing the number and name of each of said Reports in his office, and to spread the same at length on the minutes of the Court.<sup>53</sup> The following is the form of this report:

#### MASTER'S BOOK REPORT.

To the Hon. Joseph W. Sneed, Chancellor:

I submit this report of the number and name of the Reports of the Decisions of the Supreme Court in my office:

REPORTS.	VOLUMES.	REPORTS.	VOLUMES.
Overton,	1 to 2, also known as	Tennessee,	1 to 2.
Cooke,	1	"	3
Haywood,	3 to 5,	"	4 to 6.
Peck,	1	"	7
Mart. & Yerg.	1	"	8
Yerger,	1 to 10,	"	9 to 18.
Meigs,	1	"	19
Humphrey,	1 to 11,	"	20 to 30.
Swan,	1 to 2,	"	31 " 32.
Sneed,	1 to 5,	"	33 " 37.
Head,	1 to 3,	"	38 " 40.
Coldwell,	1 to 7,	"	41 " 47.
Jere Baxter,	1 to 9,	"	48 " 56.
Heiskell,	1 to 12,	"	57 " 68.
Lea,	1 to 16,	"	69 " 84.
Pickle,	1 to 24,	"	85 " 108.
Cates,	1 to 8,	"	109 " 116.

Respectfully submitted, March 4, 1907.

JOHN W. SNEED, C. & M.

These reports, after being presented to the Court, will be referred to two or more Solicitors, and on their report will be entered in full on the minutes, thus:

#### ENTRY OF REPORTS, AND THEIR REFERENCE.

In the matter of the Clerk and Master's Financial }  
Report, and Report of Supreme Court Reports. }

The Clerk and Master this day presented his Financial Report, and his Report of Supreme Court Reports, which Reports are as follows:

[*Here copy, 1, Report of Money on Hand; and 2, Report of Sup. Court Reports.*]

On consideration whereof, the Chancellor appointed John W. Green and James C. Ford, Esquires, Solicitors of the Court, to examine said Reports; and thereupon, after due examination, they reported as follows:

[*Here copy their report, which is ordinarily as follows:*]

To the Chancellor:

We respectfully report that we have examined the foregoing financial [*or, book*] report of the Master, and find it correct, in every respect, and the money and notes [*or, books*] in his hands as reported.

Respectfully submitted, March 5, 1907.

JOHN W. GREEN,  
JAMES C. FORD.

§ 1163. **Powers of the Master in Relation to the Revivor of a Suit.**—The Master may, on a rule day, receive and enter on his rule docket the suggestion

<sup>53</sup> Act of 1887, ch. 246. This is an important statute, and the Chancellor should make all needful orders to compel the Clerk to collect up all missing

Reports so as always to have them in the office. Too often these Reports are deemed nobody's in particular, and everybody's in general.

and proof of a party's death, and order and issue the necessary process to revive, such process being a *scire facias*, or notice.<sup>54</sup> The process must be made returnable to a rule day, and the suit may be revived at the next rule day after the return, if no defence is made.<sup>55</sup> The entries on the rule docket in all matters relative to revivors should be as full, and in the same form, as entries on the minute-book in term time. The procedure in reviving suits is fully given elsewhere.<sup>56</sup>

§ 1164. **Powers and Duties of the Master in Making Deeds.**—The Court may, by decree, divest the title to property, real or personal, out of any of the parties, and vest it in others, or vest it in the purchaser; or the Court may authorize the Master to execute all necessary conveyances, releases, and acquittances, either in his name as Master, or in the name of the parties by him as Master, as the Court may think proper; and the instrument so executed will be as valid as if executed by the party.<sup>57</sup> The deed when executed by the Master must be by him acknowledged in the presence of two subscribing witnesses, or acknowledged before the Clerk of the County Court, or a Notary Public, to the end that it may be registered.<sup>58</sup>

§ 1165. **When the Clerk and Master May Adjourn the Court.**—If the Chancellor is, for any reason, unable to open his Court at the time fixed by law, he may by letter, or otherwise, instruct the Clerk and Master to keep the Court open until he can get there; or, if he is unable to hold the Court at all, he may instruct the Clerk and Master to adjourn the Court to a time, by him, the Chancellor, fixed for holding a special term. If the Clerk and Master has no instructions from the Chancellor, he may adjourn the Court, in the absence of the Chancellor, from day to day, for three days in succession, or longer, if in his judgment the interest of the public requires it, and then adjourn it to the Court in course.<sup>59</sup>

§ 1166. **Powers and Duties of the Master in Receiving and Paying Out Money.**—The Master must always keep in mind the fundamental fact that in receiving, holding, and paying out money, he is the mere hand of the Court, and the trustee of the parties interested in the money. None of the money belongs to him, nor has he any right whatever to use any portion of it, not even his own costs, until the Court so orders; nor can he lawfully pay out any of it to any one on any pretence whatsoever, except in obedience to some express and plain law, or on the express command of the Court. He has no discretion vested in him, whom to pay, when to pay, where to pay, or how to pay; but must pay the very person lawfully entitled under the decree, and must make the payment in the precise manner specified by the statute, or by the decree; and must pay at his office without delay, upon application of the party entitled, his agent, or attorney.<sup>60</sup>

The Clerk and Master has authority to receive the amount of any decree rendered by his Court, either before or after the issue of an execution thereon;<sup>61</sup> but he has no authority to receive anything in payment of any decree calling for money, except money, unless the decree in plain and express terms authorizes something else to be received, and then the decree must be strictly followed.

The Clerk has no right or authority to pay money in his hands in a cause to anyone, except in obedience to an order of Court, or in compliance with some statute.<sup>62</sup>

<sup>54</sup> Code, §§ 4420; 4426.

<sup>55</sup> Code, §§ 4429; 4349.

<sup>56</sup> See, *ante*, §§ 699-719.

<sup>57</sup> Code, §§ 4484-4485.

<sup>58</sup> See, *ante*, § 650.

<sup>59</sup> Code, § 4087. This section seems broad enough to cover a case where a Chancellor, after opening his Court, for any reason, is unable to close it, or neglected to close it.

<sup>60</sup> Code, §§ 4043; 4475. The Clerk and Master is protected by the order of the Court requiring him to pay out money. If a party objects to such an order he must appeal. See 2 Perry on Trusts, §§ 476 a; 928.

<sup>61</sup> Code, § 4050, sub-sec. 5.

<sup>62</sup> Craig v. Governor, 3 Cold., 244.



When a Clerk and Master dies, the moneys in his hands as such are not assets for the payment of his debts, or for distribution, but belong to the office, and should be paid into Court; and when a Clerk and Master dies, or is removed, or his term expires, it is the duty of his successor to demand, and take possession of, all the assets and other property belonging to the office;<sup>63</sup> the money may be recovered by motion;<sup>64</sup> and the books, papers and other property may be recovered as provided by sections 806-811 of the Code.<sup>65</sup>

When the Clerk and Master is liable to any party to a suit for money in his hands, it may be recovered on motion, or a petition may be filed in the cause without bond against him and his sureties, or against the personal representatives of the Clerk and his sureties, if any of them be dead. An original suit in the Circuit Court on the Clerk and Master's bond would be irregular;<sup>66</sup> and, if no order had been made for the Clerk to pay over the money, such a suit would be improper, and not maintainable.<sup>67</sup>

§ 1167. **How Married Women are to be Paid.**—The laws of Tennessee jealously and zealously hedge married women around with safeguards against improvident husbands, impecunious agents, importunate acquaintances, and imprudent Court Clerks; and no Clerk and Master can safely pay out the proceeds of real or personal property belonging to married women unless he strictly conforms to every requirement of the statute.<sup>68</sup> These requirements are as follows:

The proceeds of real or personal property belonging to a married woman cannot be paid to any person, except by consent of such married woman upon privy examination by the Court; or, unless a deed or power of attorney is executed by the husband and wife, and her privy examination taken, as in other cases.<sup>69</sup> A married woman may, in person, receive the money; or, upon privy examination by the Court, or by any person commissioned to take such examination, direct how the same shall be paid or invested, which direction shall be reduced to writing, and entered on the minutes of the Court.<sup>70</sup> She may also, by power of attorney, duly executed by her with her husband, upon privy examination as in other cases, authorize and direct the money to be paid or invested as they may see proper, which power of attorney shall be filed with the papers, and form a part of the record of the cause.<sup>71</sup>

The Court may, on proper application, order the proceeds of a wife's lands to be re-invested in other lands for her benefit, or otherwise permanently invested.<sup>72</sup>

§ 1168. **How Moneys Belonging to Infants and Lunatics are Paid Out.**—The law regards infants and persons of unsound mind with all the solicitude of an affectionate and prudent parent, and guards their financial interests with a jealous and unceasing watchfulness, and enforces its protective powers with a comprehensive vigor.

1. **How Money Belonging to an Infant is Paid Out.** Infants are deemed in law to be wholly unable to manage their financial affairs, and a person who is both an infant and a wife is under a double disability; and the Clerk and Master must, in the first place, see that he is clearly authorized by a decree before he pays out the money in his hands belonging to an infant, and especially to an infant wife; and he must, in the next place, see that he follows the directions

<sup>63</sup> Massey v. Gleaves, 1 Tenn. Ch., 150. The person holding the office dies, but the officer himself, in contemplation of law, does not die: the officer is immortal; there is no interregnum. *Rex nunquam moritur.*

<sup>64</sup> Tanner v. Dancy, 4 Heisk., 482.

<sup>65</sup> Code, § 4060.

<sup>66</sup> Yowell, *ex parte*, 7 Heisk., 561.

<sup>67</sup> Craig v. Governor, 3 Cold., 244. Money in Court belongs to some one or more of the parties to the suit which brought it in. It is for the Court and not for the Clerk to say to whom it shall be paid, and when. To reach money in Court by at-

tachment, or execution, or garnishment, or by an independent bill, the owner of the money must be made a party: it is not sufficient to make the Clerk a party.

<sup>68</sup> Code, § 4052.

<sup>69</sup> Code, § 2483.

<sup>70</sup> Code, § 3319.

<sup>71</sup> Code, § 3320.

<sup>72</sup> Code, § 3318. The foregoing provisions apply only when a married woman is an adult; when she is a minor, the provisions of Code, § 4054, apply. See next section.

of such a decree with scrupulous exactness. The husband of an infant has no right to funds in Court belonging to her,<sup>73</sup> nor has her guardian any right thereto, unless the Court so orders. The husband of the infant may be an infant, also, in which case his guardian would have no right to the funds belonging to his wife, whether she be an infant or an adult. No guardian has any right, in any case, to draw funds from the Chancery Court without an express order of the Court, and then only on complying fully, and in good faith, with the terms of such order.<sup>74</sup> Money belonging to a minor may be paid him when he attains his majority on his affidavit, or a deposition being filed to establish his majority,<sup>75</sup> or it may be paid to his regular guardian when the Court so orders.

**2. How Money Belonging to a Non Compos is Paid Out.** Persons of unsound mind are regarded by a Court of Equity as the objects of the greatest solicitude, and their interests are protected with a stringent and scrupulous fidelity. The Clerk and Master, in paying out the funds of such persons, must look exclusively to the decree of the Court for his authority and method of procedure; and the injunctions and directions above given in reference to infants apply with equal, if not greater force, in case of payment of money belonging to idiots and lunatics.<sup>76</sup>

**§ 1169. The Books the Clerk and Master is Required to Keep.**—The Clerk and Master is required by law to keep certain office books; and on the proper keeping of these books greatly depend the ease, accuracy, and facility with which the business of the Court, and the business of the Clerk and Master's office, are transacted. The safety and integrity of these books are essential to the security of property, the final determination of rights, and the repose of society; and they should be preserved with a jealous fidelity, and an inviolable sanctity; and any defacement, obliteration, or alteration of them, should be deemed a sacrilege. The books to be thus kept by the Clerk are the following:

**1. A Minute Book.** The Clerk and Master is required to keep a wellbound book, in which shall be entered the minutes of each day's proceedings during the session of the Court, in the order in which they are made. This is the most important of all the Court books, and should be bound well enough to last a hundred years. It should be preserved unmutilated, and unchanged, with scrupulous vigilance and fidelity. And inasmuch as it contains the perpetual memorial of the decrees of the Court, the entries should be made in a bold, round hand, and with the most durable black ink. This book being under the constant personal supervision of the Chancellor, no detailed directions as to the keeping of it are necessary.<sup>77</sup>

**2. A Judgment Index Book.** The Clerk and Master is required to keep a judgment index, in which the name of each person, partnership, firm or corporation against whom a judgment or decree is rendered shall be entered under the proper alphabetical [initial] or letter of such person, partnership, firm or cor-

<sup>73</sup> He may borrow the money, if he gives the required security. *Cheatham v. Huff*, 2 Tenn. Ch., 616. There may be an application to enforce the wife's equity in her estate. See, *ante*, § 968.

<sup>74</sup> Code, §§ 4053-4054, which sections are as follows:

The proceeds of the real or personal property of an infant can only be paid to a guardian who has given bond with good security, as such, to the satisfaction of the Court.

If the infant is also a *feme covert*, the funds can only be paid out upon the order of the Court, directing how, and to whom, the same shall be paid.

<sup>75</sup> Dan. Ch. Pr., 1800-1801.

<sup>76</sup> Code, § 4055. This section is as follows:

So, also, if the person entitled to the proceeds of either realty or personalty, sold by order of Court, is of unsound mind, the funds can only be paid to a guardian, or committee, duly appointed, who has given bond and security according to law, satisfactory to the Court making the sale.

<sup>77</sup> The Chancellor should allow no contested decree

to be entered on the minutes, until it has first been submitted to the adverse Solicitor, and all his objections passed on; and every uncontested decree should be approved by the Chancellor before its entry on the minutes. In no other way can the minutes be preserved from erasures, interlineations, and alterations, which are both a reproach to the Chancellor and to the Clerk, and an impairment of the inviolable sanctity which every Court record should possess that is deemed absolute verity. Besides, authorized alterations suggest and may induce unauthorized alterations. If an alteration or interlineation is made, it should, for obvious reasons, be in the handwriting of the Clerk, or of the Chancellor. For like obvious reasons, no decree or order should ever be vacated by writing "Vacated" across it, or in any similar way; but it should be vacated by another decree or order duly entered on the minutes of the date of the order of vacation; and a memorandum like this entered on the margin of the vacated decree or order: "Vacated: see page —."

poration, giving the date, number of the cause, and amount of such judgment. Each page of said index shall have four [five] columns, as follows:

Name.		Date.		No.		Cause.		Amount.
-------	--	-------	--	-----	--	--------	--	---------

Two sets of these columns may be on each page.<sup>77a</sup>

**3. An Execution Docket.** This book is next in importance to the minute book, as it shows all the decrees of the Court in the order of their rendition, giving the dollar-and-cent result of the litigation, the costs of the suit, to whom owing, what is paid into Court on the final decree, by whom paid in, and to whom paid out. There are severe penalties imposed by law on Clerks for misfeasance in connection with the execution docket.<sup>78</sup> The following facts must be shown on the execution docket in each case:<sup>79</sup>

1. The style of the cause, giving the names of all the complainants, and all the defendants, in full.

2. The day and year of the rendition of the decree.

3. The amount of the decree, and in whose favor and against whom rendered; and if various amounts are decreed against various parties, or in favor of various parties, these facts must be shown.

4. The amount of the costs, showing the name of each officer, witness, or other person, to whom costs are due, and each item due each person and on what account owing, and the fee due on each item, all with particularity and certainty.

5. The character<sup>80</sup> and number of the executions issued; the date of their issuance, and to what county or counties issued; the persons to whom delivered, and the date of delivery, or, if sent by mail, the day it was mailed, and to whom addressed.<sup>81</sup>

6. The fact and dates of the return of the executions, and the dates and substance of the officers' returns. It is better to give the returns in full, including the officers' names.

7. The dates and amounts of all moneys paid into the office, and by whom paid, and on what accounts.

8. The dates and amounts of all moneys paid out of the office, to whom paid, and on what account, showing the facts clearly and particularly.

All of the entries in reference to executions, and payments, must be made on the execution docket at the time of the transaction.<sup>82</sup>

**4. A Cash Book.** The Clerk and Master is required to keep a cash book as one of the public records of his office, in which he shall enter, under each case, all sums of money received or disbursed by him, showing the date of receipt or disbursement, on what account received or disbursed, and from or to whom received or disbursed. This book must be indexed direct and reversed. It shall at all times be open to the inspection of the public; and it is a misdemeanor for the Clerk and Master to fail to keep this book, or to fail to allow its inspection.<sup>83</sup>

**5. A Rule Docket.** The Rule Docket must be a well-bound book, kept exclusively for the entry of all rules, notices, orders, and other proceedings in a cause made with or by the Clerk and Master.<sup>84</sup> This book is to the Master what the minute book is to the Chancellor; and should contain a perfect and detailed record or minute of every step taken in the Master's office, from the beginning of the suit to the final decree. As some guide to the Master in keeping his Rule Docket, the following summary of Rule Docket entries is given:

<sup>77a</sup> Act of 1897, ch. 27.

<sup>78</sup> Code, § 3017.

<sup>79</sup> Code, §§ 3016; 4040.

<sup>80</sup> A writ of possession is a species of execution.

<sup>81</sup> Code, § 3598.

<sup>82</sup> Code, § 3016. The Clerk and Master is not only liable in damages for neglecting to keep his execution docket according to law, Code, § 3017; but he is, also, guilty of a misdemeanor, and is liable to

removal from office, when his omissions are wilful. Code, § 4065. Nothing but scrupulous exactness and promptness in making his entries will save the Clerk harmless. Every entry should invariably be made on the execution docket at the very time of the transaction. See, *post*, § 1171 a, sub-sec., 15.

<sup>83</sup> Acts of 1897, ch. 26.

<sup>84</sup> Code, § 4417; 4085. See, *post*, § 1171 a, sub-secs. 10, 11, 13, 14.

1. He will enter the cause as soon as the bill is filed; giving the names of all the complainants and all the defendants.<sup>85</sup>

2. The names of the complainant's Solicitors.<sup>86</sup>

3. The date and fact of the filing of the prosecution, injunction, attachment or other bonds, the penalties of the various bonds filed, and the names of the sureties on each.

4. The minute, hour, day, month and year on which the bill is filed, being especially careful as to the minute and hour in case of attachment bills.

5. The date, fact and filing of each exhibit to the bill.

6. The date and fact of the issuance of each subpoena to answer, and of each writ of injunction and attachment, and the officer to whom issued; and if sent by mail so show, and what fees were advanced, if any, and by whom.

7. Every order of publication in full, dated and duly signed by the Clerk and Master.

8. Every order extending the time for answering the bill.

9. The date and fact of the return of all original and mesne process, including subpoenas to answer, writs of injunction, attachment and *scire facias*, giving the officers' returns thereon in full, including the date, and his name.

10. The date and fact of the filing of all demurrers, pleas, answers, and exhibits to answers.

11. The names of the defendant's Solicitors.<sup>87</sup>

12. Every order taking a bill for confessed. This order, and the following orders, must be set out in full, and duly dated.

13. Every order appointing a guardian *ad litem*.

14. The suggestion and proof of a party's death, and the award of a *scire facias*.

15. Every order reviving a cause upon return of a *scire facias*, or of a subpoena to answer a bill of revivor.

16. Every order setting aside a judgment *pro confesso*.

17. The date and fact of the filing of every deposition, the names of the witnesses, and by what party filed. The Code says these entries in reference to depositions may be made in a separate book.<sup>88</sup>

18. The date and fact of the filing of documents, exhibits to depositions, transcripts, deeds, wills, plats, and other sorts of evidence, and by whom filed.<sup>89</sup>

19. The date and fact of the filing of every other paper, of the making of every other rule, or order, and of every other proceeding in the cause not heretofore in this section specified, and not entered on the minute book, or execution docket.

All the entries in the rule docket will be made under the style of the cause to which they belong, and will be made in the order of time in which the acts were done, and the correct date will be attached to each entry.<sup>90</sup>

**6. A Memorandum Book.** The Clerk shall keep a memorandum book in which shall be noted every subpoena for witnesses, commissions to take depositions, with the day of issuance, and any other proceedings of the Clerk not entered on his records, rule docket, or minutes; and such memorandum books shall be open for parties, or their attorneys, to make such memorandums for the direction of the Clerk as may be necessary.<sup>91</sup>

<sup>85</sup> It is of great importance to have the names of all the parties, complainant and defendant, appear on the rule docket, because the pleadings are now seldom enrolled, and the minutes of the Court seldom give the names of all the parties; and the rule docket, in case any pleading is lost, may contain the only record showing the names of all the parties to the suit.

<sup>88</sup> The entry of the names of the Solicitors on the rule docket is a record of their authority to appear and act.

<sup>87</sup> This entry is of importance; but is often neglected.

<sup>88</sup> Code, § 4085.

<sup>89</sup> The importance of this is well illustrated by

*Mullins v. Aiken*, 2 Heisk., 551. See, also, *Baker v. Mayor*, 2 Heisk., 117. If papers get lost, the rule docket will show that they had been filed.

<sup>90</sup> Code, § 4417. The Master should make it an imperative and invariable rule to make all of his rule docket entries at the very time the act is done, thereby making the entry on the rule docket a part of the transaction itself. All neglects and postponings are reprehensible; and wilful omissions or failures should be punished by removal from office. Code, § 4065. A rule docket well kept is indispensable to the rights of litigants, and the certain dispatch of business.

<sup>91</sup> Code, § 4433.

This book is kept by very few Clerks and Masters, and yet it is a book of importance and great usefulness. When properly kept, it will constitute a sort of office docket, in which Solicitors may make memorandums for the direction of the Clerk, such as directions to issue *alias* or counterpart subpoenas to answer, or subpoenas to testify, directions as to sales, executions, or writs of possession, directions to enter judgment *pro confesso* when the proper time arrives, directions to appoint guardians *ad litem*, directions in reference to the taking of accounts, or making reports, directions in reference to the revivor of suits, directions in reference to exceptions to answers or depositions, or any other directions, or memorandums, in reference to any matter to which he desires to call the Master's attention, or on which he desires the Master to act, in reference to any cause, whether brought, or about to be brought, or already determined.

7. **A Deposition Book.** The Master is also required to keep a well-bound book, in which shall be entered under the name of each case, the depositions taken and filed in the case, the names of the witnesses, and the date of the filing, and by whom. This book may be dispensed with, by keeping the rule docket in such way as to enable the entries here required, to be made therein, without interfering with the entries regularly belonging to that docket.<sup>92</sup>

8. **An Insolvent Book.** Inasmuch as many large insolvent estates are administered in the Chancery Court, the statute requires the Clerk and Master to keep in his office a book marked "Insolvent Book," in which will be entered the character and amount of all claims filed in insolvent suits, the several claims and amounts allowed, the amount to be distributed among the creditors, and the *pro rata* to be paid each.<sup>93</sup> This is an important book: it preserves the record of an insolvent estate, and obviates the necessity of entering long schedules on the minutes of the Court.

9. **Trial Dockets.** The Clerk must keep three trial dockets, one for the Chancellor, one for the bar, and one for himself.<sup>94</sup> These dockets should be well-bound books, large enough to last several years, and should be kept with the same care and fidelity as other record books. A cause should be entered on this docket as soon as it is at issue,<sup>95</sup> and should bear the same number as on the rule docket.<sup>96</sup> The following is the form of a trial docket, the No. of the cause, names of the Solicitors, style of cause, and pleadings when filed, being on the left-hand page; and the rules, orders and decrees and the memorandums being on the right-hand page.

TRIAL DOCKET.

124 CHANCERY COURT AT KINGSTON				JANUARY TERM, 1891. 125	
NO. OF CAUSE	NAMES OF SOLICITORS	STYLE OF CAUSE	PLEADINGS WHEN FILED	RULES, ORDERS, AND DECREES	MEMORANDA
618	Jas. Sevier.  S. C. Brown	John Doe, <i>vs.</i> { Partition Bill, Richard Roe, <i>et al.</i>	Jan'y 2, 1890, Bill filed, March 3, 1890, Ans. of Richard Roe filed.	May 1, 1890, <i>Pro confesso</i> against Roland Roe. May 15, 1890, continued by defendants.	July 15, 1890, affidavits read for a continuance; but continuance denied.
619	Geo. L. Burke.  T. A. Wright.	James Fen, <i>vs.</i> { Attachment Bill, John Den.	January 19, 1890, Bill filed, April 2, 1890, Plea filed.	July 15, 1890, Jury trial demanded, July 16, 1890, Issues of Fact filed.	July 16, 1890, Sheriff directed to summon a jury for 17th inst.

§ 1170. Other Duties of the Clerk and Master.—There are various other

<sup>92</sup> Code, § 4085. This book not only may be dispensed with, but should be dispensed with, as an unnecessary multiplicity of books creates confusion. The entries that may be made in it should all appear in the rule docket.

<sup>93</sup> Acts of 1879, ch. 27; Code, §§ 2358; 2337. This book is styled by the statute "Minutes of Insolvent Estates." It would be well to take on it the receipts of all parties entitled to a *pro rata*. The name of each claimant, and the amount and character of his

claim, should be entered on this book as soon as the claim is filed; and as soon as the Master's report of assets and creditors is confirmed, and distribution ordered, the substance thereof should be entered in this book in the proper column.

<sup>94</sup> Nunnally v. Smith, 4 Bax., 311.

<sup>95</sup> Code, § 4431.

<sup>96</sup> In some counties a new docket is made out for each term, and sometimes the docket is divided into a "trial docket" and an "appearance docket." These

duties of the Clerk and Master, important in themselves, but not necessary to be treated in detail in this book.<sup>97</sup> The principal of these duties are the following:

1. To reside in the county wherein the Court is held, to keep his office at the county seat of said county, and give due attendance at his office for the performance of official duties.<sup>98</sup>

2. Not to practice law in his Court, nor become security for the prosecution of suits in his Court, nor upon any bonds, or other obligations, required to be executed by the parties in the progress of such suits.<sup>99</sup>

3. To issue all original, mesne, and final process from the Court,<sup>100</sup> and to sign all subpœnas, injunctions, attachments, executions, and all other writs issued from his Court, and to endorse on the back thereof the date of issuance.

4. To record in well-bound books, within six months after the final determination of any suit or prosecution, such proceedings as he is required by law to enroll.

5. To make and keep indexes, direct and reversed, for all books and dockets required to be kept by him.

6. To keep all the papers, books, dockets, and records belonging to his office with care and security; the papers filed, arranged, numbered, and labeled, so as to be of easy reference; and the books, dockets, and records properly lettered; and to allow parties to inspect the records free of charge.<sup>101</sup>

7. To attend Court, during the session thereof, with all the papers belonging to the term, so filed as to be of easy reference; to keep in the Court House during such session, the execution docket for the two preceding terms; and to administer all oaths and affidavits in relation to causes or proceedings pending therein.

8. On application and payment of the legal fees therefor, to make out and deliver to any person applying for the same, a correct transcript, properly certified, of any paper or record in his office.

9. To perform such duties in regard to the State and county revenue as are prescribed by law.

10. To issue executions within the time prescribed by law.<sup>102</sup>

11. It is the duty of the Clerk when a cause is taken by appeal in the nature of a writ of error to the Supreme Court, to make out, and transmit by mail, to the Clerk of the Supreme Court of his Division, a transcript of the record, within forty days after the entry of appeal, unless the entry has been within

temporary dockets are generally destroyed as waste paper, after the term closes. This practice is reprehensible. The statute contemplates only one trial docket, and that a cause shall be entered only once on this docket. This docket is made in triplicate, as stated in the text. The memoranda made by the Chancellor on his docket, and the memoranda made by the Clerk on his docket, are in the nature of records, and will support decrees *nunc pro tunc*, will evidence a Solicitor's appearance in a cause, and will be proof of steps taken at the present, or at a past term, of the Court. This shows the importance of keeping the trial dockets in book form, and of preserving them as records. If causes are entered on the trial docket in the order in which they are entered on the rule docket, much confusion is avoided, the same number can be given on each docket, and the records of the Court made to correspond.

<sup>97</sup> For these various duties, see Code, §§ 4038-4066.

<sup>98</sup> Code, § 4038.

<sup>99</sup> Code, § 4039.

<sup>100</sup> Code, § 4085.

<sup>101</sup> The Clerk has no authority to allow the papers, books, dockets, and records, belonging to his office, to be taken out of his office by any one except the Chancellor, who is entitled to take a file in a pending cause to his own room or office to enable him the more thoroughly to investigate and consider the pleadings and proofs in the cause. The Clerk should, in extraordinary cases, and subject to proper safe-

guards, allow reputable Solicitors to take out a file for a few days; but no file should ever be allowed to be taken out of the county, nor should any record book ever be allowed to be taken out of the office, or the Court House, on any pretext or by any person. The Chancellor has no lawful authority to order the Clerk to allow any file or record to be taken out of his office. The Clerk is charged with the exclusive custody of all his records, and gives a bond for their safe keeping, and his office is the only proper place for such records. Nothing does more to create delays and confusion and annoyances and suspicions, and criminations and recriminations in the progress of a suit, than the practice of allowing any one and every one connected with the suit to take out the files in a cause, or the files referred to in a cause. The Clerk should adopt and enforce rigid rules to enable him to retain the custody of his records; and the Chancellors should sustain their Clerks in so doing, and not encourage, much less undertake to authorize the miscellaneous looting of the Clerk's office by parties and the Solicitors of the Court. Those who would censure the Clerk for retaining the files, would be loudest in their denunciation of him if any file should be lost, despoiled, or mislaid. Pleadings, exhibits or depositions may, by leave of the Chancellor, be withdrawn from the files, when material to a prosecution for perjury. 1 Dan. Ch. Pr., 784; or when material in any other litigation. But certified copies of all papers withdrawn should be substituted.

<sup>102</sup> Code, § 4040.

forty days of the regular term of the Supreme Court, or during such term, and then forthwith, and transmit without delay to the Clerk of the Supreme Court. The certificate of the postmaster of his county, that the transcript has been deposited in the postoffice within the time prescribed, is presumptive evidence of the transmission required.<sup>103</sup>

12. It is the duty of the Clerk, upon application of the party entitled, his agent, or attorney, made at the office of the Clerk, to pay and deliver to the applicant without delay, any money or property in his hands, received by virtue of any decree, judgment, or order, of the Court, or any Judge thereof, or by virtue of his office. A failure so to do is a misdemeanor in his office, and, moreover, subjects the Clerk to motion against himself and his sureties.<sup>104</sup>

13. The Clerk, in all cases where there are two or more defendants, and a subpoena for witnesses, or other process, issues on application of part only of the defendants, shall mark thereon at whose instance such process was issued.<sup>105</sup>

14. Upon the suspension or removal from office of any Clerk, he shall, on demand of his successor or order of the Court, deliver over to such successor, the books, papers, and other articles belonging to the office; such delivery to be enforced as provided in sections 805-811 of the Code.<sup>106</sup>

15. To pay into the State Treasury all sums of money, funds, or witness fees that may have remained in his hands or Court unclaimed, or uncalled for, by the party or parties legally entitled to the same, for a period of six years.<sup>107</sup>

16. To perform such other duties as are, or may be, by law required of him.<sup>108</sup>

**§ 1171. Duties of the Master During the Sitting of the Court.**—The Clerk and Master should, during the sitting of the Court, be always ready to perform any duty connected with his office, or to respond to any question propounded to him by the Chancellor, or by a Solicitor, or party, touching the status of any particular matter relative to his office, files, or duties. To enable the Master to discharge these duties to the satisfaction of himself and all others concerned, he should not undertake to write up the minutes, or to take depositions, or to perform any duty that will take him out of the Court room. He should have a deputy to do all clerical work, and if the deputy is needed to take depositions or prepare reports, the Master should have a competent amanuensis employed to write up the record of each day's proceedings. Nothing is so irritating and demoralizing to all concerned as to have the minutes in arrears, and the Master in vain trying to write them up and at the same time to answer questions, make payments, take depositions, make reports, search for papers and perform other duties of a like character.<sup>109</sup> Everybody is liable to become irritated by such perplexities; and the Master who undertakes such a task not only undertakes the impossible, but he makes the Court a scene of unseemly confusion, and causes a multitude of petty annoyances, and sometimes, in his hurry and confusion, commits serious mistakes.

The statute provides that the minutes of the previous day's proceedings should be read each morning; and the Chancellor should not allow the minutes to lag behind the Court. The Master should be required to have the necessary clerical force to keep the minutes up to date. A positive rule positively enforced will prevent all the annoyances incident to the delays in the entering of the orders and decrees, especially at the close of the Court. The Master should not be allowed to degenerate into a copyist while Court is in session: better things are expected and required of the Master, and he should endeavor faithfully to justify these expectations in the fullest.

**§ 1171a. Additional Rules for the Guidance of the Clerk and Master.**—Inasmuch as new officers are constantly being appointed to perform the responsible

<sup>103</sup> Code, §§ 4041-4042.

<sup>104</sup> Code, §§ 4042-4043.

<sup>105</sup> Code, § 4049.

<sup>106</sup> Code, § 4060.

<sup>107</sup> Acts of 1891, ch. 227.

<sup>108</sup> Code, § 4040.

<sup>109</sup> The Clerk and Master should make all due preparation for the sitting of the Court: he should

duties of Clerk and Master, the following additional rules for their guidance have been formulated, the observance of which will greatly increase the efficiency, accuracy and dispatch of business in the office.<sup>109a</sup> These rules are, in the main, declaratory of the law; and are only supplemental to those given in the preceding sections.

1. **His Duty in Taking an Account.** The Clerk and Master will begin the taking of every account in due season, as required by the Code, (sec. 4474;) and he will file every report at least five days before the first day of the succeeding term, (Chancery Rule IV, sec. 8;) or file a sufficient excuse, or be liable to the penalties specified in the Code, (secs. 4472 and 4473,) and in Chancery Rule VII, § 9.

2. **His Report Must Specify the Evidence.** Every report based on evidence will refer to the particular evidence upon which each fact or item is based, giving the page; and, if a deposition is referred to, the number of the question and answer relied on must also be given. A general reference to a document or deposition will be insufficient. (Chancery Rule IV, sec. 7.)

3. **His Financial and Book Reports Must be Prompt.** The Clerk and Master will have his *Financial Report* and *Report of Supreme Court Reports* ready to present to the Chancellor as soon as he takes the bench at the opening of the term, the latter Report to be made at the first term only in each year. The Financial Report must show not only the amount of money in his office, and the causes to which the several sums belong, but will, also, show what money he has out on loan, and in what cases; and he will file the notes given by the borrowers with his Report. The money and notes specified in said report, the Clerk and Master must keep in his hands during the sitting of the Court ready to be produced, instantler, if so ordered by the Court; and *no excuse* will be accepted for failing to file said Reports, or to have said money, notes and books on hand.

4. **He Must Report Taxes on Lands Sold.** Whenever real estate is sold the Master will immediately after the sale, ascertain and report to the Court whether there are any taxes due and unpaid which were a lien upon said real estate on the day of sale; and if so, the amount of such taxes, the years for which due, and the amount due for each year. Said report shall be attached to said report of sale.

5. **His Report of Sales Must Describe the Land.** In making his *Report of Sale*, the Clerk and Master will describe the land by *metes and bounds*, if such description be found in the Record, and if not, then by the *best description* the Record gives, unless the decree of sale contains the required description, and then a reference to the tract or lot described in the decree of sale will be sufficient.

6. **He Will Require Receivers, Trustees and Commissioners to Itemize Their Reports.** The Clerk and Master will require the reports of *Receivers, Trustees and Special Commissioners* to be minutely itemized so as to show in full detail all *receipts*, when and whence received; and all *expenditures*, when, to whom and on what account made, accompanied by the receipts of persons paid, and other proper vouchers. Receivers will not be allowed to employ counsel, except at their own expense, without first having obtained the consent of the Chancellor.

7. **He Must Have Proof of Publication Ready.** When publication is made as to defendants, the Clerk and Master will file the printer's affidavit of publication, as required by the statute; or, else, have the newspapers containing the publication in open Court on the first day of the appearance term.

8. **He Will Enter no Decree Unless in Ink.** The Clerk and Master will enter no

have all his reports duly filed, including his financial and book reports; and should have his amanuensis duly employed.

<sup>109a</sup> The Chancellor may, by an order like the following, formally declare these rules; and thus make them more effective:

RULES FOR THE GUIDANCE OF THE CLERK AND MASTER.

Rules for the Guidance  
of the Clerk and Master, }

The Chancellor this day promulgated the following Rules for the Guidance of the Clerk and Master of this Court, and enjoined the due observance of the same upon the Clerk and Master, and all others having business with him, or with his office:



decree, even though read in open Court, unless it is written in ink, and upon not less than a half sheet of paper. (Chancery Rule III, sec. 1.)

9. **He Will Write Amounts in Words, When.** The Clerk and Master will, in entering decrees, write all amounts decreed to be paid, to or by any party, in words, (except hundredths of dollars,) even when the draft contains figures. The amounts in figures may be added, in parenthesis.

10. **He Will Enter Cases on His Rule Docket, When and How.** The Clerk and Master will enter every case on his *Rule Docket* as soon as the bill has been filed, giving the name of every complainant and every defendant, the names of the Solicitors, the penalties of the various bonds, and the names of the sureties on each bond.

11. **He Will Note What and When in His Rule Docket.** The Clerk and Master will note on his *Rule Docket* the minute, hour and day of the filing of every bill, especially attachment and injunction bills. He will, also, note on the *Rule Docket*, in order of time, every other paper filed or issued in the cause, including bonds, subpoenas to answer, demurrers, pleas, answers, exhibits, subpoenas to testify, notices, depositions, affidavits, transcripts, deeds, plats, records, and every other document or thing left with him to be filed in the cause, except decrees. This notation will include the name of the paper or thing, by whom and when filed; and if a deed shall give the names of the vendor and vendee, if a subpoena to answer or to testify, or depositions, or affidavits, the names of the parties to be summoned or testifying will be stated, and every paper or thing filed will be so described as to identify it. Said notation will be *prima facie* evidence of the filing the paper or thing noted; but will not be deemed notice to the opposite party when actual notice is necessary.

12. **He Will Enter all Bonds in Full, Where.** The Clerk and Master will register in a book to be kept for that purpose every prosecution, attachment, injunction and replevin bond, and every bond given by receivers, special commissioners, trustees, or other persons required by the Court to give bond during the progress of a cause, except appearance bonds and guardian bonds: the last two named will be entered in full on the minutes of the Court.

13. **He Will Enter Orders and Rules Made by Him, When and Where.** Every *pro confesso*, rule in reference to taking depositions, order for *scire facias*, order appointing a guardian *ad litem*, order setting aside a *pro confesso*, order extending the time for answering or for taking proof, order opening an account, order of revivor, order of publication, order requiring original documents to be filed, and every other order or rule made by the Clerk and Master, shall be, at the time of making the same, entered in full on his *Rule Docket*, and duly dated and signed.

14. **He Will Enter all Returns on His Rule Docket.** The returns of officers on subpoenas to answer, on writs of *scire facias*, on writs of injunctions and attachment, and other process not final, shall be entered in full on the *Rule Docket*. The Clerk and Master will require all officers to write their returns in ink.

15. **He Will Keep His Books in Detail.** The Clerk and Master is imperatively required to keep his *Judgment Index Book*, his *Cash Book*, and his *Execution Docket* in the manner required by law. Code, §§ 3016 and 4040. *Bills of Costs* must be entered *in full* on the *Execution Docket* before any execution is issued, and must specify each officer, party, witness or other person to whom costs are due, and on what account owing, giving *each item* of account and the fee due on each item. *No item of cost* will be taxed that does *not appear* on the *Rule Docket* or *Minute Book*, except costs of final process. The Clerk and Master will be especially careful to *enter in full*, on his *Execution Docket*, the officers' *returns* on all executions and writs of possession.

16. **He Will Appoint Guardians ad Litem, When.** The Clerk and Master will, at

the appearance rule day, appoint guardians *ad litem* for all minors without regular guardians.

17. **He Will Make What Entries in the Chancellor's Docket** The Clerk and Master will enter each case on the *Chancellor's Docket* in the order in which it is numbered on his Rule Docket; and will give it the Rule Docket number. He will note on the Chancellor's Docket, opposite the title of the cause, the date of the filing of the bill, answer, and other pleadings, the date and fact of filing of every report, and of the entry of every rule, and of every action in the cause of record.

§ 1172. **The Deputy Clerk and Master: His Powers and Duties.**—The Clerk and Master has authority to appoint a Deputy,<sup>110</sup> who, before entering on the discharge of his duties,<sup>111</sup> must take an oath to support the Constitution of the United States, and of this State,<sup>112</sup> the anti-duelling oath,<sup>113</sup> and an oath faithfully to discharge the duties of his office to the best of his skill and ability,<sup>114</sup> which oaths shall be filed in the office of the County Court Clerk.<sup>115</sup> The Deputy Clerk and Master may be appointed by parol,<sup>116</sup> but the better practice is to make the appointment in writing, and spread it on the minutes of the Court, the consent of the Chancellor therefor having first been had. The Clerk and Master, ordinarily, requires his Deputy to give him a bond, conditioned to faithfully discharge all the duties of the office of Deputy Clerk and Master, and to account for and pay over all money and property of every kind that may come or should come into his hands as such Deputy: this bond may be moved on by the Clerk and Master for any default on the part of his deputy.<sup>117</sup> The Deputy, thus appointed, has full power to transact all the business of the Clerk and Master,<sup>118</sup> may receive money on a decree and receipt therefor,<sup>119</sup> and administer any oath the Clerk and Master can.<sup>120</sup> He may sign official papers as Deputy, thus: "Witness my hand, this — day of ——. Richard Roe, D. C. & M.;" or thus: "Witness my hand, this — day of ——. John Doe, C. & M., by Richard Roe, D. C. & M."<sup>121</sup> In case of the death of the Clerk and Master, his Deputy holds the office until the vacancy is filled by appointment.<sup>122</sup>

110 Code, § 4050, sub-sec. 4.

111 Code, 758.

112 Code, 332.

113 Code, § 333, 752.

114 Code, 333.

115 Code, 755.

116 Bonds v. State, Mort. & Yerg., 146. A Deputy appointed but not qualified is a *de facto* officer, and his acts are valid as to third parties. Bank v. Chester, 6 Hum., 480; Kelley v. Story, 6 Heisk., 205: so

are the acts of a *locum tenens*. Montgomery v. Buck, 6 Hum., 416.

117 Code, § 3612.

118 Code, § 4050, sub-sec. 4; Martin v. Porter, 4 Heisk., 413.

119 Kelley v. Story, 6 Heisk., 205.

120 Campbell v. Boulton, 3 Bax., 357.

121 Beaumont v. Yeatman, 2 Hum., 542; Ament v. Brennan, 1 Tenn. Ch., 433.

122 Code, § 334.

## CHAPTER LXV.

## SOLICITORS: THEIR RIGHTS, DUTIES, AND LIABILITIES.

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|--|---|
| § 1173. The Office and Status of a Solicitor.              | § 1179. His Compensation for Services in a Cause. |
| § 1174. His Retainer and Appearance in a Cause.            | § 1180. When a Solicitor Has a Lien for His Fee.  |
| § 1175. The Powers of a Solicitor in a Cause.              | § 1181. His Lien, How Enforced.                   |
| § 1176. The Duties and Liabilities of a Solicitor.         | § 1182. Guardian <i>ad Litem</i> Fees.            |
| § 1177. Summary Jurisdiction of the Court Over Solicitors. | § 1183. Some Suggestions for Young Solicitors.    |
| § 1178. Confidential Communications to Solicitors.         | § 1184. Briefs of the Facts and the Law.          |

§ 1173. **The Office and Status of a Solicitor.**—Solicitors have always been considered and treated as authorized officers of the Chancery Court.<sup>1</sup> They constitute a part of the Court; and it is safe to say that our Courts would be unable to administer justice without the aid of a body of trained lawyers to present the issues involved in the controversy, to prepare the proofs, to produce the law applicable to the particular case, and by argument to develop the turning points in the controversy, and aid the Chancellor in reaching a just conclusion.<sup>2</sup>

No person is allowed to practice as an attorney or counsel in any of the Courts of this State without a license, obtained for that purpose, and without having first taken an oath, in open Court, to support the Constitution of the State, and of the United States, and to truly and honestly demean himself in the practice of his profession, to the best of his skill and abilities.

Attorneys and Solicitors are licensed to practice law in the Courts of this State by the Supreme Court, upon the certificate of the State Board of Law Examiners made after an examination as to their qualifications. The rules governing this Board in its examinations of applicants for such a license are prescribed by the Supreme Court. If, upon such certificate, the Supreme Court shall find that the applicant is of full age and good moral character, and otherwise qualified, it enters an order on its minutes licensing and admitting him to practice as attorney and counselor in all the Courts of the State.<sup>3</sup> This license, if procured by fraud, may be revoked at any time within two years.<sup>3a</sup> If the applicant is already licensed to practice in another State, or country, he may be permitted to practice upon producing such license, and satisfactory evidence of good character, and complying with the rules made by the Supreme Court on the subject.<sup>4</sup>

Judges and Chancellors are prohibited from practicing law in any of the Courts of this State. The Clerks of the several Courts, and their deputies, are

<sup>1</sup> 2 Dan. Ch. Pr., 1840; 2 Greenl. Ev., § 147. Formerly, the sworn Clerks of the Courts were the only agents of parties prosecuting causes in Chancery; but, in consequence of these Clerks being unable to transact the increasing business of the Court, the Court admitted Solicitors, as officers of the Court, to appear for and represent suitors in the Court. 2 Dan. Ch. Pr., 1840; 1 Smith's Ch. Pr., 676.

Attorneys and Solicitors are recognized as officers of the Court by our statutes, as well as by immemorial usage. See Code, §§ 3965-3980; Lawyers' Tax Cases, 8 Heisk. 569; 582; 585; 631; 635; 650; Rogers v. Park, 4 Hum., 480; Jones v. Williamson, 3 Cold., 379; State v. Underwood, 2 Tenn., (Overt.), 92; Hunt v. McClanahan, 1 Heisk., 509.

The term "Solicitor" is generally used in this book to designate a lawyer who practices in the

Chancery Court. This is the term almost universally used in Courts of Chancery; and is recognized by the Code and the Chancery Rules. Code, §§ 4369; 4400; 4402; 4403; 4422-4424; 4464; Ch. Rules, I, §§ 1, 5, 7; II, §§ 3, 7; IV, §§ 2, 3; X, §§ 1, 2. The term "Attorney" is only occasionally used when referring to Chancery practice. Code, §§ 4344; 4433; 4483. A lawyer who practices in the Circuit and Criminal Courts of our State is usually termed an attorney.

<sup>2</sup> Lawyers' Tax Cases, 8 Heisk. 582; 631; 651-652; Rogers v. Park, 4 Hum., 480; Jones v. Williamson, 5 Cold., 379. See, also, 1 Dan. Ch. Pr., 571. Ingersoll v. Coal Creek Co., Knoxville, 1906.

<sup>3</sup> Acts of 1903, ch. 247.

<sup>3a</sup> *Ibid.*; State Board v. Williams, 8 Cates, 51.

<sup>4</sup> *Ibid.*

also prohibited from practicing in their own Courts, or in any causes commenced, brought to, or carried from their Courts, or commenced in any Court from which an appeal lies to their Court. Sheriffs and other executive officers shall not practice law in the county for which they are elected, or in any cause originating or pending in the Courts of that county.<sup>5</sup>

The Court, the Clerk, and the adverse party are all interested in knowing who a party's Solicitor is, as they each have occasion to deal with him in the progress of a cause. The names of the complainant's Solicitors are usually signed to the bill, and those of the defendant's Solicitors are signed to the plea, demurrer, or answer. Such Solicitors are termed Solicitors of record; and a party suing or defending by a Solicitor is not at liberty to change his Solicitor without notice of record; and until such notice the former Solicitor will be considered his Solicitor, and he will be bound by his acts.<sup>6</sup>

§ 1174. **His Retainer and Appearance in a Cause.**—Retainer is the act of a client by which he engages an attorney or Solicitor to manage a suit for him in Court.<sup>7</sup> This act may be written or verbal, direct or indirect, express or implied. When a Solicitor appears in a cause, his authority so to do is presumed.<sup>7a</sup> The mere fact of his appearance is always deemed enough evidence of his authority; and neither the opposite party nor the Court expects or requires any other, in all ordinary cases.<sup>8</sup> This appearance may be (1) by signing, or having his named signed to, some pleading or other paper filed in the cause; or (2) by entering his name on the rule or trial docket as a Solicitor in the cause; or (3) by appearing before the Chancellor or Master in vacation, or before the Court, as such Solicitor.<sup>9</sup>

Solicitors should be careful to have evidence of their retainer to bring a suit, especially when they become surety on the prosecution bond. If their client sign any paper filed in the cause, that will be a sufficient recognition of the suit.<sup>10</sup>

§ 1175. **The Powers of a Solicitor in a Cause.**—A Solicitor has, by virtue of his retainer, full authority to do anything connected with the prosecution, defence or general management of the suit, which his client might himself lawfully do. He may make agreements in reference to the filing or amendment of pleadings or proofs, may waive notices, may let a *pro confesso* be set aside, may make stipulations as to evidence, may extend the adversary's time to plead or take proof, may agree to a continuance, or do any other act connected with the preparation of the cause for hearing, or with the pleadings, references, proofs in the cause, or with the procedure at the hearing.<sup>11</sup>

A Solicitor cannot, however, receive anything but money in satisfaction of his client's recovery, without express authority; nor can he bid his client's debt on land, or take a deed of trust to secure a debt, or assign a judgment, so as to bind his client thereby. He cannot compromise a suit without the sanction of his client; but he may assent to a decree:<sup>12</sup> if such assent be unfairly obtained, however, his client may have it set aside on a bill filed for that purpose.<sup>13</sup> By an express provision of the statute, an attorney and counsel has power to execute, in the name of his client, all bonds or other papers necessary and proper for the prosecution of the suit at any stage of its progress.<sup>14</sup>

<sup>5</sup> Code, § 3969.

<sup>6</sup> 2 Dan. Ch. Pr., 1847. Formerly, an order of Court was necessary in order to enable a party to change his Solicitor. *Ibid.*

<sup>7</sup> The client should seek the Solicitor, not the Solicitor the client: it is highly unprofessional for a Solicitor to seek a retainer. *Ingersoll v. Coal Creek Co., M.S., Knoxville, 1906.*

<sup>7a</sup> *Foster v. Blount, 1 Tenn. (Overt.), 343; Rogers v. Park, 4 Ham., 480; Jones v. Williamson, 5 Cold., 379; 1 A. & E. Ency. of Law, 952.* Where a Solicitor is employed for a suitor by a person not duly authorized, but the suitor has knowledge that the Solicitor is representing him, and does not notify the Solicitor that his services are not desired, but keeps silent and obtains benefits from such services,

the suitor will be bound. *Yerger v. Aiken, 7 Bax., 539.* As to what circumstances are evidence of a retainer, see 2 Greenl. Ev., § 139.

<sup>8</sup> *Jones v. Williamson, 3 Cold., 379.*

<sup>9</sup> See, *ante*, § 223. A judgment based on an unauthorized appearance by an attorney may be annulled on a bill filed for that purpose. *Boro v. Harris, 13 Lea, 43.*

<sup>10</sup> See, *ante*, § 233.

<sup>11</sup> 1 A. & E. Ency. of Law, 954-957; *Mathews v. Massey, 4 Bax., 461; 1 Pars. Cont., 117; 2 Greenl. Ev., § 141.*

<sup>12</sup> 1 Meigs' Dig., § 295; 1 Pars. Cont., 117-118; 1 A. & E. Ency. of Law, 954-957.

<sup>13</sup> *Jones v. Williamson, 5 Cold., 383.*

<sup>14</sup> Code, § 3978.

§ 1176. **The Duties and Liabilities of a Solicitor.**—The legal duties of a Solicitor towards his client are care, skill, diligence and integrity. He should fully disclose to his client every fact in his knowledge important for his client to know.<sup>15</sup> He is required to exhibit the utmost good faith in all his dealings with his client; and will not be allowed to use his influence to obtain gifts, conveyances, or good bargains from his client while that relation exists, except on full proof of the utmost fairness and good faith in the transaction.<sup>16</sup> A Solicitor is liable to his client for any loss suffered by his client in consequence of his want of reasonable diligence, or want of ordinary skill; he is, also, liable for all moneys or other property by him received by virtue of his retainer.<sup>17</sup>

1. **The Duties of a Solicitor to the Court** are: 1, To faithfully observe such lawful rules as the Court has prescribed for the government of the bar; 2, To observe the utmost good faith in all his intercourse with the Court and its officers; 3, To conduct himself as a gentleman while present in Court; and 4, At all times and places to obey the law of the land, and maintain an honorable reputation.

2. **The Duties of a Solicitor to His Client** are: 1, To manage his cause with care, skill and integrity; 2, To keep his client truly informed as to the state of the case; 3, To keep inviolate the secrets of his client and of his client's business; and 4, In all matters to observe the utmost good faith.<sup>18</sup>

§ 1177. **Summary Jurisdiction of the Court Over Solicitors.**—The Court exercises a summary jurisdiction over Solicitors in reference to all matters relating to their employment, their conduct in a cause, their department in Court, and their dealings with their clients and with the other officers of the Court. This jurisdiction extends to: 1, staying or dismissing proceedings begun by a Solicitor without authority, and taxing the Solicitor with the costs thereof; 2, compelling a Solicitor to observe good faith with his clients; 3, preventing him from disclosing privileged communications; 4, requiring him to surrender documents or funds received by him as Solicitor in a cause, and which he has no right to retain; 5, taxing him with the costs incident to striking impertinent or scandalous matter out of a pleading drawn or filed by him; 6, suspending their pending charges against them; 7, striking them from the roll for unprofessional conduct, or gross misbehavior, or general disreputable deportment;<sup>19</sup> and 8, requiring them to serve as guardians *ad litem* and Solicitors, without fee, for persons under disability, and paupers.<sup>19a</sup> The statutory provisions on this subject are as follows:

The several Courts of this State may strike from their rolls any person not authorized to practice in such Courts, and also any practicing attorney or counsel, upon evidence satisfactory to the Court that he has been guilty of any such misdemeanor, or acts of immorality or impropriety, as are inconsistent with the character, or incompatible with the faithful discharge of the duties, of his profession. If charges are preferred against an attorney or counsel to any Court, they must be reduced to writing, and a copy furnished the person accused, who may appear and show cause against the charges. The person stricken from the rolls on any of the foregoing grounds, or for other good cause, shall not be permitted to practice the profession in any Court of Record in this State. He may, however, appeal from the decision of the inferior Court to the Supreme Court, as in other cases.<sup>20</sup>

The statute requires Solicitors to faithfully account for all money received

<sup>15</sup> 1 A. & E. Ency. of Law, 958-962; 2 Greenl. Ev., § 144.

<sup>16</sup> *Rose v. Mynatt*, 7 Yerg., 30; *Bank v. Hornberger*, 4 Cold., 531; *McMahan v. Smith*, 6 Heisk., 171.

<sup>17</sup> A Solicitor impliedly contracts (1) that he possesses the requisite legal skill and knowledge; (2) that he will exercise due diligence; and (3) that he will observe the utmost good faith. 2 Greenl. Ev., § 144; 1 A. & E. Ency. of Law., 958-963.

<sup>18</sup> See Bouv. Law. Dic., "Attorney;" 1 A. & E. Ency. of Law, 958-963. It is the duty of a Solicitor, knowing of a collusive suit, to inform the Chancellor thereof. *Ward v. Alsup*, 16 Pick., 738.

<sup>19</sup> 2 Greenl. Ev., § 147; Code, §§ 3970-3972; 1 A. & E. Ency. of Law, 944-948; 2 Dan. Ch. Pr., 1840; *Fields v. State*, Mart. & Yerg., 171; *Smith v. State*, 1 Yerg., 228.

<sup>19a</sup> See, *post*, § 1182, note 52; Code, §§ 3979-3980.

<sup>20</sup> Code, §§ 3970-3972.

by them; and provides that any lawyer collecting or receiving money in his professional capacity, by suit or otherwise, and failing to pay the same to the party entitled, on demand, may be moved against by the party aggrieved, as prescribed in sections 3616-3619, of the Code; and that if the execution issued upon the judgment recovered by motion, is returned unsatisfied as to any part of the principal or costs, it shall be the duty of the Court to strike the name of such delinquent lawyer from the list of attorneys; and he shall be disqualified from practicing in any Court in this State, until the judgment and costs are paid.<sup>21</sup>

Solicitors, being officers of the Court, may be required to perform various duties by the Court, without compensation. They may be called on to examine the financial report of the Clerk and Master, to see that the same is correct in every respect.<sup>22</sup> And it is enacted by the Code, that at the return term of the process, the Court shall appoint counsel for the plaintiff, in actions prosecuted in the manner prescribed for paupers; and also for the defendant, if he make oath that, owing to his poverty, he cannot employ counsel.<sup>23</sup>

§ 1178. **Confidential Communications to Solicitors.**—The relations between a Solicitor and his client are of the most confidential nature, and have always been deemed sacred;<sup>24</sup> and the Courts have uniformly protected the client against any betrayal on the part of the Solicitor. In Tennessee, it is provided by statute, that no attorney or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of the suit, before or afterwards, to his injury; and that any attorney offering to give testimony in any such case shall be rejected by the Court, and is guilty of a misdemeanor, for which, on conviction, he shall be fined not exceeding one thousand dollars, to be assessed by the jury, and imprisoned not exceeding two years; and, if a practicing attorney, shall also be stricken from the rolls.<sup>25</sup>

Facts communicated by a client to his counsel are under the seal of confidence, and cannot be disclosed in proof. This is a rule of protection to the client, and not a privilege to the attorney. The latter is not allowed, if he would, to break this seal of secrecy and confidence. The rights of clients require that their intercourse with their attorneys should be protected by profound secrecy; and that all their communication should be free, and unembarrassed by any apprehensions of disclosure or betrayal.<sup>26</sup>

This rule has been adopted out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.<sup>27</sup>

<sup>21</sup> Code, §§ 3976-3977.

<sup>22</sup> M. & V.'s Code, § 386.

<sup>23</sup> Code of 1858, § 3980.

<sup>24</sup> Of the laws of the XII Tables, this fragment is preserved: *Patronus, si clienti fraudem fecerit, sacer esto.* (Accursed be he who wrongs his client.) See note to 1 Greenl. Ev., § 240, as to the civil law on the subject.

<sup>25</sup> Code, §§ 3973: 3975.

<sup>26</sup> *McManus v. State*, 2 Head, 214; 1 Greenl. Ev., §§ 237-243.

<sup>27</sup> 1 Dan. Ch. Pr., 571.

In regard to such confidential communications, it does not appear that the protection is qualified by any reference to proceedings pending, or in contemplation. If counsel receive a communication in their professional capacity, touching matters that come within the ordinary scope of professional employment, either from a client, or on his account and for his benefit, in the transaction of his business; or, which amounts to the same thing, if they commit to

paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client; they are not only justified in withholding such matters, but they are bound to withhold them; and they will not be compelled to disclose the information, or to produce the papers in any Court of Law or Equity, either as a party or as a witness. If this protection were confined to cases where proceedings had been commenced, the rule would exclude the most confidential, and, it may be, the most important, of all communications,—those made with a view of being prepared, either for instituting or for defending a suit up to the instant that the process of the Court was issued. If it were confined to proceedings begun, or in contemplation, then every communication would be unprotected, which a party makes with a view to his general defence against attacks, which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would still

Communications, however, are not privileged: 1, Where the communication was made before the attorney was employed as such, or after his employment has ceased; or 2, Where, although consulted by a friend, because he was an attorney, yet he refused to act as such; and was therefore only applied to as a friend; or 3, Where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally cognizant, (and even this has been held privileged in some of the cases); or 4, Where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure; or 5, Where the thing disclosed had no reference to the professional employment, although disclosed while the relation of attorney and client subsisted; or 6, Where the attorney made himself a subscribing witness, and thereby assumed another character for the occasion; and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove; or 7, Where he and his client engaged in the perpetration of a fraud, he will be required to testify in regard to it, for contriving frauds is no part of his professional occupation. In all such cases, it is plain that the attorney is not called upon to disclose matters, which he can be said to have learned by communication with his client, or on his client's behalf; or matters, which were so committed to him in his capacity of attorney; or matters, which in that capacity alone he had come to know.<sup>28</sup>

The Solicitor is not only required to plead this professional privilege, but if he fail so to do, it is the duty of the Court to forbid the disclosure of any privileged communication, especially if such action of the Court is invoked by the client, or by a Solicitor of the client.<sup>29</sup> A Solicitor cannot be compelled to discover any privileged communication, even when made a defendant to a bill of discovery, and it is his duty to raise the objection by demurrer if it appear on the face of the bill, or by plea, if it do not appear.<sup>30</sup>

**§ 1179. His Compensation for Services in a Cause.**—A Solicitor is entitled to reasonable compensation for his services, in the absence of an express contract fixing the amount of his fee.<sup>31</sup> Where a definite contract has been made, the client is liable therefor, and this liability continues even if he discharge his Solicitor without cause, or compromise the suit.<sup>32</sup>

Where the parties are *sui juris*, the Court ordinarily declines to do more in reference to fees than, on application of the Solicitor, to declare a lien in his favor upon the recovery obtained by his client in the cause.<sup>33</sup> But where the complainant is an executor, administrator, guardian, or other trustee, and where the bill is to wind up an insolvent estate, or insolvent corporation, or is a general creditors' bill, or a bill in the nature of a general creditors' bill, or a bill by an executor, or other trustee, for the construction of a will or other trust instrument,<sup>34</sup> the Court will, as a rule, on the application of the complainant, fix and decree the amount reasonably due his Solicitor for his services in

be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally, than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw. *Sto. Eq. Pl.*, § 600; 1 *Dan. Ch. Pr.*, 574.

<sup>28</sup> *Sto. Eq. Pl.*, §§ 601-602; 1 *Dan. Ch. Pr.*, 575-578.

<sup>29</sup> See, Code, §§ 3973-3975; *Scales v. Kelley*, 2 *Lea*, 706.

<sup>30</sup> *Ante*, § 1123; 1 *Dan. Ch. Pr.*, 571-578.

<sup>31</sup> It is sometimes said that the fee should be fixed in the contract of retainer; but this is difficult. The Solicitor cannot foretell what services he will be called on to perform, and if the fee were fixed in advance it would possess too many of the characteristics of a game of hazard. The proper time to fix the fee, where the amount of professional skill and labor are uncertain, is at the termination of the litigation, in suits in Chancery.

<sup>32</sup> *Bright v. Taylor*, 4 *Sneed*, 159; *McLain v. Williams*, 8 *Yerg.*, 230.

<sup>33</sup> *Perkins v. Perkins*, 9 *Heisk.*, 95; *Hill v. Ford*, 3 *Shan. Cas.*, 531.

<sup>34</sup> *Read v. St. Railway Co.*, 2 *Cates*, 316. But not so on a bill by a legatee to construe a will. *Ensley v. Ensley*, 21 *Pick.*, 107.

the cause;<sup>35</sup> and will order it to be paid out of the general or trust fund. In partition suits the Court may, in its discretion, order the fees of the Solicitors for the complainant and the defendant to be paid out of the common fund, where the property is sold for partition, and taxed as costs in cases where the property is partitioned in kind.<sup>36</sup>

§ 1180. **When a Solicitor Has a Lien for His Fee.**—By statute a Solicitor who begins a suit has a lien to secure his fees upon the complainant's right of action from the filing of the bill; and a Solicitor employed to prosecute a suit, already begun, has a like lien from the date of his employment, provided he gives notice of his employment on the rule docket, or files a memorandum stating his employment, with the papers in the case, or notifies the defendant thereof.<sup>37</sup> Under this statute the Solicitor's lien attaches to all that is recovered by the complainant as the result of the litigation, whether the recovery be money, chattels, lands, or interests or equities in chattels or lands.

But aside from the statute, a Solicitor has a lien to secure his reasonable fee upon everything that comes into his hands, or that comes to his client by virtue of his retainer or services in a suit;<sup>38</sup> and this lien attaches to all papers, deeds, or documents, choses in action, or other property obtained by him from his client, and to all money, chattels, lands and equities in chattels or lands, recovered by his client as the result of the litigation;<sup>39</sup> and he has a right to have his lien upon such recovery declared, and perpetuated of record in the cause and thus made secure against the treachery or ingratitude of his client, or the rapacity of his client's creditors.<sup>40</sup>

The Solicitor's lien attaches to the recovery, and when there is a recovery, either by the decree of the Court, or by the compromise of the parties, or by an award of arbitrators pursuant to a submission in a pending suit, this lien fastens itself thereon, and cannot be loosened or nullified by any act of the parties to the suit, or by any intervention of any creditor of the complainant.<sup>41</sup> As soon as there is any such recovery the Solicitor's lien not only attaches to it, but it relates to the beginning of the suit, and is superior to the lien of any attaching, garnishing, judgment or other creditors, and is superior to any contracts or compromises between the parties during the suit, or after the decree.<sup>42</sup> If property is impounded by attachment, injunction or other impounding process, or is in the hands of a receiver, or the Clerk of the Court, the lien of the complainant's Solicitor attaches thereto, as the property is in the custody of the Court, and this lien is not affected by any compromise, or adjustment between the parties or by the dismissal of the suit.<sup>43</sup>

The Solicitor of a defendant who is *sui juris* has no lien upon property, real or personal, merely protected by him in a litigation where he has made a successful defence for his client.<sup>44</sup> To entitle any Solicitor to a lien there must be

<sup>35</sup> See *Yourie v. Nelson*, 1 Tenn. Ch., 615; *Moses v. Ocoee Bank*, 1 Lea, 414; *Keith v. Fitzhugh*, 15 Lea, 49; *Whitsell v. City Building Association*, 3 Tenn. Ch., 526; *Rains v. Rainey*, 11 Hum., 261. The principle recognized in all these cases, except the first, is that where a bill impounds or secures a fund in which third persons may share, or where the bill is for the common benefit of all interested in a fund, the Solicitor of the complainant is entitled to be paid out of the fund, for his services have been for the benefit of all who come in under the bill. But Solicitors who represent defendants or petitioning creditors, must look exclusively to their own clients for their fees. *Moses v. Ocoee Bank*, 1 Lea, 414; *Keith v. Fitzhugh*, 15 Lea, 49.

<sup>36</sup> Acts of 1887, ch. 183.  
<sup>37</sup> Acts of 1899, ch. 243; *Railroad v. Wells*, 20 Pick., 706; *Tompkins v. Railroad*, 2 Cates, 157.

<sup>38</sup> *Brown v. Bigley*, 3 Tenn. Ch., 618.

<sup>39</sup> *Brown v. Bigley*, 3 Tenn. Ch., 618; 3 Pars. Cont., 270. The lien is on the net recovery, after satisfying all set-offs and superior equities. *Hays v. Dalton*, 5 Lea, 560; *Blackburn v. Clarke*, 1 Pick., 506.

<sup>40</sup> *Electric Light Co. v. Gas Co.*, 15 Pick., 371.

At common law, unless the lien is declared of record, or notice of the lien otherwise given the defendant, he may pay the complainant the full amount of the decree, or may otherwise satisfy and adjust it with the complainant, in which case the Solicitor must look alone to the complainant for his reasonable fee. 2 Dan. Ch. Pr., 1842-1845; 1 A. & E. Ency. of Law, 969-973. While perhaps not necessary now by reason of said statute, it is a prudent course to have the lien declared by the Court upon the recovery, and in case of an appeal and affirmation, by the Supreme Court. *Covington v. Bass*, 4 Pick., 499. Such a declaration rivets the lien and gives it additional force and dignity. See *Guid v. Borner*, 7 Bax., 266.

<sup>41</sup> *Tompkins v. Railroad*, 2 Cates, 157.

<sup>42</sup> See *Tompkins v. Railroad*, 2 Cates, 157; *Dameron v. Robertson*, 12 Lea, 372; *Hunt v. McClanahan*, 1 Heisk., 503; *Brown v. Bigley*, 3 Tenn. Ch., 618; and *Cunningham v. McCrady*, 2 Bax., 141.

<sup>43</sup> *Pleasants v. Kortrecht*, 5 Heisk., 694; *Sharp v. Allen*, 11 Lea, 518; *Brown v. Bigley*, 3 Tenn. Ch., 621.

<sup>44</sup> *Garner v. Garner*, 1 Lea, 29. The words, "where there has been no actual recovery," at the



an actual recovery of money or property by his client as the result of the Solicitor's services in the cause.<sup>45</sup> So if a Solicitor for a defendant obtain a recovery for his client he is entitled to a lien upon it for his reasonable fee.<sup>46</sup>

§ 1181. **His Lien, How Enforced.**—Where the fee is not fixed by contract, all the Court will do, ordinarily, where the parties are all *sui juris*, will be, on application of the complainant's Solicitor, to declare a lien upon the recovery for his reasonable compensation as Solicitor in the cause.<sup>47</sup> In such a case, it will be necessary, in case of disagreement between him and his client, for him to file an original bill to enforce his lien on the fund, or on the property recovered, as the case may be.<sup>48</sup> If the lien is upon a fund in Court, the Solicitor usually directs the Clerk to retain the amount he claims, and to pay out the balance.<sup>49</sup> Where the fund is in Court, however, at the time of the decree, the Court would have jurisdiction, on petition by the Solicitor, to which his client is made a defendant by personal service of process, to order the Master to ascertain and report: 1, whether there was any contract between the Solicitor and his client as to the amount of the fee, and if so, the amount so fixed; and 2, if no contract, what would be a reasonable fee for the Solicitor for his services in the cause. On the incoming of the report, the Court would determine the amount of the fee, and direct the Master to pay it out of the fund in Court.<sup>50</sup> But such a petition cannot be filed in the original cause after the close of the term at which the final decree was pronounced.<sup>51</sup>

The form of declaring a lien upon the recovery in a cause is substantially as follows:

#### DECLARATION OF LIEN FOR FEE.

[After the recovery has been adjudged, add:] And on application of Greene & Shields, the Solicitors of the complainant, [or, defendant, in case there is a recovery by the defendant,] a lien is hereby declared in their favor upon the recovery of their client in this cause for their reasonable fees as his Solicitors in this cause, [or, for their reasonable fees for their services as his Solicitors in this cause; and such lien is declared to be superior to the attachment lien of A B, in the case of said A B vs. C D (complainant in the original cause,) consolidated with this cause.]

§ 1182. **Guardian ad Litem Fees.**—Where the ward has an estate in the hands of the Court, or has property involved in the litigation, the Court will allow the guardian *ad litem* a reasonable fee for all services rendered his ward, as his Solicitor in the cause, such fee to be paid out of any fund in Court belonging to the ward.<sup>52</sup> If the guardian *ad litem* and Solicitor has obtained a recovery of land or money for his ward, the Court will declare a lien on the recovery for a reasonable Solicitor's fee, which fee the Court will ordinarily fix. As a rule, Solicitors for defendants who are *sui juris* have no lien on property protected by them in a litigation; but guardians *ad litem* who render services as Solicitors are entitled to a lien upon the wards' property protected, for reasonable compensation for services rendered in protecting the same;<sup>53</sup> and if there be no fund in Court, the property will be put in the hands of a

close of the opinion in this case, should read, "where there has been an actual recovery."

<sup>45</sup> Winchester v. Heiskell, 16 Lea, 565; Damron v. Robertson, 12 Lea, 372; Memphis Gaslight Cases, 21 Pick., 268.

<sup>46</sup> Damron v. Robertson, 12 Lea, 372. But not on a homestead. McBrown v. Whitfield, 24 Pick., 422; unless the homesteader be a widower, and consents. McLean v. Lerch, 21 Pick., 693. For cases where a defendant may have a recovery see, *ante*, §§ 559-560. See note to Clement v. State, 2 Shan. Cas., 251. Where a Solicitor for a defendant obtains a recovery for his client he is, *pro hac vice*, a Solicitor for a complainant, and within the Equity of the statute, the nominal defendant in such a case being, *pro hac vice*, a complainant. Equity regards substance, not forms and names. See, *ante*, § 43, and notes.

<sup>47</sup> Hill v. Ford, 3 Shan. Cas., 531. If the client is under disability the Court will fix the fee, on a reference. *Ibid*.

<sup>48</sup> Perkins v. Perkins, 9 Heisk., 95; State v. E. &

K. Railroad, 4 Bax., 97; Brown v. Bigley, 3 Tenn. Ch., 618.

<sup>49</sup> The Clerk would make himself liable for the amount of the fee, if he should pay out the whole of a fund upon which the Solicitor had a lien of record for his fee.

<sup>50</sup> If the client should move to dismiss the petition, or dispute the jurisdiction of the Court, or the propriety of the practice, the Court could order the petition to be filed and treated as an original bill.

<sup>51</sup> Payne v. Payne, 22 Pick., 467.

<sup>52</sup> A guardian *ad litem* can have no fee where his ward has no estate in Court. Pritchard v. Pritchard, 2 Ch. Apps., 294. See Bowling v. Scales, 1 Tenn. Ch., 618. His fee cannot be taxed as a part of the costs. Patton v. Dixon, 21 Pick., 97. To serve without a fee in such a case is one of the obligations he assumes when he takes his license; *Ibid*; and he performs a knightly service which he should deem an honor. See, *ante*, § 1177.

<sup>53</sup> Kerbaugh v. Vance, 5 Lea, 113; Persons v. Young, 7 Lea, 293.

receiver, with directions to apply the net rents to the liquidation of the amount decreed the guardian *ad litem*.<sup>54</sup> Where the property of an infant or married woman is sought to be sold for the support or education of the owner, or because manifestly for the interest of its owner, the Court will appoint both a guardian *ad litem* and a Solicitor, and in such a case is allowed by statute to fix the compensation of such Solicitor, which shall be the same whether a sale is ordered or not, but which shall in no event exceed one hundred dollars.<sup>55</sup>

§ 1183. **Some Suggestions for Young Solicitors.**—Young Solicitors must remember that law does not grow naturally in the brain, however large the cranium may be, and however great the vacant spaces therein. A knowledge of the law can only be acquired by constant and thoughtful study; and neither rich raiment, nor fine cigars, nor choice liquors, stimulate the growth of this knowledge. A young lawyer's proper place in business hours, when not elsewhere professionally engaged, is in his office; and his proper work there is either reading up on some legal questions on which he is deficient, or investigating the law or the facts of cases wherein he has been retained. Men who have money are generally men who have sense, and they do not go to loafing places to find a lawyer, they well knowing that good lawyers have no time to loaf, and that loafers are generally lazy and negligent of business—even if they know the law, which they seldom do.

Men who have money are discerning, and they look out for a sober, diligent, studious, attentive and trustworthy lawyer when they have important legal business. Nowhere do industry, application, temperance and integrity reap a more bountiful reward than in the legal profession, and nowhere is true merit so sure of ultimate success.

The following further suggestions may be of benefit to the younger members of the bar:

1. **Fidelity to Clients, and its Limits.** To your clients be true; but do not allow your fidelity to them to tempt you to be false to yourself. Fidelity to a client in Chancery goes no further than what is lawful and proper to do and say in enforcement or protection of his legal or equitable rights. A Solicitor is under no legal or moral obligation to assert an illegal or inequitable claim, or to set up an illegal or inequitable defence, or to take an unconscientious advantage of an adversary, in order to promote his client's welfare. The law is an honorable profession, intended for the promotion of justice, and not a trade of trickery, for the purposes of fraud or oppression. Be content with a moderate fee, one rather low than large.<sup>56</sup>

2. **Retainers Where Previous Counsel.** A Solicitor should not accept a retainer in a suit already brought without first satisfying himself that such retainer will be perfectly agreeable to the counsel already retained in the cause, except in cases where the original counsel are neglecting their client's interests, and his welfare imperatively requires immediate, affirmative action.

3. **Agreements, How Made and Performed.** All agreements in reference to the pleadings, proof, procedure, or progress of a cause made with the opposite counsel, should be complied with in the utmost good faith, even though your client disapprove such agreements. Never, however, make an agreement affecting the merits of the suit without the consent or authority of your client; and never make any agreements with the opposite party in the absence of his counsel.

<sup>54</sup> *Persons v. Young*, 7 Lea, 293.

<sup>55</sup> Code, § 3330. The Court generally appoints some reputable member of the bar both guardian *ad litem* and Solicitor. See, *Kerbaugh v. Vance*, 5 Lea, 113. If the defendant has a Solicitor already employed, the Court would have no authority to appoint one; but, in such a case, the guardian *ad litem* has the extra duty devolved on him of guarding the interests of his ward against such Solicitor, who is sometimes really in the employ of

parties whose interests are not always the interests of the ward.

<sup>56</sup> A mongrel dog will fight off all other beasts of prey only to devour the lamb himself. *Patronus si clienti fraudem fecerit sacer esto.* (If an attorney perpetrates a fraud upon his client let him be condemned to death.) This was one of the laws of the XII Tables.

4. **When a Witness in Your Own Cause.** Never argue a cause in which you are a witness, unless, perhaps, in cases where your testimony is absolutely undisputed. And, if in any case, your testimony is very material, and is liable to be controverted, make it a point of honor to decline a retainer in the cause.

5. **When and Where to Make Motions.** If you have any motion to make, or any matter to bring to the attention of the Court, do not wait until the Sheriff has been directed to adjourn the Court for dinner, or until the next day; but bring your matter forward in due season, and from your place behind the bar table. It is decidedly unprofessional to bring up your matters before the Chancellor by drawing near to the bench as the Chancellor is about to leave it, or by seeking him on the street, or in his room. Such conduct is decidedly offensive to the Chancellor, although his courteousness may conceal from you the great repugnance he has for such unprofessional deportment on your part.

6. **Manner of Making an Argument.** The most effective style for the Chancery Court is a plain, business-like, matter-of-fact manner of presenting your case, conversational in tone and gesture, and far removed from the declamatory and gesticulatory style usual before juries, and on the stump.

Address your argument to the Chancellor, and to his intellect; not to his eyes, nor to his ears, nor to his heart. Avoid putting questions to adverse counsel during your argument: questions provoke replies, and replies are often unseemly, and nearly always profitless. Courts are places of business, and the public time should not be unnecessarily wasted by contentions between counsel. When you have no longer anything to say, close your argument, and take your seat.<sup>57</sup>

Never open your argument with an apology. Apologies discourage your clients, dishearten your friends, disgust the Court, and satisfy nobody but your adversaries. An apology is a confession of weakness, or of ignorance, or of negligence. If you are not prepared to make an argument, do not undertake to stuff undressed and uncooked food down the throat of the Court. The very best argument you can make when fully prepared, may give very little light to the Chancellor; and if you have not put oil in your lamp, don't light it, as it will emit nothing but smoke and a bad smell. In such a case, act the man, return your client the fee he has paid you, and apologize to him for ever taking it: this is the only apology that is proper in such a case. If you have made preparations, and yet open with an apology, your insincerity and hypocrisy will nauseate and disgust all who hear you. Hence, whether you are prepared or unprepared, never open an argument with an apology. A great majority of all apologies are insincere, and are often mere results of vanity or weakness.

7. **Use of Hackneyed Expressions at the Bar.** Never use such hackneyed expressions as, "This is in many respects the most outrageous case that ever was tried in a Court House;" "This is the plainest case ever submitted to a Court;" "I have never, in all my practice as a lawyer, seen or heard of a grosser case of fraud;" "This enlightened Court;" "This intelligent jury;" "Such an argument is ridiculous," or "too absurd to waste time on;" "The most remarkable proposition ever stated in a Court;" "Your Honor is bound to find" so and so; "Your Honor can't do" so and so; "Your Honor would stultify yourself by doing so and so;" "It would be a gross outrage on justice for your Honor to do" so and so, and the like.

You need not "thank the Court for its attention:" it is the Court's duty to attend; and, if your argument is of any value and duly brief, the Chancellor feels like thanking you.

<sup>57</sup> The Court should adhere with pertinacity to the rule allowing the affirmative to open and close. Some Solicitors for the negative are never content unless they have the last argument. These should be made to conform to the rule, otherwise the rule is broken down and the affirmative deprived of a legal right.

The right to open and close the argument is his on whom the pleadings devolve the burden of proof. If the burden of proving any of the issues is on the complainant, he has the right to open and close the argument. If, on the other hand, the entire burden of proof is on the defendant, he ought to have the right to begin and conclude. Best Pr. Ev., § 637.

8. **Reference to Matters Dehors the Record.** Some Solicitors seem to rely not a little on facts they assume that the Chancellor knows, and endeavor to interpolate them into the record, when often the Chancellor does not know them at all; or, if he does, cannot consider them.<sup>58</sup> Such Solicitors, in argument, will say, "Your Honor knows that (such an one, naming him,) is a good and reliable man," or "Your Honor knows (him) too well to require any proof as to his character," or "Your Honor knows the farm," [house, creek road, or other locality,] or "Your Honor knows the business of," or "the price of," or "the value of" such and such things, or "Your Honor has had experience," or "knows," or "has seen," or "has heard," or "has read" so and so about the case, or about some person, thing, place or occurrence connected with the case.

All such references, allusions, assumptions and implications are indirect attempts to make the Chancellor a witness in the case; and, while not always so intended, are really attempts to tamper with the Court.

9. **Posture While Addressing the Court.** Solicitors, unless excused because of some infirmity, should stand while addressing the Court. To sit on the railing of the bar, or on a bar table, or on the back of a chair, or to lean against a pillar, or a desk, or to rest one foot upon a chair, or to otherwise prop one's self up, or to make any other exhibition of laziness or indifference while addressing the Court, is not only a gross violation of propriety, and an evidence of boorishness and ill-breeding, but is, also, a sign that the Solicitor so offending has either no respect for the Court, or no confidence in his cause, or both. The conviction of a man that he is in the right stiffens his backbone, contracts his muscles, and causes him to assume, unconsciously, an erect, dignified and manly attitude; and the impulses of an inherent politeness give him a grace of posture that at once adorns the speaker, and commands the respect and admiration of those who hear him.

10. **How to Take an Adverse Decision.** Solicitors should remember that both sides cannot be right, and cannot be victors, in the same suit. What appears plain to their prejudiced sight may appear very doubtful to a person who is absolutely indifferent. The Chancellor's business is to decide, and one party or the other must lose. The winning side should never exhibit any evidences of triumph; and the losing side should carefully conceal any emotions of chagrin, disappointment, or displeasure.

Some Solicitors, as soon as the Chancellor has delivered an opinion adverse to them, turn to the Solicitor sitting nearest, and intimate or charge that the Chancellor's opinion shows that he neither understood the law nor the facts of the case; and that they will reverse him in the Supreme Court from top to bottom. Other Solicitors, on losing a case, make a personal matter of it, and have a spell of the pouts, like a school girl whose chewing gum has been taken away from her. Solicitors who so act, however, are generally young and inexperienced, whose professional skins are thin and tender, and not yet hardened by the blows received in battles at the bar. Veteran Solicitors take defeat in such good humor that the Chancellor sometimes regrets his inability to decide in their favor. The triumph of the victor is often eclipsed by the genial, gracious manner in which the vanquished submits to his fate.<sup>59</sup>

§ 1184. **Briefs of the Facts and the Law.**—The Chancery Rules require that when a cause is reached, each Solicitor shall produce and read to the Court a brief written in ink, plainly showing the points in the cause raised by the

<sup>58</sup> See, *ante*, §§ 62, sub-sec. 1; 451.

<sup>59</sup> Some few Solicitors endeavor to break their fall, or rally their spirits, by rising and moving for a new trial, or praying an appeal, as soon as the jury deliver their verdict, or the Chancellor announces his decision. Such exhibitions of petulance not only excite the ridicule or contempt of the balance of the bar and the bystanders, but are downright disrespectful and discourteous to the jury and

to the Court, and is the outgrowth of criminal practice where a motion for a new trial is necessary to prevent a convicted defendant being prayed into the custody of the Sheriff. The proper time in a civil cause to pray for a new trial or an appeal is at the next motion morning after the decision, unless there be some special reason for urgency. Dignity and courtesy are two of the brightest jewels in a lawyer's crown.

pleadings and the proof, together with the authorities relied on in argument.<sup>60</sup> All Courts are anxious to have briefs: they greatly aid in eliminating the surplus rubbish in the cause, and in enabling the Judges to concentrate their attention upon the turning points in the controversy. One of the principal offices of the Solicitors of a Court is to aid the Court in reaching a conclusion both on the facts and on the law; and they are rightfully expected to sift and marshal the facts, and search out the law, in advance of the hearing, to the end that the Chancellor may be profited by their labors and knowledge, and his own labors be proportionately lessened. Hence, it may be laid down as a fundamental rule, that no Solicitor does his full duty to himself, or to his client, or to the Court, unless he produces at the hearing the brief required by the Chancery Rule.

The following general form may be of some service in the preparation of briefs for the Chancery Court:

**FORM OF A BRIEF.<sup>61</sup>**

John Doe,  
vs.  
Richard Roe, *et al.* } Brief for Complainant.

I.

The first question of *fact* in this case is: [*Here state it clearly and briefly; and not argumentatively.*]

Complainant maintains that [*Here state it briefly, thus: that there was a contract, or, a fraud, or, a notice, or, a deed, or, a debt, or, a trust, or, a lien, or some other equity claimed in the bill.*]

Dep. of John Doe, q. and ans., 9.

Letter of Richard Roe, exhibited to his dep., xq. and ans., 12.

II.

The second question of *fact* is: [*Here state it clearly and briefly.*] Complainant maintains that [*Show the precise point in issue, and the precise proof sustaining your contention.*]

Dep. of Wm. Brown, qs. and ans. 8, 16, 20, 21; xqs. and ans., 5 to 7.

Deed from Wm. Brown to Richard Roe, exhibited to Roe's answer.

Henry Jones, defendant's witness, is contradicted by Wm. Brown: q. and ans., 6; and is, also, discredited by David Doe and John Smith.

III.

The first question of *law* in the case is: [*Here state it briefly and clearly, without any argumentation, thus: Whether the cause of action is barred by the statute of limitations. Complainant maintains that it is not, because 1st, The defendant was complainant's agent and concealed the cause of action; and 2d, Defendant held the money [or property] as express trustee.*]

See *Peebles v. Green*, 6 Lea, 474, as to both points.

IV.

The second question of *law* is: [*Here state it briefly and plainly, without argument, thus: Can an administrator, by filing a bill to sell the land of his intestate to pay debts, defeat the right of the purchaser of an heir's title at a judicial sale made before the administrator's bill was filed?*]

Complainant contends that he cannot.

A *bona fide* purchaser from the heir may hold the heir's interest against the administrator, or a creditor.

*Smith vs. Thomas*, 14 Lea, 324.

*Gibson vs. Jones*, 13 Lea, 684.

*Raht vs. Meck*, 5 Pick., 274.

Then why may not a purchaser of the heir's interest at a judicial sale hold such interest?

H. H. INGERSOLL, Solicitor.

<sup>60</sup> Ch. Rule, X, § 2; § 1199. The Court has made rules not to hear Equity causes unless briefs are filed. See *Peck*, 436, 442; 443; 457, where the former rules will be found.

<sup>61</sup> The younger lawyers are inclined to be too elaborate in their briefs, and the older lawyers to be too laconic. The following general rules may well be observed in preparing briefs:

1st. That the Court knows the elementary law.

2d. That any law that gives much light to counsel will give some light to the Court.

3d. That one authority to the point is sufficient, unless it has been questioned, modified, or overruled.

4th. That elaborate argumentation is out of place in a brief. The skeleton only of the argument should be given.

CHAPTER LXVI.

THE SHERIFF: HIS DUTIES.

- § 1185. The Office of the Sheriff.
- § 1186. The General Duties of the Sheriff.
- § 1187. Duties of the Sheriff While Court is in Session.

§ 1188. Some Suggestions in Reference to the Sheriff's Duties in Term Time.

§ 1185. **The Office of the Sheriff.**—All Courts are powerless without officers to execute their process, and to enforce their mandates. The Legislature may enact laws; the Chancellor can deliberate, determine and decree, in pursuance of those laws; and the Clerk and Master can issue the process ordered by the fiat or decree of the Chancellor; but it remains for the Sheriff to make those laws, and that fiat or decree, effective by executing the process awarded; and thus (1) compelling the defendant to do what the law and the Court require of him, and (2) conferring upon the complainant the benefit decreed by the Court to be his due under the law.

As, therefore, the Court is powerless without its Sheriff, it is incumbent on the Sheriff to be always present and ready, in person or by deputy, to discharge every duty that may be imposed upon him, while the Court is in session: and to discharge all duties with diligence, efficiency and good faith.

If the Sheriff be absent, or cannot be relied on, the Chancellor may, upon special application, appoint any other person to serve original, mesne or final process, or to execute the orders of the Court.<sup>1</sup>

§ 1186. **The General Duties of the Sheriff.**—The duties of Sheriffs are set out in detail in the Code, and need not be stated here.<sup>2</sup> The Sheriff should keep three great facts constantly in mind: 1, That it is his duty to obey all lawful orders of the Chancellor while the Chancery Court is in session; 2, That it is his duty to execute all orders, decrees, and process of the Chancery Court issued by the Clerk and Master, or Chancellor; and 3, That in the execution of process he must use a degree of diligence exceeding that which a prudent man employs in his own affairs.<sup>3</sup> He must, with all reasonable speed, execute all process issuing from the Chancery Court, and make due return thereof, according to law and the requirements of the process.<sup>4</sup> The Sheriff must enter upon the execution of instant and extraordinary process, in person or by deputy, the moment it is placed in his hands; and should not allow one day to elapse, in any case, after original process has been put into his hands, before he sets out to execute it. The Sheriff should consult the Solicitor affirmatively interested, or the Clerk and Master, or in an extraordinary case, the Chancellor, as to his duties in executing a writ, or order of Court.

§ 1187. **Duties of the Sheriff while Court is in Session.**—The Sheriff is an officer of the Court; and it is his duty to be present, in person or by deputy, all the time the Court is in session. The statute makes it his duty to attend upon all the Courts held in his county while in session, and to obey the lawful orders and directions of the Court. He is also required to cause the Court room to be kept in order for the accommodation of the Court; and properly heated and supplied with drinking water.<sup>5</sup> It is also his duty to see that all parties keep the peace in and about the Court room.<sup>6</sup>

1 Code, § 4415.  
 2 Code, §§ 360-362; 4093.  
 3 Code, § 4093, sub-sec. 7.

4 Code, § 4347.  
 5 Code, § 360.  
 6 Code, § 362.

**§ 1188. Some Suggestions in Reference to the Sheriff's Duties in Term Time.**

In some of the counties, the Sheriffs are somewhat negligent in discharging their duties to the Chancery Court. In such cases, it might be well for the Chancellor at the opening of the term to call the attention of the Sheriff to his five great duties during the sitting of the Court:

1. **To Keep the Court Room in Order.** This means that the room should be kept clean, that the windows and doors are in proper order, that there are sufficient tables and chairs for the use of the bar, and that they are kept clean.

2. **To Keep the Court Room Duly Supplied With Water.** Fresh water for the bar, the Clerks, the litigants and the witnesses should be kept constantly in the Court room, in clean buckets, and supplied with clean dippers, tumblers, or other drinking vessels.

3. **To Keep the Court Room Comfortably Heated.** In cold weather a comfortable room is necessary. The Clerk cannot write with fingers benumbed with cold; the Solicitors cannot do justice to their clients while chilled to the bone; and the Chancellor cannot properly consider the evidence read, and the arguments made, if his mind is disquieted by the manifest discomforts of those about him, and his body is suffering from exposure to chilling drafts coming from open doors, or broken windows. The Chancellor owes it to himself, and to all concerned, to refuse to hold Court under such circumstances.

4. **To Keep Good Order in the Court Room.** The Chancellor should instruct the Sheriff at the opening of the term, (1) to suppress all smoking, loud whispering, or talking outside of the bar, while the Court is in session; (2) to keep down all noises, disputes and other disturbances, in the neighborhood of the Court room; and (3) to suppress any thing or act that tends to annoy, disturb or disquiet the Court.

5. **To Stay in the Court Room.** The Court room is the place for the Sheriff while the Chancellor is on the bench: an urgent demand for his services may arise any moment, and the Court may be compelled to wait until he can be found, and brought in. If process is to be executed, jurors to be summoned, or other duties discharged outside of the Court room, the Sheriff should either discharge these duties by a deputy, or should leave a deputy in the Court room to discharge his duties. It is disgraceful to a Sheriff to be called to come into the Court room by order of the Chancellor while Court is in session. The statute requires him to attend upon the Court while in session, and he has no right to leave the Court room without the Chancellor's permission. A sheriff has no more rights than a Chancellor; and what would be thought of a Chancellor who spent his time attending to matters about town, when the Solicitors, Clerks, and litigants are waiting for him to hold his Court?

Some Sheriffs wait for the Chancellor to direct them in every little thing. They wait to be told: 1, to get water; 2, to keep up the fires; 3, to keep the doors or windows closed; 4, to stop smoking or loud talking; 5, to suppress disorder in and about the Court House; 6, to come into the Court room, and 7, to discharge other plain duties. Chancellors have more important matters to engage their attention than overseeing Sheriffs or acting as Sheriff; and it is a downright imposition on the Chancellor to thus compel him to do what the Sheriff is sworn and paid to do. The Sheriff who waits to be directed in the foregoing matters is of but little more service to the Court, or to the people, than an ordinary porter who waits for orders.

CHAPTER LXVII.

RULES OF THE CHANCERY COURT.

<p>§ 1189. Rules of Practice of the Chancery Courts.</p> <p>§ 1190. Rule I. Pleadings and Exceptions Thereto.</p> <p>§ 1191. Rule II. Depositions, Evidence and Time for Taking Proof.</p> <p>§ 1192. Rule III. Decrees.</p> <p>§ 1193. Rule IV. Accounts, Reports, and Exceptions to Reports.</p> <p>§ 1194. Rule V. <i>Pro Confesso</i>, Proceedings Upon, and Rights of Defendant.</p> <p>§ 1195. Rule VI. Injunctions, Granting and Dissolving.</p>	<p>§ 1196. Rule VII. Contempt.</p> <p>§ 1197. Rule VIII. Continuances.</p> <p>§ 1198. Rule IX. Motions.</p> <p>§ 1199. Rule X. Hearing.</p> <p>§ 1200. Rule XI. Process: When Returnable.</p> <p>§ 1201. Rule XII. Corporations.</p> <p>§ 1202. Rule XIII. Enrollment.</p> <p>§ 1203. Rule XIV. Resales.</p> <p>§ 1204. Rule XV. Rehearing.</p> <p>§ 1205. Rules and Regulations of Practice for Particular Chancery Divisions.</p>
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§ 1189. **Rules of Practice of the Chancery Courts.**—In every system of jurisprudence, professing to provide for the due and orderly administration of public justice, some forms of proceeding must be established, to bring the matters in controversy between the parties, who are interested therein, before the tribunal by which they are to be adjudicated. And for the sake of the dispatch of business, as well as for its due conduct with reference to the rights and convenience of all the suitors, many regulations must be adopted, to induce certainty, order, accuracy, and uniformity in these proceedings. Hence it will be found that the jurisprudence of every civilized country, ancient and modern, has established certain modes, in which the complaints and defences of parties are to be brought before the public tribunals; and has authorized the latter, by rules and orders, to prescribe the time, the manner, and the circumstances, in which every suit is to proceed, from its institution to its determination.<sup>1</sup>

As our system of Equity Jurisprudence is mainly that of England, so our rules of practice in our Courts of Equity are mainly those in use in the High Court of Chancery of England at the time of the American Revolution.<sup>2</sup> The following are the statutory rules of practice now in force for the government of the Chancery Courts:

RULES OF PRACTICE OF THE CHANCERY COURTS.

AN ACT TO REVISE THE RULES OF CHANCERY PRACTICE.<sup>3</sup>

**Section 1.** *Be it enacted by the General Assembly of the State of Tennessee,* That the Rules of Practice of the Chancery Courts of this State shall be as follows; and all other rules of practice of said Courts, heretofore in force, and all sections of an Act entitled the Code of Tennessee, inconsistent with the same, or so far as the two are inconsistent, be, and the same are hereby repealed; and the rules submitted to this General Assembly by the Chancellors of this State, be adopted, as herein set out by rules, heads and sections, as follows:<sup>4</sup>

§ 1190. **Rule 1. Pleadings and Exceptions Thereto.**

**Section 1.** The residence of complainants and defendants shall be stated in all bills, if the same are known, and if unknown, then so stated.

<sup>1</sup> Sto. Eq. Pl., § 1.  
<sup>2</sup> See, *ante*, § 18; 1 Dan. Ch. Pr., 1-2, note. See Appendix to Cooke, (Cooper's ed.), where will be found all the old rules of practice adopted by our Courts.

<sup>3</sup> Acts of 1871, ch. 97. A large proportion of these Rules are directory and may be relaxed when their

rigid enforcement would work manifest injustice. See *Marsh v. Crawford*, 1 Swan, 116; *Lowe v. Morris*, 4 Sneed, 72; *Pawley v. McGimpsey*, 7 Yerg., 502; *Van Brocklin v. Wolcott*, 5 Heisk., 745; 1 Dan. Ch. Pr., 1, note.

<sup>4</sup> As will be seen by this section, this Act repeals the Rules of 1858, and all sections of the Code in-



**Sec. 2.** All papers and documents referred to in pleadings or depositions, as exhibits, shall be filed in the Master's office, at the time the pleadings or depositions are filed, unless by special order of the Chancellor or Master it is otherwise ordered, but the same shall be filed at any time thereafter upon the order of the Chancellor or Master; and no pleadings or depositions shall be received and filed by the Master until this rule shall have been complied with; provided, however, the paper is not of record in the Court.<sup>5</sup>

**Sec. 3.** The Master shall note upon the pleading or other paper filed in his office, the date of the filing.

**Sec. 4.** If exceptions be filed to an answer for insufficiency, or for scandal or impertinence, the Clerk and Master shall examine and report upon them with all convenient speed; and if either party be dissatisfied with his report, he may appeal to the Chancellor in Court.<sup>6</sup>

**Sec. 5.** Exceptions to an answer for insufficiency<sup>7</sup> shall be filed within twenty days after notice served of the filing of the answer.

The party filing the exceptions shall set them down for hearing before the Master within ten days after they are filed, and upon failure to do so, the answer shall be deemed sufficient.

Upon the exceptions being set down for hearing, the Master shall act upon them immediately, and if allowed, he shall notify the defendant's Solicitor to file a sufficient answer within thirty days, from which order the defendant may, within said time, appeal, but if the defendant, in obedience to said order, shall file an answer deemed sufficient by the Master, he shall notify the complainant's Solicitor, and he may appeal within ten days after the notice.

Upon appeal so taken, the Chancellor shall act immediately, or as soon as convenient.

**Sec. 6.** Exceptions filed shall not delay taking depositions, or otherwise preparing the cause for hearing.

**Sec. 7.** If a defendant obtain time to answer the complainant's bill he shall not file a plea or demurrer, unless the order giving time expressly embrace those modes of defence.<sup>8</sup>

### § 1191. Rule II.—Depositions,<sup>9</sup> Evidence,<sup>10</sup> and Time for Taking Proof.

**Section 1.** The Commissioner before whom a deposition is taken, is required to annex a bill of cost of taking the same.

**Sec. 2.** Proof of notice to take depositions may be made either before the Master or before the Commissioner, by the affidavit of a competent witness, or the return of a proper officer.

**Sec. 3.** If either party reside out of the State, notice may be served upon his agent or Solicitor.

**Sec. 4.** After a cause is set for hearing,<sup>11</sup> the same shall be opened to both parties for proof without leave of the Court, and without remanding the cause to the rules, but each party must take his proof in chief within four months,

consistent with the Act. Some suppose that such of the rules of 1858 as are not inconsistent with this Act are in force; but a careful reading of the above section, coupled with the consideration of the fact that nearly all of the rules of 1858 are incorporated in this Act, some without any change, and others with modifications, will show that the intention of the Legislature was to repeal the rules of 1858, except in so far as they are contained in this Act.

<sup>5</sup> The failure to file exhibits is no ground of demurrer. *Mulherrin v. Hill*, 5 Heisk., 60. The proper remedy in such a case is to apply to the Chancellor or Master for an order on the complainant to file the exhibits. See Code, § 4389.

<sup>6</sup> The next section of this rule shows that the Chancellor may act on these exceptions at Chambers,

also. As to exceptions to answers, generally, see Article on that subject. *Ante*, §§ 420-424.

<sup>7</sup> Exceptions to an answer for scandal and impertinence may be filed at any time, and acted on by the Court at any time.

<sup>8</sup> Time given in vacation should be limited to the Saturday before a rule day so as to allow a *pro confesso* on the rule day, if the answer is not filed when allowed.

<sup>9</sup> See Chapter on Depositions in Chancery. *Ante*, §§ 474-513.

<sup>10</sup> See Chapter on Evidence in Chancery. *Ante*, §§ 441-473.

<sup>11</sup> A cause is deemed set for hearing as soon as an issue of fact has been made. Code, §§ 4322; 4328; 4432; 4400-4401; and see, *ante*, § 464.

and the rebutting proof within two months;<sup>12</sup> *Provided*, the Chancellor or Master may extend the time upon sufficient cause shown by affidavit, upon terms.<sup>13</sup>

**Sec. 5.** All exceptions to depositions for want of notice, because not filed in reasonable time; or for other cause going to the admissibility thereof, except objections to the competency of the witness or his evidence, shall be made and disposed of before the commencement of the hearing or trial, otherwise they will be considered as waived. It is the duty of the Clerk to act upon the exceptions made before the hearing forthwith; and from his decision an appeal lies to the Chancellor or Judge, to be disposed of before the cause is heard or tried.<sup>14</sup>

**Sec. 6.** A witness once examined in a cause, by either party, shall not be re-examined to the same facts by the same party, unless by order of the Court, or of the Master, on sufficient cause shown by affidavit.

**§ 1192. Rule III.—Decrees.**<sup>15</sup>

**Section 1.** Each decree shall be written upon not less than a half sheet of paper, and in ink; and the date of its entry endorsed upon the same.

**Sec. 2.** Each decree in a cause, as it is entered, shall be securely fastened together at the top with the other decrees in the same cause, by the Master.

**§ 1193. Rule IV.—Accounts,<sup>16</sup> Reports,<sup>17</sup> and Exceptions<sup>18</sup> to Reports.**

**Section 1.** When a matter is referred to the Master to take an account, and make a report, the Court may, in the decree, fix the time in which the account shall be taken and the report made, and upon whom the notice of taking the same shall be executed, if in the discretion of the Court any notice is necessary.

**Sec. 2.** If the decree does not fix the time within which the account shall be taken, and the report made, the same shall be made to the succeeding term upon the following rules, viz.: The Master shall assign a time and place to consider the same, and shall issue a notice thereof to the parties interested in the account, and to be affected by it, and also their respective Solicitors, if both the party and Solicitor reside in the county; and if the Solicitor reside in the county and the party does not, then the Solicitor, and *vice versa*. In all cases in which the party is a non-resident, then the notice shall be served upon the Solicitor.

**Sec. 3.** Said notice shall be executed five days before the day assigned, and it shall be expressed in the notice, that if the party or his Solicitor, as provided above, shall fail to attend, the account will be proceeded with *ex parte*.

**Sec. 4.** If the parties or their Solicitors attend, the Master may, upon affidavits of either party showing sufficient cause, adjourn the matter from day to day, or to another day prior to the time he is required to file the report, at which time, unless he adjourn the same, he shall proceed to take the account and make the report.

**Sec. 5.** If the parties are numerous, the notice shall be served upon such of them as the decree or Master may designate.

<sup>12</sup> The time for taking proof begins to run from the filing of the plea or answer. Exceptions to an answer do not suspend the preparation of a cause for hearing, or delay the taking of depositions. Rule I, § 6, *ante*, § 1190; Code, § 4457.

Neither party is entitled, of right, to the four and two months within which to take proof; but the cause stands for trial, and may rightfully be heard, at the first term after answer filed, whether such term come one or five months thereafter. Code, §§ 4328; 4401; 4432. See, *ante*, § 533; *Rather v. Williams*, 10 Pick., 543, citing § 463 (now § 465) of this book. See, also, *Harris v. Bogle*, Nashville, 1906.

Proof in chief is proof that tends to establish the affirmative allegations in the pleadings; rebutting proof is proof that tends to refute these allegations, or assails the evidence or witnesses of the other party. Proof of matters in avoidance is proof in chief. Rebutting proof may be taken at any time within the six months, but proof in chief must be taken within the four months. *Ante*, § 465.

<sup>13</sup> The order granting an extension of time to take

proof should specify the names of the witnesses allowed to be examined, and the time allowed for that purpose; and should, also, specify the terms, these terms in no case to be less than the costs of all proof thereafter filed. *Ante*, § 463, note 12.

<sup>14</sup> The Chancery Rules of 1858, Rule, XI, allowed an appeal to the Chancellor *in Court*. This Rule omits the words, "in Court," and this fact, coupled with Code, §§ 4410 and 4416, shows that the Chancellor has power in vacation to hear this appeal; and such is the practice. This Rule is identical with Code, §§ 3868-3869. On the subject of exceptions to depositions, see, *ante*, §§ 497-501.

<sup>15</sup> See Chapter on Decrees, *ante*, §§ 555-581.  
<sup>16</sup> For the practice in taking accounts, see, *ante*, §§ 603-610. The Court has no power to order a reference for an account, except by consent, or upon a hearing of the cause. *Wessels v. Wessels*, 1 Tenn. Ch., 58.

<sup>17</sup> On the subject of reports, see, *ante*, §§ 611-620.  
<sup>18</sup> Exceptions to reports have been heretofore fully considered. *Ante*, §§ 615-617.

**Sec. 6.** After the evidence has been closed, the Master shall proceed without delay to make the report in writing, in ink, with the pages marked thereon.

**Sec. 7.** In said report, he shall refer by page to the particular parts of the record upon which he bases each item allowed.<sup>19</sup>

**Sec. 8.** Said report when completed shall be filed five days before the first day of the succeeding term, and the fact shall be noted upon the hearing docket, and also upon the Chancellor's docket, opposite the cause.

**Sec. 9.** If either party fail to attend, the account shall be closed, and no other evidence shall be introduced or heard, unless the party offering it shall, within ten days, by special affidavit, show that he has material evidence which was not before the Master at the time fixed for taking the account, and which he could not by proper diligence have produced according to the provisions of the notice, in which case the Master may open the account for the reception of evidence upon the same notice prescribed for the original account; provided, however, the Court at any time before confirmation, may, in its discretion, open the account for additional evidence.

**Sec. 10.** Upon a reference, a witness cannot be examined, either by the Master or the party whose witness he is, to the same matter, to which he has been examined in chief before the hearing of the cause, without an order of the Court or of the Master upon affidavit showing sufficient cause therefor, but he may be examined touching any other matter.

**Sec. 11.** A witness once examined by the Master may be re-examined by him at his discretion.

**Sec. 12.** The exceptions to the Master's report shall be filed on or before the second day of the term to which the report is made returnable, unless the cause is sooner reached on the docket, and in that event the exceptions must be filed at the calling of the cause; and in either case, the exceptions shall be immediately set down by the Clerk for argument, and shall be disposed of by the Court when the cause is reached for trial.

**Sec. 13.** The exceptions shall clearly and distinctly state the matter or item excepted to, and shall refer to the page or pages of the report which show the item or matter excepted to, and shall also refer to the page or pages of the depositions, or other part of the record by which it is sought to impeach the report.<sup>20</sup>

**Sec. 14.** After the time allowed for filing exceptions shall have expired, and none have been filed, the report may be confirmed, unless for good cause shown a longer time is allowed.

**Sec. 15.** All exceptions to reports shall be heard and disposed of as other motions, provided they shall be disposed of when the cause is reached.

**§ 1194. Rule V.—Pro Confesso, Proceedings Upon,<sup>21</sup> and Rights of Defendant.**

**Section 1.** It shall not be necessary to give notice to a party upon a reference for an account, when the cause is standing upon a *pro confesso* decree against such party, unless said party resides in the county.

**Sec. 2.** In all cases in which a *pro confesso* decree is set aside, pending the cause, and the party allowed to answer, upon filing the answer the defendant shall have the right to cross-examine the witnesses, whose deposition has already been taken, without any leave of the Court, and may have all proper process to compel their attendance, but must give notice to the opposite party of the time and place, as in other cases of taking depositions.

**§ 1195. Rule VI.—Injunctions;<sup>22</sup> Granting and Dissolving.<sup>23</sup>**

**Section 1.** In all cases of injunction bills, in which the oath of the defendant to the answer is waived, he may, nevertheless, for the purpose of a dissolution

<sup>19</sup> For form of report, see, *ante*, § 613.

<sup>20</sup> Form of exceptions, *ante*, § 616.

<sup>21</sup> See Article on *Pro Confessos*, and Proceedings

Thereon, *ante*, §§ 205-212; 888-890.

<sup>22</sup> See Chapter on Injunctions, *ante*, §§ 800-863.

<sup>23</sup> See, *ante*, §§ 849-858.

of the injunction, swear to his answer without leave of the Court; and upon notice to dissolve upon bill and answer, the answer may be looked to for that purpose as fully as if permission of the Court had been obtained.

**Sec. 2.** The notices of a motion to dissolve an injunction shall, in all cases, state upon *what* the motion is based, whether for want of Equity on the face of the bill, or upon bill and answer.<sup>24</sup>

**Sec. 3.** Upon the hearing of a motion to dissolve an injunction upon bill and answer, the fact that the answer has been excepted to, or that the time to file exceptions has not elapsed, shall not postpone the hearing of the motion to dissolve, but the Chancellor may, without passing upon the exception, dispose of the motion to dissolve.

**Sec. 4.** If, in a bill tendered for a fiat for an injunction, the complainant admits any money to be due the defendant, or fails to allege any sufficient Equity against any part of the matter sought to be enjoined, the Judge or Chancellor shall either order the issuance of the injunction as to so much only as to which there is sufficient Equity, or, in case the whole matter is enjoined, it shall, besides the bond required by law, be also required that the complainant pay into Court the amount admitted to be due, or otherwise perform the fiat as to any part of the matter sought to be enjoined, and as to which no injunction is ordered, before injunction issues.<sup>25</sup>

### § 1196. Rule VII.—Contempt.<sup>26</sup>

**Section 1.** If a contempt is committed in the presence of the Court, the offending party may be arrested by the officer waiting upon the Court, upon the verbal order of the Chancellor, without process or notice, and the contemner shall not be bailable, but the Court may proceed at once to fine or imprisonment, or both; but the minutes shall show the penalty inflicted, and the matter of contempt.

**Sec. 2.** In all cases of contempt committed not in presence of the Court, the mode of proceeding shall be as follows:

(1.) A petition shall be filed stating the contempt complained of, supported by affidavit, together with such exhibits and returns of officers, or certified copies thereof, as may fully show how the contempt arose.

(2.) Thereupon the Chancellor, if sufficient cause is shown, shall order the issuance of an attachment for the body of the contemner, fixing in said order the time and place of the appearance to answer, and also the amount and character of the bail bond to be taken.

(3.) The Chancellor, upon the appearance and answer of the contemner, or production of his body and refusal to answer, shall hear said proceedings at the time and place designated, unless upon cause shown he shall give further time, upon the petition, affidavit and exhibits, and answer thereto, in case the contemner answers, and if he fails to answer, then upon the case made by the petition.

(4.) In case the contemner does not appear as required by his bond, judgment shall be rendered against the parties thereto for the full amount thereof; and in case an *alias* attachment be issued, and the contemner be arrested, no bail shall be taken, unless the contemner show good cause for his default, either before the Clerk and Master<sup>27</sup> in vacation, or before the Chancellor in term time.

(5.) If a forfeiture is taken upon the bond and the term of the Court is passed, the Chancellor shall certify the fact, together with the papers, to the Master, who shall immediately enter judgment upon the bond for the amount of the same against the principal and his sureties, and also for costs, and award a *fieri facias*, and the same when collected shall be paid into Court, and all or

<sup>24</sup> *Ante*, §§ 850-852.

<sup>25</sup> As to injunctions to stay a sale under a deed of trust, or mortgage to secure the payment of loaned money, see, *ante*, § 828.

<sup>26</sup> See Chapter on Contempts, *ante*, §§ 918-924.

<sup>27</sup> Printed "Commissioner" in the statute.

so much thereof as is deemed proper by the Court, shall be awarded to the injured party, and the balance shall be paid by the Master into the treasury of the State.

**Sec. 3.** If a witness, after having been duly summoned, fails to appear before the Master upon return of an officer or proof by affidavit of such service, the Master shall issue an instant attachment for him, and designate therein the penalty of the bond conditioned for his appearance before the Chancellor at a time and place to be specified if practicable, or before the Court at the next succeeding term, if it be not then in session, to show cause why he should not be fined or committed according to law.

**Sec. 4.** If a witness should appear and refuse to answer legal interrogatories he shall be committed by the Court or Master, until he consent to give his testimony.

**Sec. 5.** The Master may, on application of complainant, issue an attachment against a defendant for want of an answer, where the time for answering has expired.

**Sec. 6.** If the Clerk and Master fail to comply with an order of reference made by the Court under the provisions of law, and the rules as above, he shall forfeit and pay fifty dollars for every such failure, unless he show by oath, to the satisfaction of the Court, he has been guilty of no contempt or culpable neglect of duty.

#### § 1197. Rule VIII.—Continuances.<sup>28</sup>

**Section 1.** [After a cause shall have been once continued by either party, no other continuance shall be granted except upon payment of all costs then accrued, including State and county tax, and execution shall issue for such costs against the party continuing, and his sureties.<sup>29</sup>]

**Sec. 2.** When a cause shall be continued by consent, the Chancellor may tax the costs as he may deem proper, or reserve the same until final decree.<sup>30</sup>

#### § 1198. Rule IX.—Motions.

**Section 1.** The Court may hear motions at such times as may be convenient.

#### § 1199. Rule X.—Hearing.

**Section 1.** The complainant or his Solicitor, before presenting a cause for hearing, shall cause all the depositions and other papers intended to be used by him on the trial, except the pleadings, to be neatly put together in one or more packages, and securely fastened together at the top, and the same paged, and a general index of the contents made at the conclusion or beginning thereof. The defendant or his Solicitor shall in like manner prepare all papers and depositions intended to be used by him.<sup>31</sup>

**Sec. 2.** When a cause is called, each Solicitor shall produce and read to the Court, a brief written in ink, plainly showing the point in the cause raised by the pleadings and the proof, together with the authorities relied on in argument; otherwise, the Court may, in its discretion, delay the hearing until these two rules are complied with.<sup>32</sup>

#### § 1200. Rule XI.<sup>33</sup> Process:<sup>34</sup> When Returnable.

**Section 1.** Whenever the terms of a Court shall continue for a sufficient time, all process which shall have been issued for more than five days before the first day of the term, may be made returnable to any Monday of the term; and if the same shall be executed five days before such return day, the defendant shall cause his appearance to be entered and make defence, or obtain time

<sup>28</sup> See, *ante*, §§ 519-521; 526-529.

<sup>29</sup> This section was repealed by the Act of 1872, ch. 8. This Act was passed at a Special Session; and its title is an attempt to bring it within the scope of the Governor's proclamation. The constitutionality of the Act is questionable.

<sup>30</sup> *Ante*, § 529.

<sup>31</sup> The Chancellors will find that the enforcement of this Rule will save much labor, and many annoyances.

<sup>32</sup> Chancellors find these briefs of such very great value that they actually have a feeling of thankfulness when briefs are handed them. No Solicitor does his duty either to the Court or his client unless he fully complies with this rule. Briefs are good case-winners. See form, *ante*, § 1184.

<sup>33</sup> The main object of this Rule was to repeal Code, § 4351.

<sup>34</sup> See Chapter on Original Process in Chancery, *ante*, §§ 184-193.

therefor within the three succeeding days, and the cause shall stand to be proceeded in at that term.

Sec. 2. If such process is executed within the five days before such return day, then the same shall be returned to the succeeding Monday, and the defendant allowed the three succeeding days thereafter to cause his appearance to be entered and make defence or obtain time therefor, and the cause shall stand to be proceeded in at that term.

Sec. 3. The two foregoing rules shall also apply to cases in which publication is made for a defendant.<sup>35</sup>

Sec. 4. *Alias* or *mesne* process taken out at any time, may be returnable to any Monday of the term, and if executed five days before the return day, the defendant shall have the first three days of the term, if the Court hold so long, otherwise on the first day of the term, in which to cause his appearance to be entered, or to make defence or to obtain time therefor, and after said three days or said first day, as the case may be, the same shall stand to be proceeded in for all purposes.<sup>36</sup>

Sec. 5. If said *alias* or *mesne* process shall be executed within the five days before the return day, the cause shall stand over to the succeeding Monday, and then to be proceeded in as in Section 4 above.

§ 1201. Rule XII.—Corporations.<sup>37</sup>

Section 1. Any person opposing the organization of a corporation, shall be required to make defence by plea, motion to dismiss, demurrer or answer, as in other cases in Chancery.

Sec. 2. If the opposition is made by answer, the same shall be put in under oath, and shall state in brief the causes why said organization should not be allowed.

Sec. 3. The petition and answer shall merely operate to make the issue or issues.

Sec. 4. All the evidence in such cases shall be by depositions taken as in other suits in Equity.

Sec. 5. All applications for the organization of corporations shall be put upon the rule docket, and if not opposed, shall be heard upon motion. Applications which are opposed shall be put upon the hearing docket upon the filing of the answers, and shall in all respects be proceeded in as other causes in Equity.

§ 1202. Rule XIII.<sup>38</sup>—Enrollment.

Section 1. After any paper is filed in a cause, either party may have the same enrolled by paying to the Master the enrolling fee thereon, which may or may not, at the discretion of the Court trying the case, be taxed to the losing party, and collected as other costs.<sup>39</sup>

Sec. 2. Any paper lost or mislaid may be supplied from the enrollment book, the Master certifying that the same is a full, true and perfect copy; and shall be used on the trial of the cause, or the enrollment book itself may be used.

Sec. 3. Whenever, in the opinion of the Court finally determining an Equity cause, it is necessary and proper that the proceedings should be enrolled, such Court shall, upon application of either party, order the enrollment; and the Clerk shall make the same accordingly, and the party applying for the order shall be taxed with the costs thereof.<sup>40</sup>

§ 1203. Rule XIV.—Re-Sales.

<sup>35</sup> If publication is begun more than five days before the first day of the term, it may require the defendant to appear on any Monday of the term coming five or more days after the last publication. *Wessells v. Wessells*, 1 Tenn. Ch., 60. And a *pro confesso* can be taken and final decree pronounced at the appearance term. *Ibid.*

<sup>36</sup> But publications, it would seem, could not be made under this section so as to give a right of trial at the same term. *McGavock v. Young*, 3 Tenn. Ch., 529.

<sup>37</sup> The Act of 1875, ch. 142, § 28, having re-

pealed the law authorizing the Chancery Courts to grant letters of incorporation, this Rule becomes valueless. *Sublato fundamento cadit opus.*

<sup>38</sup> The original Rule XIII, of the Act of 1871, has been all repealed, except section 2. See Acts of 1872, ch. 8; Acts of 1877, ch. 45.

<sup>39</sup> Acts of 1877, ch. 45.

<sup>40</sup> Acts of 1877, ch. 45, § 5. This section was not enacted as a Chancery Rule, but as an amendment of Code, § 3227: nevertheless, it is a Chancery Rule, and comes appropriately here.

**Section 1.** If the purchaser of property sold at the Master's sale fail to make payment or comply with the terms of sale, the Master may again expose the property to sale on the same day, or after giving due notice of the time and place, according to the directions contained in the decree.<sup>41</sup>

§ 1204. **Rule XV.—Re-Hearing.**<sup>42</sup>

**Section 1.** Every petition for re-hearing shall contain the special matter or cause on which a re-hearing is applied for, be signed by counsel, and the facts therein stated, if not appearing from the proceedings in the Court, shall be verified by oath or affirmation. Such petition must be presented to the Court during the term at which the decree complained of is entered upon the minutes.

HAMILTON C. SMITH, Chancellor of 1st Division.

O. P. TEMPLE, " " 2nd "

D. M. KEY, " " 3rd "

ALBERT S. MARKS, " " 4th "

W. W. GOODPASTURE, " " 5th "

CHAS. G. SMITH, " " 6th "

EDWARD H. EAST, " " 7th "

W. S. FLEMING, " " 8th "

GEORGE H. NIXON, " " 9th "

JAMES FENTRESS, " " 10th "

N. J. MORGAN,  
Chancellor of 1st Chancery Court of Shelby County.

WILLIAM L. SCOTT,  
Chancellor of 2nd Chancery Court of Shelby County.<sup>43</sup>

§ 1205. **Rules and Regulations of Practice for Particular Chancery Divisions.**

The Rules of Practice adopted by a majority of the Chancellors, or enacted by the Legislature, are obligatory upon all the Chancellors, and cannot be changed. But in the absence of any such rule, or rules, on any particular matter, or matters, of practice, each Chancellor may make rules and regulations of practice for the purpose of expediting business in his own Chancery Division.<sup>44</sup> These rules and regulations must not be in conflict with any rule made by the Chancellors as a body, nor with any statute of the State.

The following rules and regulations, nearly all of which are in beneficial operation in some one or more of the Chancery Divisions, are suggested as a basis for the action of individual Chancellors:<sup>45</sup>

RULES OF PRACTICE FOR PARTICULAR DIVISIONS.<sup>46</sup>

*Optima est lex quæ minimum relinquit arbitrio judicis; optimus judex qui minimum sibi.*—BACON.

I am bound by Magna Charta *nulli negare, nulli differe justitiam.*—LORD NOTTINGHAM.

Right and justice shall be administered without sale, denial, or delay.—CONSTITUTION OF TENNESSEE.

RETURN DAYS, APPEARANCE AND DEFENCE.

**RULE 1.** The First Monday of Every Month in Vacation is hereby made a return day for all process, except final process; and all subpoenas to answer orig-

<sup>41</sup> See, *ante*, § 627.

<sup>42</sup> See Chapter on Rehearings, *post*, §§ 1215-1222.

<sup>43</sup> These Rules, while signed by the then Chancellors, were thoroughly revised by the Legislature, through its Senate Judiciary Committee, and enacted into a law. Acts of 1871, ch. 97. Three members of that Committee afterwards became Chancellors, one of whom is the author of this book.

<sup>44</sup> Code, §§ 3935-3936. See Haralson *v.* McGavock, 10 Lea, 724.

<sup>45</sup> These rules are in force in the 2d Chancery Division, and most of them in other Divisions. See similar rules in 2 Tenn. Ch., 787-790. See Appendix to Cooke, where Judge Cooper has collected all the preceding rules of Court practice contained in our Reports.

<sup>46</sup> Rules and Regulations of Practice for the Chancery Division would be a title more consonant with the statute. Code, § 3936; but the title given is more brief, and, perhaps, as applicable.

These rules, in so far as they impose costs, are based on the law of compensation. The law has no favorites as between equals, except in so far as it favors those who are diligent. Nor has a Chancellor the right to grant a favor to one party at the ex-

pense of the other. Favors should be paid for in costs; otherwise, the party in default is rewarded, and the party who has done his duty is punished.

As "he who seeks equity must do equity," so he who seeks a favor in Court must do a favor. And where a loss must fall on one of two parties, it should be borne by him whose default occasioned the loss; otherwise, he would derive an advantage from his own wrong. Hence, a party asking leave to amend his pleadings, or to answer after a *pro confesso* order against him, or to take proof after his time has expired, or to continue a trial when the other side is ready, should not ask such a favor without offering to pay all costs occasioned by the favor he is asking. Nor should a Chancellor deprive one party of the fruits of his diligence in order to relieve the other party of the penalties of his negligence.

And, above all, it must ever be remembered that Courts are made to do full justice, and that justice delayed is only half done.

The main purpose of the following rules is to give the speediest trial consistent with the highest justice; and the bar is solicited to co-operate in the effort to effect this purpose.

inal amended or supplemental bills, bills of revivor, cross bills, bills of review and petitions, and all writs of *scire facias*, shall be made returnable to the first Monday of the month coming five or more days after the issuance of such process:<sup>47</sup> but, if a regular term of Court comes before such first Monday, such process shall be made returnable to the first day of such term. This rule includes process by publication in all cases, the last publication being deemed equivalent to the issuance of a subpoena under this rule<sup>48</sup> but in attachment cases the last publication must be at least one week before the return day.<sup>49</sup>

**RULE 2. When Defence Must be Made.** Every defendant served with such original or *mesne* process, whether by personal service or by publication, shall plead, demur, or answer, on or before the first return day coming five or more days after such service, in all cases except in attachment cases, and then on or before the first return day coming at least one week after such service. Service by publication in all cases shall be deemed to have been made on the day of the last publication: if, however, the return day is the first day of a term of the Court, the defendant must make his defence within the first three days of the term,<sup>50</sup> and will be liable to a *pro confesso* thereafter.<sup>51</sup>

**RULE 3. When a Pro Confesso May be Taken.** If any defendant, not a minor or person of unsound mind, fails to make defence on the return day, a *pro confesso* order may be taken and entered against him on the next or any subsequent rule day in vacation; and if the first day of the term is the return day, then a *pro confesso* order may be taken and entered against him on any rule day after the third day of the term.<sup>52</sup> Each day of the term, and the first Monday of every month in vacation, are rule days for the purpose of taking *pro confessos*, and for all other business proper for rule days.<sup>53</sup>

**RULE 4. Limitation on the Foregoing Rules.** The foregoing Rules are all subject to Chancery Rule XI, under the operation of which: 1, Any original writ issued, or any publication commenced, more than five days before the first day of the term, may be made returnable to any Monday of the term; 2, *Alias* and *mesne* process,<sup>54</sup> taken out at any time may be made returnable to any Monday of the term; 3, If any process issued as aforesaid, is executed within five days before the return day, the next succeeding Monday shall be the return day; and 4, In all of said cases the cause may be proceeded in as though the process had been duly executed five or more days before the first day of the term.<sup>55</sup>

**RULE 5. Copies of Subpoenas to be Issued.** The Clerk will issue with each subpoena as many copies thereof as there are adult defendants to be served, and the officer executing the writ will leave one of said copies with each adult defendant, in addition to the service now required by law. At the bottom of each of said copies shall be a notice to the defendant named therein, specifying the day on which he is required to plead, demur or answer, and warning him that if he fail so to do, the bill may be taken as confessed as to him.

**RULE 6. Answer When to be Filed on Demurrer Being Overruled.** When a plea or demurrer is overruled, the defendant must file his answer on the next rule

<sup>47</sup> Code, §§ 4348-4349; *Haralson v. McGavock*, 10 Lea, 724.

<sup>48</sup> A subpoena can be issued and served on the same day; but a publication must be made for four successive weeks, and is not deemed served until the day of the last publication, which day must be at least five days before the return day. *Wessells v. Wessells*, 1 Tenn. Ch., 65.

<sup>49</sup> Code, § 3523. Twenty-eight days next before the return day is sufficient publication in attachment cases. Thus, if the notice is published on the 19th and 26th of August and on the 2d and 9th of September, the 16th of September would be a lawful return day in an attachment suit, and the 14th of September would be a lawful return day in any other suit wherein publication was made. *Lowenstine v. Gillispie*, 6 Lea, 643, overruling *Riley v. Nichol*, 1 Heisk., 16.

<sup>50</sup> But where the term does not last three days, see, *ante*, § 225.

<sup>51</sup> As to when and how a defendant must appear, see, *ante*, §§ 222-227.

<sup>52</sup> See, *ante*, §§ 205-206; 225-227, as to when and how *pro confessos* are taken.

<sup>53</sup> Code, § 4421; *Haralson v. McGavock*, 10 Lea, 724. Formerly, only the first day of the term was a rule day in term time. *Lanum v. Steel*, 10 Hum., 280. This decision was made in 1849, and the Legislature of 1851-52 enacted that every day of the term should be a rule day.

<sup>54</sup> *Mesne* process under this rule includes writs of *scire facias*, and subpoenas to answer supplemental and amended bills, and bills of revivor. This will be seen by a comparison of Code, §§ 4348-4349; 4415; 4426-4429.

<sup>55</sup> See *Wessells v. Wessells*, 1 Tenn. Ch., 61; *McGavock v. Young*, 3 Tenn. Ch., 529.



day. The Chancellor may, however, allow further time to file an answer when the plea or demurrer is not deemed frivolous; but in no case will the Master allow further time to answer after a plea or demurrer has been overruled.

**RULE 7. Any Defendant Desiring Leave to File a Plea or Demurrer** after a *pro confesso* entered against him in vacation, or desiring an extension of time to make defence with leave to file a plea or demurrer, in vacation, must apply to the Chancellor, and not to the Master, for such leave, and must exhibit his plea or demurrer and a copy of the bill with his application, along with an affidavit showing good cause for setting aside said *pro confesso*, or for said extension, as the case may be.

**RULE 8. Defence on Leave Must be Made Within the Leave.** When a defendant has obtained time from the Chancellor or Master to make a defence, he shall make his defence in the manner and time specified in the order giving time; and the Master will not receive or file any pleading presented by the defendant after the time specified for making his defence shall have expired, without the written consent of the complainant, or an order from the Chancellor.

**RULE 9. Plea When Deemed at Issue.** If the complainant fail to set down a plea with the Clerk to be argued, or fail to take issue upon it, on or before the first rule day coming twenty or more days after the filing of such plea, it will be deemed at issue, as though a general replication had been filed.<sup>56</sup>

**RULE 10. Notice to be Given of Filing of a Plea or Demurrer.** When a plea or demurrer is filed, whether in vacation or in term time, the Clerk and Master shall at once notify the complainant, or his Solicitor.

#### PRO CONFESSOS, WHEN AND HOW TAKEN.<sup>57</sup>

**RULE 11. Pro Confesso a Legal Right: Not to be Set Aside Unless.** When the defendant has failed to make his defence in the time and manner required by the rules of the Court, the complainant has a legal right<sup>58</sup> to have an order by the Master or the Court, taking his bill for confessed, as of course; and such *pro confesso* order will be made whenever legally demanded, and will not be set aside either by the Master or the Chancellor when the defendant was served with subpoena, except with the written consent of the complainant, or on good cause shown by affidavit, accompanied by a sworn answer, showing a meritorious defence, and on the payment of costs.<sup>59</sup>

**RULE 12. Pro Confessos at Rules.** All *pro confessos* under these rules may be taken before the Master in vacation, or in open Court in term time. The defendant has the whole of the return day in vacation to file his defence, and hence, a *pro confesso* cannot be taken against him until the next rule day.<sup>60</sup>

**RULE 13. Proof in Support of Pro Confessos.** No motion for a *pro confesso* on a bill will be considered in term time, unless the proof that the subpoena has been served, or the publication has been made, is produced in open Court, and filed with the written motion. The Master will keep on file the newspapers containing the publication, or the printer's affidavit thereof.

**RULE 14. Further Time to Make Defence, When.** Whenever the complainant fails to take a *pro confesso* on the first rule day at which a *pro confesso* may be taken, under these rules, he may take said *pro confesso* on any subsequent rule day,<sup>61</sup> provided the defendant has not in the meantime filed his plea, demurrer, or answer; and provided, further, that on good cause shown by affidavit, the Master may at rules, or the Chancellor may at Chambers, or in open Court, extend the time to make defence; but if defendant's time is extended by the Master, he shall answer and not plead or demur.

<sup>56</sup> In strict law, the defendant would be entitled to have his plea taken for confessed. 1 Dan. Ch. Pr., 696; but the rule is more consonant with our practice. Seifred v. People's Bank, 2 Tenn. Ch., 21; Allen v. Allen, 3 Tenn. Ch., 145. See, ante, § 350, note 3.

<sup>57</sup> See Article on *Pro Confessos*; ante, §§ 205-206; 225-227. For form of a *Pro Confesso* see Rule 68, infra.

<sup>58</sup> Anonymous, 1 Tenn. Ch., 2.

<sup>59</sup> Code, § 4375; Tharpe v. Dunlap, 4 Heisk., 681. A defendant not served with process may have a *pro confesso* set aside, as heretofore shown. Ante, §§ 207-208.

<sup>60</sup> Wessells v. Wessells, 1 Tenn. Ch., 60; 67.

<sup>61</sup> This subsequent rule day may be either the first Monday of a month, or any day of a term.

**AMENDMENTS, WHEN AND HOW MADE.**

**RULE 15. A Bill May be Amended** in any particular, without leave, before answer filed or demurrer argued; but if the complainant should thereafter deem it necessary to bring new parties or matters before the Court, he may do so by supplemental bill, as of course, and without leave, at any time within two months after defence made; but after two months, only by leave of the Chancellor or Court.

**RULE 16. An Answer May be Amended** at any time before the complainant begins taking proof, as of course, in any matter of form, or by filling a blank, correcting a date or name, filing or referring to a document, or in other small matters, on application to the Master.

**RULE 17. If a Material Amendment to the Answer is Desired to be made, or any amendment after the complainant has begun taking proof, the defendant must apply to the Chancellor in vacation or in open Court; and if in vacation he must give the complainant or his Solicitor five days' notice of the application.**<sup>61a</sup>

**RULE 18. No Amendment to a Pleading That Causes a Continuance** by either party will be allowed, except on the payment of the same costs as would result under these rules from a continuance on application of the party asking to amend.

**RULE 19. All Amendments to be Made Within Time Allowed.** All amendments to pleadings must be made within the time allowed or they will be considered to have been abandoned. When no time is fixed for making an amendment it shall be made within thirty days after leave given.

**THE TAKING OF PROOF, AND TIME ALLOWED THEREFOR.**<sup>62</sup>

**RULE 20. Proof When to be Taken.** Each party must take his proof in chief within four months after the filing of the plea or answer, and his rebutting proof within two months. Provided, the Chancellor or Master may extend the time upon sufficient cause shown by affidavit, and upon terms.<sup>63</sup>

**RULE 21. Proof Defined.** Proof in chief is proof that tends to establish the affirmative allegations in the pleadings; rebutting proof is proof that tends to refute these allegations, or assails the evidence or witnesses of the other party. Proof of matters in avoidance is proof in chief. Rebutting proof may be taken at any time within the six months, but proof in chief must be taken within the four months.<sup>64</sup>

**RULE 22. Writings When to be Filed and Proved.** All deeds, transcripts of records, original records, or other written or printed documents, intended to be offered as evidence, on the hearing of a cause, by either party, shall be filed with the Clerk before the cause is heard: if filed during the term at which the cause is heard, notice thereof in writing shall be given the adverse party or his Solicitor, at least one day before the beginning of the hearing. If a party intends to prove any document or exhibit *viva voce*, at the hearing, he shall give the adverse party, or his Solicitor, at least one day's notice of such intention. The evidence of witnesses so examined will be reduced to writing by the Master, and filed as evidence in the cause.<sup>65</sup>

**RULE 23. Exceptions to Answer to Cause no Delay.** The filing of exceptions to the answer shall not delay the taking of depositions, or otherwise preparing the cause for hearing.<sup>66</sup>

<sup>61a</sup> See Article on Amended and Supplemental Answers. *Ante*, §§ 434-437.

<sup>62</sup> See Article on When Proof Must be Filed, *ante*, §§ 463-468.

<sup>63</sup> Ch. Rule, II, § 4; see *ante*, § 1191. The Chancery Rules of 1830, §§ 9, 18, allowed only five months. Cooke, 446; 448. "Three months and no more" are allowed by the U. S. Equity Courts. See their Rules, § 69. In England all proof must be

taken "within eight weeks after issue." 1 Dan. Ch. Pr., 889. As to when a cause stands for trial, see *ante*, §§ 465; 533.

<sup>64</sup> As to the time allowed for taking proof, see *ante*, § 465.

<sup>65</sup> 2 Tenn. Ch., 789.

<sup>66</sup> Ch. Rule, I, § 6; see *ante*, § 1190.

**RULE 24. Taking of Proof Not Delayed, When.** When a defendant obtains further time to plead or answer, or time to amend a plea or answer, the time thus obtained shall be counted as part of his time for taking proof; and, when such further time is obtained, both parties shall have the right to take proof before the plea or answer is filed, or the amendment made, as to any and all matters contained in the pleadings on file.

**RULE 25. If the Complainant Consent to Such Further Time** to file or amend a plea or answer, such time shall also be charged to him, and both parties shall be at liberty to take proof as fully as though the plea or answer had been filed, or the amendment made.

**RULE 26. Cause Triable, When.** A cause may be heard at the first term after the answer is filed;<sup>67</sup> and if not then tried each party has only the remainder of the four and two months in which to take his proof, unless he obtains further time.<sup>68</sup>

**RULE 27. No Further Proof Can be Taken After Limit Has Expired.** After the four and two months have respectively expired, or such further time as the Court may have allowed, no further proof can be taken by either party without mutual consent in writing, or without leave of the Chancellor or the Master, upon sufficient cause shown by affidavit and upon terms.<sup>69</sup>

**RULE 28. Proof Taken After the Lapse of Said Period** of four and two months will be suppressed, on exceptions by the adverse party, unless taken or filed as above prescribed.

**RULE 29. The Order Granting an Extension of Time to Take Proof** should specify the names of the witnesses allowed to be examined, and the time allowed for that purpose; and should, also, specify the terms, these terms in no case to be less than the costs of all proof thereafter filed.

**RULE 30. Notice Where Party is Out of the State.** When a party is a non-resident, or is out of the State when notice is issued, or cannot be found by an officer authorized to serve notice, in all such cases notice to take depositions, and all other notices, may be served on the Solicitor of such party.<sup>70</sup>

**RULE 31. Witness Examined at Court, When.** When a party has been unable, after due effort, to take the deposition of a witness, he may have him subpoenaed to appear before the Chancellor on the first day of the term, when leave will be given to take his deposition instanter. But no party shall subpoena more than one witness to the same term under this rule.

**RULE 32. Exceptions to Depositions When to be Made and Disposed of.** When a deposition is filed twenty or more days before Court, all exceptions thereto shall be made by the opposite party, and disposed of by the Master, on or before the first day of the Court; and when a deposition is filed within twenty days before Court, or is filed during the term, all exceptions thereto shall be made and finally disposed of during said term, and before the case is called for trial. Exceptions and grounds of exceptions not made and disposed of in the time herein specified will be considered as waived,<sup>71</sup> except exceptions to the competency of the witness, or his evidence. If the Master sustains the exceptions he shall, at once, notify the party taking the deposition, or his Solicitor.<sup>72</sup>

### CONTINUANCES, AND COSTS THEREON.<sup>73</sup>

**RULE 33. Costs on Continuances.** The party continuing a cause after he has

<sup>67</sup> See, *ante*, § 533.

<sup>68</sup> Ch. Rule, II, § 4; *ante*, § 1191.

<sup>69</sup> The fact that the evidence of the other party was filed at the last moment allowed for so doing, is no ground for enlarging the time for taking evidence, if the evidence so filed is confined to matters distinctly put in issue by the pleadings. 1 Dan. Ch. Pr., 890. But where a party closed his proof in chief just before the term began, the Court would consider that fact on a motion for a continuance by the other party, supported by a special affidavit of rebutting evidence.

<sup>70</sup> *Necessitas quod cogit, defendit.* See 1 Dan. Ch. Pr., 446; 2 *Ibid.*, 1045; *Love v. Hall*, 3 Yerg., 408; Code, § 3854 a; Ch. Rule, II, § 3.

<sup>71</sup> *Skinner v. Dayton*, 5 Johns. Ch. (N. Y.), 191. See *Tedder v. Odom*, 2 Heisk., 50; *Snyder v. Summers*, 1 Lea, 485; *Hodge v. Dillon*, *Cooke*, 281; 1 Meigs' Dig., § 445.

<sup>72</sup> Code, § 4423.

<sup>73</sup> See Article on Motions for a Continuance, *ante*, §§ 5'9 521. *Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam.* Magna Charta, § 40.

had five months' time to take proof, will be taxed with the costs of all the proof thereafter filed, unless he show good cause for not being ready.

**RULE 34. If He Has Had Six Months' Time to Take Proof,** the party continuing will be taxed with one-half of the costs of the cause not previously adjudged.<sup>74</sup>

**RULE 35. If Two Regular Terms Have Elapsed** since his time to take proof began to run, the party continuing will be taxed with all the unadjudged costs of the cause.

**RULE 36. Costs on a Second Continuance.** When costs have once been adjudged against a party on a continuance, no second continuance will be granted him except on payment of all the unadjudged costs of the cause.

**RULE 37. Costs in Case of Consent.** A party may consent to a continuance by his adversary on his paying costs according to these rules; but when both parties agree to a continuance after six months' time to take proof, without providing for the payment of one-half of the unadjudged costs, each party will be taxed with one-half of all the costs of the cause not previously adjudged.<sup>75</sup>

**RULE 38. Continuances After Six Months' Time to Take Proof.** No continuance will be granted after six months' time to take proof, except by consent, or on affidavit showing good cause; and not then except on the terms as to costs hereinbefore stated. A party waiving an affidavit for a continuance by his adversary shall be deemed to consent to such a continuance, and costs will accordingly be imposed on both, if six months' time to take proof have elapsed.

**RULE 39. Further Time to Plead or Amend How Considered.** When the defendant obtains further time to file or amend a plea or answer, the time thus obtained shall, in considering his application for a continuance, be counted as part of his time for taking proof; and if the complainant consent to such further time, it shall also be charged to him.

**RULE 40. Injunction and Attachment Suits to be Hurried.** All injunction, attachment, or other suits that stay proceedings at law, or stop public improvements, or prevent a party collecting a debt or using property he claims, must be prepared by the complainant for final hearing with extra diligence, especially when he has given no bond to pay damages.

**RULE 41. Exceptions to Above Rules.** The rules on the subject of continuances are not to be so construed as to prevent the Court, on its own motion, or with the assent of both parties, ordering a cause to be continued, to await the adjudication of another cause, or the payment of the debt sued for when it is not disputed, or the incoming of a compromise that has been made or is in progress, or in any other case when justice would be manifestly promoted thereby.<sup>76</sup>

#### PROCEEDINGS IN THE MASTER'S OFFICE.<sup>77</sup>

**RULE 42. Accounts When to be Taken.** Within sixty days after the close of the term the Master will notify the respective parties of the time of taking all accounts ordered at such term; and in taking accounts and making reports he will strictly observe Rule IV, of Chancery Practice, and the Code, sections 4471-4474.

**RULE 43. Diligence Required of Party at Whose Instance Report is Ordered.** The party at whose instance or for whose benefit a report is ordered, shall furnish the Master with proper evidence in due time for the report to be made. or he will be taxed with the costs as on a continuance; or, at the discretion of

<sup>74</sup> As to costs on a continuance, see, *ante*, §§ 521; 526-529.

<sup>75</sup> As to continuances by consent, see, § 529, *ante*. See, also, Ch. Rule, VIII; *ante*, § 1197. Continuances, whether by consent or otherwise, are under the direction of the Court, and subject to such terms in regard to the payment of costs as the Court may

deem right. The Clerk and Master has an interest in the costs. *Berger v. Harrison*, 1 Tenn., (Overt.), 483.

<sup>76</sup> *Ante*, § 528.

<sup>77</sup> For the proceedings upon a reference, see, *ante*, §§ 603-610.

the Court, a decree may be entered as though the Master had reported that the facts were not as alleged by the said party.<sup>78</sup>

**RULE 44. Report Without an Order, When.** An account may be taken and a report made by the Master in vacation, without an order of the Court, provided the parties or their solicitors file with the Master a written agreement to that effect, specifying particularly the matters to be reported on; and, also, when the cause is remanded by the appellate Court for that purpose.<sup>78a</sup>

**RULE 45. Account on Bill Taken for Confessed.** When a bill praying for an account and report by the Master is taken for confessed in vacation as to all the defendants, he shall at once proceed to hear evidence and make the report prayed for.

**RULE 46. Proceedings at Taking of an Account.** All parties to an account before the Master shall bring in their respective accounts duly itemized, and in the form of debtor and creditor. When the items in these accounts are based in whole or in part on books, the name and page of the book shall be given whence the item was taken.<sup>79</sup> The books of account shall not constitute any part of the record in the cause without the order of the Court, but may be used by the Master or counsel for the purpose of examining and cross-examining the parties, or their witnesses.<sup>80</sup>

**RULE 47. Master May Reconsider His Report, When.** When the exceptions to a Master's report raise a question of fact, the Master may at once consider them, and if he deem them, or any of them, well taken, he may amend his report accordingly.<sup>81</sup>

**RULE 48. Proceedings on a Scire Facias Before the Master.** Upon the death or marriage of a defendant, proof thereof may be made before the Master on a rule day, and a *scire facias* may at once be ordered and issued against the heirs or personal representatives or husband, as the case may be; or a bill of revivor may, at any time, be filed against said heirs, representatives or husband; and, in either event, process shall be made returnable to the next rule day, and the suit revived by the Master, as of course, unless good cause to the contrary be shown on the return of the process. If it shall appear by the return of the Sheriff upon the *scire facias*, or upon the subpoena to answer a bill of revivor, that any defendant named therein is not to be found, or if it be shown by affidavit filed, that any of the causes exist which are specified in the 1st, 2d, 4th and 5th sub-divisions of section 4352 of the Code, as ground for dispensing with personal service of process, as to any defendant to such writ of *scire facias*, or bill of revivor, the Court in term time, or the Master in vacation, may make an order requiring such defendant to appear at a time specified, and show cause why the suit should not be revived against him, a copy of which order shall be published for four successive weeks, as in other cases of publication; and if the defendant in such case fail to show cause, the suit shall be revived against him in the same manner as when personally served with process.<sup>82</sup>

**RULE 49. A Guardian ad Litem May be Appointed by the Master** at rules, whenever it appears by a sworn bill or by affidavit that a defendant, duly in Court, is a minor without regular guardian. In making such appointment, the Master will be careful to appoint a capable person, and one whose interests and duties are not in conflict with the interests of the minor.

**RULE 50. Report by the Master as to Taxes on Lands Sold.** Whenever real estate is sold under a decree of this Court, the Master shall ascertain and report to the Court whether there are any taxes due and unpaid which are a lien upon

<sup>78</sup> Ch. Rule, IV, § 9; *Maupin v. Daniel*, 3 Tenn. Ch., 223.

<sup>78a</sup> See *ante*, § 664.

<sup>79</sup> *Remsen v. Remsen*, 2 Johns. Ch., (N. Y.), 495; 2 Dan. Ch. Pr., 1221-1222; *Hicks v. Chadwell*, 1 Tenn. Ch., 251; *Myers v. Bennett*, 3 Lea, 184.

<sup>80</sup> *Budeke v. Ratterman*, 2 Tenn. Ch., 459; *Myers v. Bennett*, 3 Lea, 184.

<sup>81</sup> For exceptions, and other proceedings upon a Master's report, see *ante*, §§ 615-620.

<sup>82</sup> See 1 Heisk., 786-787. The words, "bills of review," on page 786, should be, "bills of revivor." See Chapter on Abatement and Revivor, *ante*, §§ 698-709.

said real estate; and if so, he will report the amount of such taxes, the years for which due, and the amount due for each year. Said report shall be made to the same term to which the report of said sale shall be made, and shall be attached to said report of sale.

**RULE 51. How the Files are to be Kept.** The Master will keep all the pleadings, bonds, subpoenas to answer and proof in each cause, securely protected by a strong envelope or other suitable cover; and under no circumstances will he allow any of them to be taken out of his office without the written receipt of the Solicitor taking the same.

**RULE 52. Injunction Bonds to be Filed, When.** Every bill or petition, on which a fiat for an injunction, attachment or other extraordinary process has been granted, shall be filed within five days after the date of such fiat, and the bond, or pauper oath, required by the fiat shall be filed within ten days after the date of such fiat, or the fiat shall become *functus officio* and void, unless continued by special order of the Chancellor after due notice to the defendant.

#### PROCEEDINGS AT CHAMBERS.

**RULE 53. The Chambers Docket.** The Chancellor will keep, at his office in [Knoxville,] a docket for the entering of all motions, appeals or other matters on which his action is invoked in vacation. This docket will be called the "Chambers Docket;" and during his absence<sup>83</sup> from his office will be deposited with the Clerk and Master at [Knoxville,]<sup>84</sup> who is hereby appointed Chambers Clerk, with authority to appoint a deputy.

**RULE 54. Entries in the Chambers Docket, Effect of.** In the absence of the Chancellor from his office, any and all motions, appeals, or other matters to be brought before him at Chambers, may be entered, by the party bringing the same, on the Chambers Docket, on the day specified in the notice thereof, if notice shall have been given; and if no notice is necessary, then on any day; and when so entered shall have the same force and effect as though orally made before the Chancellor in person, or by the party in person; and no *alias* notice of such motion, appeal or other matter shall be necessary.

**RULE 55. The Chancellor Will Consider and Act on Such Motion,** appeal or other matter, at his earliest convenience after his return to his office, or may continue the hearing thereof, and will notify the parties interested of his action in the premises.

**RULE 56. What May be Filed With the Chambers Clerk.** Either or both parties may file with the Chambers' Clerk any notice, pleading, affidavit, written motion, brief or other writing to which the attention of the Chancellor is desired, and may enter a memorandum thereof on said Chambers Docket, or have the said Clerk enter the same.

**RULE 57. Fees on Motions at Chambers.** Each party making a motion or application at Chambers, in a cause pending in another county, will pay to the Chambers Clerk thirty-five cents, and to the Clerk and Master of the county where the cause is pending, thirty-five cents, to pay postage, expressage and registration fees under the Acts of 1903 and 1905.<sup>85</sup>

#### MOTIONS, WHEN AND HOW MADE.

**RULE 58. No Motion Will be Considered** by the Court, or by the Chancellor at Chambers, unless reduced to writing in proper form to be entered on the minutes.

**RULE 59. Every Motion Must Show on Its Face** clearly the grounds on which it is based; and if these grounds do not appear of record they must be made to appear by affidavit, or petition.

<sup>83</sup> *Absentia ejus qui reipublica causa abest, neque ei neque aliis damnosa esse debet.* (The absence of one who is away in the service of the State ought to be prejudicial neither to him nor to others.)

<sup>84</sup> This "Chambers Docket" will ordinarily be kept in the Court House of the town where the Chancellor resides.

<sup>85</sup> See, *ante*, §§ 776-783.

**RULE 60. No Motions Will be Made or Heard in Court,** except on motion mornings, unless both parties be present and consenting.

**THE HEARING, AND PRACTICE THEREAT.**

**RULE 61. Briefs Imperatively Required.** Rule X of Chancery Practice in reference to briefs will be rigidly enforced, and must be strictly complied with by both parties in all contested cases, and especially by the party demanding a hearing. The Chancellor reserves the right to continue any cause until proper briefs are presented; and a failure to comply with said Chancery Rule may be treated as a contempt of Court.

**RULE 62. All Agreements Must be in Writing.** Every agreement between parties or their Solicitors, except agreements made in open Court, must be reduced to writing and duly signed, before brought to the attention of the Chancellor.<sup>86</sup> This rule applies to all agreements in reference to process, pleadings, proceedings in the Master's office or at chambers, evidence, continuances, motions, reports, decrees, sales, compromises and all other matters to be considered of by the Chancellor.

**RULE 63. Jury Trials.** In order to make proper preparations therefor, all jury trials must be demanded in the pleadings, or in open Court, on or before the first day of the term after the cause is at issue; and at that term the issues to be submitted must be made up and entered of record; and unless both the demand and the issues are so made and entered of record, a jury trial will be conclusively deemed to be waived.<sup>87</sup>

**FORMS OF PLEADINGS AND DECREES.**

**RULE 64. Prolixity Reprehended.** The Code makes it the duty of the Court "to discountenance prolixity and unnecessary and false allegations in all Chancery pleadings."<sup>88</sup> It is, therefore, recommended: 1st, That the "protestation" formula be omitted from the commencement of demurrers, and that their conclusion be: "And the defendant prays the judgment of the Court hereon;" 2d, That the "saving and reservation" clauses be omitted from the commencement of answers, and that answers commence thus: "The defendant for answer to said bill says;" and 3d, That bills of revivor, and amended and supplemental bills omit all recitals of the allegations in the original bill, unless the circumstances of the case specially require such recital.

**RULE 65. Bills and Answers to be Paragraphed.** It is recommended that every bill be divided into paragraphs consecutively numbered, each paragraph containing a separate fact and its special circumstances;<sup>89</sup> and that the answer be likewise divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct allegation, admission, or denial.<sup>90</sup>

**RULE 66. Bounds of Lands and Debts Must be Specified.** Bills to sell, recover, or clear up title to lands, must on their face describe the lands by metes and bounds, or by the adjoining tracts, or by natural objects, so as to identify the lands fully: a reference to exhibits will not suffice. And bills to sell the lands of a decedent to pay his debts must, also, specify the debts sought to be thus paid, to whom owing, on what account, and how evidenced.

**RULE 67. General Replication to a Plea.** The general replication to a plea shall be: "The complainant joins issue on the plea."<sup>91</sup>

**RULE 68. Form of a Pro Confesso.** *Pro confesso* orders shall be drawn substantially as follows:

*Here insert the style of  
the cause.* }

In this cause, it duly appearing to the Court that [*here name the defendants in default*]

<sup>86</sup> Gres. Eq. Ev., 47, note; 1 Dan. Ch. Pr., 848. The Court will give full effect to such agreements. *Jones v. Kimbro*, 6 Hum., 319; *ante*, § 472.

<sup>87</sup> *Stadler v. Hertz*, 13 Lea, 315; *Cbeatham v. Pearce*, 5 Pick., 668; see, *ante*, § 547.

<sup>88</sup> Code, §§ 4314-4316. Changes in forms, which

simply and yet preserve the substance, subserve the ends of justice. *Lawson v. State*, 3 Lea, 314.

<sup>89</sup> See, *ante*, § 157; 1 Dan. Ch. Pr., 356.

<sup>90</sup> See, *ante*, § 378; 1 Dan. Ch. Pr., 731.

<sup>91</sup> See, *ante*, § 350.

have been regularly brought into Court by service of subpoena, [or, by publication,] and have made no defence, but are in default, it is ordered, on motion of the complainants, that, as to said defendants, the bill be taken for confessed, and the cause set for hearing *ex parte*.

**RULE 69. Figures and Blanks Not Allowed in Decrees, When.** In drawing decrees, amounts decreed to be paid to or by any party must be expressed in words, except hundredths of a dollar. Decrees for the sale of land must describe the land to be sold, by metes and bounds, if possible; if not, then by adjoining tracts or by natural objects, so as definitely to identify it. A reference to the pleadings or exhibits for a description, will not suffice. Decrees must contain no blank dates, blank amounts, or other material blanks, when presented to the Chancellor, unless the Solicitor presenting the same is seeking instructions in reference to filling such blanks, or otherwise perfecting the decree. All blanks must be filled, in any event, before the decree is handed in to be entered on the minutes.

**RULE 70. Consent Decrees Must be Signed.** Every order or decree purporting on its face to be by consent must show on its face who are the parties consenting thereto; and must be signed by such parties, or their respective Solicitors; otherwise, it will not be entered by the Clerk and Master, unless on the order of the Chancellor.

**RULE 71. Décrees How Written.** Each decree shall be written upon no less than half a sheet of legal cap paper, and in ink.<sup>92</sup>

#### MISCELLANEOUS MATTERS.

**RULE 72. All Motions for a New Trial must be in writing, and specify the particular grounds relied on.**<sup>93</sup>

**RULE 73. Diligence, Courtesy, Dignity and Good Faith** should characterize the conduct of all who minister in the Courts of Justice. "*Is ordo vitio careto, cæteris specimen esto.*"

**RULE 74. Rules May be Relaxed, When.** When the rigid enforcement of these rules would work manifest injustice, the Chancellor may relax them.<sup>94</sup>

<sup>92</sup> Ch. Rule, III, § 1; *ante*, § 1192.

<sup>93</sup> Railroad v. Johnson, 6 Cates, 623; see note 3 to § 1211, *post*.

<sup>94</sup> Marsh v. Crawford, 1 Swan, 116; Lowe v. Morris, 4 Sneed, 72; 1 Dan. Ch. Pr., 1, note; *Cursus Curie est lex Curie*; *ante* § 61, sub-sec. 4; Van. Brocklin v. Wolcott, 5 Heisk., 745.



## PART X.

## PROCEEDINGS FOR THE CORRECTION OF ERRORS.

## CHAPTER LXVIII.

## NEW TRIALS, AND REHEARINGS.

- ARTICLE I. New Trial After Judgment at Law.  
 ARTICLE II. New Trial After Verdict in Chancery.  
 ARTICLE III. Rehearing in Chancery.

## ARTICLE I.

## NEW TRIAL AFTER JUDGMENT AT LAW.

- |  |  |
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| § 1205a. Methods of Correcting Errors.                             | § 1208. Frame and Form of Bill to Obtain a<br>New Trial After Judgment at Law. |
| § 1206. Suits to Obtain a New Trial After<br>Judgment at Law.      | § 1209. Character of Relief Granted on a<br>New Trial.                         |
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§ 1205a. **Methods of Correcting Errors.**—The remedies for the redress of wrongs, and the vindication of rights are many, and ordinarily adequate to all exigencies.

1. **New Trial After a Judgment at Law.** If an unjust judgment has been rendered in a Court of law as the result of fraud, accident, surprise, or mistake, without any fault on the part of the losing party, or his attorneys or agents, he will be given a new trial by the Chancery Court.

2. **New Trial After a Verdict in Chancery.** If there has been a trial by jury, the losing party may have a new trial if any substantial injustice has been done him, or if the verdict be contrary to right and justice.

3. **Rehearing in Chancery.** If the cause was heard by the Chancellor, and an error committed, or injustice done by reason of some omission, or oversight, a rehearing may be had, if applied for before the term ends, or thirty days elapse.

4. **Bill of Review.** If the term has ended, or the thirty days elapsed, any party aggrieved by a decree by reason of some error of law on its face, or by reason of newly discovered evidence, may file a bill of review, and have the wrong righted.

5. **Writ of Error Coram Nobis.** If an error of fact has occurred whereby a party has been wronged in a proceeding of which he had no notice, or in which he was prevented from making defence by disability, or by surprise, accident, mistake, or fraud, without fault on his part, he may have such error corrected by a writ of error *coram nobis*.

6. **Appeal to the Appellate Court.** If no one of the foregoing remedies is available, or desired, the injured party may appeal the cause to the Supreme Court, or to the Court of Civil Appeals, and there assign the errors of which he complains.

7. **Writ of Error in the Appellate Court.** If for any reason an appeal is denied, or is not applied for, or is otherwise not available, the party aggrieved by an error apparent on the record, may take the cause to the Supreme Court, or to the Court of Civil Appeals, by a writ of error.

8. **Supersedeas by Judge of Appellate Court.** If during the progress of a suit, and before a final decree, a party is injured by an affirmative act or interlocutory order, from which no appeal will lie or can be had, he may have it superseded by one of the Judges of the proper appellate Court, or by the Court itself.

9. **Bill to Impeach a Decree for Fraud.** If none of the foregoing remedies are available in consequence of the fraud of the successful party in obtaining the decree, the party injured may file a bill to impeach the decree for fraud. Such a bill having been already fully considered, will not be further noticed.

§ 1206. **Suits to Obtain a New Trial After Judgment at Law.**—It is one of the oldest maxims of the Court of Chancery that “Equity hath power, upon circumstances, to relieve against penalties, judgments and executions;” and in considering a difficult case the circumstances often move the conscience of the Chancellor when the ordinary rules and principles of adjudication fail. One of the greatest outcries against the Chancery Court of England in its infancy was its action in nullifying and modifying the judgments of the Courts of law. But the Chancellors adhered boldly to their maxim that “Equity would not suffer a right to be without a remedy.”<sup>1</sup>

When, therefore, by the fraud of the plaintiff, or by reason of some accident, surprise or mistake, without any fault on his part, an unjust judgment had been rendered in a Court of law, the defendant was granted relief in Equity. Indeed, relief in such cases was one of the occasions that called the Court of Chancery into existence.<sup>2</sup>

§ 1207. **When a New Trial Will be Granted After Judgment at Law.**—It is not enough to move a Court of Conscience to action that an unjust judgment has been rendered against the party complaining, but there must be circumstances to show that the judgment was brought about by the fraud of the other party, or was the result of accident, surprise or mistake on the part of the complainant without any fault or negligence on his part. It is a great exercise of power in one Court to set aside the judgments of another Court, especially when the other Court is one of concurrent jurisdiction; besides, it is a maxim of Equity that the welfare of society is promoted by having litigation come to an end.

The Court of Chancery, therefore, will not grant a rehearing of a suit decided in a Court of law, unless: 1st, it be clearly shown that the judgment complained of is unjust and contrary to good conscience; and 2d, that it resulted from the fraud of the other party, or from accident, surprise or mistake unmixed with negligence on the part of the complainant or his agent or attorney.<sup>3</sup>

§ 1208. **Frame and Form of Bill to Obtain a New Trial After Judgment at Law.**—As already stated,<sup>4</sup> whenever a complainant goes into a Court of Equity asking extraordinary relief he must show extraordinary care in fully disclosing the facts of his case. To set aside the solemn judgment of another Court is a very different matter from a suit upon a note of hand or the enforcement of a lien. Hence, the Court requires the complainant not only to show that the judgment complained of is unjust, but to clearly set forth in his bill the particular facts constituting the alleged fraud of which he complains, or circumstances causing the accident, surprise or mistake, if one of these be his ground for relief.<sup>5</sup> It is not sufficient to charge in general terms that he was prevented from making his defence by the fraud of the defendant, or by accident, surprise or mistake, or to allege in general terms that he used diligence, or was not guilty of negligence.<sup>6</sup>

<sup>1</sup> See, *ante*, § 33.

<sup>2</sup> *Ante*, §§ 3; 33.

<sup>3</sup> *Kearney v. Smith*, 3 Yerg., 127; *Prater v. Robinson*, 11 Heisk., 391; *Kirkpatrick v. Utley*, 14 Lea, 96; *Ballard v. Railroad*, 10 Pick., 205. Relief after judgment at law was granted in the following cases: *Lewis, exrs. v. Brooks*, 6 Yerg., 166; *Galbraith v. Martin*, 5 Hum., 50; *Rice v. Bank*, 7 Hum., 39;

*Rowland v. Jones*, 2 Heisk., 321; *Hickerson v. Raiquel*, 2 Heisk., 329; *Holcomb v. Canady*, 2 Heisk., 610; *Burem v. Foster*, 6 Heisk., 333.

<sup>4</sup> *Ante*, §§ 142; 838.

<sup>5</sup> *Kirkpatrick v. Utley*, 14 Lea, 96.

<sup>6</sup> *Ford v. Ford*, 2 Cold., 75; *Levan v. Patton*, 2 Heisk., 108. See, *ante*, § 838, sub-sec. 2.

**BILL FOR A NEW TRIAL AFTER JUDGMENT AT LAW.**

[For address and caption see, ante, §§ 155; 164.]

Complainant respectfully shows to the Court:

I.

That he was on [the day the suit was brought against him in the Circuit Court, giving the date,] the owner in fee of the following tract of land in DeKalb county, [describe it as described in his deed,] and was lawfully in possession thereof.

II.

That on said day the defendant brought an action of ejectment against him in the Circuit Court of DeKalb county, and filed his declaration, to which complainant pleaded "not guilty."

III.

That at the May term thereafter of said Circuit Court while complainant was absent from the Court the defendant insisted on a trial of said suit, and obtained a judgment for said land, and for the costs, on which judgment a writ of possession and an execution for the costs have issued and are now in the hands of the sheriff of said county.

IV.

That complainant would not have been absent from said Circuit Court when said ejectment suit was tried had it not been for the assurance of the defendant that the case could not be tried at said May term, the defendant claiming that the criminal business would consume the whole term, and saying that he was going home that day, which was two days before the said ejectment suit was tried, and at his earnest solicitation complainant agreed to go home, and did go accordingly.

V.

That before complainant left said Court, as aforesaid, his life was threatened by some lawless men somewhat intoxicated, and complainant charges that the defendant incited them and treated them on whisky, and then came to complainant and told him of said threats and advised him to go home, and so complainant went, influenced in part by said threats and in part by defendant's assurances that he was going home, and that said ejectment suit would not be tried at that term.

VI.

That before complainant left said Court at said May term his attorney in said ejectment suit was taken very sick and had gone to his home in the city of Nashville. Complainant was wholly ignorant of this fact when he left Court for his own home as aforesaid, but the defendant was fully informed of the fact, and told complainant's said attorney that he, the defendant, was, also, going home and that said ejectment suit would not be tried at that term.

VII.

That complainant has a perfect legal title to said tract of land based on a conveyance connected with a State grant and thirteen years' adverse and exclusive possession thereof under his said deed, whereas the defendant's claim to said land is based on a grant to him made two years ago for five thousand acres, sometimes called "a wildcat" grant, under which he has had no possession, and which if valid as to any one is void as to complainant because no notice was given him of the entry on which it is based.

VIII.

Complainant therefore prays:

1st. That subpoena to answer issue [*&c.*, see, ante, §§ 158; 164.]

2nd. That the said judgment in ejectment against him in favor of the defendant be set aside and declared null and void, that the questions in issue in said Circuit Court suit be determined in your Honor's Court, and that said grant in so far as it covers complainant's said tract be declared a cloud on complainant's title.

3rd. That if your Honor prefer not to take jurisdiction to retry said questions in issue that a new trial be granted him in said Circuit Court.

4th. That defendant, his agents, tenants and privies, and the said Sheriff, be enjoined from taking any step under said judgment in ejectment, and especially from in any way enforcing said execution and writ of possession.

5th. That complainant have such other, further and general relief as he may be entitled to. This is the first application for an injunction in this case.

CHARLES E. SNODGRASS, Solicitor.

[Annex affidavit: see, ante, §§ 161; 789.]

§ 1209. **Character of Relief Granted on a New Trial.**—The proper procedure under the present jurisprudence of our State, when a bill for a new trial is sustained, is to take full jurisdiction, and determine all questions in issue in the Court below. Under the old practice, a new trial was granted in the Court below.<sup>7</sup>

<sup>7</sup> In *Holcomb v. Canady*, 2 Heisk., 610, a bill to enjoin a judgment in an action of ejectment and obtain a new trial, the Supreme Court ordered the judgment below to be set aside, and awarded a new trial in the Court below. But, in this case, the bill

prayed for a new trial in the Court below, and the defendant answered without demurring; so the Supreme Court granted the special prayer. Besides, this decision was before the Act of 1877.

When Chancery has jurisdiction for one purpose it will take jurisdiction for all purposes, as already shown.<sup>8</sup> The reason Equity Courts have in many cases awarded new trials at law was because their jurisdiction did not include actions at law, and besides they were not provided with juries; but neither of these reasons apply in this State since the Act of 1877, and our Chancery Court has now both the jurisdiction and the equipment to try any action at law, except a few involving unliquidated damages.

**DECREE GRANTING A NEW TRIAL.**

[For title, commencement and recitals, see, ante, § 567.]

On consideration whereof it is ordered, adjudged and decreed:

1st. That the judgment in ejectment obtained by the defendant against the complainant in the Circuit Court of DeKalb county, on the ... day of ....., 19...., [giving the exact date,] was obtained by fraud and is grossly inequitable and unjust, and the defendant, his solicitors, attorneys, agents and privies, are perpetually enjoined from taking any steps to enforce the same and from setting up any claim thereunder.

2d. That the title to the tract of land sued for in said ejectment suit is in the complainant, and the grant obtained by the defendant from the State on the ... day of ....., 19...., [giving its date,] and numbered 19,847, is void as against complainant's title to said tract of land and is a cloud thereon, and the defendant is perpetually enjoined from setting up any claim thereunder to complainant's said tract.

3d. That the defendant pay all the costs of this cause, for which an execution will issue.

If the Court decides to grant a new trial in the Circuit Court,<sup>9</sup> the second paragraph of the above decree will be as follows:

2d. The defendant, his agents, attorneys and privies, are enjoined to consent that the said judgment in said Circuit Court be set aside, and the cause wherein it was rendered be reinstated on the docket and a new trial granted therein, and that said cause then stand in exactly the same plight and condition as though it had been continued by consent on the third day of the term at which said judgment was rendered, and had remained so continued ever since.

**ARTICLE II.**

**NEW TRIALS AFTER VERDICT IN CHANCERY.**

- § 1210. New Trials in the Chancery Court.
- § 1211. Motion for a New Trial.
- § 1212. Grounds for a New Trial.

- § 1213. Bill of Exceptions.
- § 1214. Form of a Bill of Exceptions.

**§ 1210. New Trials in the Chancery Court.**—Where there has been a jury trial in the Chancery Court the losing party, if in any material way unjustly aggrieved by the verdict, may obtain a new trial, if the motion therefor is made in due season, and the grounds properly presented.

**§ 1211. Motion for a New Trial.**—If any party is dissatisfied with the finding of the jury on the issues of fact submitted to them at the hearing of the cause, he may move the Court to set their verdict aside, and grant him a new trial. This motion may be made on any day during the term of the Court at which the trial is had, unless such term continues longer than thirty days, in which case it must be made and acted on within thirty days after the decree is entered on the minutes, unless within the thirty days the time is extended.<sup>1</sup> The proper time for entering a motion for a new trial is before the decree is

<sup>8</sup> See, ante, §§ 36; 38.

<sup>9</sup> The Chancery Court cannot directly grant a new trial in another Court: all it can do in that regard is to compel the parties to consent to a new trial, which is, at best, an awkward procedure as compared with a decree in Chancery, disposing of the whole matter. Why impose on an innocent complainant the burden of another trial? Equity, says

the maxim, prevents a multiplicity of suits and circuity of action. Equity delights to do complete justice and not by halves. See, ante, §§ 36; 38. See notes 3 and 7, supra. *Interest reipublice ut sit finis litium.*

<sup>1</sup> *Ellis & Gresham v. Ellis*, 8 Pick., 471. See, ante, § 576.

pronounced;<sup>2</sup> and if not then entered, the delay must be satisfactorily excused. It often happens, however, that the ground of the motion did not become known until after the decree was entered, in which case an affidavit of the fact would be a sufficient explanation for not making the motion before the entry of the decree.

If a new trial is granted, the cause retains its place on the trial docket, and stands in the same plight and condition as though no trial had been had, and no verdict been rendered; and the losing party is not in any way prejudiced by the verdict. The cause may be remanded to the rules for further proof, on motion of either party as on a continuance. Depositions may be taken in the cause to be read at the next trial, and the depositions on file may be re-read when the cause is again heard. The witnesses, however, must all be re-summoned, if their testimony is again desired.

If a new trial is refused, the losing party must either submit to the consequent decree, or must tender a bill of exceptions and appeal to the proper appellate Court.

The form of a motion for a new trial, and of the action of the Court thereon, is substantially as follows:

#### MOTION FOR A NEW TRIAL.

John Doe, *et al.*,  
vs.  
Richard Roe, *et al.* } No. 789.

In this cause, the defendant moved the Court to set aside the verdict and findings of the jury on the issues of fact submitted to them, because of the following errors: 1st, [*specifying them*;<sup>3</sup>] [and in support of his motion read the affidavits of himself, Sam E. Young, George Brown and Henry Price, *stating what affidavits or papers were read, although this is not necessary*.]

And argument of counsel having been heard, and the premises considered, it is ordered and adjudged by the Court that said motion be [allowed, and the verdict and findings of the jury on the issues of fact submitted to them are set aside, and a new trial is granted, because of error of the Chancellor in charging the jury, or in admitting or excluding evidence, or of misconduct of the jury, or other ground. (*It is not necessary to state the ground, but well to do so.*) Or,] disallowed and overruled, and a new trial refused. To which order and ruling of the Court the defendant excepted, and tendered his bill of exceptions to said ruling and to former rulings of the Court, which bill is signed by the Chancellor, and made a part of the record of the cause.

**§ 1212. Grounds for a New Trial.**—The following is a summary of the ordinary grounds upon which a motion for a new trial in Chancery is based:

1. **Errors Preliminary to the Trial.** The Court may have committed some material error in overruling a motion for a continuance; or in overruling issues of fact presented, or in admitting issues of fact objected to.

2. **Errors in Empaneling the Jury.** The Court may have admitted an incompetent juror over proper objection, to the prejudice of the objector; or other error may have been committed in selecting or qualifying the jury, to the great prejudice of the losing party.

3. **Errors in the Admission of Illegal Evidence.** Illegal evidence of a hurtful character may have been admitted over the objection of the losing party, especially evidence likely to prejudice or mislead the jury.

4. **Errors in the Exclusion of Legal Evidence.** A party is entitled to have all the legal evidence he offers submitted to the jury, and if any such evidence is excluded by the Court, and there is a probability that such evidence may have had some weight with the jury, a new trial will be granted the party injured by such exclusion.

<sup>2</sup> The motion for a new trial should not be entered in the presence of the jury, 1st, Because it is discourteous and disrespectful to the jury; and 2d, Motions are not then in order. The motion should be made at the time fixed by the rules of Court for the making of motions. In Criminal Courts it is necessary to enter the motion earlier, in order to entitle the defendant to bail. Code, § 5151a. But Solicitors should not import the manners of the Criminal Courts into the Courts of Chancery. See, *ante*,

§ 1183, note 59, and *post*, § 1269, note 62.

<sup>3</sup> *Trott v. West*, 10 Yerg., 500; *Turner v. Ross*, 1 Hum., 16; *Ferrell v. Alder*, 2 Swan, 77; *Railway Co. v. Mahoney*, 5 Pick., 311. The Court should have a rule requiring applicants for new trials to specify in writing the particular grounds on which their applications are based. *Railroad v. Johnson*, 6 Cates, 632. In case of such a rule, grounds not specified are deemed waived, and cannot be assigned for error in the Supreme Court. *Ibid*.

5. **Errors in the Charge of the Court.** If the Chancellor make any error in his charge to the jury (1) by charging material instructions not law, and liable to mislead; (2) by refusing to charge propositions submitted by the losing side, such propositions being legal, material, pertinent, and not covered by the charge delivered; or (3) by otherwise misdirecting the jury in any matter to the prejudice of the losing party, or refusing to properly direct them as to any matter when such refusal was prejudicial to the party asking a new trial.

6. **Misconduct on the Part of the Jury.** If the jury has been tampered with, or render a gambling verdict, or hear material evidence from one of their number, or otherwise misconduct themselves, to the detriment of the losing side, a new trial will be granted.

7. **Surprise by Unexpected Evidence.** If a witness gives material testimony which can be fully rebutted, or if he can be wholly discredited, and the losing party could not well have anticipated such testimony, a new trial will, ordinarily, be granted him.

8. **Newly Discovered Evidence.** If the losing party discovers material evidence of a controlling character, after the testimony was closed, evidence he could not well have discovered before, and there has been no want of diligence on his part, a new trial will, generally, be given him, to let in such evidence.

9. **The Verdict is Contrary to the Weight of the Proof.** If the verdict, in the opinion of the Chancellor, is clearly contrary to the weight of the proof, it will be set aside and a new trial granted, on motion of the losing party.

10. **Other Grounds for New Trial.** If, for any other reason, injustice has been done the losing party, either by some affirmative act of the Chancellor, or the jury, or the opposite party; or if, by the failure of the Court, or the jury, or some member of the jury, to do what the losing party was entitled to have done, he has been denied a fair trial, the Court will, on his motion, on a plain case made out, set the verdict aside and grant him a new trial.

§ 1213. **Bill of Exceptions.**—When a cause is heard by the Chancellor, the proof is all in writing, except in divorce cases; and, by statute, all the depositions and exhibits that were read on the hearing of the cause constitute a part of the record, as if they were incorporated into the decree.<sup>4</sup> When, however, issues of fact are submitted to a jury, the trial is conducted as in the Circuit Court, and witnesses are examined before the jury. In such a case, if the losing party desires to appeal from the action of the Court refusing him a new trial, he should tender a bill of exceptions,<sup>5</sup> detailing therein the evidence, the exceptions, the rulings of the Court, the charge to the jury, and the requests refused, as well as any other matter of fact either party may desire to incorporate therein pertinent to the application for a new trial, including the affidavits and other evidence introduced in support of the application. If the truth of the case is fairly stated in the bill of exceptions, it is the duty of the Chancellor to sign it,<sup>6</sup> and thereupon it becomes a part of the record of the cause.<sup>7</sup> The bill of exceptions may be signed at any time during the term, in the absence of a rule of the Court requiring it to be tendered within some reasonable period after the trial;<sup>8</sup> but it cannot be signed after the adjournment of the term at which the trial was had;<sup>9</sup> unless the Chancellor, in his discretion, allow further time, not to exceed thirty days after the adjournment;<sup>10</sup> in which case it must be both signed by the Chancellor and filed with the Clerk and Master within

<sup>4</sup> Code, §§ 3108; 3121.

<sup>5</sup> Code, § 3156; *Scruggs v. Heiskell*, 11 Pick., 455.

<sup>6</sup> The Chancellor may be coerced by *mandamus* to sign a bill of exceptions which he admits is correct, but not when he disputes its correctness. *State v. Cooper*, 23 Pick., 202; *State v. Maiden*, 2 Cates, 487.

<sup>7</sup> Code, § 2968. The minutes need not show that the bill of exceptions was signed. *Grubbs v. Greer*, 5 Cold., 160.

<sup>8</sup> *Patterson v. Patterson*, 5 Pick., 151; and cases there cited.

<sup>9</sup> This rule is imperative, and the ingenuity of judges and attorneys to evade or avoid it has been hitherto ineffectual. *Jones v. Burch*, 3 Lea, 747; *Kennedy v. Kennedy*, 13 Lea, 24.

<sup>10</sup> Acts of 1899, ch. 275; *Wright v. Redd*, 22 Pick., 719.

the extension; and these facts must affirmatively appear or it will not be considered a part of the record.<sup>11</sup>

Unless made a part of the record by the Chancellor, as heretofore shown,<sup>12</sup> none of the following matters can be properly incorporated in a transcript of a record for review in the appellate Court, unless first made a part of the record by a bill of exceptions, and if copied into the record by the Clerk, without such authority, will be utterly disregarded in the appellate Court:<sup>13</sup>

1. **Evidence Submitted to a Jury.** None of the evidence submitted to a jury, not even the depositions, exhibits, deeds and other documents duly filed before the trial, will be regarded in the appellate Court, on the question of a new trial, unless duly made a part of the record by a bill of exceptions.<sup>14</sup>

2. **Oral Testimony in a Divorce Suit,** decided by the Chancellor, must be incorporated in a bill of exceptions, if a party wishes to use it in the appellate Court.

3. **Affidavits, and Exhibits Thereto,** constitute no part of the record of the cause, and will not be considered by the appellate Court, unless incorporated in a bill of exceptions, or unless made a part of the record by notation of the Chancellor on their face,<sup>15</sup> or by a decree so ordering and explicitly identifying them.

4. **Papers, Depositions, Documents and Other Writings, Rejected as Evidence** during the trial, are thereby banished and outlawed, and cease to constitute a part of the record even if once properly filed, unless made a part of the record anew by being incorporated in a bill of exceptions,<sup>16</sup> or unless the action of the Chancellor thereon is verified by his signature as heretofore shown.<sup>17</sup>

5. **The New Matters Presented as Grounds for a New Trial.** By new matters is meant matters not a part of the record before the trial began. Every affidavit, or other paper showing any misconduct on the part of the jury or others, affidavits of surprise, of new evidence, or of other matters, and the rulings of the Court thereon, must all be made a part of the record by a bill of exceptions, or they will come to naught, and will not be heeded by the appellate Court even if copied into the transcript of the cause.

6. **The Charge of the Court, and the Rulings During the Trial,** although reduced to writing and filed in the cause, constitute no part of the record, and will not be looked into by the appellate Court unless duly incorporated into a proper and duly signed bill of exceptions. If either party, and especially the losing party, desires to assign errors upon the charge of the Court, or any of the refusals of the Court to charge propositions or requests, or upon any ruling of the Court in admitting or excluding evidence, or upon any other act of the Court, the Chancellor, the jury, or any other person during the progress of a suit or trial, he must incorporate such matters in a bill of exceptions, and have it signed, before the term closes.<sup>17a</sup>

In brief, nothing constitutes a part of the record for review in the appellate Court except the pleadings, exceptions thereto, process, bonds, reports of the Master, exceptions thereto, the orders and decrees on the minutes, the bill of exceptions, and, if the cause is tried by the Chancellor without a jury, the depositions, the written exceptions thereto, and rulings thereon, and the exhibits, read on the hearing of the cause.

If an original record of the Court is read in another cause, the decree should so show on its face, or it should be so shown in a bill of exceptions, otherwise there will be nothing to show that it was read in the cause. A transcript of a

11 *Muse v. State*, 22 Pick., 181; *Hinton v. Insurance Co.*, 2 Cates, 113; *Bettis v. State*, 19 Pick., 339; *Jones v. Moore*, 22 Pick., 188.

12 See *ante*, § 538.

13 *State v. Hawkins*, 7 Pick., 140.

14 In the absence of a bill of exceptions, the appellate Court will conclusively presume that the evidence justified the verdict. *Scruggs v. Heiskell*, 11 Pick., 455.

15 *Anderson v. Railroad*, 7 Pick., 44; *Nance v.*

*Chesney*, 17 Pick., 466; *Kelley v. Fletcher*, 10 Pick., 1; *State v. Mitchell*, 20 Pick., 336; and *Lucas v. Malone*, 22 Pick., 380.

16 See *ante*, § 538.

17 *Ibid.*

17a Matter to be inserted in a bill of exceptions must be in existence when the bill is signed, and so marked or described as to identify it, leaving no discretion to the Clerk what to insert. *Battier v. State*, 6 Cates, 563.

record is duly filed in the cause wherein it is read, but an original record is not filed, and cannot be, in another cause.

If a deposition is not read, the decree, or Chancellor's notation, should show; or if a deposition taken by one party is read by the other party, the decree should so show. In short, every fact material to the case, which will not appear in the appellate Court, or will incorrectly appear, must be made to appear, or to correctly appear, by a bill of exceptions, by the notation of the Chancellor, or by proper recitals in the final decree. If questions or answers, or both, contained in a deposition are excluded by the Chancellor at the hearing, on exceptions taken, they are out of the case, unless incorporated in a bill of exceptions, or duly noted and made a part of the record by the authentication of the Chancellor, or by recitals in the decree. And a party will lose the benefit of his exceptions to questions or answers in a deposition, or his exceptions to other evidence, unless he has the decree to recite them, or makes them appear in a bill of exceptions,<sup>18</sup> or has them authenticated by the Chancellor, as heretofore shown.<sup>19</sup>

§ 1214. **Form of Bill of Exceptions.**—No particular form is essential to a bill of exceptions. Its office is to give a fair statement of the facts it purports to set out. A bill of exceptions may be taken to any action of the Court as to any matter the history whereof does not or will not fully appear in the record. If taken at any term but the trial term they are often styled "wayside bills of exceptions."<sup>20</sup> The form of such a bill of exceptions, and of all others, may well be understood by the following illustration:

**BILL OF EXCEPTIONS.**

John Doe, *et al.*,  
*vs.* } Bill of Exceptions.  
 Richard Roe, *et al.* }

On the trial of this cause, the following is all the evidence that was submitted to the jury [or to the Court, if there was no jury:]

I.

**Evidence in Behalf of the Complainant.**

1. The deposition of John Doe, the complainant, was read as follows: [*The Clerk will here copy it, in full.*]

During the reading of said deposition, the defendant objected to direct question 10, and the answer thereto, because they relate to a letter which is not shown to be lost, or mislaid, or out of the complainant's reach, but the Court overruled said objection, and admitted the question and answer. [*So show every other exception made to the evidence contained in the deposition. These exceptions must be explicit: general exceptions go for nothing. If questions or answers were objected to before the commissioner who took the deposition, the objections must be renewed at the hearing, or they will be deemed to be waived, or abandoned.*]

2. The complainant next read the following documents:

(1) Exhibit A to the bill, as follows: [*Here copy it, in full.*<sup>21</sup>] This exhibit was proven *viva voce* in open Court by the testimony of Henry Jones.

<sup>18</sup> Stone *v.* Manning, 19 Pick., 232, citing the above section of this book, then § 1045.

<sup>19</sup> See, *ante*, § 538.

<sup>20</sup> A wayside bill of exceptions would begin as follows:

**WAYSIDE BILL OF EXCEPTIONS.**

John Doe, *et al.*,  
*vs.* } Wayside Bill of Ex-  
 Richard Roe, *et al.*, } ceptions.

On the hearing of the motion [or petition, or application, or other matter, specifying it so as to identify the question before the Court,] at the August term, 1891, of the Court, the following was all the evidence submitted to, or heard by, the Court:

1. The petition of George Johnson was read, as follows: [*Here set it out, in full.*]

2. The affidavit of Sam Jones was read, as follows: [*Here set it out, in full.*]

3. Deed from John Doe to George Jones was read, as follows: [*Here insert it, in full.*]

4. William Brown testified orally, in open Court, as follows: I am the receiver in this cause [*&c., giving his testimony.*]

5. Henry Jones testified orally, in open Court, as follows: [*Here give his testimony. And so with all*

*the other evidence introduced, or offered to be introduced.*]

6. The Chancellor ruled [*so and so, giving all of his rulings that do not appear on the minutes of the Court.*]

To the action of the Court [*in doing, or refusing to do, what is complained of, specifying it,*] the complainant [or defendant, or petitioner, or other person,] excepts, and tenders this, his bill of exceptions, which is signed by the Chancellor, and made a part of the record in the cause.

August 26th, 1891.

A. J. ABERNATHY, Chancellor.

<sup>21</sup> In the hurry usually attendant upon the making out of a bill of exceptions, it is not necessary to actually copy therein the writing offered in evidence, whether grants, deeds, receipts, notes, depositions, transcripts, records, or other documents; but the bill of exceptions must show, by a sufficient description, that they were read, or offered in evidence, and then make them parts of the record by the use of the words: "Here insert," or "The Clerk will here copy, in full," or similar words, in parentheses, or brackets. This is a direction to the Clerk to put the paper described into the bill of exceptions when he



(2) Grant 21,846 from the State to John Brown, as follows: [*Here copy it, in full.*]

(3) Deed from John Brown to the complainant John Doe, as follows: [*Here copy it, in full.*]

To the reading of this deed, the defendant objected because not properly probated for registration, but the objection was overruled by the Court, and the deed admitted as evidence.

(4) The original record in the case of John Doe, the complainant, *vs.* Roland Roe, the ancestor of the defendants, in this Court was read in evidence. By consent of all parties, however, it was agreed that only the pleadings and decrees in said cause were material, and it was agreed that they only should be incorporated in this bill of exceptions: they are as follows: [*Here copy them, in full, in order of time.*]

(5) A part of a letter from defendant Richard Roe to complainant was offered in evidence, but was objected to by said Roe upon the ground that all of the letter was not offered, which objection was sustained by the Court, notwithstanding the complainant testified that the balance of the letter was on other matters in no way connected with the matters in controversy, and for that reason was by him destroyed. Said paper is as follows: [*Here copy it.*]

(6) *And so show every other deed, document or paper of any sort, read to the jury, or offered to be read. Show what objections were made to any document, and what the ruling of the Court was thereon. If any document or paper was excluded, so show, and set it out in full, or direct the Clerk to copy it.*

3. Henry Jones testified as follows: [*Here give the material part of his evidence, and especially state what questions and answers were objected to, and the ground of the objection, and the ruling of the Court on the objections, thus:*22] Complainant asked witness the following question: [*Here state the question.*] The question was objected to by the defendant on the ground that: [*Here state the ground of objection.*] The objection was sustained, [or overruled,] by the Court, to which ruling of the Court the complainant [or defendant] excepted. [*The objection may be to the answer of the witness, and not to the question, or it may be to both: in either event the facts must be clearly set forth. The objection may be to the witness himself, on the ground that he is incompetent to testify at all, or incompetent in the particular case, or as to the particular fact. The first objection would arise where the witness has been convicted of an infamous crime, and judgment of infamy pronounced against him. If such a witness is excluded, it may not be necessary for the bill of exceptions to show what he would have proved, or what was proposed to be proved by him, the objection being not to what he may say, but to the right of the party introducing him to have him say anything. Nevertheless, it is prudent, and may often be necessary, to show what the complainant proposed to prove by him, in order to show the materiality of his evidence.*

[*Where the witness is generally competent, but incompetent in the particular case or matter because a party, and at the same time an administrator, or executor, or a guardian, or a party and a witness against an administrator, executor, or guardian, or a husband or wife of a party, the relationship of the witness should be shown, and the facts offered to be proved by the witness, or the questions asked, should be set out, and the grounds of the objections to the evidence fully stated, and the rulings of the Court, so that the questions of law raised may specifically and distinctly appear.*]

4. George Jones testified as follows: [*Here set out the substance of his evidence. If any other witnesses were examined by the complainant, or any other documentary evidence introduced by him, set out the testimony or documents as shown above, stating fully and particularly what objections were interposed to the witness, or to his testimony, or to the document, or to its contents, giving the grounds of the objections, and show what were the rulings of the Court on such objections, being careful to put everything in the bill of exceptions in the order of time in which it occurred, so that the bill of exceptions may be a faithful photograph of the facts.*]

This was all the proof in chief introduced by the complainant.

comes to make it out as a part of the transcript for the appellate Court. But the Clerk cannot copy into the bill of exceptions any matter not in existence when the bill was signed. See note 17a, *supra*. If there was any objection made to any deposition, paper, writing, or other document, at the time it was offered in evidence, the objection should appear in the bill of exceptions in accordance with the facts, and the ruling of the Court thereon should be given, as in other cases.

22 It is needless to set out the whole testimony of a witness. As a rule, a mere abstract of the material part is all-sufficient. Thus:

1. *Henry Jones* proved the execution of the following paper. [*Here copy the paper.*]

2. *William Smith* discredited *Jonadab Snobs*.

3. *Thomas Brown* testified that he was present at the time and place testified to by witness *Snobs*; was in hearing of what was said, and heard no such talk as *Snobs* testified to.

4. *James Johnson* proved the good character of *Thomas Brown*, and that he was a credible witness.

5. *George Jones* testified substantially as did *Thomas Brown*.

6. *Jane Brown* testified that the defendant told her on or about Christmas, 1891, that he [was going

to do, or] had done [*so and so, briefly stating it.*]

It is safe to say that nine-tenths of the average bill of exceptions is mere surplusage. The young lawyer thinks the appellate Judges read the evidence in jury cases. They do not realize that it would take at least a year for each of the Judges to read all the records filed in any one of their three Courts. The Judges, as a rule, pay no attention to the evidence in jury causes, except in so far as is necessary to understand the questions of law raised.

Ordinarily, all the evidence that is necessary in a bill of exceptions is a general statement that there was proof that tended to show certain facts; that such and such evidence was offered and ruled out on objections; and that such and such evidence was objected to but admitted, stating the specific grounds of the objections. This is all the appellate Court cares to know about the evidence. Their business is not to sit as a jury and sift and weigh facts, but to sit as a Court to hear and determine questions of law. Our bills of exceptions in jury cases need reforming altogether. See *Railway Cos. v. Hendricks*, 4 Pick., 719; *Glass v. Bennett*, 5 Pick., 485; *Dossett v. Miller*, 3 Sneed, 75; *Huffman v. Hughtlett*, 11 Lea, 549. And stenographic reports of evidence only make what was bad a great deal worse.

## II.

**Evidence in Behalf of the Defendant.**

1. Richard Roe, one of the defendants, testified as follows: I am one of the defendants. The complainant made and delivered to me this title-bond; [*Here copy it, in full.*] I paid him four hundred dollars on the day he gave me the bond, and he gave me this receipt for it: [*Here copy the receipt.*] I took possession of the land in dispute under this title-bond. [*And so go on, giving tersely the testimony of this witness, and of all other witnesses introduced by the defendants.*]

2. The deposition of Thomas Stokes was read as follows: [*Here copy it, in full.*]

3. The deposition of James Walker was offered in evidence, but the complainant objected to its being read because he had excepted to it, and the Clerk and Master had sustained his exceptions, and there had been no appeal from the ruling of the Clerk. The defendant then asked to be allowed to appeal; but the Court refused the request, and excluded the deposition. Said deposition, exceptions and ruling are as follows: [*Here copy the deposition in full, and copy the exceptions and the ruling of the Clerk, or the Chancellor.*]

4. Henry Smith was offered as a witness, but he stated, when examined on his *voir dire* by the complainant, that he did not believe in a future state of rewards and punishments, and on being objected to by the complainant on that ground, the Court ruled that he was incompetent to testify. The witness, also, stated that he believed a man's conscience punished him for his sins, and that he deemed it both a sin and a crime to testify falsely.

5. William Johnson testified as follows: [*Here set out his testimony, and, also, the objections to his testimony, if any, and the rulings of the Court on each objection.*]

The defendant here closed his proof, and the complainant introduced the following rebutting evidence:

## III.

**Rebutting Evidence by the Complainant.**

1. Henry Doe, one of the complainants, testified as follows: I am one of the complainants, Defendant, Richard Roe, told me he was not able to pay for the land in dispute, and agreed that the rents of the land were worth as much as he had paid on the title-bond. He said he had lost the bond, and agreed to surrender the possession at the end of last year. He gave me a writing to that effect. This writing I forgot to bring to Court with me. On objection by the defendants, all of the evidence of this witness as to the writing, and as to its contents, was ruled out by the Court on the ground that the writing itself was the best evidence of its contents. [*And so go on with the testimony, and with the objections and rulings, to the end of the case.*]

2. George Wilson and Samuel Carper both testified that they knew the witness, Richard Roe, that they knew his general reputation in the neighborhood where he lived, that such reputation was bad, and that from that reputation he was not entitled to credit on oath in a Court of Justice, and that witnesses would not believe him on his oath. Samuel Carper, on cross-examination, stated that he and Richard Roe were not friendly, and that Roe had once sued him, and got a judgment against him, which judgment the witness Carper testified was unjust, and obtained by perjured evidence.

## IV.

**Rebutting Evidence by the Defendant.**

1. The defendants then introduced George Bowers and Andrew Jones, who both testified that they well knew the general reputation of Richard Roe, that it was fair, and that his reputation entitled him to be believed on oath in a Court of Justice, and that they would believe him.

This was all the evidence in the cause.<sup>23</sup>

## V.

**The Charge of the Court.**

The Court charged the jury as follows: [*Here copy the charge, in full.*]

## VI.

**Requests for Additional Instructions.**

At the conclusion of the charge to the jury, and before the jury retired, the defendants requested the Court to charge the following propositions:

No. 1. [*Here copy it.*]

No. 2. [*Here copy it; and set out all of them in regular order, as numbered.*]

Thereupon the Court charged the jury further, as follows: [*Here copy the further charge.*]

## VII.

**Motion for a New Trial.**

The jury having found in favor of the complainants on the issues of fact submitted to them, the defendant moved the Court for a new trial, and in support of his motion read the following affidavits:

1. Affidavit of Richard Roe, as follows: [*Here copy it.*]

2. Affidavit of Henry James, as follows: [*Here copy it.*]

3. Affidavit of Charles Thompson, one of the jurors, as follows: [*Here copy it.*]

<sup>23</sup> The bill of exceptions must show that it contains all the evidence. *Ransom v. State*, 8 Cates, 366.

VIII.  
Conclusion.

The Court overruled the defendants' motion for a new trial, and pronounced a decree upon the findings of the jury. To which action of the Court the defendants excepted, and now except; and they also except to the rulings of the Court upon the evidence herein set out, and to the refusal of the Court to charge the jury as requested, and to the charge of the Court to the jury, and to the said decree, and tender this their bill of exceptions to all of said matters, which bill is signed by the Chancellor, and made a part of the record of the cause. August 26, 1891.

A. J. ABERNATHY, Chancellor.

There should be an entry on the minutes, showing the fact that the bill of exceptions was duly presented, and signed by the Chancellor, and made a part of the record of the cause.<sup>24</sup>

## ARTICLE III.

## REHEARINGS IN CHANCERY.

§ 1215. Rehearings Generally Considered.

§ 1216. Grounds of a Rehearing.

§ 1217. Who May Have a Rehearing.

§ 1218. When and Where Petition Must be Filed.

§ 1219. Frame of Petition to Rehear.

§ 1220. Form of Petition to Rehear.

§ 1221. Proceedings When Rehearing is Granted.

§ 1222. Decree Upon Rehearing.

§ 1215. **Rehearings Generally Considered.**—In a suit at law, if either party has suffered injustice, because (1) of some error of law committed by the Judge, or (2) some error of fact committed by the jury, or (3) the unexpected introduction of evidence by the adverse side, or (4) because of his inability to produce newly discovered evidence in his own behalf, his remedy is to move for a new trial. So, if there has been a trial by jury in the Chancery Court, and a like injustice has been done, the injured party's remedy is to move the Court for a new trial, as already shown in the preceding Article. But it sometimes happens that some similar injustice is done some of the parties by the decree of the Court when the Chancellor decides the cause without a jury. The method of remedying such a wrong is by a petition for a rehearing.<sup>1</sup> If, however, the error is manifest, the Chancellor will ordinarily correct it on motion, if the matter be brought to his attention while his control of the decree continues. Indeed, our Chancellors will often, on motion, re-examine a case where it is made very probable that he has committed some material error of law or fact, to the detriment of the party complaining, without requiring him to file a formal petition for a rehearing. In such a case, however, the motion should be in writing, and should be as specific in its assignment of errors as a petition to rehear.<sup>2</sup> If the injustice complained of was done on motion, the proper method of correcting it is by motion.<sup>3</sup>

A rehearing in any case is not a matter of right, but rests in the sound discretion of the Court;<sup>4</sup> nevertheless, as all Courts, and especially Courts of Equity, have been established that justice may be done, the Chancellor will always so exercise that discretion as to rehear a cause when justice requires it.<sup>5</sup> The Chancellor may refuse a rehearing, where there is reason to suspect

<sup>24</sup> See, *ante*, § 1211.

<sup>1</sup> An application for a rehearing stands upon the footing of an application for a new trial at law. *Mavs v. Wherry*, 3 Tenn. Ch., 222; Sto. Eq. Pl., § 421, note.

<sup>2</sup> The Chancellor may, however, require a petition to rehear to be filed; and should require such a petition, unless the opposite side consent to this informal method of rehearing. The appellate Court will not review the action of the Chancellor in case he refuses to rehear a case on motion. *Taylor v. Boyd*, 6 Heisk., 613; *Frazier v. Tubb*, 2 Heisk., 669; *Galloway v. Dunnington*, 10 Lea, 216.

<sup>3</sup> 1 Barb. Ch. Pr., 353.

<sup>4</sup> *Galloway v. Dunnington*, 10 Lea, 216; 2 Dan. Ch. Pr., 1480, note. On the subject of a Court's discretion, see, *ante*, §§ 583, note 4; 833, note 37; 857; 902.

<sup>5</sup> A rehearing is usually granted if there be colorable ground for the application. *Travis v. Waters*, 1 Johns. Ch., (N. Y.), 48. In England, one rehearing appears to be a matter of course. *Land v. Wickham*, 1 Paige, (N. Y.), 257. A rehearing will, also, be granted, of course, if the decree was pronounced without argument, even though the case be submitted by consent. *Blake's Ch.*, 165.

it is intended for delay, or may impose such terms upon the applicant as may be necessary to preserve the rights of the other party from injury resulting from the delay.<sup>6</sup>

A petition for a rehearing suspends all proceedings upon the decree until the petition is disposed of.<sup>7</sup> There should, however, be an entry on the minutes showing the filing of the petition, and suspending the execution of the decree until further orders, as follows:

**ORDER STAYING PROCEEDINGS ON PETITION TO REHEAR.**

Elijah Robertson, *et al.*,  
*vs.*  
 William Maclin, *et al.* } Petition to Rehear.

The defendants having presented and filed their petition for a rehearing of this cause, on consideration thereof it is ordered by the Court that until said petition is heard and disposed of, all further proceedings in this cause be stayed, including proceedings upon the decree pronounced at the present term.

**§ 1216. Grounds of a Rehearing.**—The ordinary grounds of a rehearing are: 1, Some material mistake by the Chancellor in a matter of law, to the detriment of the party complaining; 2, Some erroneous deduction drawn by the Chancellor from the evidence, materially injuring the party complaining; 3, The unexpected introduction of material evidence by the adversary which can be fully refuted, or explained away; 4, The unexpected exclusion of material evidence at the hearing;<sup>8</sup> and 5, The discovery of new evidence sufficiently strong to reverse or materially modify the decree, and which could not have been previously discovered by due diligence.<sup>9</sup> This newly discovered evidence must be pertinent to the issues raised by the pleadings: if new facts are discovered constituting a new issue, they may be brought before the Court by a supplemental bill in the nature of a bill of review. Such a bill can only be filed by leave of the Court; and if such leave is granted, then a petition to rehear should be filed at the same time, and such a petition should be presented along with the supplemental bill.<sup>10</sup>

A rehearing will not be granted to let in newly discovered evidence which is merely cumulative; nor to contradict a witness examined by the adverse party; nor where the new evidence sought to be introduced could have been had at the hearing, if reasonable diligence had been used,<sup>11</sup> nor to supply omissions of proof.<sup>12</sup> And not only must the new evidence be material and forcible,<sup>13</sup> and due diligence be shown; but the Court must be satisfied that it exists, and that it can and will be produced if a rehearing is granted.<sup>14</sup>

A rehearing should not be applied for when the error complained of is one which may be corrected on motion, as heretofore shown.<sup>15</sup>

**§ 1217. Who May Have a Rehearing.**—Any party to the record, injuriously affected by the decree, may have it reheard, but a stranger to the cause cannot be heard in this way: he must assail the decree by an original bill, making proper parties. The right to a rehearing is not confined to the parties against whom the decree is rendered; if the party obtaining the decree has not been given such a decree as he was entitled to, even if taken upon a *pro confesso*, he is entitled to have it reheard.<sup>16</sup>

<sup>6</sup> Land v. Wickham, 1 Paige, (N. Y.), 257.

<sup>7</sup> Blake's Ch., 165.

<sup>8</sup> Shea v. Mabry, 1 Lea, 334.

<sup>9</sup> Robertson v. Macklin, 4 Hay., 53; Scales v. Nichols, 2 Yerg., 140. See, also, Smith v. Sneed, Cooke, 190; 2 Dan. Ch. Pr., 1480; 1487. The question in relation to newly discovered evidence, is not what the petitioner knew, but what with reasonable diligence he might have known. See, Bill of Review, *post*, § 1238.

<sup>10</sup> 1 Barb. Ch. Pr., 362-365; Sto. Eq. Pl., §§ 421-423. This supplemental bill in the nature of a bill of review will be heard at the same time the original cause is reheard; and if a rehearing is allowed, and the supplemental bill permitted to be filed, the order should provide that the party have leave to file the

bill, that the cause be reheard, and that the supplemental bill be heard at the same with the rehearing of the original cause. 1 Barb. Ch. Pr., 365. See bills in the nature of bills of review, *post*, § 1231.

<sup>11</sup> 2 Dan. Ch. Pr., 1480, note; Kelley v. McKinney, 5 Lea, 164.

<sup>12</sup> Manufacturing Co. v. Weatherly, 17 Pick., 318.

<sup>13</sup> Kelly v. McKinney, 5 Lea, 170.

<sup>14</sup> Scales v. Nichols, 2 Yerg., 140. This case shows that a rehearing may be granted whenever a bill of review will lie, the object of the rehearing being to obviate the necessity of a bill of review; and herein our practice goes one step further than the English practice.

<sup>15</sup> *Ante*, § 573.

<sup>16</sup> 1 Barb. Ch. Pr., 354.

§ 1218. **When and Where Petition Must be Filed.**—A petition to rehear must be filed in the Court that pronounces the decree complained of, and must be presented to the Court during the term at which the decree complained of is entered upon the minutes,<sup>17</sup> unless such term continues longer than thirty days, and then it must be presented within thirty days after the decree.<sup>18</sup> If the decree is final, and the term at which it was entered has passed, the decree cannot be reconsidered by the same Court, except upon a bill of review.<sup>19</sup> The party injured, in such a case may, however, have the decree reviewed by the proper appellate Court, on a writ of error.

§ 1219. **Frame of Petition to Rehear.**—The petition being in the nature of a motion for a new trial, must specify the particular matter or cause on which the application for a rehearing is based; and if the facts therein stated do not appear of record in the cause, the petition must be verified by oath or affirmation: it must, also, be signed by counsel.<sup>20</sup>

The particular injustice complained of should be specified; and if the application is based on new evidence, its materiality should be made to appear to the Court by stating its nature, and precisely what it will be when taken;<sup>21</sup> and if the witnesses are accessible, the petition should be accompanied by their affidavits, showing what they will prove.<sup>22</sup> The petition must be confined to the case made by the pleadings, and cannot, under the guise of a rehearing, inject new matters into the cause, and raise issues not involved in the original suit.<sup>23</sup>

The petition concludes with a prayer that the cause may be reheard, and that the decree may be reversed, or that it may be altered in such points as are alleged to be erroneous or unjust, and that the petitioner be allowed to bring forward the proof specified in the petition, if any be shown.

§ 1220. **Form of Petition to Rehear.**—A petition for a rehearing should show (1) the particular matter and manner wherein the petitioner has been aggrieved by the decree, or other action of the Court; (2) wherein and whereby he is entitled to have the wrong done by him redressed, setting forth specially the supposed errors of the Court, or the new evidence relied on; and (3) should pray that the cause be reheard, and the decree modified, or set aside, according to the case made. The following is a form of

PETITION FOR REHEARING.<sup>24</sup>

Elijah Robertson, *et al.*,  
vs.

William Maclin, *et al.* } In Chancery, at Lewisburg.

To the Hon. W. S. Bearden, holding the said Chancery Court:

Petitioners, the above named defendants, respectfully show to the Court:

I.

That they are much aggrieved by so much of the decree rendered in this cause on the 22nd day of the present month, (November,) as adjudged that complainants were entitled to recover 1666 acres of the land conveyed by Joseph Hynds to petitioners' father, William Maclin, as to which Landon Carter recovered judgment of four hundred dollars damages against Elijah Robertson, deceased. Petitioners are, also, aggrieved by so much of the said decree as onerates them with the costs of the suit.

II.

The Court held petitioners liable for said 1666 acres, on the supposition that they were a part of the lands sought to be recovered by complainants in their bill; whereas, petitioners aver the fact to be that said 1666 acres are entirely outside of the bounds of the tracts, to recover which the bill was filed; and neither complainants nor Elijah Robertson, in his life time, ever set up any claim to, or possessed any interest or estate in said 1666 acres, or any part thereof. Said 1666 acres are not only outside of all the grants specified in complainant's

17 Ch. Rule, XV, § 1; Code, § 3119; Haywood v. Marsh, 6 Yerg., 69; Robertson v. Maclin, 4 Hay., 53; Overton v. Bigelow, 10 Yerg., 48.

18 Acts of 1835, ch. 65; Railroad v. Johnson, 16 Lea, 387.

19 Allen v. Barksdale, 1 Head, 238; Robertson v. Maclin, 4 Hay., 53. Not even an interlocutory decree can be reheard at a subsequent term. Overton v. Bigelow, 10 Yerg., 48.

20 Ch. Rule, XV, § 1; *post*, § 1204.

21 Sales v. Nichols, 2 Yerg., 140.

22 Mays v. Wherry, 3 Tenn. Ch., 219. If the witnesses, however, are not in reach, the statement of that fact in the petition would probably be a sufficient excuse for not filing their affidavits.

23 1 Barb. Ch. Pr., 356. If new matters are discovered after decree, but at the same term, they must be brought forward by a supplemental bill in the nature of a bill of review. 1 Barb. Ch. Pr., 362.

24 This petition is based on the case of Robertson v. Maclin, 3 Hay., 70; and 4 Hay., 53.

bill, but are a part of an entirely different and older grant, the lands covered by which are many miles from the lands in dispute.

## III.

Petitioners were greatly surprised by the production of the said judgment in favor of Landon Carter, not having been notified until the 19th of this month that it would be filed as evidence in this cause; and not suspecting, for a moment, that it would, or could by any possibility, be used as evidence that petitioners' father, William Maclin, held as trustee or otherwise for complainants any of the lands sued for by the complainants.

## IV.

Petitioners had no opportunity to show that said 1666 acres were wholly outside of all the grants claimed by complainants; but petitioners aver that such is the fact, and this fact they will be abundantly able to prove if the cause is reheard. Petitioners refer to the affidavit of William Hickman, and to two letters of Elijah Robertson, deceased, herewith filed, and marked respectively exhibits 1, 2, and 3, in support of this petition.

## V.

Petitioners therefore pray that your Honor will grant a rehearing of this cause, to the end that said decree may be reversed and set aside, (1) in so far as it divests the title to said 1666 acres out of petitioners and vests it in complainants, and (2) in so far as it adjudges the costs of the suit against petitioners.

P. C. SMITHSON, Solicitor.<sup>25</sup>

[*Annex affidavit of the truth of the petition, as in § 789, ante.*]

§ 1221. **Proceedings When a Rehearing is Granted.**—No answer is, ordinarily, required or made to a petition to rehear, but the Chancellor may call on the parties to present briefs on the points raised. If a rehearing is granted because of some error of law, or of some erroneous deduction from the evidence, the cause is usually reheard upon the same record, and at the same term at which the decree was rendered;<sup>26</sup> and in such case so much of the record is read as is necessary to enable the petitioner to show, and the Court to understand, the errors complained of. At the rehearing, the petitioner has the right to open and close the argument, for the burden of showing error rests upon him.<sup>27</sup>

If a rehearing is granted to allow the reading of evidence on file, but by mistake overlooked and not read at the hearing, the case is heard upon the pleadings and the evidence originally read, and upon the evidence overlooked, the latter only being read as a rule, unless the Chancellor directs the former to be re-read. If a rehearing is granted to let in new evidence, the case is heard anew, and the pleadings and evidence are read in the same manner, as upon an original hearing; and the same defences may be set up, the same objections to evidence may be made, and the same claims to relief urged, as upon an original hearing. But in any rehearing no one will be heard to assail the decree except the party who obtains the rehearing: and, if any other party is injured, he must join in the petition, or file a separate petition for a rehearing.<sup>28</sup> Where a rehearing is granted to let in new evidence, the parties should not, as a rule, be allowed to go into further proof generally; but the petitioner should be confined to the proof mentioned in his petition, and the other party should be confined to the proof in rebuttal thereof.<sup>29</sup>

The Court will give the complainant the same right to amend as he would be entitled to on an original hearing.<sup>30</sup>

§ 1222. **Orders and Decrees Upon a Rehearing.**—On a rehearing, the cause is entirely open as to the party in whose favor the former decree was rendered; but as to the other party it is open only as to the parts of the decree by him complained of. And so upon a petition by a defendant for a rehearing, the Court may give the complainant more extensive relief than was given him by the original decree.<sup>31</sup> The object of a rehearing is, ordinarily, to ascertain whether certain alleged material errors of law or fact exist, and when such allegations are found to be true, the decree on the rehearing is changed accordingly.

<sup>25</sup> The petition must be signed by counsel; and must be verified by oath or affirmation unless the facts appear of record. Ch. Rule, XV, § 1; *post*, § 1204.

<sup>26</sup> *Kelley v. McKinney*, 5 Lea, 170.

<sup>27</sup> 1 Barb. Ch. Pr., 360.

<sup>28</sup> 1 Barb. Ch. Pr., 360.

<sup>29</sup> *Kelley v. McKinney*, 5 Lea, 170.

<sup>30</sup> 1 Barb. Ch. Pr., 360.

<sup>31</sup> 1 Barb. Ch. Pr., 360.

**ORDER DISMISSING A PETITION TO REHEAR.**

John Doe, }  
*vs.* }  
 Richard Roe. } No. 689.

In this cause the defendant having this day [*or*, at a former day,] presented a petition to rehear, and the Chancellor having heard argument, and considered the matters raised by the petition, refused a rehearing. It is, therefore, ordered that the petition be dismissed, and that the petitioner pay all the costs thereof.

**ORDER GRANTING A REHEARING.**

[*Follow the above form down, and including, the words "raised by the petition," then add:*] granted the prayer thereof, and ordered that the decree therein complained of, entered in this cause on June 10, 1890, on the 95th and 96th pages of this book, be reheard; and that until such rehearing all proceedings on said decree be suspended and stayed.

**DECREE ON THE REHEARING OF A CAUSE.**

Elijah Robertson, *et al.*, }  
*vs.* }  
 William Maclin, *et al.* }

This cause, coming on to be reheard this 27th day of August, 1891, before Hon. W. S. Bearden, Chancellor, upon the petition to rehear, and the whole record in the cause, including the proofs filed in support of the petition to rehear, and argument of counsel having been heard, on consideration of all which it is ordered and adjudged by the Court that the prayer of the petition be granted, and the cause reheard.

And thereupon it is ordered and decreed that the decree pronounced in this cause at the last [*or*, present] term adjudging that [*Here briefly state what was decreed.*] be recalled, reversed, and annulled, and that the bill in this cause, be dismissed, and that complainants, and John Johnson, their prosecution surety, pay all the costs of the cause, for which execution is awarded.

## CHAPTER LXIX.

## BILLS OF REVIEW.

- ARTICLE I. Bills of Review Generally Considered.  
 ARTICLE II. Bills of Review for Errors of Law.  
 ARTICLE III. Bills of Review for New Matter or New Proof.  
 ARTICLE IV. The Leave to File a Bill of Review.  
 ARTICLE V. Frame and Form of a Bill of Review.  
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## ARTICLE I.

## BILLS OF REVIEW GENERALLY CONSIDERED.

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§ 1223. **Object of a Bill of Review.**—It sometimes happens (1) that the Chancellor makes an erroneous legal deduction from the pleadings and the facts as recited in his decree, and that, as a consequence, his decree is erroneous on its face; and it sometimes happens (2) that after the time for taking proof has expired, new evidence comes to light sufficient to have changed the decree had it been before the Chancellor. The only remedy, in Chancery, in such cases is a bill of review, which has for its object the reversal, alteration, or explanation, of the decree, so that it may conform to the law of the case where there is error of law, or may conform to the real facts of the case where there is new proof.<sup>1</sup>

Inasmuch as on a bill of review for error of law apparent, the evidence cannot be looked to, if the evidence when looked to will disclose error *not* apparent on the face of the decree, the party injured by such error should take the case to the appellate Court by a writ of error, which is far more efficacious than a bill of review. A writ of error opens the whole case, and enables the appellate Court to correct all errors, whether apparent or not, and whether errors of law, or erroneous deductions of fact.<sup>2</sup>

§ 1224. **Grounds of a Bill of Review.**—The power of a Court of Chancery to review a decree, after the adjournment of the term at which it was pronounced, rests on the first of the Ordinances in Chancery of Lord Bacon; which is as follows: “No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted, except (1) it contain either error in law, appearing in the body of the decree, without further examination of matters of fact, or (2) some new matter, which hath arisen in time after the decree, and (3) not any new proof,

<sup>1</sup> *Berdanatti v. Sexton*, 2 Tenn. Ch., 705; 2 Dan. Ch. Pr., 1576, note. A bill of review will not lie to impeach a decree for fraud. *Wilson v. Schaefer*, 23 Pick., 300; nor to annul a perfected sale of land made under the decree. *Donaldson v. Nealis*, 24 Pick., 638.

<sup>2</sup> *Livingston v. Noe*, 1 Lea, 55; *Davidson v. Bowden*, 5 Sneed, 134; *Winchester v. Winchester*, 1 Head, 493. It is sometimes said in our Reports, that a bill of review for error of law apparent is in the nature of a writ of error. This is true when a writ of error at common law is meant; but wholly

untrue if our statutory writ of error in Chancery causes is meant. The distinction should be kept in mind. The writ of error at common law lies only upon matter of law arising upon the face of the proceedings, and not to reverse any error in the determination of facts. 3 Black. Com., 406. Whereas, our statutory writ of error in Equity causes carries up the evidence read at the hearing, and requires the Supreme Court to review and examine the cause, as if brought up by appeal. Code, § 3108; *Winchester v. Winchester*, 1 Head, 500.



which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to light after the decree was 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.<sup>73</sup> This Ordinance authorizes a bill of review (1) for error of law; (2) for new matter; and (3) for new proof.<sup>4</sup> Any two or more of these grounds may be properly joined in the same bill,<sup>5</sup> without making it multifarious.<sup>6</sup>

§ 1225. **What Decrees May be Reviewed.**—A bill of review lies only after a final decree. A decree is final in the meaning of the rule when it is such a one as finally adjudicates and disposes of all the merits of the controversy, and reserves and leaves nothing further for the Court to do in the cause; and when the term of the Court at which the decree was pronounced has ended; or when the term has not ended, but thirty or more days have elapsed since the decree was entered on the minutes.<sup>7</sup> In short, a decree will be deemed final for the purpose of a bill of review when a writ of error would lie to have it reviewed in the appellate Court.<sup>8</sup> But an interlocutory decree may be reviewed by a bill, or a supplemental bill, in the nature of a bill of review, to put in issue material and determinative new matter discovered after the making of such decree.<sup>8a</sup>

§ 1226. **Who May File a Bill of Review.**—No persons, except parties and their privies in representation, such as heirs, executors, and administrators, can have a bill of review, strictly so called.<sup>9</sup> But other persons in interest, and in privity of title and estate, who are aggrieved by the decree, such as devisees and remainder-men, are entitled to maintain an original bill in the nature of a bill of review, so far as their own interests are concerned.<sup>10</sup> Of course, no persons, but persons having an interest, are entitled to maintain a bill of review. And even persons, having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third persons.<sup>11</sup> It may be generally stated that all the parties to the original bill aggrieved by the decree ought to join as complainant in a bill of review, and all the others should be made defendants.<sup>12</sup> A person not a party, or not in privity with a party, cannot be affected by the decree, and therefore cannot maintain a bill to impeach it.<sup>13</sup>

§ 1227. **When the Bill Must be Filed.**—As to the period within which a bill of review must be filed, the law provides that no bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, or imprisoned, a right to a bill of review within three years after such disability has been removed.<sup>14</sup>

The bill must show on its face, affirmatively, that it is filed within the time allowed by the statute, and until this is done the complainant has no standing in Court.<sup>15</sup> But the parties under disability need not wait until their disability is removed: they may file their bill during disability by next friend.<sup>16</sup>

<sup>3</sup> Eaton v. Dickinson, 3 Sneed, 397; Sto. Eq. Pl., § 404. What is meant in the Ordinance by a decree "being under the great seal," is that the decree has been enrolled. In some text books and reports this meaning of the phrase "under the great seal" is substituted therefor. The enrollment of a decree in the meaning of the Ordinance, and an adjournment of the term of the Court at which a decree has been made, are in our practice synonymous terms. Bledsoe v. Carr, 10 Verg., 57.

<sup>4</sup> Bledsoe v. Carr, 10 Verg., 57.

<sup>5</sup> 2 Dan. Ch. Pr., 1576.

<sup>6</sup> Colville v. Colville, 9 Hum., 524.

<sup>7</sup> Sto. Eq. Pl., 408 a; Johnson v. Hanner, 2 Lea, 8; M. & C. R. R. v. Johnson, 16 Lea, 387; Acts of 1885, ch. 65.

<sup>8</sup> See, post, § 1272.

<sup>8a</sup> Hardwick v. American Can Co., 7 Cates, 393.

<sup>9</sup> Fitzgerald v. Cummings, 1 Lea, 240.

<sup>10</sup> Persons not *in esse* at the date of the decree, but who were before the Court by representation, may maintain a bill of review. Wilson v. Schaefer, 23 Pick., 300, citing the above section of this book, then § 1058. A bill of review, or a supplemental bill in the nature of a bill of review, may be filed by a defendant as well as by a complainant when aggrieved. Hardwick v. American Can Co., 7 Cates, 393.

<sup>11</sup> Sto. Eq. Pl., § 408; Winchester v. Winchester, 1 Head., 460; Montgomery v. Olwell, 1 Tenn. Ch., 169.

<sup>12</sup> 2 Dan. Ch. Pr., 1579; Sto. Eq. Pl., § 409; Fuller v. McFarland, 6 Heisk., 79.

<sup>13</sup> Arnold v. Moyers, 1 Lea, 310.

<sup>14</sup> Code, § 3120; Acts of 1901, ch. 15.

<sup>15</sup> Anderson v. The Bank, 5 Sneed, 661.

<sup>16</sup> Winchester v. Winchester, 1 Head, 460.

After one bill of review has been dismissed on demurrer, another bill of review will not be allowed, although error be patent.<sup>17</sup>

§ 1228. **Where the Bill Must be Filed.**—A bill of review is a proceeding for reversal applicable to a Court of Chancery only, and can be filed in that Court only.<sup>18</sup> As such a bill seeks to reverse, alter, or explain, the decree of a Chancery Court, and as one Chancery Court has no revisory jurisdiction over another Chancery Court, it necessarily follows that a bill of review must not only be filed in the Chancery Court, but also in that Chancery Court wherein the decree complained of was pronounced.<sup>19</sup>

A bill of review, therefore, will not lie in an appellate Court to review one of its own decrees;<sup>20</sup> nor will it lie in the Chancery Court to review a decree of an appellate Court for error of law apparent on the face of the decree.<sup>21</sup>

§ 1229. **Preliminary Relief Obtainable at the Filing.**—On a bill of review being filed, an injunction may be had if prayed for and proper, to stay proceedings under the decree assailed, if still unexecuted,<sup>22</sup> or to enjoin a transfer of the property alleged to have been wrongfully decreed to a defendant to the bill of review, or when necessary to secure such property it may be attached, or impounded. But no extraordinary preliminary relief should be granted unless a very clear case is made out by the bill, and then only on bond and ample security being given.<sup>23</sup> If the decree complained of requires the party filing the bill of review to pay any money, or to deliver up any notes, bonds, stocks, or the like, he should be required to pay the money into Court, and to deliver the choses in action to the Clerk, and no injunction should be granted in such cases. Under proper circumstances, a receiver may be appointed, especially where the property is such that it cannot be turned over to the Court.

§ 1230. **Hearing of a Bill of Review.**—A bill of review for error apparent is heard along with the original pleadings, orders, and decrees; and, if sustained, the decree complained of is reversed, altered, or explained, as Equity may require, and as far as the errors specified in the bill, but no further.

A bill of review for newly discovered evidence is heard on both the pleadings, proofs, and decrees, in the original cause, and the pleadings and new proofs since filed, the two records constituting one for the purpose of reviewing the case on the old and new proof.<sup>24</sup>

On a bill of review being sustained, whether on error apparent or on new proof, the Court reverses, alters, or explains the decree complained of so as to do what is right on the case as it then stands, and, when necessary, will resort to any process, ordinary or extraordinary, to remedy any wrong done the complainant by the decree he complains of.<sup>24a</sup> But these remedies must be confined to those who were parties to the original suit, and to their representatives; and an innocent purchaser, since the original decree, cannot be disturbed by proceedings under a bill of review.<sup>25</sup>

§ 1231. **Bills in the Nature of Bills of Review.**—It may happen, however, that the new matter is discovered before the term ends at which the decree

<sup>17</sup> Knight v. Atkisson, 2 Tenn. Ch., 388.

<sup>18</sup> Overton v. Biglow, 10 Yerg., 50; Wilson v. Wilson, 10 Yerg., 201. These cases decide that such a bill cannot be filed in the appellate Court.

<sup>19</sup> Anderson v. The Bank, 5 Sneed, 661.

<sup>20</sup> Wilson v. Wilson, 10 Yerg., 200.

<sup>21</sup> Wallen v. Huff, Thomp. Cases, 21; Heisk. Dig., 596; 2 Barb. Ch. Pr., 91; 93; Hurt v. Long, 6 Pick., 445; Murphy v. Johnson, 23 Pick., 552. But a voidable decree in an appellate Court may be attacked and annulled. *Ibid.* See, *ante*, § 814, sub-sec. 2. Whether a bill of review will lie in the Chancery Court of original jurisdiction to review a decree of an appellate Court on the ground of newly discovered evidence of a controlling character, the complainant being free from fault and negligence, does not seem to have been expressly adjudicated either in Wallen v. Huff, or in Hurt v. Long, *supra*. The question is raised in Maddox v. Apperson, 14 Lea, 617, but not decided. Such a bill may be filed in the English Chancery Court after an affirmation of

a decree upon an appeal by the House of Lords. 2 Barb. Ch. Pr., 93; 2 Dan. Ch. Pr., 1579; Sto. Eq. Pl., § 418; and such seems to be the general rule. See authorities cited; also, Stafford v. Bryan, 2 Paige, (N. Y.), 45, Desty's note, Law. Ed. The general language of Hurt v. Long, 6 Pick., 445, would seem to imply, however, that no bill will lie in Chancery to review any decree of an appellate Court, unless fraud has intervened in obtaining the decree, or some new equity has arisen, which would authorize an original bill in the Chancery Court to set aside the decree.

<sup>22</sup> Livingston v. Noe, 1 Lea, 66; Code, § 4490.

<sup>23</sup> Code, § 4491; Butler v. Peyton, 4 Hav., 88.

<sup>24</sup> Berdanatti v. Sexton, 2 Tenn. Ch., 704; Payne v. Beech, 2 Tenn. Ch., 708.

<sup>24a</sup> See, *ante*, § 657, sub-sec. 2. In the headline of this sub-section the word "injunction" should be "execution."

<sup>25</sup> Winchester v. Winchester, 1 Head, 460.

complained of is pronounced, or before the Chancellor's power to change it has terminated, or after an interlocutory decree, such as a decree of reference to the Master.<sup>26</sup> In such a case, the new matter is brought forward by a supplemental bill, or a new bill, in the nature of a bill of review;<sup>27</sup> and it ought to be accompanied by a petition to rehear the original cause, at the same time that it is heard upon the supplemental bill. Such a supplemental bill cannot be filed without the leave of the Court, nor without an affidavit, or petition, similar to that required in the like case of a bill of review. If necessary, a bill of review may also be incorporated into such a supplemental bill. And where a different kind of relief is sought, or a different principle from that on which the original decree is given, there it must be sought by a supplemental bill in the nature of a bill of review.

It seems to be a general rule, that a supplemental bill for newly discovered matter should be filed as soon after the new matter is discovered, as it reasonably may be. If, therefore, the party proceeds to a decree after the discovery of the facts, upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own *laches* not to have brought them forward at an earlier stage of the cause.<sup>28</sup>

A supplemental bill in the nature of a bill of review, nearly resembles in its frame a bill of review, except that, instead of praying, that the former decree may be reviewed or reversed, it prays, that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill; and that the complainant may have such relief as the nature of the case, made by the supplemental bill, requires.<sup>29</sup> It should, also, state the circumstances positively, which entitle the party to file it.<sup>30</sup>

## ARTICLE II.

### BILLS OF REVIEW FOR ERRORS OF LAW.

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| § 1232. When a Bill of Review for Errors of Law Will Lie. | § 1235. Errors Deducible From the Evidence Not Errors of Law. |
| § 1233. What are Errors at Law.                           | § 1236. Rationale of a Bill of Review for Error of Law.       |
| § 1234. How Errors of Law are Ascertained.                |   |

§ 1232. **When a Bill of Review for Errors of Law Will Lie.**—In regard to errors of law, apparent upon the face of the decree, the established doctrine is, that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts.<sup>1</sup> That is the proper office of an appellate Court, upon an appeal, or writ of error. But, taking the facts to be, as they are stated to be in the pleadings and on the face of the decree, you must show that the Court has erred in point of law. If, therefore, the pleadings and the decree do not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by an appeal to the appellate Court. In England, decrees were for-

<sup>26</sup> See, *ante*, §§ 1215-1222.

<sup>27</sup> 2 Dan. Ch. Pr., 1582, note; *Hardwick v. American Can Co.*, 7 Cates, 393. But the new defence must be consistent with the original defence. *Ibid.*

<sup>28</sup> *Ibid.* Sto. Eq. Pl., §§ 422-423.

<sup>29</sup> Sto. Eq. Pl., § 425.

<sup>30</sup> Sto. Eq. Pl., § 425.

<sup>1</sup> *Eaton v. Dickinson*, 3 Sneed, 397. This case decides that the Code, § 3121, making "the depositions and exhibits read at the hearing a part of the record, as if the same were transcribed and incor-

porated with the decree," introduces no new ground for a bill of review, and in no way enlarges or modifies the ground of review defined in the Ordinance of Lord Bacon. The Supreme Court, being unable to ascertain the meaning and object of the above statute, concluded "to permit it to slumber on the statute book as a dead letter," rather than to guess its meaning or object, "proper respect for the Legislature" so requiring it! The *meaning* does not seem obscure, whatever may be said as to the *object*.

merly drawn up with a special statement of the material grounds of fact on which the decree was based. In the Courts of Tennessee the decrees are more or less general, and often without any statement of facts. In England, the decree formerly embodied the substance of the bill and answers. In our Courts, the decree usually contains a mere reference to the antecedent proceedings without embodying them. But, for the purpose of examining all errors of law on a bill of review, the original bill, answers, and other proceedings, not including the evidence, are in our practice treated as a part of the decree itself; for it is only by a comparison with the pleadings that the correctness of the decree can be ascertained.<sup>2</sup>

By error apparent on the face of the decree and the antecedent pleadings, is not meant such error as springs out of inadmissible or improper evidence, or erroneous deductions from the evidence, or even utter absence of evidence, but such error of law as necessarily results from the facts assumed in the decree, and alleged in the pleadings.

§ 1233. **What are Errors of Law.**—The error of law complained of must be a violation of some statute, or of some settled principle or rule of law or Equity, or of the practice of the Court.<sup>3</sup> The bill cannot be maintained for clerical errors, or for mistakes in the calculation of interest, or clerical omissions or mistakes apparent from the record and papers in the cause.<sup>4</sup> The errors of law which a bill of review may be filed to have corrected are such as are injurious to the party filing the bill, and such as he has the right to complain of, by virtue of his having been a party to the original suit, or of his being a privy of a party, or a party by representation.

On the hearing of a bill of review, no errors of law can be noticed except those specifically pointed out by the bill;<sup>5</sup> and even these cannot be noticed unless the complainant shows himself aggrieved by them.<sup>6</sup>

§ 1234. **How Errors of Law are Ascertained.**—In our practice the pleadings are considered as incorporated in the decree, for the purposes of a bill of review; and the decree made must be such a decree as, supposing every necessary allegation to be proved, might lawfully be made upon the pleadings. The decree cannot be reversed merely because not sustained by the proof. But, if no proof, which could legally be introduced under the pleadings, could justify such a decree, the decree is erroneous for error apparent upon its face.<sup>7</sup> If the decree complained of is not warranted by the pleadings in the cause, there is error apparent on its face. That is to say, if, taking the facts to be true as recited in the pleadings and in the decree, the decree is contrary to law, or not warranted by the allegations of the pleadings, a bill of review for error apparent will lie. So a decree which goes beyond the allegations of the bill, or fails to dispose of matters of Equity raised by the pleadings, is erroneous on its face, and may be reviewed.<sup>8</sup>

§ 1235. **Errors Deducible from the Evidence not Errors of Law.**—Upon a bill of review for errors of law the evidence cannot be looked to for any purpose whatever. The pleadings, however, are regarded as recited at length in the decree, and the decree can be compared with the pleadings in order to test its correctness, and to make apparent any error therein. But the evidence is, so to speak, *dehors* the record, in ascertaining errors of law; and if the evidence be set out in a bill of review for errors of law, a demurrer would lie on that ground, or the evidence might on motion be stricken out,<sup>9</sup> or if not challenged

<sup>2</sup> 2 Dan. Ch. Pr., 1576, note 6; Sto. Eq. Pl., § 407.

<sup>3</sup> 2 Dan. Ch. Pr., 1576; See, *Moseby v. Partee*, 5 Heisk., 37.

<sup>4</sup> 2 Dan. Ch. Pr., 1576; Code, §§ 2872-2879.

<sup>5</sup> 2 Dan. Ch. Pr., 1576, notes; *Randall v. Payne*, 1 Tenn. Ch., 137; L. & M. R. Co. v. *Rainey*, 7 Cold., 448; *Brown v. Severson*, 12 Heisk., 383.

<sup>6</sup> 2 Dan. Ch. Pr., 1579; Sto. Eq. Pl., § 409; *Donaldson v. Nealis*, 24 Pick., 638, citing the above section of this book, then § 1065.

<sup>7</sup> This statement is from the dissenting opinion of Andrews, Judge, in L. & M. Railroad Co. v. *Rainey*, 7 Cold., 456; and seems to be fully justified by our decisions on the subject. See *Randall v. Payne*, 1 Tenn. Ch., 137; *Berdanatti v. Sexton*, 2 Tenn. Ch., 705; *Finley v. Taylor*, 3 Bax., 237.

<sup>8</sup> *Randall v. Payne*, 1 Tenn. Ch., 137; *Moseby v. Partee*, 5 Heisk., 38; *Burts v. Beard*, 11 Heisk., 472.

<sup>9</sup> 2 Dan. Ch. Pr., 1576, note; *Livingston v. Noe*, 1 Lea, 55.

would probably be deemed mere surplusage, and utterly ignored.<sup>10</sup> If a party desires to go outside of the pleadings and decree, and have the evidence reviewed, and the Chancellor's conclusions of fact corrected, he must take a writ of error.<sup>11</sup> A party may, however, file a bill of review both for error of law and new proof, and such bill would not be multifarious.<sup>12</sup>

§ 1236. **Rationale of a Bill of Review for Error of Law.**—A bill of review for error of law apparent is in the nature of a special demurrer to the pleadings and the decree, the bill making profert of them, so to speak, and thereupon, in effect, demurring thereto:

1. Because the particular part of the decree specially complained of in the bill of review is greatly injurious to the complainant, and wholly unwarranted by the premises on which it was founded, these premises being the allegations of the pleadings and the recitals of the decree;<sup>13</sup> or,

2. Because the said premises show that the complainant was entitled to the specific relief set out in his bill of review, whereas no such relief, and no part thereof, was given him in and by the decree complained of.

Therefore it is, that a demurrer to a bill of review for error apparent does but little more than make an issue of law, its ground being "that there are no errors of law in the decree in said bill of review mentioned."

For the foregoing reasons, it is all-important at once to good pleading and to good faith, that a bill of review for error of law should fully and fairly set forth the pleadings and decree complained of, and the specific errors of law relied on to have the decree reversed, altered, or explained. If this be done, the whole matter in issue on the bill of review can be determined on demurrer, and if not done, the defendant may plead the former decree and demur to the opening of the same;<sup>14</sup> or he may make both defences in an answer.<sup>15</sup> On demurrer to the bill, the Court will, on its own motion, if necessary, consider the original pleadings and decrees as though incorporated into the bill of review: this is the proper practice, and enables the defendant to demur even when the bill does not fully and fairly set forth the pleadings and decree sought to be reviewed; and enables the Court, on such a demurrer, to decide whether there be error of law apparent, or not.<sup>16</sup>

### ARTICLE III.

#### BILLS OF REVIEW FOR NEW MATTER, OR NEW PROOF.

§ 1237. Bills of Review for New Matter.  
§ 1238. Bills of Review for New Proof.

§ 1239. As to New Matter Originally Not in Issue.

§ 1237. **Bills of Review for New Matter.**—The Ordinance authorizes a bill of review for "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." By "new matter which hath arisen in time after the decree," is not meant matter which has come into existence since the decree, but matter which was in existence but had not come to the knowledge of the party to be benefited by it, and therefore could not have been used when the decree was made.<sup>1</sup> This new matter must be something material to the issues determined by the decree complained of; for, if it be new facts not in issue in the original suit, but come into existence since the decree, such new facts, if grounds for relief,

<sup>10</sup> Colville v. Colville, 9 Hum., 524.

<sup>11</sup> Livingston v. Noe, 1 Lea, 60.

<sup>12</sup> Colville v. Colville, 9 Hum., 524; Winchester v. Winchester, 1 Head, 484.

<sup>13</sup> See Berdanatti v. Sexton, 2 Tenn. Ch., 705.

<sup>14</sup> Livingston v. Noe, 1 Lea, 59; Sto. Eq. Pl., § 833.

<sup>15</sup> Code, § 4318.

<sup>16</sup> Post, § 1251; Hurt v. Long, 6 Pick., 445.

<sup>1</sup> Bledsoe v. Carr, 10 Yerg., 55.

must be brought before the Court by an original bill.<sup>2</sup> Hence, as the new matter resolves itself into new evidence, this ground for a bill of review is resolved into proof discovered after the decree.<sup>3</sup> This ground will be considered along with the ground for proof discovered before the decree, but too late to be used at the hearing, the requisites of such proof being the same in each case.

§ 1238. **Bills of Review for New Proof.**—A bill of review may be brought upon the discovery of new proof, such, for example, as the discovery of a release, or a receipt, or a deed, or other cogent evidence which would change the merits of the claim upon which the decree was founded.<sup>4</sup> The new matter must not only be relevant and material,<sup>5</sup> but it must be such as, if known, would have produced a different determination.<sup>6</sup> In other words, it must generally be new matter to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish the old one. In the next place, the new matter must have first come to the knowledge of the party too late to have been used in the cause at the original hearing. Lord Bacon's Ordinance says, in one part, it must be "after the decree." But that seems to be corrected by the subsequent words, "and could not possibly have been used at the time when the decree passed," which words point to the expiration of the time for taking testimony.<sup>7</sup> And, accordingly, it is now the established exposition of the Ordinance, that the new matter shall not have been discovered until after the party's time for taking proof has expired, and too late to apply to the Chancellor, or Master, for leave to obtain the benefit of the discovery.<sup>8</sup>

The new proof must not be merely cumulative; it should be of so clear and decisive a nature as, unless successfully met, to compel a reversal.<sup>9</sup> If newly discovered witnesses be admitted, it should be done with great caution, because tending to open the door to perjury.<sup>10</sup>

More or less new evidence comes to light on each side after a trial, and if a cause be reheard on mere cumulative evidence, every original hearing would be a mere preliminary skirmish. The new cumulative evidence discovered by each party since the hearing must ordinarily be deemed equiponderant.

In the next place, the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known; for, if there be any *laches* or negligence in this respect, that destroys the title to the relief.<sup>11</sup> The rule is well settled that the new matter must not have been discovered until after the time for taking proof had expired; but if the nature of the new evidence is such that the party, or his Solicitor, with proper diligence might have had it at the hearing, no relief will be granted. The inquiry is not what the applicant knew, but what by due diligence he might have known.<sup>12</sup>

§ 1239. **As to New Matter Originally Not in Issue.**—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 must be founded, must not always be new matter to be used as evidence to prove matter in issue, in some manner, in the original bill. A case, indeed, can rarely happen, in which new matter discovered would not be, in some degree, evidence of matter in issue in the orig-

<sup>2</sup> If the new facts antedate the decree, and constitute a new issue, they may be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. Sto. Eq. Pl., § 416; 2 Dan. Ch. Pr., 1577.

<sup>3</sup> See Sto. Eq. Pl., § 415, note; 2 Dan. Ch. Pr., 1578 note.

<sup>4</sup> Sto. Eq. Pl., § 412; 2 Dan. Ch. Pr., 1578; Colville v. Colville, 9 Hum., 524.

<sup>5</sup> 2 Dan. Ch. Pr., 1577.

<sup>6</sup> Burson v. Dosser, 1 Heisk., 763; Long v. Granberry, 2 Tenn. Ch., 85. If a defendant, after an interlocutory decree against him, discover new and controlling evidence he may set it up by a supplemental bill in the nature of a bill of review. Hardwick v. American Can Co., 7 Cates, 393.

7 Sto. Eq. Pl., § 413.

<sup>8</sup> 2 Dan. Ch. Pr., 1580; Sto. Eq. Pl., § 423; Huffacre v. Green, 4 Hay., 51.

<sup>9</sup> 2 Dan. Ch. Pr., 1577, note; Burson v. Dosser, 1 Heisk., 754; Frazier v. Sybert, 5 Sneed, 100; Maddox v. Apperson, 14 Lea, 618.

<sup>10</sup> Burson v. Dosser, 1 Heisk., 762.

<sup>11</sup> Sto. Eq. Pl., § 414.

<sup>12</sup> Harris v. Edmondson, 3 Tenn. Ch., 211. If the new evidence was known at the hearing, the party desiring it should apply for a continuance on that ground, supporting his application by a special affidavit of the newly discovered evidence.

inal cause, if the pleadings were properly framed. But the doctrine seems now to be fully established, that matter discovered after a decree has been made, although not capable of being used as evidence of anything which was previously in issue in the cause, but constituting an entirely new issue, may yet be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review.<sup>13</sup>

## ARTICLE IV.

### THE LEAVE TO FILE A BILL OF REVIEW.

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| § 1240. When Leave to File the Bill is Necessary. | § 1242. How the Bill May Serve for a Petition for Leave. |
| § 1241. How Leave is to be Obtained.              | § 1243. When Leave May be Properly Denied.               |

§ 1240. **When Leave to File the Bill is Necessary.**—The practice as respects the filing of a bill of review is the same in Tennessee as it was in England at the beginning of the Revolution; and a bill of review for errors of law may be brought as a matter of right, no leave of the Court being necessary. But a bill of review brought upon the discovery of new evidence is not a matter of right, and cannot be filed without leave of Chancellor: this leave cannot be given in vacation, but must be granted in open Court;<sup>1</sup> and if filed without such leave may be demurred to on that account.<sup>2</sup> But the grant of leave to file does not bind the Court to sustain the bill when filed, and, in a proper case, it may be dismissed on demurrer.<sup>3</sup> If, however, a deficient bill for both error of law and new proof be presented for leave to file, while the Chancellor should allow it to be filed for error apparent, and refuse to allow it to be filed for new proof; yet, if he refuses to allow it to be filed at all, for any purpose, it will not be reversible error, for if the bill is insufficient on both grounds, the appellate Court will not remand it to be filed in order that it might be immediately thereafter dismissed.<sup>4</sup>

When a bill of review is grounded on both errors of law and new proof, it may be filed as a bill for error apparent even when the Court refuses to allow it to be filed as a bill grounded on new proof. If such a bill be filed without leave being asked, it may stand on both grounds, unless the adverse party challenge it, in due time and form, as a bill for new proof.

§ 1241. **How Leave is to be Obtained.**—The application to file a bill of review, for newly discovered proof, is usually made by petition;<sup>5</sup> but it may also be made by motion, supported by affidavit.<sup>6</sup> The petition should state the nature of the suit, reciting the bill, answer and other pleadings, and the proceedings thereon to final decree, giving the substance thereof with fullness and particularity. The petition should set out the newly discovered evidence in detail, and give the names of the witnesses, if any, and show the circumstances of the discovery of the new evidence, the exact date of such discovery, and the reasons why it was not discovered before. The petition must rebut any presumptions of want of diligence that may arise from the circumstances of the case. It is not sufficient that the petitioner expects to prove certain facts;

<sup>13</sup> Sto. Eq. Pl., §§ 415-416; 2 Dan. Ch. Pr., 1577; Frazer v. Sypert, 5 Sneed, 100; Heisk. Dig., 596. If it were an open question, it might with great force be contended that this is the sort of "new matter which hath arisen in time after the decree," referred to by Lord Bacon in his Ordinance.

<sup>1</sup> Colville v. Colville, 9 Hum., 524; Finley v. Taylor, 8 Bax., 237; Winchester v. Winchester, 1 Head, 640; Sto. Eq. Pl., § 412; 2 Dan. Ch. Pr., 1577.

<sup>2</sup> Jackson v. Jackson, 3 Shan. Cas., 18. See, *post*, § 1250.

<sup>3</sup> McGuire v. Gallagher, 11 Pick., 349.

<sup>4</sup> Puryear v. Puryear, 5 Bax., 640.

<sup>5</sup> Winchester v. Winchester, 1 Head, 460; Long v. Granberry, 2 Tenn. Ch., 85; *ante*, § 1231.

<sup>6</sup> Sto. Eq. Pl., § 412; 2 Dan. Ch. Pr., 1578; Puryear v. Puryear, 5 Bax., 640; Frazer v. Sypert, 5 Sneed, 100.

he must set out the exact evidence by which he can establish them.<sup>7</sup> He must, also, clearly show the pertinency of this evidence, and its effect upon the decree sought to be reviewed.<sup>8</sup>

Upon the application the Court must be satisfied, not only of the relevancy and materiality of the new matter, but also that it has come to the knowledge of the applicant and his agents, for the first time, since the period at which he could have made use of it in the suit; and that it could not with reasonable diligence have been discovered sooner; and that it is of such a character that, if brought forward in the suit, it would have altered the decree.<sup>9</sup> If the nature of the new evidence is such that the party, or agent attending to the suit in his absence, or his Solicitor, might, with proper diligence, have had it upon the original hearing, no bill of review will be allowed. The material point in such cases is, not what the party knew, but what he, or his agent, or Solicitor, by due diligence might have known.<sup>10</sup> Diligence must be affirmatively shown to entitle a party to file the bill.<sup>11</sup>

But when application for leave to file a bill of review for newly discovered proof is made on behalf of an infant, the rule that reasonable diligence must be shown does not apply, and diligence need not be shown, negligence not being imputable to an infant in such cases.<sup>12</sup>

On application for leave to file a bill of review for new proof, the verifying must be done by the complainant himself, whether the new proof is brought forward by affidavit, petition, or bill. The statements as to the newness of the discovery, the degree of diligence used, and other matters required to be presented under oath, cannot be made by proxy; the complainant himself must make oath to them;<sup>13</sup> or it must be clearly made to appear that another person has had the exclusive control of the complainant's affairs, in which case the other person may do the verifying. But matters sworn to on information and belief, without any personal knowledge thereof, should not weigh heavily on an application to file a bill of review for new proof.

It is not absolutely required that the new evidence should have come to the knowledge of the party asking leave, since the decree complained of was pronounced. It is sufficient if such evidence be discovered after his time for taking proof had expired, but too late to obtain leave to take it before the trial. In such case, however, the party should ask for a continuance; and if that be refused, should file a petition to rehear; and if he did neither, he should be required to satisfactorily show why. For a party should not be allowed, either to experiment with his case by going willingly to trial without the new proof, or to neglect the remedy by rehearing when it was available.<sup>14</sup>

§ 1242. **How the Bill may Serve for a Petition for Leave.**—The better practice in obtaining leave to file a bill of review for new proof is by petition under oath;<sup>15</sup> nevertheless, there has grown up in our State a practice of ignoring the petition, and making the bill itself answer all the purposes of a petition.<sup>16</sup> This practice probably arose from the Court sometimes allowing the petition itself to be filed as bill of review, after successfully discharging its function as a petition for leave. A bill thus drawn to answer the double purpose of a petition and pleading must, of course, contain all the essentials of each; and if it does

<sup>7</sup> McGuire v. Gallagher, 11 Pick., 349.

<sup>8</sup> 2 Dan. Ch. Pr., 1578, notes; Harris v. Edmondson, 3 Tenn. Ch., 211; Burson v. Dossier, 1 Heisk., 754. The petition must contain all the essentials of a special affidavit for a continuance. *Ante*, § 520.

<sup>9</sup> 2 Dan. Ch. Pr., 1578.

<sup>10</sup> Berdanatti v. Sexton, 2 Tenn. Ch., 705.

<sup>11</sup> Maddox v. Apperson, 14 Lea, 618.

<sup>12</sup> McCown v. Moores, 12 Lea, 635. But see *Hurt v. Long*, 6 Pick., 445, which holds that minors attempting to review decrees stand upon the same footing as adults. See, also, *ante*, § 935, note 14.

<sup>13</sup> Berdanatti v. Sexton, 2 Tenn. Ch., 705.

<sup>14</sup> Sto. Eq. Pl., § 423.

<sup>15</sup> Hardwick v. American Can Co., 7 Cates, 393, citing the above section of this book, then § 1074.

See, also, *Long v. Granberry*, 2 Tenn. Ch., 85; *Winchester v. Winchester*, 1 Head, 460; *Frazer v. Sypert*, 5 Sneed, 100.

<sup>16</sup> *Long v. Granberry*, 2 Tenn. Ch., 85. It is suggested that the better practice would be, to combine the two methods: 1st, To present the bill sworn to in due form, containing the former pleadings and decree, and setting forth the new evidence and its materiality and recent discovery; and, 2nd, To show, by separate affidavit, the details of the discovery of the new evidence, the degree of diligence used, the circumstances rebutting any seeming want of diligence, and all other matters necessary to show that the case is one in which leave should be granted. See *Puryear v. Puryear*, 5 Bax., 640; *Frazer v. Sypert*, 5 Sneed, 100.



contain these essentials, and is properly verified, the Court having regard to the substance and not to the form, would on motion, allow such a bill to be filed without further requirements. But even when the Court has granted leave to file such a bill, or any other bill of review for new matter, the defendant thereto is not in any way precluded from moving to dismiss it, or from demurring to it, or from making any other defence to it.<sup>17</sup>

§ 1243. **When Leave may be Properly Denied.**—The leave to file a bill of review for newly discovered evidence is not a matter of right, even when all the ordinary prerequisites have been complied with, but rests in the sound discretion of the Court. It may, therefore, be refused, although the facts, if admitted, would change the decree, and although good diligence in discovering such facts be shown, where the Court, looking at all the circumstances, shall deem it injurious to innocent parties, or otherwise unadvisable, to allow further litigation.<sup>18</sup>

And on the hearing of the application for leave, the Court may look to the record in the case sought to be reviewed, and may consider any matter therein that avoids the allegations of the proposed bill of review.<sup>19</sup>

## ARTICLE V.

### FRAME AND FORM OF A BILL OF REVIEW.

§ 1244. General Requisites of the Frame.

§ 1245. What a Bill of Review for Error of Law Should Show.

§ 1246. What Should be Stated in a Bill of Review for New Proof.

§ 1247. Essentials of a Bill of Review.

§ 1248. Forms of Bills of Review.

§ 1244. **General Requisites of the Frame.**—In a bill of this nature, it is necessary to state: 1, the former bill, and the proceedings thereon; 2, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and 3, the specific ground of law, or new proof discovered, upon which he seeks to impeach it. No errors can be noticed except those specified in the bill of review.<sup>1</sup> And if the decree is impeached on the ground of new proof, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery.

The bill may simply pray that the decree may be reviewed, and altered or reversed, in the point complained of, if it has not been carried into execution. But if the decree has been carried into execution, the bill should 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.

If the original suit has become abated, the bill may, also, be at the same time a bill of revivor. And a supplemental bill may likewise be added, if any event has happened which requires it. If any person not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement. All the parties to the original bill ought to be made

<sup>17</sup> Long v. Granberry, 1 Tenn. Ch., 85; Burson v. Dosser, 1 Heisk., 754. In this case, a demurrer was sustained after leave given to file the bill.

<sup>18</sup> 2 Dan. Ch. Pr., 1577, note; Winchester v. Winchester, 1 Head, 489; Harris v. Edmondson, 3 Tenn. Ch., 211; Frazer v. Sybert, 5 Sneed, 100; Maddox v. Apperson, 14 Lea, 617.

<sup>19</sup> Proudfit v. Pickett, 7 Cold., 563. And see Bur-

son v. Dosser, 1 Heisk., 754; Hurt v. Long, 6 Pick., 445. As to the practice in filing bills of review, and supplemental bills in the nature of bills of review, for new matter, see Hardwick v. American Can Co., 7 Cates, 393.

<sup>1</sup> 2 Dan. Ch. Pr., 1576, note 6; 1580; Frazer v. Sybert, 5 Sneed, 100.

parties to the bill of review, either as complainants or as defendants, for no one ought to be affected by any decree without first being heard.<sup>2</sup>

A bill of review, defective in frame, may sometimes be sustained as a cross bill,<sup>3</sup> or as an original bill.<sup>4</sup>

**§ 1245. What a Bill of Review for Error of Law Should Show.**—When the bill seeks to review a decree for error of law apparent, it should not only state fully the pleadings and decree, but should either file a transcript of them as an exhibit, and make such transcript a part of the bill itself, so as to be considered on demurrer; or, if it seeks no other relief but a review of errors apparent, it should be filed in the original cause, and make the original pleadings and decree a part thereof, by proper averments and prayers. But if the bill of review also partakes of the character of an original bill, it would not be proper to file it in a cause already in Court. Nevertheless, in whatsoever manner the bill seeks to review a decree for error of law apparent, it should so bring such decree, and the antecedent pleadings, before the Court that, on demurrer, the Court may, by an inspection of such decree and pleadings, finally determine the question whether the errors pointed out in the bill of review exist or not.<sup>5</sup> The practice is, to look into the pleadings and decree in the original case on the hearing of a demurrer to a bill of review for error of law apparent, and the Court would no doubt be justified in so doing even though the bill of review did not properly incorporate them, or make them a part of itself.<sup>6</sup>

Where the bill seeks to review errors of law only, no reference to the former evidence is proper, and any reference to new evidence would be mere surplusage. The bill must be rigorously confined to errors of law, apparent from an inspection of the decree complained of and the antecedent pleadings. Every matter outside of these should be kept outside of the bill.

In drawing a bill of review for error of law apparent on the face of the decree complained of, the draftsman must keep in mind that on such a bill: 1, Nothing can be looked to except the pleadings and decree in the original cause, and the errors therein specifically designated by the bill of review; 2, No part of the evidence whatever in the original cause can be looked to for any purpose whatever; 3, No error in admitting or in excluding evidence, and no erroneous deductions from evidence, and no overlooking of evidence, can be considered; 4, No error of fact to be ascertained by examination of the evidence can be presented or regarded, however glaring such error may be; 5, No new evidence can be brought forward, however strong, for any purpose; and 6, That a bill of review for error of law apparent does not open up the whole case, as does an appeal or writ of error in an appellate Court. The language of the ordinance is plain and inelastic. The error to be complained of, in such a bill, must be "error of law appearing in the body of the decree without further examination of matters of fact." Nevertheless, our Reports show the filing and dismissal of many bills of review for error of law apparent, the draftsmen of which relied *not* on errors apparent, but on errors to be made apparent, forgetful of the inflexible and inexorable rule that on such bills there can be no "further examination of matters of fact." The stumbling-block in drawing such bills

<sup>2</sup> 2 Barb. Ch. Pr., 97-98; 2 Dan. Ch. Pr., 1580; Sto. Eq. Pl., § 420; Fuller v. McFarland, 6 Heisk., 79. In this case the bill was dismissed on demurrer because of the want of a material party. This was a harsh ruling, the ordinary practice in such cases being to allow an amendment to bring in the party omitted. Gray v. Hays, 7 Hum., 588. See, also, ante, § 111.

<sup>3</sup> 2 Barb. Ch. Pr., 98.  
<sup>4</sup> Donaldson v. Nealis, 24 Pick., 638. The true question in such a case is, not what name is given to the bill, but does the bill set forth a case for relief. See, ante, §§ 43; 269; 431, note 4; 681; 719; 139, note 19.

<sup>5</sup> Bursan v. Dosser, 1 Heisk., 758; Anderson v. The Bank, 5 Sneed, 661.

<sup>6</sup> The original pleadings and decree were exam-

ined by the Court, on demurrers to bills of review for error of law apparent, in the following cases: Bursan v. Dosser, 1 Heisk., 754; Brown v. Severson, 12 Heisk., 381; Rogers v. Dibble, 6 Lea, 74; Livingston v. Noe, 1 Lea, 55; Arnold v. Movers, 1 Lea, 308; Durant v. Davis, 10 Heisk., 522; Sanderson v. Gregory, 3 Heisk., 578; as well as in other cases; and in every case it was assumed to be the proper practice so to do. So that it may be safely laid down as a rule of practice that, on demurrer to a bill of review for error of law apparent, the pleadings and decree in the original case may be looked to as though they were a part of the bill of review, for the purposes of ascertaining whether the bill is proof against the demurrer. Hurt v. Long, 6 Pick., 445.

seems to be a failure to discriminate between bills of review for errors of law apparent, and bills of review for new proof recently discovered, coupled with a failure to recognize the fact that bills of review are not intended as a substitute for appeals or writs of error to the proper appellate Court.

**§ 1246. What Should be Stated in a Bill of Review for New Proof.**—In addition to setting forth the pleadings and decree as heretofore stated, the new proof on which a bill of review is rested must be so stated in the bill, as to enable the Court to determine that the evidence, when produced, will be controlling; and that the complainant has been guilty of no negligence in not discovering and producing it on the former hearing. It is not sufficient for the bill to state that the complainant expects to prove certain facts, but he must state the exact evidence he can produce to establish them.<sup>7</sup> And the bill should be so drawn as to enable the Court to determine these matters upon a demurrer.<sup>8</sup>

**§ 1247. Essentials of a Bill of Review.**—For convenience in drafting bills of review, and in testing their validity when drawn, the following summary of their essentials is given:

**I. Whether Based on Law, or on Facts.**

1. The decree sought to be reviewed must be final, and beyond recall or change by the Court pronouncing it.

2. The bill must be filed by a party, or his heirs, executor, administrator, or other privy aggrieved by the decree complained of.

3. The bill must be filed in the Court that rendered the decree complained of, unless the decree was rendered by an appellate Court, and then it must be filed in the Court from which the case was carried to the appellate Court.<sup>9</sup>

4. All the parties to the original decree, and, also, all persons who have subsequently become interested under the decree, must be made parties.

5. The bill must be brought, or motion therefor made, within three years from the date of the decree, or the removal of a disability to sue.

**II. If Based on Error of Law, Alone.**

1. The error must be specifically pointed out.

2. The error must be manifest when pointed out, and not be a doubtful point of law.

3. This error must appear in the body of the decree, the pleadings being considered as a part of the decree, in such a case.

4. No error arising from the evidence, or the illegality or absence of evidence, in the cause sought to be reviewed, can be considered, except in so far as such evidence may appear in the pleadings, or be stated in the decree.

**III. If Based on Newly Discovered Facts, Alone.**

1. The facts must not be merely cumulative, but of such a cogent nature as to have been decisive, if they had been before the Court at the hearing.

2. These facts must have been discovered too late to have been used at the hearing.

3. There must have been no want of diligence in not previously discovering these facts.

4. These facts must be pertinent to the controversy, and proper to be used on the issues made by the pleadings.

5. Leave to present these facts in a bill of review must be obtained of the Court, by motion supported by affidavit, or by sworn petition, or by presenting the bill itself, so drawn as to include the matter of a petition.

6. The affidavit, petition, or bill should be verified by the party in person, and not by his agent, or Solicitor, unless good reason therefor be shown.

**§ 1248. Forms of Bills of Review.**—As already stated, a bill of review must recite the filing of the former bill, its object, the proceedings thereon, the

<sup>7</sup> *Livingston v. Noe*, 1 Lea, 59; *Burson v. Dossor*, 1 Heisk., 761; *Maddox v. Apperson*, 14 Lea, 618; *McGuire v. Gallagher*, 11 Pick., 349.

<sup>8</sup> *Burson v. Dossor*, 1 Heisk., 761.

<sup>9</sup> As to what decrees of an appellate Court, if any, can be reviewed, see, *ante*, § 1228.

decree, the point in which the complainant considers himself aggrieved by it, and the ground of law or fact upon which he seeks to impeach it; and must pray that the decree may be reviewed and reversed, and the desired relief granted. The following is a form of a

**BILL OF REVIEW FOR ERRORS AT LAW.**

To the Hon. Thos. M. McConnell, Chancellor, holding the Chancery Court at Chattanooga: Richard Roe, executor of David Doe, deceased, and Charles Jones, by

Henry Jones, his next friend, both residents of Hamilton county, complainants,

*vs.*

Rachel Doe, a resident of the same county, defendant.

Complainants respectfully show to the Court:

I.

That on the 10th day of January, 1890, the defendant, Rachel Doe, filed her original bill in this Court against them, alleging that she was the widow of David Doe, complainant Roe's testator, that her husband died without leaving any lineal descendants, that she was his widow, that he devised all his personal estate to the complainant, Charles Jones, that she had, in due time and form, dissented from his will, and claiming that by reason of the premises she was entitled to all of the said personal estate remaining after the debts of the testator were paid, and praying to have the same decree to her.

II.

Complainants answered said bill admitting all the material facts thereof except that she was the widow of the said David Doe. And thereupon proof having been taken, the cause was heard at the last term of this Court, and a decree pronounced, adjudging that the now defendant, Rachel Doe, was the widow of David Doe, deceased, and entitled to all of his personal estate remaining after the payment of his debts, and of the expenses of executing his will; and a reference was made to the Master to take the necessary account, which reference is now pending. All of which matters will more fully appear by reference to the record in said cause, which reference is here made.

III.

Complainants show further to your Honor, that they are aggrieved by said decree, and ought not to be bound thereby, and that said decree is erroneous, and ought to be reviewed and reversed and set aside, for the reason<sup>10</sup> that the effect of the dissent of the defendant as widow did not entitle her to all the said residue of said personal estate, but to only one-third thereof, and that the complainant, Charles Jones, is entitled to the other two-thirds, and the same should have been decreed to him, instead of to her.<sup>11</sup> And for this error in said decree, apparent on the face thereof, complainants bring this their bill of review to be relieved in the premises.

IV.

The premises considered, complainants pray:

1st. That proper process issue to compel the defendant, Rachel Doe, to answer this bill [but her oath to her answer is waived.]

2d. That said decree may be reviewed, reversed and set aside to the extent of the error hereinbefore complained of;<sup>12</sup> and

3d. That complainants may have such other, further, and general relief as they may be entitled to at the hearing.

ROBERT PRITCHARD, Solicitor.

**BILL OF REVIEW FOR NEW MATTER.**

*[A bill of review for new matter is substantially of the same form as a bill of review for errors of law. Supposing, in the foregoing form, that proof had recently been discovered that Rachel Doe had been duly divorced by her husband, in the State of Pennsylvania, where they lived until David Doe moved to Tennessee, the third paragraph of the foregoing form would be so modified from the words "reversed and set aside" as to read:]*

III.

— for the following errors therein:

1st. The effect of the dissent of the defendant as widow did not entitle her to all the residue of said personal estate, but only to one-third thereof, and that the complainant, Charles Jones, is entitled to the other two-thirds, and the same should have been decreed to him instead of to her, which error is apparent on the face of said decree.

2d. Since said decree, and within the last thirty days, complainants have discovered the facts to be that the defendant, Rachel Doe, was not the lawful wife of the testator, David Doe; but that they had been lawfully divorced in the State of Pennsylvania, shortly before the said David Doe removed to this State; that said David sickened and died soon after coming here, and complainants knew nothing of his marital relation, and knew nothing of

<sup>10</sup> If there be more errors than one, the phraseology should be: *For the following errors therein appearing on its face:*

<sup>11</sup> If the bill assails the entire decree, this allegation should be: *No decree ought to have been pronounced in favor of the then complainant, and her said bill ought to have been dismissed.*

<sup>12</sup> If the errors complained of entitle the complainants to have the whole decree reversed, this prayer should be: *2d. That said decree may be reviewed, reversed, and set aside, and no further proceedings be had thereon, and that said bill be dismissed.*

his family and kindred. Complainant Charles Jones is a minor of tender years, incapable of conducting a lawsuit, and has no relatives or acquaintances in Pennsylvania, they and he having always lived in Tennessee. The defendant, Rachel Doe, produced certified evidence of her marriage to the said testator, and complainants were thereby deceived and lulled into acquiescence in her claims of widowhood. Complainants file the transcript of the record of said divorce, which shows the defendant to be an artful, treacherous, and adulterous woman, and make it an exhibit to this bill, and mark it "Exhibit A," and will read it at the hearing. (The Clerk, however, will not copy it in making a copy of this bill for the defendant.) The defendant hurried her case to a hearing at the first term, which came only twenty-seven days after the bill was filed, and complainants charge that her purpose in delaying the filing of the bill, and in hastening the hearing, was to prevent complainants from making investigation into her said claim. Complainants did not know these new facts when said decree was pronounced, and could not by reasonable diligence have known them previous to said decree: this is especially true of complainant, Charles, by reason of his tender age and the foregoing facts. And these new matters complainants are advised, and charge, entitle them to have said decree wholly reversed, and set aside, and said bill dismissed.

IV.

Therefore, complainants come into your Honor's Court, and the premises considered, pray:

1st. That proper process issue to compel the defendant, Rachel Doe, to answer the bill, but her oath to her answer is waived.

2d. That said decree may be reviewed, reversed and set aside, and the said bill by the defendant filed against complainants may be dismissed.

3d. That complainants may have such other, further, and general relief as they may be entitled to at the hearing.

ROBERT PRITCHARD, Solicitor.

[*Annex affidavit and jurat. See § 789, ante.*]

## ARTICLE VI.

### DEFENCES TO A BILL OF REVIEW.

§ 1249. Defences to a Bill of Review for Error of Law.

§ 1250. Defences to a Bill of Review for New Proof.

§ 1251. Demurrers to Bills of Review.

§ 1252. Form of a Demurrer to a Bill of Review.

§ 1253. Form of a Demurrer and Plea to a Bill of Review.

§ 1249. **Defences to a Bill of Review for Error of Law.**—If a bill of review for error of law fairly state the pleadings and the decree complained of, a demurrer is the proper defence.<sup>1</sup> In our practice, it is usual not only to state fully the pleadings and decree, but also to make them exhibits to the bill of review for greater certainty; and to pray that they may be taken and treated as a part of the bill, for all the purposes thereof.<sup>2</sup> When this is done, a demurrer will be decisive of the case: if the issue be in favor of the demurrant, the bill will be dismissed; and, if in favor of the complainant, the prayer of the bill will be allowed, and the decree complained of will be reviewed, and reversed, altered or explained, in the matters specially complained of, as justice may require.<sup>3</sup>

<sup>1</sup> *Randall v. Payne*, 1 Tenn. Ch., 452; *L. & M. R. R. v. Rainey*, 7 Cold., 430; *Saunders v. Gregory*, 3 Heisk., 578.

<sup>2</sup> *Anderson v. Bank*, 5 Sneed, 661. In this case, the Supreme Court say: "The bill is defective in not exhibiting the record which it proposes to review, for the inspection of the Court. It will not do to call upon the other side to produce;" it, the complainant must make it a part of his case." It is true, the bill in this case was filed in the Chancery Court at Tazewell to review a decree of the Chancery Court at Rogersville; and it is, also, true that the syllabus seems to confine the rule as to exhibiting the record, to such a case. The rule, however, is a good one in all cases; and the Court does not confine the rule to the exceptional case, as does the Reporter. In *Burson v. Dossor*, 1 Heisk., 758, Judge McFarland says: "The action of the Court upon a demurrer to a bill of review, for errors apparent on the face of the record, necessarily disposes of the whole case. Whether or not the error appears, must be determined from the bill and the original record,

and cannot be changed by an answer to the bill of review, or proof." This is certainly the logical view of the matter. And in *Hurt v. Long*, 6 Pick., 445, it is laid down that, under our practice, upon a demurrer against opening the decree, the original decree, and the pleadings in the case in which it was pronounced, are before the Court for inspection to determine whether the alleged errors exist or not. *Durant v. Davis*, 10 Heisk., 522.

<sup>3</sup> 2 Dan. Ch. Pr., 1583; *Sto. Eq. Pl.*, § 634; *Burson v. Dossor*, 1 Heisk., 758; *Durant v. Davis*, 10 Heisk., 522. An examination of the reported cases will show that nearly all the bills of review for error of law apparent have been finally determined on demurrer; and that, on the hearing of the demurrer, the pleadings and decree in the original cause were considered by the Court. Such is the correct practice. *Saunders v. Gregory*, 3 Heisk., 578; *Hurt v. Long*, 6 Pick., 445. The contrary rule was laid down in *L. & M. R. Co. v. Rainey*, 7 Cold., 431.

But if the bill of review fails to set forth the pleadings and decree fully and fairly, the defendant may plead the original pleadings, and decree in bar of the bill of review, and demur to the relief sought by the bill on the ground that there is no error of law in the decree.<sup>4</sup> Or the defendant may make both of these defences by answer under our statute,<sup>5</sup> and set out therein such parts of the decree as the complainant has omitted or mistated, or may exhibit to the answer a certified copy of the pleadings and decrees; or may make the original record an exhibit. The defendant may also set up in his answer any matter of defence that would avail as a plea, such as: 1, that the decree complained of was made by consent;<sup>6</sup> or 2, that the matters contained in said decree have been adjusted since the decree, on valuable considerations; or 3, that complainant has in some other way debarred or estopped himself from having the decree re-opened;<sup>7</sup> or 4, any other matter proper for a plea in bar, such as the defence of innocent purchaser.<sup>8</sup>

A bill of review for error of law may be filed as a matter of right, and no leave therefore is necessary; and when error of law and discovery of new proof are joined in the same bill, the bill may be dismissed in so far as it sets up new proof, for want of leave to file it; but such dismissal will not take it out of Court as to the error of law apparent.<sup>9</sup> A demurrer to the whole bill will, also, be overruled if the bill can, on its face, be sustained either for error of law or for new matter, and yet not for both. The demurrer must be confined to so much of the bill as is demurrable, or such demurrer will be overruled.<sup>10</sup>

§ 1250. **Defences to a Bill of Review for New Proof.**—A bill of review on the discovery of new proof should state the newly discovered evidence and its pertinency with such particularity and fullness, and should set forth the time and manner of its discovery, and the circumstance of diligence connected therewith, with such definiteness, as clearly to show the complainant's right to have the decree complained of reviewed as prayed. If he fails so to do in his bill, a demurrer will lie to it for want of these essentials: for our practice requires that in such bills, the complainant should make such a full and specific statement of the various grounds on which his bill is based, that their sufficiency may be fully tested by demurrer.<sup>11</sup>

If the bill be proof against a demurrer, the defendant may answer and traverse the allegation that the evidence offered is newly discovered; and may set up in avoidance of such new matter any defence that would have availed if such new matter had been charged in the original bill.<sup>12</sup> The defendant may also show that the decree was made by consent, or plead a release, compromise, or any matter in estoppel, or any other matter in bar, as shown in the preceding section.

If the bill of review be both for error of law and for new proof, and be maintainable on one of these grounds, only, a demurrer to the whole bill wou'd be too broad, and would for that reason be overruled.<sup>13</sup> The demurrer should be specifically confined to so much of the bill as it will destroy, and the balance of the bill should be otherwise answered unto.<sup>14</sup>

If a bill of review for new proof be filed without leave given in open Court, it may, on motion, be taken from the files;<sup>15</sup> and if demurred to for want of such leave, the Court may treat the demurrer as equivalent to a motion to

<sup>4</sup> L. & M. R. R. v. Rainey, 7 Cold., 430; Hurt v. Long, 6 Pick., 445.

<sup>5</sup> Code, § 4319. See Randall v. Payne, 1 Tenn. Ch., 452; Burson v. Dosser, 1 Heisk., 758.

<sup>6</sup> 2 Dan. Ch. Pr., 1583, note. A consent decree obtained by fraud may be impeached by bill for that purpose. *Ante*, § 935.

<sup>7</sup> Sto. Eq. Pl., § 833.

<sup>8</sup> Livingston v. Noe, 1 Lea, 66.

<sup>9</sup> Colville v. Colville, 9 Hum., 524.

<sup>10</sup> *Ibid.*, *ante*, § 306.

<sup>11</sup> Burson v. Dosser, 1 Heisk., 761; Harris v. Edmundson, 3 Tenn. Ch., 211.

<sup>12</sup> Sto. Eq. Pl., § 834; 2 Dan. Ch. Pr., 1584.

<sup>13</sup> Colville v. Colville, 9 Hum., 524.

<sup>14</sup> *Ante*, § 306; 403.

<sup>15</sup> Colville v. Colville, 9 Hum., 524; Finley v. Taylor, 8 Bax., 237; Wilson v. Wilson, 10 Yerg., 200; Dance v. McGregor, 5 Hum., 428.

dismiss for want of leave.<sup>16</sup> But a demurrer to a bill of review on other grounds is a waiver of the objection that the bill was filed without leave.<sup>17</sup>

§ 1251. **Demurrers to Bills of Review.**—Such demurrers have already been considered;<sup>18</sup> and it is only necessary to say that where the error alleged is one of law apparent upon the decree, the practice now is, in Tennessee, to test the validity of the bill by demurrer;<sup>19</sup> and, on the argument of the demurrer, to consider the pleadings in the original suit, and the decree complained of, as though they were incorporated in full in the bill of review.<sup>20</sup> Indeed, a bill of review for error apparent is but little more than a demurrer itself, the errors alleged being in the nature of grounds of demurrer, and the pleadings and decree in the original suit being in the nature of a bill, or a declaration.<sup>21</sup>

On the hearing of a demurrer to a bill of review for error apparent, the evidence cannot be looked into or considered for any purpose whatsoever, no matter what manifest error or injustice in the decree may appear by an examination of the evidence. If the party wishes the evidence reviewed, he must take the case to the proper appellate Court.

A demurrer will lie to a bill of review for error apparent:

1. If there be no material error apparent on the face of the pleadings and the decree.

2. If there be no such error which aggrieves the complainant, and of which he has the right to complain.

3. If the bill be filed before the Court has lost control of the decree complained of; or

4. If the bill be filed after the period limited by statute for the filing of such bills, and its allegations do not bring the complainant within any statutory exceptions to the limitation.<sup>22</sup>

§ 1252. **Form of a Demurrer to a Bill of Review.**—The following form contains various grounds of demurrer, all of which perhaps never will appear in any one bill, but some one or more of them may exist in any case.

#### DEMURRERS TO A BILL OF REVIEW.<sup>23</sup>

[Give the usual caption and commencement of a demurrer as in § 310, ante.]

##### I.

That there is no such material error of law in the decree complained of as complainant in his bill alleges; but on the other hand the decree is correct in the particular set out in the bill as a ground of review.

##### II.

That the error complained of, if it exists as complainant avers, is not an error that aggrieves him, nor is he injured thereby, nor is it one of which he has the right to complain.

##### III.

That the alleged newly discovered evidence, if true and proved, would not warrant the Court in reviewing the decree in the particulars complained of, said evidence not having the probative force requisite in such a case.

##### IV.

That admitting the newly discovered evidence would warrant the Court in reviewing the decree as prayed, nevertheless the bill does not affirmatively show that measure of diligence on the part of the complainant either in making the discovery, or in the bringing of the suit after the discovery, requisite in such a case.

##### V.

That the bill shows on its face that it was not brought within three years from the time of pronouncing the decree complained of, and the allegations of the bill do not show that complainant has been laboring under any statutory disability.

[Conclude as in § 310, ante.]

<sup>16</sup> Finley v. Taylor, 8 Bax., 237; Knight v. Atkinson, 2 Tenn. Ch., 384. Or the Court may directly sustain the demurrer, and dismiss the bill. Jackson v. Jackson, 3 Shan. Cas., 18.

<sup>17</sup> Dance v. McGregor, 5 Hum., 428; Saunders v. Gregory, 3 Heisk., 578.

<sup>18</sup> See, ante, §§ 1249-1250.

<sup>19</sup> Saunders v. Gregory, 3 Heisk., 578.

<sup>20</sup> Hurt v. Long, 6 Pick., 445; Durant v. Davis, 10 Heisk., 322.

<sup>21</sup> See, ante, § 1236.

<sup>22</sup> Sto. Eq. Pl., §§ 634-635.

<sup>23</sup> On the hearing of a demurrer to a bill of review for error of law, the original decree and the original pleadings may be looked into, in order to ascertain whether there be any such error or errors in the decree as the complainant, in his bill of review, alleges. The whole question, whether there be errors of law, will be determined on a demurrer, and no plea or answer is necessary. Hurt v. Long, 6 Pick., 445; Burson v. Dossier, 1 Heisk., 758.

§ 1253. **Form of a Demurrer and Plea to a Bill of Review.**—If the bill of review for error of law fails to fully set forth the pleadings and decree in the original cause, the defendant may set them up by a plea, and demur to the relief on the ground that there is no error of law in the decree.

**DEMURRER AND PLEA TO A BILL OF REVIEW.**

John Doe, }  
 vs. } No. 987.—In Chancery, at Knoxville.  
 Richard Roe. }

The demurrer and plea of the defendant to the bill of review filed against him in this cause.

The defendant for demurrer to so much of the bill as prays to have the original decree opened and reviewed for error of law, says that there is no such error of law in said decree as the complainant supposes, and that said decree contains no error of law of which the complainant can complain, and that said decree contains no error.

The defendant, not waiving his said demurrer, but relying thereon, for plea to so much of the said bill as undertakes to set forth the [pleadings and] decree in the original cause, says that the said bill does not truly set forth said [pleadings and] decree;<sup>24</sup> therefore the defendant pleads said [pleadings and] decree, which are in the words and figures following: [*Here set out the (bill, answer and) decree in the original cause, in full.*]

And the defendant demands the judgment of the Court whether he shall be compelled to make any other or further answer to said bill of review. V. A. HUFFAKER, Solicitor.

<sup>24</sup> If the bill sets forth the pleadings correctly it will be necessary to plead the decree only. As to this method of defence by demurrer and plea, see *Hurt v. Long*, 6 Pick., 445.



## CHAPTER LXX.

## WRITS OF ERROR CORAM NOBIS IN THE CHANCERY COURT.

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| <p>§ 1254. Office of a Writ of Error <i>Coram Nobis</i>.</p> <p>§ 1255. When a Writ of Error <i>Coram Nobis</i> Will Lie.</p> <p>§ 1256. When and How the Writ is Obtained.</p> <p>§ 1257. Frame of the Petition.</p> | <p>§ 1258. Forms of Petitions for a Writ of Error <i>Coram Nobis</i>.</p> <p>§ 1259. Proceedings Upon the Petition.</p> <p>§ 1260. Proper Practice in Chancery Upon a Petition.</p> <p>§ 1261. Hearing, and Decree.</p> |
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§ 1254. **Office of a Writ of Error Coram Nobis.**—A writ of error *coram nobis* is equivalent to an original bill in the nature of a bill of review;<sup>1</sup> and its office is to enable a Court to correct its own judgment or decree when, while just on its face, it is nevertheless unjust in fact, because of a matter of fact not before the Court when the judgment or decree was rendered, which matter the party injured was prevented from bringing before the Court, because he had no notice of the writ, or was under disability, or was prevented by surprise, accident, mistake or fraud, without fault on his part.<sup>2</sup> It is called a writ of error *coram nobis* because the record sought to be corrected by the writ remains, and is to remain “before us,” that is, in the Court issuing the writ.<sup>3</sup> The writ does not lie to enable the petitioner to obtain the benefit of newly discovered evidence,<sup>4</sup> or to controvert any fact already adjudicated upon issues made up, or to dispute the probative force of the evidence upon which the adjudication was based, or to show an error of law upon the face of the record. And in a Court of law the writ does not lie to contradict or dispute any return of an officer,<sup>5</sup> or any fact recited in the judgment, or otherwise appearing affirmatively in the record. But in the Chancery Court the rule is different, and if the record recites any jurisdictional fact which is false, or if the officer’s return show service of subpoena on the petitioner, when in fact there has been no service, or if the record show an appearance by counsel, when in fact petitioner had no counsel, and made no appearance, upon a petition for a writ of error *coram nobis* in the Chancery Court, the record as to these matters may be contradicted and shown to be false by parol proof, as on a bill to impeach a decree for fraud.<sup>6</sup>

The grounds of this remedy are errors of fact, and not errors of law;<sup>7</sup> and these errors of fact must be matters which do not appear on the face of the record. Errors of fact which do appear of record cannot be corrected by this method of procedure; they must be corrected by a motion for a new trial, or a rehearing, or a bill of review, in the same Court; or by appeal, or writ of error, in the proper appellate Court.<sup>8</sup>

§ 1255. **When a Writ of Error Coram Nobis Will Lie.**—This writ is intended for the correction of decrees erroneous in fact, where the party ag-

<sup>1</sup> Willis v. Willis, 20 Pick., 382, citing § 1092, now § 1260, of this book.

<sup>2</sup> Code, §§ 3110; 3116. The decisions of the Supreme Court in cases at law, and especially in cases prior to the Code, are not to be followed in Chancery, without diligently discriminating between (1) the practice at law and the practice in Equity, and (2) between the law in reference to this writ before the Code and the law in the Code. The Code, § 3116, adds a new and most extensive ground of jurisdiction in cases of writs of error *coram nobis*, to-wit: surprise, accident, mistake, or fraud, without fault on the petitioner’s part. Tibbs v. Anderson, 1 Thomp. Cases, 268. This new ground is almost co-extensive with the remedy in Equity in such cases, and was, no doubt, intended to be so exercised.

<sup>3</sup> 6 A. & E. Ency. of Law, 810. As a matter of fact, no writ of error issues, the petition and notice of it being filed, and *supersedeas*, when necessary, being in lieu of the writ.

<sup>4</sup> Tibbs v. Anderson, 1 Thomp. Cases, 264.

<sup>5</sup> Baxter v. Ervin, 1 Thomp. Cases, 175.

<sup>6</sup> Leftwick v. Hamilton, 9 Heisk., 310. The opinion of the Court, in this case, by Turney, afterwards Chief Justice, shows how a Court of Equity can disenthrall itself from the entanglements of technicalities in cases where a Court of law would be so enmeshed by its own rules to be powerless to do justice.

<sup>7</sup> Upton v. Phillips, 11 Heisk., 215.

<sup>8</sup> Patterson v. Arnold, 4 Cold., 368; Brandon v. Diggs, 1 Heisk., 476.

grieved by the error was in no fault, but was prevented from making his defence by reason of some one or more of the following facts:

1. Want of Notice of the Suit in which the decree complained of was rendered, coupled with a good defence on the merits. Thus, if a decree is rendered, on motion, against a person as surety on some bond executed in a cause in the Court, or a summary judgment is rendered on motion against a person as co-surety or principal, or as a sheriff, clerk, or deputy of either, or as Solicitor, or as otherwise liable to judgment on motion, such person may have such decree or judgment set aside by this proceeding: 1, if he had no notice of the judgment,<sup>9</sup> and 2, if he had a real defence to the motion. A real defence means a defence on the merits, such as (1) *non est factum*, (2) payment, (3) statute of limitations, (4) former judgment, (5) novation, and the like.<sup>10</sup>

2. Some Disability not appearing of record, such as infancy, coverture, or unsoundness of mind. Thus, if the person against whom the decree was rendered was, at its rendition, an infant, or married woman, or person of unsound mind, this fact not appearing of record, such person is entitled to this remedy to have the decree set aside.<sup>11</sup>

3. Some Surprise, Accident, Mistake or Fraud, which prevented the person aggrieved from making defence, he himself being without fault.<sup>12</sup> In such a case, the petitioner must show: 1, a real defence on the merits; 2, the specific facts constituting the surprise, accident, mistake or fraud; and 3, the absence of fault on his part, or on the part of his agents. 1. A judgment after a continuance would be a surprise.<sup>13</sup> 2. High water making the road to the Court impassable, or sudden and great sickness preventing the petitioner from either attending Court, or employing an agent, or Solicitor, would constitute an accident.<sup>14</sup> 3. Where a non-resident defendant supposed on sufficient grounds that he had employed an attorney to make defence, and the attorney happened to be one of the plaintiff's attorneys, the defendant being ignorant thereof, and as a consequence judgment by default and final judgment were rendered against him, this was held to be a case of mistake.<sup>15</sup> 4. Where the defendant's Solicitor drew his answer denying the equities of the bill, and a deposition was taken by consent disproving the bill, and both answer and deposition were delivered to the complainant's Solicitor on his promise to file them both

<sup>9</sup> But, in the Circuit Court, a party cannot, in this proceeding, show that he was not, in fact, served with process when the officer's return shows service. The party's remedy in such a case is a bill in Chancery. *Ridgeway v. Bank*, 11 Hum., 523. But his petition for a writ of error *coram nobis* will, in Chancery, be given all the force of a bill to impeach or avoid a decree, and on such petition the Chancery Court will allow the petitioner to dispute and disprove the officer's return that he was served with process. *Leftwick v. Hamilton*, 9 Heisk., 310.

<sup>10</sup> Code, §§ 3116-3117; *Crawford v. Williams*, 1 Swan, 341. See cases in our Digests under "Error Coram Nobis."

<sup>11</sup> Code, §§ 3116-3117; *Norris v. Wilber*, 1 Bax., 365. It would seem that if a party died before judgment, where his death was in no way noticed of record, his personal representative would be entitled to this remedy. *Crawford v. Williams*, 1 Swan, 346. If a decree be rendered against an infant or married woman without notice of their disability, and as though they were *sui juris*, such a decree is, nevertheless, valid, unless attacked by a petition for a writ of error *coram nobis*, or by a bill filed for that express purpose. *Andrews v. Andrews*, 7 Heisk., 234.

<sup>12</sup> The enlargement of this common law remedy so as to cover a part of the jurisdiction of the Courts of Equity does not, in any way, limit or lessen that jurisdiction. See *Starkey v. Hammer*, 1 Bax., 445; *ante*, § 37. The Code allows this writ in cases where the person seeking relief was prevented from making his defence, by surprise, accident, mistake, or fraud, without fault on his part. Code, § 3116. In such cases, also, a bill will lie in Chancery to enjoin the judgment, or grant the proper relief, or give a new trial. *Ante*, § 814. It was intimated in *Isler v.*

*Turner*, 7 Hum., 116, that if there be an unembarrassed and adequate remedy at law by writ of error *coram nobis* a bill in Chancery would not lie. In *Douglas v. Joyner*, 1 Bax., 32, the Supreme Court moved a step forward and held that the remedy by writ of error *coram nobis* and by a bill in Chancery were concurrent remedies where the judgment is assailed for want of notice. Now, it is believed, a Court of Chancery will, under the Act of 1877, ch. 97, grant relief on a proper case, whether the application be called a writ of error *coram nobis*, or a bill. Why deny justice which is substance, because of an error of nomenclature, which is form? *Majors v. McNeill*, 7 Heisk., 294; *Leftwick v. Hamilton*, 9 Heisk., 310; 314; *ante*, § 43; *Hicks v. Haywood*, 4 Heisk., 598. In this case, the petition does not seem to have been for a writ of error *coram nobis*, and yet it would seem that relief would have been granted upon it, as though it had prayed for such a writ, if merits had existed. See, also, *Jones v. Kincaid*, 5 Lea, 677, where it was held that a judgment at law, obtained by surprise, might be relieved against by bill in Chancery, as well as by a writ of error *coram nobis* at law; and in *Leftwick v. Hamilton*, 9 Heisk., 310, a petition for a writ of error *coram nobis* was treated as a bill to avoid a decree, and it was expressly adjudicated that on such a pleading the return of the officer might be attacked.

<sup>13</sup> *Crouch v. Mullenix*, 1 Heisk., 479; *Jones v. Kincaid*, 5 Lea, 677.

<sup>14</sup> *Napier v. Person*, 7 Yerg., 300. This was a *certiorari* case, but the principle applies to a *coram nobis* case. *Rice v. Bank*, 7 Hum., 39; *Burem v. Foster*, 6 Heisk., 339; *Rowland v. Jones*, 2 Heisk., 321.

<sup>15</sup> *Crawford v. Williams*, 1 Swan, 341.

with the Clerk and Master, instead of which he filed neither, but took an order *pro confesso*, and then a final decree, just as the term was about to close, in the absence of the defendant's Solicitor, and without his knowledge or consent, this would be a case of fraud.<sup>16</sup>

§ 1256. **When and How the Writ is Obtained.**—The writ of error *coram nobis* is obtained by a sworn petition therefor, presented to the Chancellor of the Court<sup>17</sup> making the decree, at his Chambers, or in open Court. The petition must be presented, allowed to be filed, and filed within one year from the rendition of the decree complained of.<sup>18</sup> No notice of the presentation of the petition need be given the adverse party. If, on reading and considering the petition, the Chancellor should be of opinion that a case for the writ is made out, he will endorse upon the petition his

#### FIAT FOR A WRIT OF ERROR CORAM NOBIS.

To the Clerk and Master of the Chancery Court at [place of Court making the decree complained of:]

Upon a prosecution bond being given, file this petition, and let it operate as a writ of error *coram nobis*, returnable to the first day of the next term. Notify the opposite party, or his Solicitor, of the filing of this petition, and the suing out of the said writ. [Upon the petitioners giving a special bond therefor, as prescribed by the statute, issue a *supersedeas* to stay all further proceedings upon the decree and execution complained of.<sup>19</sup>]

At Chambers, August 8, 1891.

B. M. WEBB, Chancellor.

The petitioner, having obtained this fiat, gives the bond required, and thereupon the Clerk and Master files the bond and the petition. No writ of error *coram nobis* in fact issues, the fiat of the Chancellor being in the nature of such a writ, and so operating, upon the prosecution bond being given and the petition filed.<sup>20</sup> The notice of the suing out of the writ must be served on the opposite party, or his Solicitor, at least ten days prior to the term of the Court to which the writ of error *coram nobis* is returnable.<sup>21</sup> This notice is usually issued by the Clerk and served by an officer;<sup>22</sup> but it would seem it may be given by the petitioner after the manner of giving notice of the taking of a deposition, or notice of a summary proceeding by motion.<sup>23</sup>

§ 1257. **Frame of the Petition.**—A petition for a writ of error *coram nobis* should be addressed to the Chancellor of the Court making the decree complained of, and should set forth fully and particularly the following:

1. The general facts of the existence and nature of the suit, the names of the parties, and the character and date of the decree complained of.

2. Such an error of fact, meritorious in its nature, as would have prevented the decree, at least, to the extent complained of, if the fact had duly appeared at the hearing.

3. That the petitioner was prevented from showing this fact because (1) he had no notice of the suit,<sup>24</sup> or (2) was under the disability of infancy, coverture, or insanity; or (3) he was the victim of surprise, accident, mistake or fraud, without fault on his part.

<sup>16</sup> Tucker v. James, 12 Heisk., 333.

<sup>17</sup> In Elliott v. McNairy, 1 Bax., 342, the question is raised, but not decided, whether the writ can be granted by any other Judge or Chancellor. It would seem from a consideration of the various sections of the Code pertinent to the question, that the doubt should be resolved in favor of the power of any Judge or Chancellor to grant the writ, it being in the nature of extraordinary process. Code, §§ 3915; 3946; 4434; Chadwell, *ex parte*, 7 Heisk., 630.

<sup>18</sup> Code, § 3111. Obtaining a fiat on the petition within the year is insufficient, if the petition itself be not filed and bond given within the year. Elliott v. McNairy, 1 Bax., 342; Cain v. Cocke, 1 Lea, 288. If the Clerk should file the petition and fiat within the year, and, by leave of the Clerk, bond be given before the next term, this would probably save the petitioner's right, as on bond being given it would relate to the filing of the petition and not *vice versa*, unless the fiat required the bond to first be given.

See, Code, § 3188. But, see Chester v. Foster, 6 Pick., 515.

<sup>19</sup> Code, §§ 3111-3113. Before the Chancellor's order shall operate as a *supersedeas*, the party applying shall give bond, with good security, in double the amount of the decree, conditioned to abide by and perform the decree of the Court. Code, § 3112.

<sup>20</sup> Elliott v. McNairy, 1 Bax., 342.

<sup>21</sup> Code, § 3113.

<sup>22</sup> Code, § 3115, shows that process may issue, or publication be made, as to the defendant.

<sup>23</sup> Crawford v. Williams, 1 Swan, 341; and cases there cited.

<sup>24</sup> If the officer's return show service of the writ on the petitioner, the return may be controverted, in Chancery. Leftwick v. Hamilton, 9 Heisk., 310. The rule in the Circuit Court is otherwise, because, at law, parol evidence cannot be heard to contradict a record. State v. Disney, 5 Sneed, 598; *ante*, § 814, notes.

4. And praying for a writ of error *coram nobis*, for proper process to notify the opposite party, and, if necessary, for a *supersedeas*.

This petition, after being duly verified, may be presented to the Chancellor at Chambers, or in open Court;<sup>25</sup> and he may, on granting the writ of error, also order it to operate as a *supersedeas*.<sup>26</sup> A petition for a writ of error *coram nobis* in the Chancery Court must: (1) inject into the case a fact that does not therein appear, but which, if it had appeared, would have either prevented the decree, or would have made it reversible on appeal; or (2) it must deny some fact appearing in the record which, if it had not appeared, would have prevented the decree, or would have made it reversible on appeal; and (3) the petition must, in either of these two cases, go further, and show that the petitioner was prevented from proving the new fact alleged in his petition, or from disproving the fact denied, by reason of want of notice, or some disability, or some surprise, accident, mistake, or fraud without fault on his part. And on alleging and proving the existence of one of these reasons for not making his defence, the decree will be recalled and annulled; and the petitioner allowed to make the defence set up in his petition.

§ 1258. **Form of a Petition for a Writ of Error Coram Nobis.**—The petition for a writ of error *coram nobis*, and, indeed, the proceedings on such a petition are very analagous to a bill for a new trial, or a bill to avoid a decree, and the proceedings thereon. Indeed, it would seem that one of the purposes of this remedy was to enable a party to obtain, in a less formal way, that redress ordinarily obtained by original bill in such cases.<sup>27</sup> The following is a

**GENERAL FORM OF A PETITION FOR THE WRIT.**

To the Hon. [name of] Chancellor, holding the Chancery Court at [town where the decree was made:]

A B, a resident of Davidson county, petitioner,<sup>28</sup> }  
 vs. }  
 C D, a resident of the same county, defendant. }

Your petitioner, [name of person aggrieved] respectfully shows to the Court:

I.

That on [date] a decree was pronounced against him in your Honor's Court in the case of C D, vs. A B, No. 4168, in favor of said C D for [number of] dollars. Petitioner is much aggrieved by said decree by reason of a material error of fact therein. Said decree was based upon [Here show, in full, the ground on which the decree was based, stating explicitly whether it was on a note, bond, or other evidence, of debt, and whether it was rendered against him as surety, or on some other ground. If an execution has issued on the decree, state the fact.]

II.

Your petitioner further shows that [Here set forth the petitioner's defence to said decree, to-wit, non est factum, failure of consideration, payment, former judgment, statute of limitations, novation, or other defence on the merits.]

III.

Your petitioner would have made said defence to said decree, but [Here show: 1, that he had no notice of said decree, or of any proceeding, or intention to proceed, against him in said cause; or 2, that he was prevented by some disability, specifying it, from showing or correcting such error; or 3, that he was prevented from making said defence by surprise, accident, mistake, or fraud, giving the particulars thereof in detail, and showing that there was no fault or negligence on his part, or on the part of his agent, or Solicitor.]

IV.

Your petitioner is advised that had the foregoing facts appeared at the hearing of said motion, [or, cause,] no decree would have been pronounced against him, and that by reason of said error of fact occurring in said proceeding, and said want of notice [disability, surprise, accident, mistake, or fraud, as the case may be,] he is entitled to a writ of error *coram nobis*,

<sup>25</sup> Code, § 3111.  
<sup>26</sup> Code, § 3111.

<sup>27</sup> The efficiency of this writ, and its scope, have been greatly enlarged by our statutes. *Patterson v. Arnold*, 4 Cold., 367; *Jones v. Pearce*, 12 Heisk., 286; *Tibbs v. Anderson*, 1 Thomp. Cases, 268. And, in a Court of Chancery, a petition for the writ will lie to attack the record itself, and will, in such a case, be given all the force of a bill to avoid or impeach a decree. *Leftwick v. Hamilton*, 9 Heisk., 310.

<sup>28</sup> The better practice in Chancery is to give the

petition a caption of its own, as though it were an original bill. The Code denominates the petitioner as the plaintiff in error, and the other party as defendant. Code, §§ 3114-3115. See, also, *Hicks v. Haywood*, 4 Heisk., 598; and *Leftwick v. Hamilton*, 9 Heisk., 310. In the Circuit Court the petition is usually, but not always, entitled as of the original cause. The petition, however, being a new suit, should be entitled as such, especially in Chancery. See, *Elliott v. McNairy*, 1 Bax., 345. A bill of review bears its own title.

to the end that said decree may, for said error of fact, be reversed and annulled; and he, therefore, prays:

1st. That your Honor, by proper fiat, will order this petition to be filed, and that notice thereof be issued and served on the said, [*naming the adverse party,*] requiring him to make defence at the next term of this Court; and that your Honor's said fiat operate as a writ of error *coram nobis*.

2d. That a writ of *supersedeas* be, also, ordered to be issued to stay all further proceedings on said decree, [and said execution,] until further order of your Honor.

3d. That at the hearing hereof, said decree be recalled, reversed and annulled;

4th. And that your petitioner may have all such other writs as may be necessary on a petition for a writ of error *coram nobis*, and that he may have all such other, further, and general relief as he may be entitled to by reason of the premises in a Court of Equity.

X Y, Solicitor.

A B, Petitioner.

[*Annex affidavit and jurat, as in § 789, ante.*]

The following is another and more specific form<sup>29</sup> of a

#### PETITION FOR A WRIT OF ERROR CORAM NOBIS:

To the Hon. W. F. Cooper, Chancellor, holding the Chancery Court at Nashville:

Pauline Wilber, a resident of Davidson county, petitioner,	} No. 6842.
<i>vs.</i>	
Lizzie Norris, a resident of the same county, defendant.	}

Your petitioner, Pauline Wilber, a resident of Davidson county, respectfully shows to your Honor:

#### I.

That on the 10th of April, 1871, a decree was pronounced against her, in the cause of Lizzie Norris *vs.* Pauline Wilber, No. 6842, in your Honor's Court, in favor of said Lizzie Norris, for the sum of two hundred dollars, and the costs of the cause. Petitioner is much aggrieved by said decree, by reason of a material error of fact therein. Said decree was based upon a bill taken *pro confesso*, and an alleged account for said sum, the account consisting of items of goods, wares and merchandise, alleged to have been sold to petitioner by the complainant in said cause. Petitioner denies that she, in law or equity, was ever liable for said account, or for any part thereof. Petitioner is a married woman, living with her husband, George Wilber, in the city of Nashville, and such of said items as were ever received by petitioner, were for the family of which her husband is the head.

#### II.

Petitioner further shows that she never, at any time, promised to pay for any of said items; and that many of them were never received, or used by her. She shows and avers that her husband has a good defence to the whole of said account, by reason of a cross account, or set-off, against the same, for work and labor done, and materials furnished for the complainant.

#### III.

Petitioner further shows to your Honor that she would have made said defence to said decree, but was prevented from so doing by reason of the fact that she had no notice of the proceedings in said cause, until the Sheriff came today with an execution to enforce said decree; and that the return of the officer showing service of subpoena upon her is utterly false, as she will be able abundantly to show, if given the opportunity. And petitioner further shows that she was at the time said suit was brought, and has ever since been under the disability of coverture, being a married woman, the wife of George Wilber, as before stated, and would thereby have been prevented from making said defence, had notice of said proceedings been given her.

#### IV.

Petitioner is advised that had the foregoing facts appeared at the hearing of said cause, no decree would have been pronounced against her; and that by reason of her said defence on the merits not appearing in the proceedings, and because of said disability, and said want of notice, she is entitled to a writ of error *coram nobis*, to have said decree recalled, reversed and annulled, and she therefore prays:

1st. That your Honor will, by proper fiat, order notice hereof to be served on said Lizzie Norris, who lives at No. 983, Summer Street, Nashville, requiring her to make defence to this petition at the next term; and that your Honor's said fiat shall stand and operate as a writ of error *coram nobis*.

2d. That a writ of *supersedeas* be ordered to be issued to stay all further proceedings on said decree, and on said execution, or else that a restraining order be made to the same end and effect.

3d. That at the hearing hereof said decree be recalled, reversed and annulled.

4th. And that your petitioner may have all such writs as may be necessary on a petition for a writ of error *coram nobis*; and may have all such other, further, and general relief, as she may be entitled to in a Court of Equity, by reason of the premises.

<sup>29</sup> This form is based upon the cases of *Norris v. Wilber*, 1 Bax., 365; and *Leftwick v. Hamilton*, 9 Heisk., 310.

And if a next friend for the petitioner be deemed necessary by your Honor, Frank Heart hereby joins in this petition in that character and capacity; and he in his own proper person avers on information and belief, that the foregoing facts are each and all true as hereinabove alleged, and he adopts this petition as next friend of said Pauline Wilber.<sup>30</sup>

W. M. ROBERTSON, Solicitor.  
State of Tennessee, }  
County of Davidson. }

PAULINE WILBER  
FRANK HEART.

Personally came Pauline Wilber and Frank Heart<sup>31</sup> and severally made oath that the statements made in their foregoing petition as of their own knowledge are true, and those made as on information and belief they believe to be true.

Sworn to and subscribed before }  
me this July 5, 1876. }  
JOHN JONES, D. C. & M. }

PAULINE WILBER  
FRANK HEART.

**§ 1259. Proceedings Upon the Petition.**—The opposite party, or his Solicitor, will be personally served with notice of the filing of the petition if either of them is a resident; if the opposite party be a non-resident, and have no known Solicitor in the State, the Court, Chancellor, or Master, upon affidavit of these facts, may order him to be notified by publication, as in other non-resident cases. The notice must be served ten days prior to the term specified in the notice, or the cause cannot be heard at that term without the consent of the party entitled to notice.<sup>32</sup>

The petition must contain the two following requisites: First, it must show some error of fact which if it had appeared at the hearing would have been a good defence, and would have prevented the decree complained of; and second, it must show that the petitioner was prevented from making said defence because (1) of want of notice, or (2) because of some disability, or (3) because of some surprise, accident, mistake or fraud, without fault on his part. If the petition fail to show either of said two requisites, or if showing them it is not filed within one year since the decree, it may be dismissed on motion.<sup>33</sup> The petition, however, may be amended on good cause shown, by affidavit, the new facts to be sworn to on the personal knowledge of petitioner, or of some other person acquainted with the facts.<sup>34</sup>

**MOTION TO DISMISS THE PETITION.**

John Bell, }  
vs. } No. 682.  
Henry Dunn. }

The defendant, Henry Dunn, moved the Court to dismiss the petition for a writ of error *coram nobis*.

1st. Because said petition was not filed within one year from the rendition of the decree complained of.

2d. Because the petition does not disclose a meritorious defence, the facts therein set up not being such as would have prevented the decree complained of had they judicially appeared at the hearing.

3d. Because the petition does not set up any sufficient reason for not making defence to said decree.

And said motion having been argued by both the parties the Court is pleased to allow the same, [or, to disallow the same.] It is therefore adjudged that said petition be dismissed, that the decree complained of be affirmed, and that the petitioner, Henry Dunn, and Frank Hill, his prosecution surety, pay all the costs incident to said petition, for which execution is awarded, [If a supersedeas issued render judgment on the bond therefor against the sureties, for the amount of the decree superseded, statutory interest thereon, and costs of the suit.<sup>35</sup>]

<sup>30</sup> Being a married woman, it might be urged that she must appear by next friend, and in *Leftwick v. Hamilton*, 9 Heisk., 310, that practice was followed. It is believed, however, that the Court would entertain her petition without a next friend. The complainant having sued her without a next friend, should be estopped to deny her a hearing should she make her defence without a next friend.

<sup>31</sup> In *Leftwick v. Hamilton*, 9 Heisk., 313, it was expressly decided that the next friend was the proper person to swear to the petition. In *Smith v. Republic L. Ins. Co.*, 2 Tenn. Ch., 631, it was expressly decided that the oath of the next friend amounts to nothing, and that the married woman must swear to her bill. Therefore, to be safe, let both swear to the petition. See, *ante*, § 785, note 4. An affidavit to

the petition by an "agent" is a nullity. *Reid v. Hoffman*, 6 Heisk., 440.

<sup>32</sup> Code, §§ 3113; 3115.

<sup>33</sup> *Gallena v. Sudheimer*, 9 Heisk., 189. This motion may be made at any term or time before issue is joined upon the errors assigned. *Elliott v. McNairy*, 1 Bax., 342.

<sup>34</sup> *Baxter v. Grandstaff*, 3 Tenn. Ch., 244.

<sup>35</sup> In all cases of affirmation of the judgment, or dismissal of the writ for any cause, where the original judgment has been superseded, judgment shall be rendered against the plaintiff in error and his sureties for the amount of the former judgment, with interest at the rate of twelve and one-half per cent. *per annum* from the rendition thereof, and all costs. Code, § 3114.

If no motion to dismiss is made, the Court may direct petitioner to assign errors according to the practice in the Circuit Court, or according to the rules prescribed for that purpose. This assignment must follow, and be strictly confined to, the errors specified in the petition.<sup>36</sup> The following assignment is based on the preceding petition:

**ASSIGNMENT OF ERRORS.**

Pauline Wilber, }  
*vs.* } No. 6842.—Assignment of Errors.  
 Lizzie Norris. }

The petitioner, Pauline Wilber, assigns the following errors of fact in the decree complained of, and avers that they are true:

1. She was a married woman at the rendition of said decree, she being then the lawful wife of George Wilber.
2. She had no notice of the proceedings in the cause wherein said decree was made.
3. She did not owe the account on which said decree was based, or any part thereof.

W. M. ROBERTSON, Solicitor.

If the grounds alleged in the assignment for not making defence be insufficient, the opposite party may demur to them;<sup>37</sup> but as the questions raised by such a demurrer have ordinarily been previously raised by a motion to dismiss the petition, demurrers seldom lie.<sup>38</sup> If no ground of demurrer exists, the defendant must plead to the assignment, if he dispute its truth. The following is a form of a

**PLEA TO THE ASSIGNMENT OF ERRORS:**

Pauline Wilber, }  
*vs.* } No. 6842.—Plea to Assignment of Errors.  
 Lizzie Norris. }

The defendant, Lizzie Norris, for plea to the assignment of errors in this case, says that there is no error in the record, as in said assignment alleged.<sup>39</sup>

R. H. McEWEN, Solicitor.

§ 1260. **Proper Practice in Chancery Upon a Petition.**—A proceeding by writ of error *coram nobis* is a proceeding according to the forms of the common law; and nearly all of the cases in our Reports are cases at law. When the Chancery Court was given jurisdiction in such cases by the Code of 1858, it could not have been contemplated that the common law forms of pleading should be used by this Court. It has been adjudicated it was not so contemplated by the Act of 1877 increasing the jurisdiction of this Court.<sup>40</sup> Nevertheless, when suits of this character began to be brought in Chancery, under the Code of 1858, Solicitors, without considering the difference between the forms of procedure in the two Courts, and unduly influenced by the History of a Lawsuit, adopted the practice and pleading in use in the law Courts. Not until the case of *Leftwick v. Hamilton*,<sup>41</sup> was the attention of Solicitors and Chancellors called to the difference of procedure when such a suit is instituted in Chancery. In that case the petition is dealt with as a bill to avoid a decree. This is the solution of all the many perplexities, inconsistencies, and incongruities exhibited in the reported cases in Chancery.<sup>42</sup> Chancery cherishes forms no further than they contribute to the main object of its existence—the attainment of substantial justice.<sup>43</sup>

The proper practice in Chancery in these suits is to regard the petition as in

<sup>36</sup> *Elliott v. McNairy*, 1 Bax., 342; *Gallena v. Sudheimer*, 9 Heisk., 190.

<sup>37</sup> *Memphis G. S. Institution v. Hargan*, 9 Heisk., 496; *Urton v. Phillips*, 11 Heisk., 215.

<sup>38</sup> *Gallena v. Sudheimer*, 9 Heisk., 189.

<sup>39</sup> If the assignment should be submitted to a jury, it might be necessary to frame issues of fact, as follows:

1st. Was Pauline Wilber a married woman at the time the decree complained of was made?

2d. Did she have notice of the proceedings in which said decree was made?

3d. Did she, at the time of said decree, owe the account on which said decree was based? or, any part of said amount? if any part, how much in amount?

<sup>40</sup> Chan. 97; *Jackson v. Nimmo*, 3 Lea, 597.

<sup>41</sup> 9 Heisk., 310. Chancellor Cooper, afterwards one of the Judges of the Supreme Court, calls attention to the irregularity of this proceeding when instituted in Chancery. *Bolling v. Anderson*, 1 Tenn. Ch., 131.

<sup>42</sup> In *Bolling v. Anderson*, 1 Tenn. Ch., 127, both Solicitor and Chancellor seemed groping in darkness. See also, *Coltart v. Ham*, 2 Tenn. Ch., 356. In *Hicks' Manual of Ch. Pr.*, §§ 333-334, the novelty and confusion of transferring the practice and pleading at law to the Chancery Court is alluded to, and the road of escape suggested.

<sup>43</sup> *Birdsong v. Birdsong*, 2 Head, 301. See, *ante*, §§ 43; 269; 431; 681; 719.

the nature of a bill to impeach, avoid, or review,<sup>44</sup> a decree on some one or more of the grounds specified in the statute authorizing this writ.<sup>45</sup> On such a petition being filed, subpœna to answer it should be issued, or publication made when necessary,<sup>46</sup> and the defendant to the petition should make to it the same defences, and make them at the same time and in the same manner as bills are defended against, to-wit: by motion to dismiss, demurrer, plea in bar or answer;<sup>47</sup> and upon such defence the Court should make such order or decree as is proper in law and Equity according to the course of procedure in the Chancery Court.<sup>48</sup>

If the case is not tried at the first term, the defendant may, on a sworn answer, denying the facts alleged in the petition, move the Court to discharge the *supersedeas*. If the motion be allowed the defendant must give a refunding bond with good security to perform the decree, in case the suit should be eventually decided in favor of the petitioner.<sup>49</sup>

§ 1261. **Hearing and Decree.**—The parties would be entitled to the same time for taking their proof as upon an original bill. When the case is prepared for a hearing, either party may demand a jury as in other suits, and in such an event the issues of fact will be made up as usual under the direction of the Court.<sup>50</sup>

At the hearing, if the reason assigned for not making defence to the decree complained of be not satisfactorily proved, the petition will be dismissed; or if such reason be proved, but the defence on the merits be not proved,<sup>51</sup> the petition will be dismissed. In all cases where the original decree has been superseded, if the petition is dismissed, or if the original decree is affirmed on any ground, a decree must be rendered against the petitioner and his sureties on the *supersedeas* bond for the amount of the original decree, with interest thereon at the rate of twelve and one-half per cent. from the rendition thereof, and all costs.<sup>52</sup>

<sup>44</sup> A writ of error *coram nobis* in the Chancery Court is equivalent to an original bill in the nature of a bill of review. *Willis v. Willis*, 20 Pick., 382, citing the above section of this book, then § 1092.

<sup>45</sup> *Leftwick v. Hamilton*, 9 Heisk., 310. The Code authorizes process, § 3115; shows that a sworn answer may be filed, § 3118; terms the petitioner the plaintiff in error, § 3114; and the opposite party the defendant, § 3115. In *Elliott v. McNairy*, 1 Bax., 342, the proceeding is declared to be not a step in the original cause, but a new suit commenced to reverse a former judgment on the grounds set forth in the petition. This is the precise purpose of a bill to impeach or avoid a decree.

<sup>46</sup> Code, § 3115. This section does not, in any way, restrict the general authority of the Chancery Court, or its Clerk and Master, to order publication as to a defendant in any case where it would be proper on an original bill. This section shows that process may issue on the petition being filed.

<sup>47</sup> In *Leftwick v. Hamilton*, 9 Heisk., 310, Turney, then Judge, afterwards Chief Justice, speaks of the petition as "making up an issue of fact," and of the "allegations of the petition tendering a question of fact." By adhering to the Chancery practice, and treating the petition for a writ of error *coram nobis* as in the nature of a bill, and making defence thereto by motion to dismiss, demurrer, plea in bar, or answer, each party is enabled to present his case without embarrassment, and the Chancellor can pass upon all the questions raised at one hearing, and complete and speedy justice be done. Why import into the Chancery Court the formal assignment of errors, demurrers to such assignment, and pleas to the assignment, when every legal or equitable question can be raised on the petition by motion to dismiss, demurrer, plea in bar, or answer? The assignment of errors is necessary in the Circuit Court in order to reduce the matters in the petition down to particular points on which issues can be taken for the action of a jury; *Crawford v. Williams*, 1 Swan, 341; just as issues of fact are made up in Chancery when a jury is demanded there upon an original bill.

The Code, contemplating, probably, the difference of practice and pleading in the two Courts, has provided that the Court may prescribe rules for the assignment of errors, for making issues thereon, and for all such other matters as are necessary to give full effect to this proceeding. Code, § 3115; *Hicks' Ch. Pr.*, § 338. A Chancellor no more needs an assignment of errors and an issue of fact upon them, when a petition of this sort is filed, than he does when any other petition or any original bill is filed. Should a jury be demanded to try the issues raised by the petition and answer, then, and only then, would it be proper for the Court to order issues to be made up. Code, § 3115.

<sup>48</sup> The case of *Isler v. Turner*, 7 Hum., 116, was a bill in Equity in the nature of a writ of error *coram nobis*. The case of *Douglas v. Joyner*, 1 Bax., 32, was in substance, purpose, and effect, a proceeding in the nature of a writ of error *coram nobis*, under the form of a bill in Chancery. The case of *Hicks v. Haywood*, 4 Heisk., 598, fully sustains the text. In this case, the proceeding was by petition, after execution had issued on the decree complained of. The petition was answered and on the issue thus made proof was taken. It is true, the petition was dismissed, but it was dismissed on the merits. Chief Justice Nicholson, in delivering the opinion of the Court, treated the petition as a petition for a writ of error *coram nobis*, although the petition itself did not so pray, but did pray for a *supersedeas*. The case was heard on the merits, the practice by bill and answer was clearly recognized, and if the merits had been with the petitioner, he would have been granted relief.

<sup>49</sup> Code, § 3118.

<sup>50</sup> Code, §§ 3115; 4468.

<sup>51</sup> The burden of proving his reason for not defending against the original bill will rest upon the petitioner; but the burden of making out his case, it would seem, should rest upon the complainant in the original cause, for the original decree, once opened, would seem to lose all its force.

<sup>52</sup> Code, § 3114.



If, on the other hand, the petitioner makes out his case substantially as set forth in his petition, the original decree will be recalled, reversed and annulled; and the costs thereof adjudged against the complainant in that decree.<sup>53</sup> The costs incident to the petition may be adjudged as the Chancellor, in his discretion, may deem equitable.

The petitioner may succeed in opening the decree, and yet he may, in Chancery, be adjudged liable to the original complainant in a sum less than the amount of the original decree. In such a case, the original decree will be modified accordingly; but only simple interest upon it will be allowed, and the costs of the original cause may be divided, if deemed equitable. As he who seeks equity must do equity, the Chancellor may, while granting relief to the petitioner, require him to submit to such a decree in favor of the original complainant as may be equitable. And in general, when the original decree is once opened, the Court may pronounce such a decree upon the whole record as may be required by the rules and principles of Courts of Equity.

<sup>53</sup> *Anderson v. Hagge*, 3 Shan. Cas., 672.

CHAPTER LXXI.

APPEALS IN THE CHANCERY COURT.

- § 1262. Office and Effect of an Appeal.
- § 1263. Who May Appeal.
- § 1263a. To What Court the Appeal Must be Taken.
- § 1264. When and How an Appeal is Obtained.
- § 1265. What Decrees May be Appealed From.

- § 1266. An Appeal in the Nature of a Writ of Error.
- § 1267. Differences Between an Appeal and an Appeal in the Nature of a Writ of Error.
- § 1268. Appeal Bond, or Oath in Lieu.
- § 1269. Practical Suggestions Concerning Appeals.

§ 1262. **Office and Effect of an Appeal.**—The object of an appeal is to enable a party dissatisfied with the Chancellor's rulings, orders, and final decree, to have the cause reheard and redetermined by an appellate Court, upon all the matters of law and fact appearing in the record; and where an appeal has been prayed, granted, and perfected, and the term ended, or the thirty days elapsed, the cause is thereupon transferred from the Chancery to the appellate Court,<sup>1</sup> and the jurisdiction of the Chancellor ended.<sup>2</sup> But at all times during the term, if within thirty days after its entry, the decree is under the control of the Court; and may, during that period, be modified, or even vacated; or the order granting an appeal may, during the same period, be vacated, or modified.<sup>3</sup> So, during that period, a final decree and a prayer and a grant of an appeal therefrom may all be set aside, and an interlocutory order made in the cause, and thereafter the final decree, prayer, and appeal be re-entered.<sup>4</sup>

The office of an appeal is to transfer the adjudication of the cause to the appellate Court,<sup>5</sup> to the end that the appellant may have a re-examination in that Court of the whole matter of law and of fact appearing in the record.<sup>6</sup>

An appeal absolutely devitalizes a decree as an adjudication, and confers full jurisdiction on the appellate Court to deal with the cause as though no decree had ever been pronounced.<sup>7</sup> Nevertheless, the inanimate decree is in the record, and may, by order of the appellate Court, or the consent of both parties, or the act or neglect of the appellant, be revitalized, in whole or in part.<sup>8</sup>

<sup>1</sup> Code, § 3155; *Morris v. Richardson*, 11 Hum., 389; and cases there cited.

<sup>2</sup> Upon a prayer for, and grant of, an appeal, and the execution of the appeal bond, and the rise of the Court, that Court has no longer any jurisdiction of the cause. The appellant cannot even thereafter dismiss his appeal in that Court. Whatever is thereafter done in the cause must be done in the appellate Court. *Freeman v. Henderson*, 5 Cold., 547.

<sup>3</sup> *Timmons v. Garrison*, 4 Hum., 148; *Abbott v. Fagg*, 1 Heisk., 742.

<sup>4</sup> *Hall v. Bewley*, 11 Hum., 106; *Merrill v. Elam*, 2 Tenn. Ch., 513. In this latter case, a receiver was appointed upon the interlocutory order.

<sup>5</sup> The appeal is to the present term of the appellate Court, if in session, if not then to the next term. *Pond v. Trieg*, 5 Heisk., 532.

<sup>6</sup> Code, § 3155. Formerly the original papers in a cause in Chancery were, on appeal, transmitted to the Supreme Court. Acts of 1822, ch. 14. And on an appeal, the Supreme Court heard the cause on these original papers, as though it had originated in that Court.

The right of appeal was first given by the Act of 1819, ch. 31. *McEffe v. Shirley*, *Mart & Yerg.* 299.

<sup>7</sup> *Butler v. B. & L. Association*, 13 Pick., 688, citing the above section of this book, then § 1094.

<sup>8</sup> The appellate Court re-examines, not only the decree appealed from, but, also, the whole record, to see whether the Chancery Court committed any reversible error at any stage of the cause. An appeal

renders the decree of the Chancellor absolutely inoperative, except in so far as it is a lien upon the defendant's realty.

It is generally said that an appeal vacates, annuls, or makes void, the decree of the Chancery Court. *Furber v. Carter*, 2 Sneed, 1; *Maskall v. Maskall*, 3 Sneed, 208; *Gallena v. Sudheimer*, 9 Heisk., 189. This language, however, is too broad, as will appear from the following considerations: 1. The appellate Court affirms, modifies, or reverses the decree below; and a decree that has been vacated and annulled by an appeal, cannot be affirmed, modified, or reversed. See Code, §§ 3165; 3167; 2. The appellant may dismiss his appeal, in which case the decree appealed from at once revives, and becomes possessed of full vigor. *Maskall v. Maskall*, 3 Sneed, 208; *Franklin v. Franklin*, 2 Swan, 561; *Stone v. Huggins*, 1 Shan. Cas., 564; which could not happen if the decree be annulled, or made void, by the appeal; 3. The appellate Court may affirm the decree when the appellant fails to bring up the record after appeal granted, and the appellee brings it up, and moves for an affirmance. *Thomas v. Railroad*, 15 Lea, 533; 4. The decree, notwithstanding the appeal, continues to be a lien on the debtor's land. Acts of 1885, ch. 21; and if the decree below is affirmed, this lien becomes effective from its date; 5. The decree will be affirmed without examination of the record, if the appellant fail to assign errors. Supreme Court

[See the next page for the remainder of this note.]

If a party is dissatisfied with only a part of the decree, he may appeal from such part only, expressly limiting his appeal to such part. Often a suit is divisible in its nature, or may contemplate different objects, or seek relief against different defendants, and the complainant may obtain part of the relief he seeks, or may obtain a recovery against some of the defendants. In such a case he may appeal from so much only of the decree as denies him the remainder of the relief he sought.<sup>9</sup> And so, if a defendant be dissatisfied with a part only of a decree, he may confine his appeal to such part.<sup>10</sup>

§ 1263. **Who May Appeal.**—Any one or more of the parties to an appealable judgment or decree of the Chancery Court may pray and obtain an appeal.<sup>11</sup> Indeed, all parties, both complainant and defendant, may, and often do, appeal from a Chancery decree. And what is meant by parties is not only all persons who appear as complainants and defendants on the face of the bill, or the cross bill, including guardians *ad litem* and next friends of minors, but also,<sup>11a</sup> all *quasi* parties. *Quasi* parties include: 1, persons who file petitions or claims in a cause;<sup>12</sup> 2, persons who purchase property at a Master's or commissioner's sale;<sup>13</sup> 3, persons who become the sureties of purchasers; 4, persons who become record assignees of such purchasers;<sup>14</sup> 5, persons held liable on garnishment proceeding;<sup>15</sup> 6, persons who set up claims to the property in litigation by intervening in the suit; 7, persons against whom judgment is rendered for whatsoever cause; and 8, persons who sought to become parties, or sought an adjudication which was denied.

§ 1263a. **To What Court the Appeal Must be Taken.**—Appeals from the Chancery Court lie to either the Supreme Court, or to the Court of Civil Appeals. If the case involves an amount,<sup>15a</sup> exclusive of costs, exceeding one thousand dollars, or involves the constitutionality of a statute of the State, or a contested election for office, or the State revenue, or is an ejection suit, the appeal must be taken to the Supreme Court; but appeals from the Chancery Court in all other cases must be taken to the Court of Civil Appeals, as hereinafter shown.

§ 1264. **When and How an Appeal is Obtained.**—An appeal must be prayed during the term at which the decree complained of was entered on the minutes, and if more than thirty days elapse after the decree is rendered, and before the term ends, an appeal must be prayed within thirty days after the decree.<sup>16</sup> And not only must an appeal be prayed within the period stated, but it must be perfected within that period; unless the Court within that period grants

Rules, § 29; 1 Pick., 757; Denton v. Woods, 2 Pick., 37; Wood v. Frazier, 2 Pick., 500; 5 Pick., 774-775; 6. The very fact that the Supreme Court rules require errors to be assigned conclusively shows that the decree appealed from has such latent efficacy that, unless affirmatively shown to be erroneous, it will be affirmed. If the decree be "vacated," "annulled," and "made void," by an appeal, the burden in the appellate Court would rest upon the complainant; whereas, in practice, it rests upon the appellant. Wood v. Frazier, 2 Pick., 500. See, also, Smith v. St. Louis M. L. Ins. Co., 3 Tenn. Ch., 509; 7. Under the present practice an appeal only challenges the correctness of the decree, and if the appellant fail to make good his challenge the decree stands. In the appellate Court, it is the appeal that is prosecuted, not the suit. Stone v. Huggins, 1 Shan. Cas., 564. On the effect of an appeal, see Sugres v. Sugres, 1 Tenn. (Overt.), 3, note; and on the difference between an appeal and an appeal in the nature of a writ of error, see, *post*, § 1267, and Smith v. Holmes, 12 Heisk., 466.

<sup>9</sup> Gilchrist v. Cannon, 1 Cold., 581. But if he prays a broad appeal from the entire decree, the whole case will be subject to review. Wood v. Cooper, 2 Heisk., 454; Caldwell v. Hodsden, 1 Lea, 45.

<sup>10</sup> In cases of a limited appeal, the record to be sent up to the appellate Court may, by consent, be limited, accordingly, to such matters as are necessary to fully present the questions raised by the

appeal, and thus the costs of the appeal be greatly reduced.

<sup>11</sup> Code, § 3159.

<sup>11a</sup> Loftis v. Loftis, 10 Pick., 232.

<sup>12</sup> Bibb v. Tarkington, 2 Lea, 21; Ewing v. Maury, 3 Lea, 389.

<sup>13</sup> Newland v. Gaines, 1 Heisk., 720; Eagan v. Phister, 5 Sneed, 298.

<sup>14</sup> Newland v. Gaines, 1 Heisk., 720.

<sup>15</sup> Code, § 3492.

<sup>15a</sup> The "amount involved" is the amount *sued for*, and not the amount allowed by the Chancellor in his decree. See note 5 to § 26, *ante*. If property, not money, is sued for, the value of the property as stated in the bill, if stated, or as shown by the proof, would be the "amount involved." If no particular amount over fifty dollars is sued for, as in case of a suit for an accounting, the amount allowed by the decree appealed from would be the "amount involved." If there be no way to fix the "amount involved," the appeal will lie to the Court of Civil Appeals, as it, ordinarily, will in suits for divorce where the alimony claimed is less than one thousand dollars, and in suits for a *mandamus*, a *quo warranto*, and for relief purely injunctive.

<sup>16</sup> M. & C. Railroad v. Johnson, 16 Lea, 387. This thirty day provision applies exclusively to those Courts whose terms continue longer than thirty days. In all other Courts, the appeal must be prayed and perfected, or time to give bond obtained, before the term ends.

further time within which to give the appeal bond, or take the pauper oath, in which case the bond or oath must be filed strictly within the time granted.<sup>17</sup>

In strict practice, a party is not entitled to an appeal unless: 1, the decree he complains of is one from which an appeal will lie as a matter of right; 2, unless the appeal is prayed during the period when the Court has the right to grant it; and 3, unless a proper appeal bond, or pauper oath in lieu, is tendered with the prayer. The Court will, however, generally allow some time, not exceeding thirty days, in which to give an appeal bond, but in such case the bond must be filed in the time so given, or the right to the appeal will lapse.<sup>18</sup>

A decree rendered at a former term cannot be appealed from at a subsequent term even when some order is made in the cause intended to carry into effect the former decree.<sup>19</sup>

It is not enough to pray for an appeal: an appeal must be both prayed for and granted.<sup>20</sup> A prayer without a grant, and a grant without a prayer, are equally ineffectual either to oust the Chancery Court of its jurisdiction, or to vest jurisdiction in the appellate Court. To put the Chancellor in error for refusing to grant an appeal when the party praying therefor is thereunto entitled, he must not only pray an appeal in open Court, within the thirty days after decree, but he must, also, tender a proper appeal bond, or proper pauper oath. The following is a form of a

#### PRAYER FOR AN APPEAL.

From which decree [and from all former decrees made in this cause at the present term] the defendant [*or complainant*] prays an appeal to the [present,<sup>21</sup> *or*] next term of the Supreme Court at Nashville, [Knoxville, *or* Jackson;] and he having tendered a sufficient appeal bond, said bond is filed and the appeal granted; [*or* which appeal is granted upon his giving a sufficient appeal bond, or taking the pauper oath: and ten (twenty *or* thirty) days are allowed him in which to file said bond, or take said oath.]

#### PRAYER FOR A LIMITED APPEAL.

From so much of said decree as adjudges that complainant is not entitled to [*specify what the Court denied him*] the complainant prays an appeal [*&c., as above*]. If the defendant appeals, then say: From so much of said decree as adjudges that the defendant is liable for (*specifying what*) the defendant prays an appeal, *&c., as above*.]

§ 1265. **What Decrees May be Appealed From.**—An appeal may be had in Chancery either when allowed by the Chancellor in cases subject to his discretion, or when obtained as a matter of right.

1. **Appeals as a Matter of Discretion.**<sup>22</sup> The Chancellor may, in his discretion, allow an appeal: 1, from a decree determining the principles involved and ordering an account, or a sale or partition before the account is taken, or the sale or partition is made; or 2, he may allow an appeal on overruling a demurrer; or 3, he may allow any party to appeal from a decree which settles his right, although the case may not be disposed of as to others.<sup>23</sup> An appeal by the complainant will not lie, however, from a decree dismissing the bill on demurrer as to some of the defendants;<sup>24</sup> but it will lie on application of a defendant whose demurrer has been overruled, the cause remaining in the Chancery Court as to the other defendants.<sup>25</sup>

<sup>17</sup> Hale v. Parmley, 1 Thomp. Cases, 45; Snyder v. Summers, 1 Lea, 481.

<sup>18</sup> In such a case, however, a writ of error may be obtained.

<sup>19</sup> Caldwell v. Hodsdon, 1 Lea, 45. In this case, the appeal was from the order then made, and from all the decrees and orders made in this case theretofore.

<sup>20</sup> Vanvabry v. Staton, 4 Pick., 351.

<sup>21</sup> If the appellate Court be in session when the appeal is prayed the appeal must be to the present term. Pond v. Trigg, 5 Heisk., 532.

<sup>22</sup> In Abbott v. Fagg, appeals are divided into (1) appeals as a matter of favor, and (2) appeals as a matter of right. 1 Heisk., 748.

<sup>23</sup> Code, § 3157. This discretion should generally be so exercised as to terminate the case as speedily as possible, and at the least expense. Hence, if the appellate Court meets before another term of his

Court, the Chancellor should consider whether it would not be well to allow an appeal. On the other hand, if another term of his Court will come before the sitting of the appellate Court, he should consider whether it would not be better to have the case prepared at his next term for a final decree, so that on appeal it may be terminated. Where an appeal lies in the discretion of the Chancellor, a grant of an appeal without more will be held to be an exercise of this discretion. Harrison v. Farnsworth, 1 Heisk., 751; Andrews v. Warner, 3 Pick., 1; and Younger v. Younger, 6 Pick., 25.

<sup>24</sup> Hunter v. Gardenhire, 10 Lea, 87; Peters v. Neely, 16 Lea, 280.

<sup>25</sup> Sigler v. Vaughn, 11 Lea, 131. This case, in effect, overrules Mosby v. Hunt, 7 Lea, 82, in which case it was held to be an improper exercise of his discretion for a Chancellor to grant such an appeal. See, also, Barksdale v. Butler, 6 Lea, 450.

2. Appeals as a Matter of Right lie only from final decrees.<sup>26</sup> Any party dissatisfied with such a decree may appeal from it. A decree is final when it so disposes of the cause that nothing remains to be done, but to issue the final process awarded. When a decree decides and disposes of the whole merits of the cause, and reserves on its face no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the case again before the Court for a decision, it is a final decree,<sup>27</sup> even though it omits to adjudicate the costs, or to award an execution in case of a money recovery.<sup>28</sup> A decree which, although determining the principles involved, orders an account, or orders a sale or partition of land, is not final, because the account or sale or partition will require the further action of the Court; and much less is an order or ruling final, which is made in the progress of a cause, prior to a decree determining the principles involved in the litigation.

No appeal will lie, even by consent of the Chancellor and of the parties,<sup>29</sup> from an interlocutory order or ruling, such as: 1, orders granting, dissolving, or modifying, injunctions or attachments;<sup>30</sup> 2, orders appointing, removing, or instructing, receivers, or refusing so to do; 3, orders allowing, or refusing to allow, amendments of any sort, either to pleadings, or other proceedings; 4, orders in reference to the giving of prosecution, injunction, attachment, or other bonds; 5, orders granting or refusing leave to take further proof; 6, orders sustaining or overruling exceptions to reports, or to any other action of the Master;<sup>31</sup> 7, orders disallowing motions to dismiss bills or petitions;<sup>32</sup> 8, orders allowing or disallowing pleas; 9, orders allowing or refusing a decree *pro confesso*; 10, orders setting aside, or refusing to set aside, a decree *pro confesso*; 11, orders refusing or allowing a new trial by jury; 12, orders allowing or refusing a reference to the Master, before any decree determining the principles involved;<sup>33</sup> 13, nor from any other order that is interlocutory, except an order overruling a demurrer.<sup>34</sup> Nor will an appeal lie from an order intended to carry into effect a decree not appealed from;<sup>35</sup> nor from a judgment for contempt in the presence of the Court,<sup>36</sup> nor from an order, in a suit by the State, directing funds in litigation to be deposited in the State treasury.<sup>37</sup>

The aim of the law is to allow all parties a fair opportunity to have all the errors to their prejudice revised on one appeal, and one only. To allow appeals from every ruling of the Chancellor from the beginning of the suit to the final decree would be to absolutely clog the wheels of justice; suits would become interminable, the appellate Courts would be overwhelmed by an avalanche of petty appeals on insignificant matters; and the delays would amount to a practical denial of justice. For this reason, neither writs of error, nor appeals of right, will be entertained by the appellate Courts to revise any interlocutory order, proceeding, or decree, even though the parties themselves acquiesce in the appeal or writ of error. A party is entitled to only one hearing, in any one cause, to have the errors therein corrected; and he is not entitled to, and will not be allowed, several appeals or writs of error, at several times, in the same cause, to have the supposed errors therein revised and corrected. He must

<sup>26</sup> Meek v. Mathis, 1 Heisk., 540. Younger v. Younger, 6 Pick., 25. As to final decrees, see, ante, §§ 572-573; 575-576.

<sup>27</sup> Pond v. Trigg, 5 Heisk., 539. In Abbott v. Fagg, 1 Heisk., 747, it was held that the cases decided before the Code are not safe guides in determining what decrees are so final that an appeal will lie from them as a matter of right; and that an appeal as a matter of right will not lie until after an account is taken, or a sale or partition made, although the decree ordering the account, sale, or partition, determine all the principles involved, and settle all the matters and questions in controversy, except those arising from the account, sale, or partition. The object of this statute, Code, § 3157, was to give but one appeal as a matter of right. Hume v. Commercial Bank, 1 Lea, 220.

<sup>28</sup> See, ante, § 576, note 5.

<sup>29</sup> See Gibson v. Widener, 1 Pick., 16.

<sup>30</sup> Jacobi v. Schloss, 7 Cold., 385; Foley v. Leath,

3 Shan. Cas., 353.

<sup>31</sup> Porter v. Burton, 10 Heisk., 584; Barton v.

Turley, 11 Lea, 600.

<sup>32</sup> Kernodie v. Tatum, 4 Heisk., 312.

<sup>33</sup> Porter v. Burton, 10 Heisk., 584; Brandon v.

Crouch, 11 Heisk., 605; Chestnut v. McBride, 6 Bax.,

93; Andrew Johnson's Estate, 9 Lea, 625.

<sup>34</sup> Code, § 3157; Sigler v. Vaughn, 11 Lea, 131.

<sup>35</sup> Pond v. Trigg, 5 Heisk., 532.

<sup>36</sup> Brizendine v. State, 19 Pick., 677.

<sup>37</sup> Code, §§ 3508-3509, (M. & V.,) Acts of 1873, ch. 78.

wait until a final decree before he appeals as a matter of right, or takes a writ of error.<sup>38</sup>

The distinction between interlocutory and final decrees has been fully considered in the Chapter on Decrees.<sup>39</sup>

When issues of fact are made up on demand of either party, and tried by a jury according to the forms of a Court of law, errors therein cannot be corrected by appeal, but must be corrected by an appeal in the nature of a writ of error.<sup>40</sup> But errors in divorce cases can be corrected by an appeal only.<sup>41</sup>

§ 1266. **An Appeal in the Nature of a Writ of Error.**—When a cause is tried by the Chancellor alone upon written proofs, the party dissatisfied with his decree must take an appeal; but if the cause is tried by a jury, on issues of fact, the party dissatisfied with the decree based on the jury's verdict must take an appeal in the nature of a writ of error.<sup>42</sup> This is a remedy purely statutory, and is intended to operate as a writ of error and *supersedeas* would at common law.<sup>43</sup> An appeal in the nature of a writ of error may be had from a decree in Chancery, upon the same terms and subject to the same regulations as an appeal.<sup>44</sup> The bond required from the appellant, and the proceedings in the appellate Court upon an appeal in the nature of a writ of error, are also the same as in case of an appeal.<sup>45</sup>

The effect of an appeal in the nature of a writ of error is quite different from that of a simple appeal. An appeal practically abrogates and annuls the decree appealed from, and absolutely devitalizes it as an adjudication; whereas an appeal in the nature of a writ of error leaves the decree intact, but wholly suspends its operation and activity until the appellate Court passes on the objections made to it by the appellant.<sup>46</sup> On an appeal, the complainant continues to be the complainant, and the burden rests upon him of satisfying the appellate Court that the decree appealed from is substantially correct;<sup>47</sup> whereas an appeal in the nature of a writ of error is a new suit, and the appellant, whether complainant or defendant below, becomes a plaintiff in the appellate Court, and on him rests the burden of showing that the decree complained of is erroneous in some substantial matter.<sup>48</sup>

In practice, however, the distinction between an appeal, and an appeal in the nature of a writ of error, from decrees in Chancery, is not rigorously observed; and if a party pray an appeal when he should have prayed an appeal in the nature of a writ of error, or *vice versa*, the appellate Court will probably treat the cause as though brought up by a proper prayer, if the bond is in proper form.<sup>49</sup> And now, inasmuch as the rules of practice in the appellate Courts require errors to be assigned in cases brought there by a simple appeal, as well as in cases brought there by appeal in the nature of a writ of error, the burden of the argument in each set of cases is practically the same, because all decrees are deemed *prima facie* correct,<sup>50</sup> and the appellant is required to point out the errors in all decrees of which he complains.<sup>51</sup>

<sup>38</sup> Porter v. Burton, 10 Heisk., 584; Hume v. Commercial Bank, 1 Lea, 220; Barksdale v. Butler, 6 Lea, 454; Johnson's Estate, 9 Lea, 625.

<sup>39</sup> See, *ante*, §§ 572-576.

<sup>40</sup> Code, § 3156.

<sup>41</sup> Code, § 3158. But a writ of error will lie as to the alimony. McBee v. McBee, 1 Heisk., 558.

<sup>42</sup> Code, §§ 3156; 3172; 3174. If the cause is tried by the Chancellor, on oral proof, by consent of parties, in lieu of a jury, it must be taken to the appellate Court by an appeal in the nature of a writ of error.

<sup>43</sup> Banks v. Brown, 4 Yerg., 198; Thomasson v. Kercheval, 10 Hum., 322.

<sup>44</sup> Code, § 3172.

<sup>45</sup> Code, § 3175.

<sup>46</sup> Smith v. Holmes, 12 Heisk., 466; Akers v. Akers, 16 Lea, 7.

<sup>47</sup> The appellate Court may, by rule, devolve this burden on the party taking the appeal.

<sup>48</sup> Maskall v. Maskall, 3 Sneed, 208.

<sup>49</sup> Bell v. Brown, 5 Yerg., 107.

<sup>50</sup> See Smith v. St. Louis M. L. Insurance Co., 3 Tenn. Ch., 509.

<sup>51</sup> Sup. Court Rule, 20; 5 Pick., 775; Wood v. Frazier, 2 Pick., 500. Prior to the Act of 1819, ch. 21, decrees in Chancery could be reviewed in the Supreme Court only by writ of error, or by an appeal in the nature of a writ of error, in neither of which cases could any facts be considered except those appearing in the decree itself, the evidence in the case not being otherwise reviewable. McEffe v. Shirley, Mart. & Yerg., 299. The evidence then was mainly oral. But by the Act of 1822, ch. 14, on appeals the original papers, including the depositions, were delivered by the Clerk and Master to the Clerk of the Supreme Court to be read by the Judges thereof. Car. & Nich., 220. By the Act of 1835, ch. 20, all depositions and exhibits, read at the hearing in the Chancery Court, were made a part of the record; and since then the difference between an appeal and an appeal in the nature of a writ of error has practically ceased to exist, the power of the Supreme Court to review the facts being the same in each case.

§ 1267. **Difference Between an Appeal and an Appeal in the Nature of a Writ of Error.**—In addition to the differences stated in the preceding section, a simple appeal is the proper remedy in all cases tried strictly according to the forms of the Chancery Court; but where an issue of fact has been made upon demand of either party, and passed upon by a jury, according to the forms of the Circuit Court, there an appeal in the nature of a writ of error is the proper remedy to correct the decree based on the action of the jury.<sup>52</sup> Where a case is tried by the Chancellor according to the forms of the Chancery Court, an appeal opens up the whole case, and the appellate Court determines it as though it had been originally instituted in that Court, pronouncing a final decree, if proper, and enforcing it by the necessary final process. Where, however, there has been a trial by jury on the demand of either party,<sup>53</sup> and an appeal in the nature of a writ of error, the appellate Court, if of opinion that there was a proper ground for a new trial, cannot go on and pronounce a final decree, but must remand the cause to the end that a new trial by jury may be had.<sup>54</sup>

§ 1268. **Appeal Bond, or Oath in Lieu.**—Before a party is entitled to an appeal, or an appeal in the nature of a writ of error, he must tender a sufficient appeal bond, or a pauper oath in lieu, when such oath is allowed by the Court. If the decree is for a specific sum of money and against the party in his own right,<sup>55</sup> the appeal bond must be for the amount of the decree and damages and costs,<sup>56</sup> but in all other cases a bond for costs only is sufficient.<sup>57</sup> Where, however, real estate is ordered to be sold to enforce a vendor's lien, a mortgage, or trust deed, or a partition, or for maintenance or reinvestment, and the owner prays and obtains an appeal, he shall only be required to execute a bond to pay the costs in both Courts.<sup>58</sup>

#### APPEAL BOND.

We, Frank Bright and George Friend, acknowledge ourselves indebted to Victor Mann in the sum of [*the amount of the decree, damages and costs.*]

But this obligation to be void if the said Frank Bright, who has prayed an appeal to the next term of the Supreme Court, [or Court of Civil Appeals,] at Knoxville from a decree rendered against him in favor of the said Victor Mann by the Chancery Court at Murfreesboro, at its June term, 1891, shall pay and satisfy the amount of the debt,<sup>59</sup> damages and costs, the said Supreme Court, [or Court of Civil Appeals,] may adjudge against him, in the cause.

(*To be dated, signed, witnessed, and filed.*)

A party cannot, however, obtain an appeal on the pauper oath unless the Court expressly so allows. If the appeal is granted upon a bond being given, and time is allowed in which to give such bond, the Clerk has no authority under such an order to accept the pauper oath in lieu of the bond required; and should he accept such oath, the appeal will be dismissed in the appellate Court on motion, for want of an appeal bond.<sup>60</sup> In fact, unless the bond is filed, or other condition upon which the appeal is granted complied with, there is no appeal, and the jurisdiction of the appellate Court does not attach.

Pauper oaths for appeals to the appellate Courts can readily be framed by reference to the forms given in sections 182-183, and to the forms following:

#### PAUPER OATH FOR AN APPEAL.

State of Tennessee, }  
County of ..... }

I, John Doe, do solemnly swear that I am a resident of said State, and that, owing to my

<sup>52</sup> Code, §§ 3156; 3174. So, also, where the Chancellor sits as a jury, by consent of parties, and determines issues of fact on oral evidence.

<sup>53</sup> If the trial by jury is for the information of the Court, and not on demand of either party, the rule would probably be different.

<sup>54</sup> Code, § 3156; 4469. See, *ante*, § 552.

<sup>55</sup> Administrators, executors, guardians, trustees, and other fiduciaries, against whom decrees are rendered as such, not holding them personally liable, may appeal upon giving a bond to pay the costs in the appellate Court. *Terry v. Stukely*, 3 Yerg., 506.

<sup>56</sup> Code, § 3164.

<sup>57</sup> *Insurance Co. v. Van*, 1 Shan. Cas., 443; *Smith*

*v. Smith*, 2 Shan. Cas., 132; *Curry v. Wright*, 5 Heisk., 612; *Crawford v. Life Ins. Co.*, 12 Heisk., 154.

<sup>58</sup> Code, § 3164 a. *Watkins v. Land Co.*, 7 Pick., 683. This section does not apply to attachment cases, *Staub v. Williams*, 1 Lea, 123; but does to mechanics' lien cases. *Kinsey v. Stanton*, 6 Bax., 92.

<sup>59</sup> If the decree be not for a specific sum of money, or not against the party in his own right, the bond will be for costs only. Code, §§ 3162-3163, and the Act of 1905, ch. 89, do not apply to appeals in Chancery.

<sup>60</sup> *Henly v. Claiborne*, 1 Lea, 224; *Mowry v. Danversport*, 6 Lea, 82; *Walsh v. Crooks*, 7 Pick., 390.

poverty, I am not able to bear the expenses of an appeal by me prayed to the next term of the Supreme Court, [or Court of Civil Appeals,] at Knoxville, [or, Nashville, or Jackson,] from a decree of the Chancery Court of said county, rendered on the...day of....., 19...., [against me and in favor of Richard Roe,<sup>61</sup>] and that I am justly entitled to the relief sought.

JOHN DOE.

Sworn to and subscribed before me this .... day of ....., 19....

O. K., C. & M.

**PAUPER OATH BY NEXT FRIEND FOR AN APPEAL.**

State of Tennessee, }  
County of ....., }

I, John Doe, as next friend of Mary Den, a married woman, [or infant,] do solemnly swear that we are both residents of said State, and that Mary Den is not able, and has not sufficient property, to bear the expense of an appeal prayed by me as her next friend to the next term of the Supreme Court, [or Court of Civil Appeals,] at Knoxville, [or Nashville, or Jackson,] from a decree of the Chancery Court of said county, rendered against her and in favor of Richard Roe on the...day of....., 19....; and that she is justly entitled to the relief sought to the best of my belief.

JOHN DOE.

Sworn to and subscribed before me, this .... day of ....., 19....

O. K., C. & M.

**§ 1269. Practical Suggestions Concerning Appeals.**—Having determined to appeal,<sup>62</sup> see to it that you get everything into the record you have a right to have in. If any of your evidence has been ruled out, or any improper evidence of your adversary admitted, or if any depositions were not read, or were read by the party not taking them, see that these facts properly appear either in the decree, or by a bill of exceptions.<sup>63</sup> If you think the inspection of an original document by the appellate Court will aid you, have the decree direct the Clerk to make it an exhibit to the transcript. If any parol admissions were made by the adverse side during the trial for the action of the Chancellor, let the decree so show. If any original records were read, let the decree so recite. If any agreements or admissions in writing were made by the other party, see that they are duly filed as part of the record, and it may be well to let the decree recite that the decree was based on such agreements or admissions, as well as on the balance of the record. If there be any large maps, or plats, it will save expense to have them sent up as part of the transcript, without being copied. If you have any doubt whether any document or other evidence is properly a part of the records, make it such by a bill of exceptions.

If a party desiring an appeal is unable to give the requisite appeal bond, or is absent at the term when the decree is pronounced so that his Solicitor does not know his wish, or is prevented in any way from taking an appeal from a final decree, he may wait and file the record for a writ of error. In such a case, his Solicitor should see to it that every matter his client is entitled to have in the record, or in the final decree, is put in. If a bill of exceptions is necessary, for any purpose, it should be prepared and signed by the Chancellor, and properly made a part of the record by an order to that effect. In short, the Solicitor should take every step he would take in case of an appeal. Then he can have the transcript made out, and if necessary obtain a *supersedeas*, before the Clerk and Master executes the decree, or before the Sheriff executes any final process in his hands. In this way nearly all the benefits of an appeal can be had.

Above all, remember that the last moments of a Court require great vigilance on the part of an appealing party to see that all proper entries are made, and

<sup>61</sup> Or, "in the case of John Doe v. Richard Roe."

<sup>62</sup> Solicitors should remember that Courts are made to *decide*, and that when a decision is made one party or the other must *lose*. Any display of feeling or vexation, or even of annoyance, by the losing Solicitor, is not only disrespectful to the Court, but savors of boorishness. A few Solicitors make it a point to appeal as soon as the Chancellor delivers his opinion; but, as a rule, their standing at the bar is not eminent. Well balanced and courteous Solicitors never appeal from the Chancellor's *opinion*; they wait until the decree has been reduced to writing, and settled, and then appeal from the *decree*. If the Chancellor should grant an appeal from his opinion it would profit the appellant nothing, but would ex-

pose him to merited derision. The Chancellor's opinion may be erroneous, while his decree may be correct. The Supreme Court does not take cognizance of the opinion of the Chancellor, even if erroneous: it looks alone to what is decreed. *Boyd v. Sims*, 3 Pick., 780. So, in jury trials, no motion for a new trial should be made until after the jury has retired. Common courtesy and ordinary politeness require this much. It is a mistake to suppose that a Solicitor will lose any right, or suffer any loss of dignity, by waiting for the jury to retire, before entering his motion for a new trial, or by waiting until the decree is drawn, before praying an appeal therefrom. See, *ante*, §§ 1183, note 59; 1211.

<sup>63</sup> See Bill of Exceptions, §§ 1213-1214, *ante*.



that nothing necessary to his appeal is omitted, and that nothing not duly authorized is entered.

If you are dissatisfied with a decree determining the principles involved and ordering an account, or a sale, or partition, pray an appeal: if the Chancellor declines to grant it, your prayer will show that you did not acquiesce in the decree. If you are dissatisfied with any decree that may be deemed final, pray an appeal from it, and let the Court adjudge as to its finality.

If you are uncertain to which of the appellate Courts to appeal, appeal to the Court of Civil Appeals, for that Court has authority, if it finds that the appeal should have been to the Supreme Court, to transfer the case to that Court; whereas the Supreme Court has no power to transfer to the Court of Civil Appeals a case that should have been appealed to it, and is bound to dismiss the appeal. But in the latter case you can have the decree you complain of reviewed on a writ of error, in the Court of Civil Appeals.

CHAPTER LXXII.

WRITS OF ERROR, AND OF SUPERSEDEAS.

ARTICLE I. Writs of Error.

ARTICLE II. Writs of Supersedeas.

ARTICLE I.

WRITS OF ERROR.

- § 1270. Office of a Writ of Error.
- § 1271. Who May Have a Writ of Error.
- § 1272. To What Decrees a Writ of Error Will Lie.
- § 1273. When the Writ Must be Obtained.

- § 1274. How a Writ of Error is Obtained.
- § 1275. Form of Petition for Writ of Error, and of Notice.
- § 1276. Effect of a Writ of Error.

§ 1270. **Office of a Writ of Error.**—A writ of error is a writ addressed by an appellate Court to an inferior Court, commanding the latter to transmit to the former the whole proceedings, in a specified cause, to final judgment inclusive, to the end that the appellate Court may examine the whole record in the cause, both of law and of fact, and render such judgment thereon as may appear to be right upon the face of the record.<sup>1</sup> In practice, however, the writ in fact never issues, the applicant otherwise obtaining the benefit thereof.<sup>2</sup>

The office of a writ of error is to enable a party to have corrected the errors in a decree rendered against him: 1, Where he had no day in Court; or 2, Where he was absent, and therefore could not appeal; or 3, Where he was present, and did not discover the error, or for any other reason did not appeal; or 4, Where he was an infant, or of unsound mind, or imprisoned, or she was a married woman, when the decree was made; or 5, Where an appeal, or an appeal in the nature of a writ of error, is dismissed because not filed in time;<sup>3</sup> or 6, Where in any other case, an appeal, or an appeal in the nature of a writ of error, from a final decree has not been taken, or having been taken, has not been perfected, or whether taken or not has been dismissed by the appellate Court without a hearing upon its merits.

§ 1271. **Who May Have a Writ of Error.**—Any party to a suit who would have been entitled to an appeal, or an appeal in the nature of a writ of error, is entitled to a writ of error.<sup>4</sup> Under the term “party,” is included next friends and guardians *ad litem*,<sup>5</sup> and all *quasi* parties against whom a decree has been made, or who have been denied relief by them prayed, such as makers of notes or bonds, given in the cause, sureties on such notes or bonds, and claimants who have filed petitions in a cause. And so the personal representatives or heirs or assignees of a party, or a *quasi* party, may have this writ when they stand in the shoes of the decedent,<sup>6</sup> and in a will case, persons interested in the result of the litigation are entitled to a writ of error, even though not parties of record.<sup>7</sup>

<sup>1</sup> Stephens on Pldg., 117-122; Cain v. Cocke, 1 Lea, 289.

<sup>2</sup> Bell v. Brown, 5 Yerg., 107.

<sup>3</sup> Code, §§ 3182-3185; Acts of 1901, ch. 15.

<sup>4</sup> Code, §§ 3172; 3176. See, *ante*, § 1263. A writ of error is in the nature of a new suit, and may be obtained as of right by any person entitled to it, exactly as he is entitled to a subpoena on filing his bill and giving a prosecution bond, or taking the pauper's oath. *Ridgely v. Bennett*, 13 Lea, 208; and cases there cited. The party who prosecutes a writ of error in a suit at law is termed plaintiff-in-error, whether plaintiff or defendant in the Court below, and the

other party is termed defendant-in-error; but in a Chancery cause defendants continue to be defendants in the appellate Court, even when they bring up a case by writ of error, because the statute provides that Chancery causes removed to an appellate Court by writ of error, or appeal in the nature of a writ of error, shall be reviewed as if brought up by appeal. Code, § 3108.

<sup>5</sup> A guardian *ad litem* may prosecute a writ of error on the pauper oath. *Alexander v. Morris*, 1 Cates, 724.

<sup>6</sup> *Caldwell v. Hodsden*, 1 Lea, 305.

<sup>7</sup> *Linch v. Linch*, 1 Lea, 526.

Upon an application for a writ of error more than two years after the rendition of the decree sought to be reviewed, and upon an application by an heir, assignee, or other privy, the proper mode of proceeding is by petition,<sup>8</sup> stating the facts which take the petitioner out of the period of limitation, as well as giving the assignment of errors to be used on the trial. They must establish a *prima facie* case entitling them to the writ. If the defendant in error contest the facts alleged in the petition, he must do so by a plea. He cannot do so by a motion to dismiss, for, upon such a motion, the petition will be taken as true.<sup>9</sup>

§ 1272. **To What Decrees a Writ of Error Will Lie.**—A writ of error lies from a final decree in all cases where an appeal, or an appeal in the nature of a writ of error, would have lain.<sup>10</sup> A writ of error will not lie from any decree which (1) is made pursuant to a mandate from an appellate Court,<sup>11</sup> or (2) which can only be appealed from as a matter of favor in the discretion of the Chancellor, but is confined to such decrees as may be appealed from as a matter of right;<sup>12</sup> nor will the appellate Court entertain jurisdiction of a cause brought up by writ of error, when the decree is not absolutely final, even though counsel on both sides request that the cause be heard.<sup>13</sup>

§ 1273. **When the Writ Must be Obtained.**—A writ of error cannot be had unless the party applying therefor notify the adverse party of his intention to apply for the writ, and present the transcript and bond therefor (1) to the Clerk of the appellate Court within one year after the decree, or (2) to the appellate Court, or to a Judge thereof, within two years after the decree.<sup>14</sup> But persons who are under the disability of infancy or coverture, or who are of unsound mind, or imprisoned, may prosecute writs of error within the time prescribed after their disability is removed.<sup>15</sup> To entitle a party to a writ of error, he must not only make application therefor within the time allowed by law, but must also within that time file a transcript of the record, execute a cost bond, with security, or take the pauper's oath, and notify the adverse party.<sup>16</sup> If this be not done, the writ will be dismissed on motion of the defendant, notwithstanding a fiat for the writ may have been obtained within the statutory time.<sup>17</sup>

§ 1274. **How a Writ of Error is Obtained.**—A writ of error must be obtained from that appellate Court, or a Judge thereof, which would have had jurisdiction of the case on appeal, as heretofore shown.<sup>17a</sup> The first step to be taken by a party who wishes to obtain a writ of error is to procure from the Clerk and Master a complete and duly certified transcript of the record in the cause. If less than one year has elapsed since the entry of the decree complained of, he may file the transcript with the Clerk of the appellate Court, of that Division wherein the decree was made; and, upon giving a bond for costs,<sup>18</sup> or taking the pauper oath in lieu, the Clerk will file the transcript and notify the other party of the filing of the transcript, and the granting of a writ of error, if the party filing the transcript has not already given such notice.

If a year or more has elapsed since the entry of the decree complained of, the party complaining must not only procure the transcript as stated; but he must, also, prepare a petition addressed to the appellate Court, or to one of its

<sup>8</sup> The petition should be sworn to.

<sup>9</sup> *Ridgely v. Bennett*, 13 Lea, 206; *Caldwell v. Hodsden*, Lea, 305. If, however, the petition on its face fails to make out a case for the writ, it may be dismissed on motion.

<sup>10</sup> Code, § 3176; 3172.

<sup>11</sup> *Johnson v. Murphy*, 23 Pick., 558.

<sup>12</sup> See, *ante*, § 1265; *Meek v. Mathis*, 1 Heisk., 540; *Hume v. Commercial Bank*, 1 Lea, 220.

<sup>13</sup> *Gibson v. Widenor*, 1 Pick., 16.

<sup>14</sup> The record must be filed, the cost bond given, and notice served on the adverse side, in order to perfect a writ of error; and if the notice is given after the two years, even when the record and bond were filed within the two years, the writ will be dismissed. *Chester v. Foster*, 6 Pick., 515.

<sup>15</sup> Code, §§ 3180-3182. Thus, an infant has one year in which to obtain the writ from the Clerk, and

two years in which to obtain it from the appellate Court, or a Judge thereof, after he attains his majority. *Caldwell v. Hodsden*, 1 Lea, 305. But a person under disability may, during such disability, sue out a writ of error by next friend. *Ridgely v. Bennett*, 13 Lea, 206. See note 3, *supra*.

<sup>16</sup> The notice must be given within the period fixed by law. *Chester v. Foster*, 6 Pick., 515.

<sup>17</sup> *Cain v. Cocke*, 1 Lea, 288. The bond seems to be essential to the filing of the writ. *Moody v. McNeill*, 3 Heisk., 544.

<sup>17a</sup> See, *ante*, § 1263 a.

<sup>18</sup> Code, § 3178 a. But he must pay the cost of the transcript to the Clerk and Master in advance. See, § 1286, *post*. It is no part of the Clerk and Master's duty to file a transcript in the appellate Court for a writ of error. *Gillespie v. Cox*, 1 Heisk., 777.

Judges, if in vacation, giving a statement of the case, and the precise points raised by the pleadings, and the errors of fact or law relied upon to reverse or modify the decree, giving appropriate references to the record, and citing the pages thereof. The statement must conform to the requirements of a brief, and is all the brief the petitioner will be allowed to rely on in the appellate Court.<sup>19</sup> The petition must, also, be accompanied by a copy of the notice served on the opposite party, or his counsel,<sup>20</sup> and if no notice be served, an excuse therefor must be given satisfactory to the Court or Judge to whom the petition is presented. The petition should pray for a writ of error, and if a *supersedeas* is desired, it should so pray. The petition should be sworn to if it alleges any fact not appearing of record, or if a *supersedeas* is prayed for.<sup>21</sup>

If the appellate Court of the Division in which the decree was made be in session, the transcript may be presented in open Court accompanied by the petition containing the brief to be used on the trial; and the writ moved for. If proper notice of the application for the writ has been given to the adverse party, such notice will be exhibited with the transcript; if no notice be given a sufficient excuse must be presented; and thereupon the appellate Court will allow the transcript to be filed, and grant the writ.

**ORDER GRANTING A WRIT OF ERROR.**

John Doe, }  
*vs.* } Writ of Error to the Chancery Court, at Nashville.  
 Richard Roe. }

This day appeared Richard Roe, and presented a transcript of the record in the case of John Doe *vs.* the said Richard Roe, lately determined in the Chancery Court at Nashville, accompanied by a petition for a writ of error, containing a brief assigning errors in said record, and a copy of the notice served on the said John Doe, and moved the Court for a writ of error in said cause; and it satisfactorily appearing to the Court that due notice of this application has been given the adverse party, it is ordered by the Court that said motion be allowed, and that said transcript be filed upon proper bond being given, and thereupon said bond was accordingly given and said transcript and notice filed. [If notice of the application has not been given, omit all after "errors in said record," and insert: and accompanied by an affidavit giving a sufficient excuse for not serving said Doe or his counsel with a notice of petitioner's intention to apply for a writ of error. And thereupon the said Richard Roe moved the Court for a writ of error, [and *supersedeas*,] in said cause. On consideration of all which, said transcript was ordered to be filed, and said writs to issue, upon proper bonds being filed therefor, which bonds having been duly filed, the Clerk was thereupon ordered to give notice<sup>22</sup> to said John Doe of the granting of the writs of error [and *supersedeas*]<sup>23</sup> in said cause.]

If the appellate Court of the proper Division be not in session, the transcript, petition, and notice may be presented to any Judge of the appellate Court, or the Clerk of the appellate Court in the proper Division. If presented to the Judge, he will endorse on the petition his

**FIAT FOR A WRIT OF ERROR.**

To the Clerk of the Supreme Court, [or Court of Civil Appeals,] at Jackson, [Nashville, or Knoxville.]

File this transcript, petition, [and notice;] and on bond for a writ of error being given, or pauper oath taken, the writ is granted. Issue notice hereof to the defendant in error, [in case no notice has already been given.]

February 23, 1907.

A B, Judge.

If the transcript and bond are presented to the Clerk in the first instance, and within one year after the decree, no petition or other preliminary is necessary, and he will endorse thereon the style of the cause, the date of the filing, and the fact that it is filed for a writ of error thus:

<sup>19</sup> Supreme Court Rules, § 27; 5 Pick., 777. This rule is as follows:

On presenting records to one of the Judges, or to the Court in term time, for writs of error or writs of error and *supersedeas*, a petition must accompany it, containing the brief to be used on trial, and attached to record; accompanied, also, by copy of notice served on opposite party or counsel, or such reasons given for absence thereof as the Court or Judge deems sufficient to excuse party from giving notice.

The character of this brief will be shown hereafter. See, § 1306.

<sup>20</sup> Five days' notice in writing shall be given the adverse party. Code, § 3183.

<sup>21</sup> For forms, see, *post*, §§ 1275; 1278.

<sup>22</sup> In "Anonymous," 1 Thomp. Cases, 81, the Supreme Court held that the writ of error issued of right out of the Clerk's office, as a matter of course; and that it was not proper to apply to the Court for a writ of error. But now, see Code, § 3177, authorizing the applicant to move for the writ in the Supreme Court.

<sup>23</sup> Petitions for *supersedeas* considered, *post*, §§ 1277-1279.

## CLERK'S ENDORSEMENT ON TRANSCRIPT FOR WRIT OF ERROR.

John Doe,  
*vs.*  
 Richard Roe. } From the Chancery Court at Nashville.

Transcript for writ of error and bond therefor filed by Richard Roe, and writ granted, this Feb. 23, 1907. C D, Clerk.

Where the applicant for the writ is a personal representative, or heir, or assignee, or other person entitled, whose right does not appear in the record, his petition for the writ should not only contain his brief, to be relied on at the hearing, but he should go further, and make out a *prima facie* case of his right to have the writ.<sup>24</sup>

If the appellate Court, or any Judge thereof, or the Clerk thereof, grant the writ and allow the record to be filed without any previous notice of the application to the adverse party,<sup>25</sup> the Clerk will issue the proper notice. In any case, notice given to the adverse party five days before the hearing of the cause will be sufficient.<sup>27</sup> The law favors the writ, and allows no unnecessary obstacle to be interposed between the applicant and its allowance;<sup>28</sup> nevertheless, the writ cannot be had without filing the transcript therefor, and giving bond to the appellate Court Clerk, or taking the oath in lieu. Giving an appeal bond in the Chancery Court, and having the Clerk send up a transcript, when no appeal is prayed or granted, will not entitle the party so doing to any relief in the appellate Court.<sup>29</sup> The bond for the writ is the same that is required for an appeal; and the proceedings in the appellate Court after the transcript has been filed are exactly the same as though the case had been brought up by appeal.<sup>30</sup>

The practice in obtaining writs of *supersedeas* will be considered in a separate Article.<sup>31</sup>

§ 1275. **Form of Petition for Writ of Error, and of Notice.**—The following are forms of a petition for a writ of error, and of the notice of the application for the writ:

## PETITION FOR A WRIT OF ERROR [AND SUPERSEDEAS.]

To the Honorable Supreme Court of Tennessee, [or Court of Civil Appeals,] sitting at Knoxville, [or Nashville, or Jackson,] or to any of the Judges thereof:

John Doe,  
*vs.*  
 Richard Roe, *et al.* } In Chancery at Jamestown.

The petition of the complainant in said cause for a writ of error [and *supersedeas*] respectfully shows:

## I.

That on the .... day of ....., 19...., a final decree was rendered against him in said cause [state briefly the substance of the decree. If execution or writ of possession has issued on said decree, and a *supersedeas* is desired, state the fact, and date when issued.] All of which will more fully at large appear in the record in said cause, a transcript of which is hereto attached.

## II.

Petitioner avers that said decree is erroneous in this [giving very briefly the main errors alleged.] All of which will more fully appear by the reference to the brief attached to this petition, and made a part thereof.

## III.

Petitioner has given the adverse party due notice of his intention to make this application, a copy of which notice is hereto attached, and marked A.

## IV.

The premises considered, petitioner prays that a writ of error [and *supersedeas*] be granted him, that the errors in said cause be corrected, and justice done him, and for general relief. [If a *supersedeas* is prayed for add to the petition:] This is the first application for a *supersedeas* in this case.

[Annex affidavit: see, ante, § 789.]

JOHN DOE.

<sup>24</sup> Ridgely v. Bennett, 13 Lea, 208; Caldwell v. Hodsdon, 1 Lea, 305.

<sup>25</sup> Spurgin v. Spurgin, 3 Head, 23. If the defendant appears, and appears to move to dismiss for want of notice, such appearance cures the want of notice. McBee v. McBee, 1 Heisk., 558.

<sup>27</sup> Code, § 4515; White v. Bettis, 5 Heisk., 374.

<sup>28</sup> Spurgin v. Spurgin, 3 Head, 23.

<sup>29</sup> Wooten v. Daniel, 16 Lea, 156. In this case, the Supreme Court held that a judgment obtained on such a transcript, and without notice to the adverse party, was absolutely void, and could be enjoined by a bill in Chancery.

<sup>30</sup> Code, § 3184.

<sup>31</sup> See, post, §§ 1277-1279.

If the writ, or writs prayed for, be granted by one of the Judges he will endorse thereon his

**FIAT FOR WRIT OF ERROR.**

To the Clerk of the Supreme Court, [or Court of Civil Appeals,] at Knoxville [or Nashville, or Jackson.]

File this petition, and the notice and transcript attached [or exhibited] thereto, and on proper bond, [or pauper oath,] therefor being given, the writ of error is allowed as prayed for.  
Dec. 29, 1905. A B, Judge.

If a *supersedeas* also is applied for, it may be granted by the same fiat.<sup>31a</sup>

**NOTICE OF INTENTION TO APPLY FOR WRIT OF ERROR  
[AND SUPERSEDEAS.]**

John Doe, }  
vs. } In the Chancery Court at Jamestown.  
Richard Roe, et al. }

The complainant in said cause will take notice that at 10 a. m. on the .... day of ....., 19...., at [designating the precise place] in the City of Chattanooga, [or other town, naming it,] I will present a transcript of the record in said cause to one of the Judges of the Supreme Court, [or Court of Civil Appeals,] and apply for a writ of error [and *supersedeas*] in the cause.

This .... day of ....., 19....

L. T. SMITH, Solicitor of Defendant.

§ 1276. **Effect of a Writ of Error.**—A writ of error does not stay proceedings in a cause in the Chancery Court, nor prevent the enforcement of the decree complained of. To do this the plaintiff-in-error must, also, obtain a *supersedeas*.<sup>32</sup> If the decree below has been executed by a sale of property, either real or personal, before the writ of error is obtained and *supersedeas* granted, the right, title and interest of any purchaser acquired under such sale and decree, will not be disturbed or affected by the reversal of the decree.<sup>33</sup> A writ of error and a *supersedeas*, obtained before a sale or other execution of a decree, has, however, all the force and effect of an appeal in the nature of a writ of error, and suspends the decree until the decision of the cause in the appellate Court.

**ARTICLE II.**

**WRITS OF SUPERSEDEAS.**

§ 1277. Office and Effect of a *Supersedeas*.

§ 1278. *Supersedeas* of Interlocutory Orders and Decrees.

§ 1279. *Supersedeas* of Final Decrees.

§ 1277. **Office and Effect of a *Supersedeas*.**—A *supersedeas* is a common law writ used by appellate Courts in aid of their revisory jurisdiction, and specially adapted to staying proceedings upon final decrees and final process, and in staying the enforcement of affirmative interlocutory orders and *mesne* process. The office of the writ is to keep matters *in statu quo*, until the appellate Court can pass upon the merits of the final decree, or interlocutory order, whose enforcement is stayed or superseded;<sup>1</sup> and, as a consequence, the effect is to de-vitalize the decrees, orders, and process to which it applies. Even if a levy on personalty has been made by virtue of an execution, the effect of a *supersedeas* is to release the levy, and restore the property to the defendant in the execution.<sup>2</sup> And the *supersedeas* takes effect from the date of the fiat, whether notice of the fiat, or the *supersedeas*, was issued and served, or not; and all proceed-

<sup>31a</sup> See next Article, §§ 1277-1279.

<sup>32</sup> See, *post*, §§ 1278-1279.

<sup>33</sup> Code, § 3186. The plaintiff-in-error has the right to have errors in the record revised, and whether such revision will benefit him or not, is not a question for the Supreme Court to consider. *McBee*

*v. McBee*, 1 Heisk., 565. But see, *Lewis v. Baker*, 1 Head, 386.

<sup>1</sup> *M. & M. Railroad v. Huggins*, 7 Cold., 217; *Mabry v. Ross*, 1 Heisk., 773.

<sup>2</sup> *Post*, § 1279.

ings on the decree or process superseded, subsequent to the award of the *supersedeas*, are void.<sup>3</sup>

If, however, the *supersedeas* is applied for, and granted, merely to stay an interlocutory order, or decree, or the enforcement thereof, or both, the effect of such a limited *supersedeas* would be to stay such decree or enforcement only, and would not prevent the Chancery Court from proceeding in all other matters to a final decree, in the same manner as though the interlocutory order or decree superseded had never been made. The effect of such a *supersedeas* is to wholly suspend the order superseded until final decree.<sup>4</sup>

The appellate Court, or a Judge thereof, may grant a *supersedeas* to a Chancery decree in two cases: 1, Where an improper interlocutory order or decree has been made; and 2, Where a writ of error has been granted to a final decree. These two cases will be separately considered.

§ 1278. **Supersedeas of Interlocutory Orders and Decrees.**—The appellate Court, in term time, or either of the Judges thereof, in vacation, may on proper application therefor, grant writs of *supersedeas* to an interlocutory order or decree of the Chancery Court, or to an execution issued thereon, as in case of final decrees.<sup>5</sup>

1. **What Interlocutory Orders or Decrees Will be Superseded** The object of the statute is to enable the appellate Court in term time, or one of its Judges in vacation, to stay the execution of an order or decree of the Chancery Court, which, in advance of the final hearing, undertakes to deprive the litigant of rights or property. The orders and decrees intended to be embraced in the statute are only such as are of a nature to be actively enforced against the rights or property of the litigant.<sup>6</sup>

The power conferred by the statute is to supersede such interlocutory orders and decrees, or executions issued thereon, as may be superseded upon granting a writ of error on a final decree; that is, such orders and decrees as adjudicate rights and admit of active execution. The statute does not apply to orders or decrees of a negative or prohibitory character, or to such as have already been executed. There must be something affirmative to be done, or in process of being done, that may be stayed by *supersedeas*. Hence, an order, or a fiat, granting an injunction, or dissolving an injunction previously granted, cannot be superseded;<sup>7</sup> neither can an order appointing a receiver, or discharging a receiver, or refusing to appoint a receiver, when the order is within the discretionary power of the Court, or Chancellor.<sup>8</sup>

The statute was intended to meet those cases, fortunately rare, where, in advance of a decree on the merits, from which the losing party may appeal, the Chancery Court makes an order actually determining a party's rights, and orders its enforcement.<sup>9</sup> Thus a *supersedeas* will lie (1) to an interlocutory order improperly requiring a party to pay money into Court, and enforcing it by execution;<sup>10</sup> (2) to an interlocutory order improperly awarding a mandatory injunction;<sup>11</sup> (3) to an interlocutory order improperly dispossessing a party in a case not within the discretionary power of the Court to appoint a receiver.<sup>12</sup> A *supersedeas* will not lie to an interlocutory order or decree that

<sup>3</sup> *Claiborne v. Crockett*, Meigs, 607; *Rocco v. Parczyk*, 9 Lea, 328.

<sup>4</sup> *M. & M. Railroad v. Huggins*, 7 Cold., 224. The object of the *supersedeas* is not to revise or reverse the interlocutory order or decree superseded, but merely and exclusively to stay its enforcement until the final hearing of the cause by the Chancellor, when an appeal will lie as a matter of right. At the final hearing, the Chancellor may make the order or decree superseded a part of his final decree, or he may modify it, or ignore it, or reverse it, and this final decree may be enforced, unless appealed from; and if appealed from will be confirmed if right in itself, notwithstanding there may be errors in some of the interlocutory orders and decrees. See § 1317.

<sup>5</sup> Code, §§ 3933; 4513. The reason of this statute was, that under our system of jurisprudence, an appeal lies of right from only final decrees, and such

an appeal would be of no avail, if the Court undertook to do by interlocutory order what only ought to be done by the final decree. *Blake v. Dodge*, 8 Lea, 466.

<sup>6</sup> *Mabry v. Ross*, 1 Heisk., 769; *Blake v. Dodge*, 8 Lea, 465.

<sup>7</sup> *M. & M. Railroad Co. v. Huggins*, 7 Cold., 217; *Mabry v. Ross*, 1 Heisk., 769; *Park v. Meek*, 1 Heisk., 78.

<sup>8</sup> *Baird v. Turnpike Co.*, 1 Lea, 394; *Bramley v. Tyree*, 1 Lea, 531; *Roberson v. Roberson*, 3 Lea, 50. See, also, *Trougher v. Akin*, 1. *Cates*, 451, citing this book, §§ 856-857. (now 904-905.)

<sup>9</sup> *Park v. Meek*, 1 Lea, 78.

<sup>10</sup> *Blake v. Dodge*, 8 Lea, 466; *Park v. Meek*, 1 Lea, 80.

<sup>11</sup> *M. & M. Railroad v. Huggins*, 7 Cold., 227.

<sup>12</sup> *Baird v. Turnpike Co.*, 1 Lea, 397.

orders an account, or a sale, or a partition, or that merely protects, restrains, or impounds; nor will it lie to an affirmative interlocutory order or decree, which, though supersedable if application had been made in season, has been already executed.<sup>13</sup>

2. **How a Supersedeas is Obtained.** The writ of *supersedeas* in case of an interlocutory order or decree may be granted as in case of final decree.<sup>14</sup> Therefore, in order to obtain a *supersedeas* the application must be made by petition addressed to the appellate Court of the Division in which the order or decree complained of was made, if the Court be in session in such Division; if not so in session, the petition must be addressed to one of the Judges of the Court, even though, in fact, the Court be in session in another Division.<sup>15</sup> An appellate Court sitting in one Division has no jurisdiction of any matter coming from an inferior Court in another Division.

The petition should contain a full and clear historical statement of the litigation in which the order or decree complained of was made, giving the various steps, in order of time, taken in the cause down to the particular order or decree complained of, and should then show wherein such order or decree aggrieves and oppresses the petitioner, and why it should be superseded. The petition must, also, be accompanied, as an exhibit, by a perfect transcript of the record<sup>16</sup> in the cause wherein the order or decree complained of was made; and the petitioner must give to the adverse party, if a resident, or if he be a non-resident, to his Solicitor, reasonable notice of the time, place, and Judge, when, where, and to whom the application for a *supersedeas* is to be made.<sup>17</sup> The petition should state that it is the first application for a *supersedeas* in the case.<sup>18</sup> The application must be to that appellate Court, or a Judge thereof, having jurisdiction of the case on appeal.<sup>18a</sup> If made to a Judge it should be addressed to him; and when made to the Court, it should be addressed to "*The Honorable Supreme Court of Tennessee, [or Court of Civil Appeals,] sitting at Knoxville,*" or at Nashville, or Jackson, as the case may be. The following form of the notice and petition will serve as a guide in drawing such papers for either appellate Court:

#### NOTICE OF APPLICATION FOR A SUPERSEDEAS.

Mr. John Doe:

Take notice, that I will on the 2d day of August, 1890, at his residence in Chattanooga, present a transcript of the record in the case of John Doe *vs.* Richard Roe, in the Chancery Court at Kingston, Tenn., to Hon. D. L. Snodgrass, and apply to him thereon for a *supersedeas* to the interlocutory decree made in said cause on July 17, 1890, requiring me to pay five hundred dollars into said Court.

July 24, 1890.

RICHARD ROE, by E. E. YOUNG, Solicitor.

#### PETITION TO SUPERSEDE AN INTERLOCUTORY ORDER.

To the Hon. David L. Snodgrass, one of the Judges of the Supreme Court, residing at Chattanooga:

Your petitioner, Richard Roe, a resident of Roane county, respectfully represents to your Honor that he is much aggrieved by an interlocutory order made on July 17, 1890, in and by the Chancery Court at Kingston, in the case of John Doe against petitioner in said Court, requiring him to pay into Court within thirty days the sum of five hundred dollars, and on his failure so to do, ordering an execution to issue against him therefor.

The complainant, a former ward of petitioner, filed his bill in said cause against petitioner, alleging that petitioner was largely indebted to him as his guardian, and praying an account. Petitioner answered said bill, denying any indebtedness as guardian, and pleading a stated

<sup>13</sup> M. & M. Railroad *v.* Huggins, 7 Cold., 227; Baird *v.* Turnpike Co., 1 Lea, 396.

<sup>14</sup> Code, § 3933.

<sup>15</sup> Baird *v.* Turnpike Co., 1 Lea, 394. If the petition be presented to the Court while sitting in a Division other than that wherein the order or decree complained of was made, it will be deemed presented to the Judge to whom the record is assigned. *Ibid.*

<sup>16</sup> There is, perhaps, no direct adjudication that a transcript of the record must accompany the petition; but the practice is to file such a transcript. Baird *v.* Turnpike Co., 1 Lea, 394. The practice in obtaining a *supersedeas* in such cases is practically

the same as in obtaining a *supersedeas* on a writ of error, as will fully appear by an examination of the cases cited in this Article.

<sup>17</sup> There seems to be no statute or express rule requiring such notice, but natural justice requires it, especially when a *supersedeas* on the pauper oath is applied for; and the reported cases often affirmatively show that such notice was in fact given. See, Code, § 3133. Baird *v.* Turnpike Co., 1 Lea, 395; Campbell *v.* Boulton, 3 Bax., 355. Supreme Court Rule, 27, does not apply to a *supersedeas* to an interlocutory decree. 5 Pick., 777.

<sup>18</sup> Code, §§ 4434-4435, 4454.

<sup>18a</sup> See, *ante*, § 1263 a.



dred dollars left in his hands on said settlement by said John Doe to secure petitioner as his security on a bail bond for said Doe's appearance at the then next term of the Circuit Court, which came in August, 1889. Said Doe failed to appear at said term, having fled to Texas, and a forfeiture was taken on said bond against him, and against petitioner as his surety on said bail bond, and judgment pronounced against them jointly and severally for the sum of five hundred dollars, which judgment is in full force, unappealed from and unsatisfied. All of these facts are set forth in petitioner's answer to said bill, and in his answer he offers to pay said five hundred dollars to complainant when said judgment and costs are satisfied, and his said liability entirely discharged and ended.

On said answer, the Chancery Court declared said five hundred dollars a trust fund, and made the order on petitioner aforesaid, of which he now complains. All of the foregoing facts will fully and at large appear by reference to the record in said cause, a perfect transcript of which is herewith filed as a part of this petition, and marked A.

Petitioner has served a notice on the complainant Doe that he will present said record to your Honor on this day, and move for a *supersedeas* to said interlocutory order, a copy of which notice is herewith filed, marked Exhibit No. 1.

The premises considered, petitioner prays your Honor to grant him an order superseding said order of said Chancery Court, and staying all further proceedings on said order.

This is the first application for a *supersedeas* in this case.

E. E. YOUNG, Solicitor.

[To be sworn to by the petitioner in person, or by his agent or attorney, as in § 797, ante.]

If, on examination of the record, a case for a *supersedeas* is made out, the Court in term, or the Judge in vacation, will grant a *supersedeas*; and may require the petitioner to give bond with good security. If the writ is granted by the Court an order therefor will be entered on the minutes, as follows:

**ORDER FOR A SUPERSEDEAS TO AN INTERLOCUTORY ORDER.**

John Doe, }  
 vs. } In the Chancery Court, at Kingston.  
 Richard Roe. }

The defendant, Richard Roe, having this day presented to the Court a petition for a *supersedeas* to an interlocutory decree made in this cause, on July 17, 1890, ordering an execution to issue against him on his failure to pay into Court the sum of five hundred dollars within thirty days, and having exhibited to said petition a transcript of the record in this cause, and due notice of this application having been given the said Doe, on consideration thereof, it is ordered by the Court that, upon the petitioner giving bond and good security, the prayer of said petition be granted; and a writ of *supersedeas* will issue to stay all further proceedings on said interlocutory decree until the further order of this Court. Said bond will be in the penalty of one thousand dollars, payable to the complainant, John Doe, and conditioned to pay the amount of said decree, if so required upon final hearing; and further to pay all such costs and damages as the complainant may sustain by reason of said *supersedeas*.

If the writ is granted by a Judge he will endorse on the petition his

**FIAT FOR A SUPERSEDEAS.**

To the Clerk of the Supreme Court at Knoxville:

Upon this petition being filed, and a bond given in the penalty of one thousand dollars, conditioned as required by the statute in such a case, you will issue the writ of *supersedeas* as prayed in the petition.

M. M. NEL, Judge of the Supreme Court.

August 2, 1905.

The Court or Judge may require the petitioner to give a bond with good security, payable to the opposite party, conditioned to pay the amount of the interlocutory order or decree if so required upon final hearing, and further to pay all such costs and damages as the opposite party may sustain by reason of the *supersedeas*.<sup>19</sup> The Clerk of the appellate Court will, upon order therefor being made, issue the *supersedeas* as ordered; and will also transmit to the Chancery Court a copy of the petition and *supersedeas* to be filed in the cause, and to constitute a part of the record.<sup>20</sup>

If a *supersedeas* has been improperly granted, the petition therefor may be dismissed, and the *supersedeas* discharged, on motion of the adverse party,<sup>21</sup> made before the Court in the Grand Division wherein the order or decree superseded was made.

<sup>19</sup> Code, § 3933.  
<sup>20</sup> Code, § 3934.

<sup>21</sup> Park v. Meek, 1 Lea, 78; Roberson v. Roberson, 3 Lea, 50.

§ 1279. **Supersedeas of Final Process.**—A writ of error does not stay proceedings on the decree complained of; and inasmuch as the decree may be executed before the appellate Court can pass on the errors assigned, it often becomes of great importance to the plaintiff-in-error to obtain a stay of proceedings until the hearing of the cause in the appellate Court. This stay is obtained by means of a *supersedeas*.

1. **How a Supersedeas is Obtained.** In order to obtain a *supersedeas* of a final decree, or of process issued thereon, the applicant must present the transcript of the record of the cause to some Judge of the appellate Court, accompanied by a petition,<sup>22</sup> containing the brief to be used at the hearing of the cause in the appellate Court, and praying for a writ of error, and a *supersedeas*. The petition must also be accompanied by a copy of the notice served on the opposite party or his counsel, or by an affidavit giving a good and sufficient reason for not serving the notice. If the writ has already been granted, then the prayer will be for a *supersedeas* only. If a case for a *supersedeas* is made out to the satisfaction of the Judge, he will endorse on the petition his

**FIAT FOR A SUPERSEDEAS.**

To the Clerk of the Supreme Court at Jackson :

Upon this petition being filed, and a bond given for the amount of the decree complained of, and damages and costs, [or, upon the plaintiff in error giving the pauper oath.] you will issue a writ of *supersedeas*, as prayed for in said petition.

W. D. BEARD,  
Chief Justice.

February 23, 1907.

The application for a *supersedeas* is usually made at the same time that the writ of error is applied for, and if both are granted the following would be the

**FIAT FOR A WRIT OF ERROR AND SUPERSEDEAS.**

To the Clerk of the Supreme Court at Jackson :

File this transcript and petition for a writ of error, which writ is granted upon a proper prosecution bond for costs<sup>23</sup> being given, [and notify the defendant hereof, if not already notified.] And upon the plaintiff in error giving a sufficient *supersedeas* bond for the amount of the decree and damages and costs, issue a *supersedeas* to stay all further proceedings on said decree, [or, issue a writ of *supersedeas* as prayed in said petition.]

February 23, 1907.

W. K. McALISTER,  
Judge of the Supreme Court.

If the appellate Court of the Division in which the decree was pronounced be in session, the application for a *supersedeas* may be made in open Court as already shown.<sup>24</sup>

2. **The Bond for a Supersedeas.** A writ of error does not suspend, or in any way interfere with, the proceedings in the Chancery Court to enforce the decree, and for this reason the statute allows any person to obtain the writ, without a *supersedeas*, by giving bond and security for costs alone; or, if unable to give security he is allowed to take the pauper's oath.<sup>25</sup> But inasmuch as a writ of error and a *supersedeas* stay all proceedings on the decree complained of, in the same manner as does an appeal, the statute requires that, when both are granted, the bond shall be the same as on appeal, that is for the amount of the decree and damages and costs, if the decree is for a specific sum of money and against the party in his own right; in other cases, the bond is for costs only.<sup>26</sup>

A *supersedeas* in aid of a writ of error may, however, be granted on the

<sup>22</sup> See *Goodman v. Floyd*, 2 Hum., 59. On presenting records to one of the Judges in vacation, or to the Court in term time, for writs of error, or writs of error and *supersedeas*, a petition should accompany it, containing the brief to be used on the trial, and copy of notice to adverse party or counsel, or sufficient excuse for not giving the notice. Supreme Court Rules, § 27; 5 Pick., 777. The petition is only required to aid the Judge in the performance of his duty, and the *supersedeas* would be good if granted without a petition. *Mowry v. Davenport*, 6 Lea, 84. And so, the Judge may grant a *supersedeas* without any brief being filed; but a Solicitor who would apply for such extraordinary process without taking extraordinary pains to show himself thereunto entitled, either lightly esteems the writ, or is

ignorant of the proper practice, or thinks the Judge has more time to sift out the errors in the record than he himself is willing to devote to the task.

<sup>23</sup> A writ of error without a *supersedeas* may be obtained by giving bond and security for costs alone, or by taking the pauper oath. Code, § 3178 a; but where a *supersedeas* issues, the bond should be for the amount of the decree and damages and cost. Code, §§ 3164; 3184.

<sup>24</sup> See, *ante*, § 1274.

<sup>25</sup> Code, § 3178 a. The oath may be taken before any officer authorized to administer oaths. *Campbell v. Boulton*, 3 Bax., 354; *Knoxville Iron Co. v. Smith*, 2 Pick., 45.

<sup>26</sup> Code, §§ 3184; 3164; see, *ante*, § 1268.

pauper oath;<sup>27</sup> but where there has been a levy on personal property, this should seldom be done, first because the levy shows that the plaintiff in error is not a pauper, and second, because the *supersedeas* releases the levy, and may thereby deprive the defendant in error of his only chance to make his debt.<sup>28</sup> To enable the defendant in error to resist a *supersedeas* on the pauper oath, the statute provides, in cases of *certiorari* in the Circuit Court, that no *supersedeas* shall issue on the pauper oath without an express order of the Judge dispensing with security, and that such order may be made only on notice to the adverse party of the application to take the pauper oath;<sup>29</sup> and this statute has been held to apply to like applications for a *supersedeas* made to an appellate Judge to stay proceedings on a final decree in the Chancery Court.<sup>30</sup> A *supersedeas* granted on the pauper oath without notice to the defendant in error, would, nevertheless, be valid.

The following are the ordinary forms of writs of error and writs of *supersedeas*:

#### WRIT OF SUPERSEDEAS.

State of Tennessee.

To the Sheriff of Knox county, Greeting:

Whereas it has been represented to us by the petition of Richard Roe, that John Doe has obtained a decree against him in the Chancery Court of Roane county, on the 17th day of July, 1890, for the sum of five hundred dollars, and that said decree is erroneous and unjust: And furthermore, that execution has issued, or is likely to issue, to enforce the collection of the same; and the aforesaid Richard Roe, having obtained an order from his Honor, David L. Snodgrass, one of the Judges of the Supreme Court of said State, for a *supersedeas* to issue in said case;

These are, therefore, to command you, the Sheriff aforesaid, that if you have the property of the said Richard Roe already levied upon, by virtue of said decree and execution, forthwith to restore the same to the said Richard Roe at your peril; and you will also notify said John Doe that said execution is superseded, and that he is inhibited from further proceeding with said decree and execution, until the further order of this Court. And how you shall have executed this process, you will make known to this Honorable Court, at the Court House, in Knoxville, the second Monday in September next.

Witness, D. D. Anderson, Clerk of our said Court, at office, in Knoxville, the second Monday in September, 1890.

D. D. ANDERSON, Clerk.

#### NOTICE OF WRIT OF ERROR.

State of Tennessee.

To the Sheriff of Knox county:

Whereas, Richard Roe having filed in the Supreme Court Clerk's Office for the Eastern Division of said State, at Knoxville, a certified transcript of the record in the case of John Doe *vs.* Richard Roe, recently determined in the Chancery Court of Roane county; and having entered into bond as required by law, and demanded a writ of error;

These are, therefore, to command you, the Sheriff as aforesaid, that you notify the said John Doe thereof, and that he be and appear before the Judges of our said Supreme Court, at Knoxville, on the second Monday of September next, then and there to show cause, if any there be, why the judgment of the Court below, in said cause, should not be reversed or annulled; and have you then and there this writ.

Witness, S. E. Cleage, Clerk of our said Supreme Court, at office, in Knoxville, the second Monday of September, 1906.

S. E. CLEAGE, Clerk.

<sup>27</sup> Mowry *v.* Davenport, 6 Lea, 80.

<sup>28</sup> McCann *v.* Lawson, 3 Head, 256; Rocco *v.* Parczyk, 9 Lea, 328.

<sup>29</sup> Code, § 3133.

<sup>30</sup> Campbell *v.* Boulton, 3 Bax., 354; Mowry *v.*

Davenport, 6 Lea, 83. Code, § 3133, would seem to apply exclusively to Circuit Judges. Combs *v.* Vogel, 7 Bax., 271. The Legislature probably thought that the appellate Judges would be sufficiently cautious in this matter without any statutory monition.

## CHAPTER LXXIII.

## TRANSCRIPTS FOR APPEALS, AND WRITS OF ERROR.

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| <p>§ 1280. Transcripts of Records, as Evidence, and for Review.</p> <p>§ 1281. What a Transcript for an Appeal, or a Writ of Error, Should Contain.</p> <p>§ 1282. Requisites of a Transcript.</p> <p>§ 1283. Form of a Transcript for an Appeal, or a Writ of Error.</p> | <p>§ 1284. Abbreviated Transcript in Cases Appealed.</p> <p>§ 1285. Suggestions in Reference to Making Out Transcripts.</p> <p>§ 1286. Clerk's Fees for Transcripts.</p> |
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§ 1280. **Transcripts of Records, as Evidence, and for Review.**—There is some confusion among the younger members of the Bar as to what transcripts should contain. This confusion arises from the fact that what is a good transcript to be used as *evidence*, may not be a good transcript to be used in an appellate Court for the purpose of *correcting errors*.

1. **Transcript for Use as Evidence.** A transcript is often obtained to be used as evidence either (1) as the proof of a decree or judgment on which suit has been or is to be brought; or, (2) as a link in a chain of title; or, (3) as evidence of a former adjudication; or, (4) for any of the other purposes of proof. Such a transcript is quite a different thing from a transcript to be filed in an appellate Court in order that alleged errors therein may be reviewed and corrected. When the transcript is to be used as evidence, it consists of: 1, The process whereby the defendant was brought before the Court, and the Sheriff's return thereon; 2, The pleadings in the cause; 3, The various orders made of record in the cause; and 4, The decree.<sup>1</sup> If the reports made in the cause, or the bill of exceptions, or any deposition filed in the cause, or other paper in the file, or the executions issued on the judgment, be needed for any purpose as a part of the original file in the cause, any one or more or all of them may be incorporated into the transcript, and thus be made evidence; but where the object of the transcript is to obtain the benefit of the decree, or of any order in the cause, as evidence,<sup>2</sup> then nothing is essential to a perfect transcript except the process and the return thereon, the pleadings, orders on the minutes, and final decree.

2. **Transcripts for Purposes of Review in an Appellate Court.** When a transcript is needed to be filed in an appellate Court on an appeal, or an appeal in the nature of a writ of error, or for a writ of error, it must contain not only all that is required when the record is to be used as evidence, but it must, also, include the bonds filed in the cause, all the entries on the minutes, the reports of the Master and receiver, the depositions, all exceptions to pleadings, reports and depositions, the exhibits, the bill of exceptions, and all documents duly filed in the cause as evidence upon the issues presented by the pleadings.

The papers and matters that are no part of a record, and cannot be included in a transcript, unless duly incorporated in a bill of exceptions, or otherwise authenticated, have already been enumerated, and need not be repeated.<sup>3</sup>

§ 1281. **What a Transcript for an Appeal, or Writ of Error, should Contain.** For the convenience of Clerks and Masters the following summary of what constitutes a transcript in case of appeal, or for a writ of error, is here given:

<sup>1</sup> See *Coffee v. Neely*, 2 Heisk., 304. A decree in Chancery may be proved by a certified copy of the bill, answer, and decree. 1 Greenl. Ev., § 511. The caption of the decree should precede it. *Ibid.* In *Lowry & Harris v. McDermott*, 5 Yerg., 225, it was held that a decree could be read in evidence without producing the bill and answers upon which it was

made. See, Code, § 2030, sub-sec. 18; and § 2071. The adverse party can produce the balance of the record if it invalidates the decree.

<sup>2</sup> As to the probative force of a record, see, *ante*, § 446.

<sup>3</sup> See, *ante*, §§ 538; 1213-1214.

1. **Bonds.** All bonds given, and recognizances taken, during the prosecution of the cause, including prosecution, injunction, attachment, refunding, and replevin bonds, administrators', guardians', and receivers' bonds, and appeal bonds, and pauper oaths in lieu of bonds; and the endorsements thereon.

2. **Process.** All original and *mesne* process whereby a party is brought before the Court, such as original, *mesne*, and counterpart subpoenas to answer, attachment writs both original, *alias*, and ancillary, attachments to compel an answer, and judicial attachments; and the endorsements and returns thereon.

3. **Pleadings.** All pleadings filed in the cause, such as bills, amended and supplemental bills, pleas in abatement, demurrers, pleas in bar, replications to pleas, answers, amended and supplemental answers, cross bills and petitions to rehear, and the endorsements thereon; and all issues of fact submitted to a jury.

4. **Exceptions to Pleadings.** All exceptions to pleadings because of scandal, impertinence, or insufficiency, and the rulings of the Master and Chancellor thereon, including all appeals to the Chancellor.

5. **Evidence.** All exhibits to pleadings or to depositions, all depositions, grants, deeds, transcripts, or other writings or documents duly filed as evidence in the cause.

6. **Reports and Exceptions Thereto.** All reports by the Master, or a special commissioner, or a receiver, or a guardian, including reports on a reference and reports of sale; and all exceptions to all reports. But no guardian's or receiver's report should be included in a transcript unless some question is to be made on them in the appellate Court.

7. **Rule Docket Entries.** All orders made in the cause on the rule docket, such as publication orders, *pro confessor*s, orders appointing guardians *ad litem*, orders setting aside *pro confessor*s, orders awarding writs of *scire facias* and reviving a cause, and any other orders on which a question has been made in the Chancery Court.

8. **Orders and Decrees.** All the orders and decrees in the cause appearing on the minute book, and all orders made by the Chancellor in vacation; prefixing to the orders and decrees of each term the caption of the term, and to the orders and decrees of each day the caption of the minutes of that day.

9. **The Bill of Exceptions.** The bill of exceptions when incorporated into the transcript should omit all such expressions as "Here insert," or "Here copy," or "Here set it out;" and, in lieu, the particular deed, deposition, affidavit, or other paper referred to, should be copied in full, according to the direction.

10. **Bill of Costs.** The transcript should contain an itemized bill of costs, such as appears, or should appear, on the execution docket, showing the amount due each officer, witness, or other person, and on what account, and giving the State and county taxes.

11. **Index.** No transcript is complete without a good index, giving in alphabetical order the name of every paper, bond, writ, pleading, report, deposition, witness, order, and decree in the cause.

12. **Certificate.** Every transcript should be duly certified, and it is in good form for the Clerk to affix his seal of office to his certificate.

13. **Transcript on a Second Appeal.** If a cause once appealed to an appellate Court and remanded is again appealed, the transcript already in the appellate Court on the first appeal constitutes a part of the record in the cause, and the Clerk is required to make out and transmit a transcript of such proceedings only in the Chancery Court as were subsequent to the remandment of the cause.<sup>4</sup>

In making out all transcripts for the appellate Courts, Clerks should keep in mind that everything, from the filing of the prosecution bond to the final decree, must be entered in the order of time in which the papers were filed,

<sup>4</sup> Code, § 3171.

and motions, orders, and decrees were made, so that nothing which was filed or done afterwards shall precede in the transcript what was previously filed or done, except in transcribing the evidence on which a report is based.

§ 1282. **Requisites of a Transcript.**—The appellate Courts have adopted the following rules in reference to transcripts:

1. All transcripts from the inferior Courts shall be written in a large, plain and legible hand, or printed, or type-written. It shall be so written on only one side of the paper, with black ink, upon law paper, in length fourteen inches, and in width eight and one-half inches, with half an inch between the lines, having a blank margin on the left of every page, and the whole firmly attached at the top.<sup>5</sup>

2. Clerks shall make out transcripts so that process, pleadings, rules, orders, decrees, judgments, and steps of whatever kind, shall be entered in the order of sequence as they occurred in the progress of the cause. The date of issuance of process and of the filing of pleadings, and the date of rules made in the Clerk's office, and the date and terms of rules, orders, decrees, judgments, and steps of every kind made in Court, shall precede the entry of the same, respectively, in the transcript; and the Clerk shall make a minute and perfect index of the contents of the transcript. In case there be any failure, omission, or defect as to any of these particulars by the Clerk of the inferior Court, he shall not be allowed any cost for the transcript wherein such failure, omission, or defect occurs.<sup>6</sup>

3. Unless there is a question on the same in the Court below, no notice to take depositions, nor caption of any deposition, nor affidavit, nor any other unnecessary paper, shall be inserted in the transcript; nor shall any fee be allowed any clerk for such matter. But the date of service of each paper so omitted shall be given, and also the time and place at which the deposition was taken, and who of the parties were present. And in copying depositions taken upon interrogatories, the answer shall follow each question. Reports and accounts shall follow the orders or decrees on which they are based, when practicable, and be followed by the proof on which they are taken. No report of receivers, or other matter not affecting the questions in controversy, shall be put in the transcript unless required by counsel, and then it shall be stated at whose instance it was done, and the cost thereof will be charged accordingly.<sup>7</sup>

4. In all cases appealed the transcripts must be filed in the appellate Court<sup>8</sup> within forty days after the filing of the appeal bond, or a pauper oath in lieu, and, upon any Clerk and Master failing to comply with this rule, all costs for making the transcript will be disallowed. No transcript, after it has been filed, shall be taken from the Court House by counsel engaged in a cause without the Clerk's permission, or a receipt given therefor; and no transcript shall be carried out of the city in which the Court is held unless upon the order of the Court or one of the Judges, or unless it is otherwise directed by rule or general order of the Court, or where counsel desire the record in order to prepare brief required under these rules; in which case they will be allowed to take such records without order upon giving receipt therefor to the Clerk.<sup>9</sup>

5. When a Clerk of an inferior Court shall fail to make out and file with the

<sup>5</sup> Supreme Court Rule, 2, adopted June 21, 1891; 5 Pick., 769.

<sup>6</sup> Sun. Court Rule, 3.

<sup>7</sup> *Ibid.*, 4.

<sup>8</sup> There seems to be no express statute requiring Clerks to make out and file in the appellate Court transcripts of the record in case of appeals. Formerly, the original papers in an Equity cause were transmitted to the appellate Court, and the cause there heard *de novo*, as though originating there. See 2 Scott's Rev., 36; 485; Car. & Nich., 220; Cook, Appendix, 438; 1 Tenn., (Over.), 395, note. *Communis error facit jus*. The statute in reference to transmitting transcripts is as follows:

It is the duty of the Clerk of each of the several

Courts, when a cause is taken by appeal in the nature of a writ of error, to the appellate Court, to make out and transmit by mail, to the Clerk of the Appellate Court of his Division, a transcript of the record, within forty days after the entry of appeal, unless the entry has been made within forty days of the regular term of the appellate Court, or during such term, and then forthwith, and transmit without delay to the Clerk of the appellate Court. Code, § 4041. The certificate of the postmaster of his county, that the transcript has been deposited in the post-office within the time prescribed in the preceding section, is presumptive evidence of the transmission required. Code, § 4042; Act of Feb. 12, 1907.

<sup>9</sup> Sup. Court Rule, 5, as amended June —, 1905.

Clerk of this Court a transcript of the record in any cause in which the State of Tennessee is a party, in which an appeal is prayed and granted, in the time and manner prescribed by law, no cost will be allowed to such Clerk in such case.<sup>10</sup>

6. In all transcripts, civil and criminal, hereafter sent to this Court, the Clerks of the inferior Courts shall indorse on the same the names of counsel for plaintiffs and defendants in their Courts, and of plaintiffs and defendants in the appellate Court, (if known to them,) and on their failure to do so, they will forfeit their fees in such cases.<sup>11</sup>

§ 1283. **Form of a Transcript for an Appeal, or a Writ of Error.**—In order to further aid Clerks and Masters in making out transcripts for the appellate Courts, the following form is given:

**TRANSCRIPT FOR AN APPELLATE COURT.**

Transcript of the Record in the case of John Doe and William Doe *vs.* Richard Roe, Roland Roe, Romeo Roe, Rupert Roe and Rachel Roe, in the Chancery Court at Knoxville, being cause No. 9876, on the rule docket of said Court:

**ORIGINAL BILL.**<sup>11a</sup>

Jan. 1st, 1889, bill filed, but exhibits not filed until Jan. 20, 1889. Original bill as follows: [*Here copy the bill.*]

**BONDS FOR PROSECUTION.**

Jan. 1st, 1889,<sup>12</sup> prosecution bond, [*or pauper oath.*] filed as follows: [*Here copy the bond, or oath.*]<sup>13</sup>

Jan. 1st, 1889, injunction bond filed, as follows: [*Here copy the bond, if one be filed.*]

Jan. 1st, 1889, attachment bond filed as follows: [*Here copy the bond, if one be filed.*]

**ORDER OF PUBLICATION.**

Jan. 1st, 1889, order on rule docket as to defendant Robert Roe, [*a non-resident.*] as follows: [*Set it out in full.*]

**SUBPOENA TO ANSWER.**

Jan. 1st, 1889, subpoena for Richard Roe, Roland Roe and Rachel Roe, issued as follows: [*Here copy it, and the Sheriff's return on it.*]

**INJUNCTION WRIT.**

Jan. 1st, 1889, issued as to defendant Richard Roe as follows: [*Here copy it, and the Sheriff's return on it.*]

**ATTACHMENT WRIT.**

Jan. 1, 1889, as to defendant, Romeo Roe, as follows: [*Here copy it, and the Sheriff's return on it, in full.*]

**ORDER OF PUBLICATION.**

Jan. 5, 1889, on rule docket, for defendant, Rupert Roe, [*the attachment against him having been levied on his property.*] as follows: [*Here copy it.*]

**EXHIBITS TO BILL.**

Jan. 20, 1889, filed as follows: [*Here copy them in the order in which they are exhibited to the bill, making a separate line for the number or letter designating each exhibit, thus:*]

**Exhibit A, [or, No. 1.]**

[*Here copy it.*]

**ORDER PRO CONFESSO.**

Feb. 5, 1889, order *pro confesso*, on the rule docket as to Robert Roe, as follows: [*Here insert it, in full.*]

**ANSWER OF RICHARD ROE.**

Feb. 5, 1889, filed, as follows: [*Here copy it in full, and, also, copy any exhibits thereto, in the same manner as exhibits to the bill are set out.*]

**PRO CONFESSO AS TO ROBERT ROE SET ASIDE.**

March 4, 1889, order on rule docket, as follows: [*Here insert it.*]

<sup>10</sup> *Ibid.*, 6.

<sup>11</sup> *Ibid.*, 7.

<sup>11a</sup> Suits in Chancery are begun by filing a bill; hence, the bill should be copied into the transcript before the prosecution bond. See, *ante*, §§ 132; 178, note 35.

<sup>12</sup> The date of issuance of process and of the filing of pleadings, and the date of rules made in the

Clerk's office, and the date and terms of rules, orders, decrees, judgments, and steps of every kind made in Court shall precede the entry of the same, respectively, in the transcript. Sup. Court Rule, 3.

<sup>13</sup> The endorsement on a bond, pleading, or deposition need not be copied, when the date of its filing is prefixed to its entry in the transcript.

**PRO CONFESSO AGAINST THE OTHER DEFENDANTS.**

April Term, 1889, [*Here copy (1) the caption of the minutes<sup>14</sup> of the April Term, 1889; (2) the caption of the minutes of April 12, 1889, and (3) the order pro confesso made on that day, prefixing to the pro confesso the date at which it was made.*]

**PRO CONFESSO AS TO RUPERT ROE SET ASIDE.**

April 15, 1889, [*Here copy the caption of the minutes for that day, and then give the order setting aside the pro confesso.*]

**DEMURRER OF RACHEL ROE.**

April 15, 1889, demurrer filed, as follows: [*Here insert it.*]

**DEMURRER OF RACHEL ROE OVERRULED.**

April 16, 1889, [*Here copy the caption of the minutes for that day, and then give the order overruling the demurrer.*]

**ANSWER OF RACHEL ROE.**

April 17, 1889, answer filed, as follows: [*Here insert it.*]

**DEPOSITION OF JOHN SMITH.**

May 2, 1889, deposition taken May 1, 1889, in presence of both parties, in the Clerk and Master's office at Knoxville, by consent and without notice, as follows: [*Here copy it, omitting the notice to take it, the caption, the certificate and the affidavit of transmission.*<sup>15</sup>]

**DEED FROM HENRY JONES TO WILLIAM JONES.**

May 2, 1889, deed filed as follows: [*Here insert it.*] By order of the Chancellor the original deed is hereto attached, marked A.<sup>15a</sup>

**DEED FROM WILLIAM JONES TO JOHN DOE.**

May 3, 1889, deed filed as follows: [*Here insert it, and the certificates to it.*]

May 4, 1889, [*In the same way set out all the proof filed in the cause, putting the name of the witness or paper on a line by itself so that it will attract attention, and beginning the next line with the date of the filing of each deposition, deed, transcript or other paper or document filed as evidence.*]

**REFERENCE TO THE MASTER.**

October Term, 1889, [*Here copy the caption of the Oct. Term, 1889.*]

Oct. 15, 1889, [*Here copy the caption of the minutes of this day, and, also, the interlocutory decree of reference to the Master.*]

**MASTER'S REPORT.**

Oct. 17, 1889, report filed, as follows: [*Here insert it.*]

**DEPOSITION OF JOHN SMITH.<sup>16</sup>**

May 2, 1889, filed. This deposition was read on the preliminary hearing, and will be found on page 17, *ante*.

**DEPOSITION OF WM. SMITH.**

Oct. 16, 1889, deposition filed. This deposition was taken by consent in the Master's office, in presence of both parties and their Solicitors, and is as follows: [*Setting it out.*]

**EXCEPTIONS TO MASTER'S REPORT.**

Oct. 18, 1889, exceptions filed, as follows: [*Here insert them, giving their form and style as closely as possible.*]

**COURT'S ACTION ON REPORT AND EXCEPTIONS.**

Oct. 19, 1889, [*Here copy the caption of the minutes of this day; and then give the entry showing the action of the Court on the report, and the exceptions thereto.*]

**LEAVE TO FILE SUPPLEMENTAL BILL.**

Oct. 20, 1889, [*Here copy the caption of the minutes of this day, and then give the order allowing the supplemental bill to be filed.*]

**SUPPLEMENTAL BILL.**

Oct. 20, 1889, supplemental bill filed, as follows: [*Here insert it.*]

<sup>14</sup> For forms of captions, see, *ante*, §§ 532; 1138. The caption of the minutes of *each term* at which any entry was made in the cause should precede the caption of the minutes of the *day* when the entry was made; but where several entries are made at one term the caption of the term need not be repeated.

<sup>15</sup> Supreme Court Rule, 4. But the time and place of taking the deposition, and who of the parties were present, must be stated. *Ibid.*

<sup>15a</sup> When an inspection of an original document will aid the appellate Court in reaching a conclusion as to its genuineness, integrity, age, meaning or other characteristic, the Chancellor may order it sent up with the transcript. See, *ante*, § 450, note 76.

<sup>16</sup> The proof on which a report is based must follow the report in the transcript. Sup. Court Rule, 4.



**ANSWER TO SUPPLEMENTAL BILL.**

Nov. 2, 1889, answer filed, as follows: [*Here insert it.*]

**DEPOSITION OF ROLAND ROE.**

Dec. 3, 1889, deposition filed. This deposition was taken on notice served Nov. 10, 1889, and was taken at Concord, on Dec. 1, 1889, in presence of both parties, and the Solicitor of the defendant. Said deposition is as follows: [*Here insert it.*]

**RECORD IN CASE OF JOHN DEN VS. RICHARD FEN.**

Dec. 5, 1889, record filed, as follows: [*Here copy the transcript, if it be a transcript: if it be an original record, copy it exactly as though you were making a transcript of it for the Supreme Court, on an appeal.*]

**DEMAND FOR A JURY.**

April Term, 1890, [*Here copy the caption of the minutes of the April Term, 1890.*]

April 15, 1889, [*Here copy the minutes of April 15, 1890, showing the demand for a jury in the cause.*]

**ISSUES OF FACT FOR THE JURY.**

April 16, 1890, issues filed, as follows: [*Here copy them.*]

**TRIAL BY JURY, AND VERDICT.**

April 17, 1890, [*Here copy the caption of the minutes of this day, and then give the entry on the minutes showing the trial, verdict, motion for a new trial, &c.*]

**FINAL DECREE.**

April 18, 1890, [*Here copy the caption of the minutes of this day, and then give the final decree.*]

**BILL OF EXCEPTIONS.**

April 20, 1890, bill of exceptions filed, as follows: [*Here copy the bill of exceptions. Put the name of each witness on a separate line preceding his testimony or deposition; put the title of each deed, exhibit, or other paper, on a separate line; and in general so copy the bill of exceptions that every separate matter in it can easily be seen at a glance at the page it is on. This can only be done by the use of proper head-lines. There should be a separate head-line for every writ, pleading, deposition, deed, or other paper, the charge of the Court, and other important matter contained in the bill of exceptions.*]

**APPEAL BOND.**

May 2, 1891, bond filed, as follows: [*Here copy it.*]

**BILL OF COSTS.**

[*Here copy it in full, exactly as it appears on the execution docket; and then add the fees due the Clerk for making out the transcript, and for transmitting it.*]

**CERTIFICATE.**

I, W. L. Trent, Clerk and Master of the Chancery Court at Knoxville, certify that the foregoing is a full, true and perfect transcript of the record and bill of costs, remaining in my office, in the case of John Doe and William Doe against Richard Roe, Roland Roe, Romeo Roe, Rupert Roe and Rachel Roe.

Witness my hand, and the seal of said Court, this June 1st, 1891.

[L. s.]

W. L. TRENT, C. & M.

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[*And so continuing to the end. It is often proper to index the same matter under two heads: thus the depositions of witnesses should be indexed under the head of depositions, and, also, under the name of each witness in his alphabetical order.*]

Remember that nothing contained in brackets [ ] in the foregoing form should go into the transcript, the matter in brackets being simply directory or explanatory to the Clerk.

Above all, remember the *large, plain and legible* hand in which the transcript must be written; and if printed or type-written it must be equally as plain and legible as though written. And it must be written or printed on only one side of the paper, and with good black ink, and upon law paper, with half an inch between the lines, having a blank margin on the left of every page, and the whole firmly fastened together at the top.<sup>17</sup>

§ 1284. **Abbreviated Transcript in Cases Appealed.**—Often, if not generally, on appeals to an appellate Court, a large part of the matters contained in the transcript are so unnecessary that they are regarded by both counsel and Court as mere surplusage, needlessly encumbering and enlarging the transcript, and increasing the difficulty of finding what is really material to the questions sought to be raised in the appellate Court. To save the unnecessary expense, as well as the unnecessary burden to Court and counsel, arising from the insertion of unnecessary matters in a transcript it has been enacted that the appellant, or his Solicitor, in a case appealed, may designate in writing such parts of the record and papers in the case as he may desire to be put in the transcript, and the Clerk shall transcribe the same. The appellant, or his Solicitor, shall notify the opposite party, or his Solicitor, thereof, when the latter may, if desired, designate the remainder, or such parts of the remainder, of the record and papers of the cause as he may wish transcribed; and thereupon the Clerk shall transcribe the same. The Clerk may, however, proceed to transcribe all the record and papers until otherwise directed. If the appellate Court considers the designation of the remainder or additional parts of the record and papers unnecessary and burdensome it will adjudge the costs thereof against the party requiring the same.<sup>18</sup>

The notice by the appellant may be as follows:

**DESIGNATION BY APPELLANT OF WHAT IS TO GO INTO THE TRANSCRIPT.**

John Doe, *et al.*,  
*vs.* } In Chancery at Knoxville.  
 Richard Roe, *et al.* }

To the Clerk and Master:

In the above case appealed by the defendants to the Supreme Court, the defendants hereby designate the following parts of the record and papers for insertion in the transcript:

1. Original bill and exhibits thereto.
2. Answer.
3. Depositions of Roland Roe and Wm. Smith.
4. Bill, answer and final decree in case of John Den *vs.* Richard Fen.
5. Final Decree.

I desire no other parts of record or papers in said cause put into the transcript.

Aug. 1, 1905.

JAS. C. FORD, Solicitor for Defendants.

The designation must, of course, be filed with the Clerk and Master, and the appellant should notify the opposite party, or his Solicitor, thereof. This may be as follows:

**NOTICE OF DESIGNATION AS TO TRANSCRIPT.**

John Doe, *et al.*,  
*vs.* } In Chancery at Knoxville.  
 Richard Roe, *et al.* }

The appellees (complainants) in the above cause are hereby notified that the appellants

<sup>17</sup> Supreme Court Rule, 2. The importance of legible and well constructed transcripts cannot be easily over-estimated.

1. **They are Essential to Justice.** If a transcript is illegible, confused, or unsystematic, it may fail to be understood, and thus full justice fail to be done.

2. **Ease and Expedition of Business Require Them.** The Judges are under no obligation to strain their eyes out of their heads, or perplex their brains, in vainly striving to decipher the hieroglyphics often found in transcripts. Clerks are paid to do their work that every part of the transcript shall be so

plain as to be read without effort. See *Glass v. Bennett*, 5 Pick., 485.

3. **Clerks' Costs for Transcripts Disallowed.** It is no uncommon thing for the Supreme Court to strike out all of the costs for making out a transcript, when it is badly written, or otherwise imperfect. Code, § 4577; *Garwood v. Cooper*, 12 Heisk., 103; *Staunton v. Harris*, 9 Heisk., 585; *State v. White*, 5 Sneed, 620; *McGavock v. Puryear*, 6 Cold., 45; *Bass v. Schurer*, 2 Heisk., 216; *Sible v. State*, 3 Heisk., 137; and *Telegraph Co. v. Ordway*, 8 Lea, 560. Sup. Court Rule, 3.

<sup>18</sup> Acts of 1903, ch. 35. This is a most wholesome statute.

(defendants) have designated the following parts of the record and papers in said cause for insertion in the transcript.

[Here insert the parts contained in the designation.]

Aug. 1, 1905.

JAS. C. FORD, Solicitor for Appellants.

If the appellees desire an abbreviated transcript they may, on receiving this notice, make a designation of additional parts of the record to be put into the transcript, as follows:

#### DESIGNATION BY APPELLEES AS TO THE REMAINDER OF TRANSCRIPT.

John Doe, *et al.*, }  
*vs.* } In Chancery at Knoxville.

Richard Roe, *et al.* }  
 To the Clerk and Master:

In this cause, which has been appealed to the Supreme Court by the defendants, who have designated certain parts of the record and papers for insertion in the transcript, the complainants hereby designate the following parts of the remainder of the said record for insertion:

1. Interlocutory decree, ordering a report.
2. Master's report.
3. All proof taken by the Master or filed with him by the parties for his consideration in making his report.

4. Exception to Master's report.

5. Court's action on report and exceptions thereto.

We wish no other parts transcribed.

Aug. 3, 1905.

THOS. L. CARTY, Solicitor for Complainants.

If the appellees desire the entire remainder of the record and papers to go into the transcript, they need make no response to the notice of designation given them by the appellants.

The Clerk and Master will copy these designations and notices in the transcript, as they (1) are his authority for the omission from the transcript of those parts of the record not specified in the notices of designation; and (2), they are necessary to enable the appellate Court to adjudge the costs of the transcript in accordance with the statute.

The parties may make their designations of record at the foot of the decree or order granting the appeal, in which case no notice to the opposite party by the appellant is necessary.

Until a designation has been duly made the Clerk and Master may proceed to transcribe all the record and papers in the cause; and if, after he has begun his transcription, a designation is filed with him he should include in the transcript all that he has transcribed down to date of designation, and note the fact thus:

#### NOTATION OF TRANSCRIPTION BEFORE NOTIFICATION.

The record in this cause was transcribed to this point before the following designation was filed: [Here insert the designation of appellants, and if the appellees have made a designation insert that also; and then proceed to transcribe what is specified in the designation, or designations.]

§ 1285. **Suggestions in Reference to Making Out Transcripts.**—Clerks and Masters will find that the observance of the following rules will save them time, labor, perplexity, and annoyance, in making out a transcript in a cause:

1. **Arrange all the Papers in Due Chronological Order.** Do this at the outset, before you copy a paper. If you have properly kept your rule docket, it will give in due order of time every paper filed in the cause, and thus greatly aid you.

2. **Make a Memorandum of the Date of Every Entry on the Minutes.** By consulting the index you will have no trouble in obtaining these dates. Put each date, the subject of the entry, and the page of the minute book where entered, on a separate piece of paper, the size of the back of an ordinary paper when duly folded for filing. This done, insert these slips or pieces of paper among the other papers in the cause in their proper order of time.

3. Separate the Reports and Accounts, the Decrees Ordering Them, and the Proofs on Which they are Taken, from the Balance of the File. If there be a report, or an account, in the cause, let it follow the order or decree of reference, and let the proof on which it is based follow it.<sup>19</sup> As a rule, the proof will follow it, in due order of time; but sometimes the Master bases his report, in part or in whole, on proof taken before the order of reference. When such proof was heard by the Chancellor before the reference, it should go into the transcript in strict order of time; but the Master should make a reference to it in giving the proof on which his report is based, as heretofore shown. Your file being thus properly assorted, in due order of sequence, as required by the appellate Court Rules,<sup>20</sup> may now be delivered to the copyist.

4. Put a Proper Caption to Every Bond, Writ, Pleading, Deposition, Deed, Order, Report, Decree, or Other Separate Paper Copied. Put this caption on a separate line in a plain, bold, legible hand, as shown in the foregoing form. Make the caption short, not exceeding four or five words.

5. Follow Each Caption with the Date of the Filing, or Entry. The Rules of the appellate Courts require that the date shall precede the entry of every paper, rule, order, or decree.<sup>21</sup> Facts cannot be understood when divorced from their dates,<sup>22</sup> and hence the vast importance of knowing the date before the fact is made known.

6. Omit Unnecessary Matters. Notices to take depositions, captions and certificates to depositions, affidavits relating to the transmission of depositions, reports of receivers, subpoenas for witnesses, notices, or other matter not affecting the questions in controversy, should not be incorporated into the transcript, unless required by counsel; and then the Clerk will state at whose instance it was put in. Affidavits, used in support of a motion made in the cause, are no part of the record unless made so by a bill of exceptions, or by express order on the minutes to that effect; and, therefore, should not be copied into the transcript.

7. How to Make Out the Index. Prepare about twenty-six small sheets of paper, and letter them A, B, C, &c., consecutively, and put each sheet in the index to any of your record books, putting sheet A on page A, sheet B on page B, and so on. Then your transcript being completed and bound, go through it, and as you reach a head-line, say Bond for Costs, turn to the letter B in your index, and put Bond for Costs on the memorandum sheet B you have previously put there. In this way go through the whole transcript. Then take your memorandum index sheets out of your index, and have them copied into the transcript, in due alphabetical order.

§ 1286. Clerk's Fees for Transcripts.—In case of appeals, or appeals in the nature of a writ of error, it is the duty of the Clerk and Master to make out and duly transmit to the Clerk of the appellate Court a full, true, and perfect transcript of the record in the cause, without his fees being prepaid, even when the appeal is on the pauper oath. But when any person or party applies to the Clerk for a transcript in any other case, as for a writ of error, or a writ of *supersedeas*, or to file as evidence, the Clerk may, and generally does, require his fees to be paid, or well secured, before he begins the work, or delivers the transcript.<sup>23</sup>

After a Clerk has duly made out and filed a transcript, his duty in that regard is at an end; and if such transcript be lost, destroyed or mutilated, it must be supplied as provided in the statute, and the Clerk cannot be required to make out another transcript, unless his fees therefor are paid before delivery.<sup>24</sup>

<sup>19</sup> Sup. Court Rule, 4.

<sup>20</sup> Rules, 3 and 4.

<sup>21</sup> Rule, 3.

<sup>22</sup> Facts are composed of time, place, act and

circumstances. See, *ante*, § 786, note 14.

<sup>23</sup> See, Code, §§ 3792; 4040, sub-sec. 9; *Telegraph C. v. Ordway*, 8 Lea, 558.

<sup>24</sup> *Telegraph Co. v. Ordway*, 8 Lea, 558.

## CHAPTER LXXIV.

## THE COURT OF CIVIL APPEALS: ITS HISTORY AND JURISDICTION.

§ 1287. The Court of Civil Appeals.

§ 1288. Jurisdiction of the Court of Civil Appeals.

§ 1289. How Causes are Heard in the Court of Civil Appeals.

§ 1290. The Decrees of the Court of Civil Appeals.

§ 1291. How the Decrees and Judgments of the Court May be Reviewed in the Supreme Court.

§ 1287. **The Court of Civil Appeals.**—Such had been the increase of litigation in Tennessee, consequent on the increase of population and wealth, that it was impossible for our Supreme Court to hear and determine all the appeals, in civil and criminal causes, with due deliberation and accurateness, notwithstanding the extraordinary industry of the Judges, and the admirable rules by them devised for the speedy dispatch of business and the ready attainment of correct results.

In order to aid the Supreme Court, the Legislature in 1883, authorized its Judges to appoint a commission of three lawyers as referees for two years to whom the Court might refer such cases on its dockets as it saw fit.<sup>1</sup> This commission sat as a *quasi* Court, heard arguments, and made written reports to the Supreme Court of their findings of facts and law. Upon these findings parties dissatisfied therewith filed assignments of errors, as in case of exceptions to Masters' reports, and the cases were heard in the Supreme Court upon these assignments.

While the Commission of Referees was of great assistance to the Supreme Judges, it was not continued. But the dockets of the Supreme Court continued to be crowded with appeals, and further relief became indispensable to the speedy determination of these causes.

Inasmuch as in appeals from Chancery decrees the Supreme Court was required by statute to re-examine the whole matter of law and fact appearing in the record,<sup>2</sup> it was considered that the best method of aiding the Supreme Court would be by relieving it of the necessity of passing on the facts of the case in Chancery causes. Accordingly the Court of Chancery Appeals was established, not as an independent appellate Court, but rather as a handmaid of the Supreme Court in the ascertainment of the facts in cases appealed from the Chancery Courts.<sup>3</sup>

While the Court of Chancery Appeals, composed of learned, diligent and impartial Judges, from its creation, gave great satisfaction to all concerned, nevertheless, in consequence of appeals being allowed therefrom to the Supreme Court in all cases, the dockets of the latter Court continued overloaded, notwithstanding the industry of its Judges, and its stringent rules as to arguments and briefs. Therefore, to further relieve the Supreme Court the Legislature, in 1907<sup>4</sup>, made three important changes in the Court of Chancery Appeals: 1st, it increased the number of Judges to five; 2d, it greatly enlarged its jurisdiction; and 3d, it changed its name to "Court of Civil Appeals," in conformity with its increased jurisdiction over both civil actions at law and suits in Chancery.

§ 1288. **Jurisdiction of the Court of Civil Appeals.**—The jurisdiction of the Court of Chancery Appeals was dependent upon the action of the Supreme

<sup>1</sup> Acts of 1883, ch. 257.

<sup>2</sup> Code, § 3155. Some Chancery cases formerly consumed a week each in being heard.

<sup>3</sup> Acts of 1895, ch. 76. This Act is constitutional. *McElwee v. McElwee*, 13 Pick., 649.

<sup>4</sup> Senate Bill, No. 7, passed Feb. 12, 1907, while the portion of this book treating of appeals was being printed, and the author was forced to rely on a typewritten copy which may be somewhat imperfect.

Court assigning causes for its determination; but the jurisdiction of the Court of Civil Appeals is absolute and wholly independent of any assignment by the Supreme Court.<sup>5</sup> Causes were not appealed to the Court of Chancery Appeals, but to the Supreme Court. Under the said Act of 1907, all causes of which it has jurisdiction are appealed, or otherwise taken, direct to the Court of Civil Appeals. The language of the Act is as follows:

“The jurisdiction of the Court of Civil Appeals is appellate only, and extends (1) to all cases brought up from Courts of Equity or Chancery Courts, except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, State revenue and ejection suits; and (2) to all civil cases tried in the Circuit and Common Law Courts of the State, in which appeals in the nature of writs of error, or writs of error, may be applied for the purpose of having the action of said trial Court reviewed. In all cases in which appellate jurisdiction is conferred upon said Court of Civil Appeals, the appeals and appeals in the nature of writs of error from the lower Court shall be taken directly to the Court of Civil Appeals; and this Court, or any Judge thereof, is given the same power to award and issue writs of error, *certiorari* and *supersedeas*, which the Supreme Court had in such cases, returnable to the Court of Civil Appeals. The practice in such cases in the latter Court shall be the same as that prescribed by law for the Supreme Court.”<sup>6</sup>

The Court of Civil Appeals has all the powers of the Supreme Court necessary to fully enforce and effectuate its appellate jurisdiction; and the Court, or any Judge thereof, may grant writs of error, *certiorari*, and *supersedeas*, returnable before it.<sup>6a</sup>

And in the causes within its jurisdiction, the Court has full authority by *certiorari*, *mandamus*, or otherwise, to obtain a perfect record, and to adopt and use all the means necessary to the full and efficient exercise of an appellate jurisdiction.

The Court is empowered to prescribe its own rules of practice.<sup>7</sup> And the Clerks and Marshals of the Supreme Court are, also, the Clerks and Marshals of the Court of Civil Appeals, and are required to perform the same duties.<sup>8</sup> The concurrence of a majority of the Judges is sufficient for all purposes.<sup>9</sup>

**§ 1289. How Causes are Heard in the Court of Civil Appeals.**—The rules of practice, the course of procedure, and the forms of orders, decrees and writs, are the same as those of the Supreme Court; and for convenience and brevity they are incorporated in a subsequent Chapter on the proceedings and practice in both Courts.<sup>10</sup>

**§ 1290. The Decrees of the Court of Civil Appeals.**—Unless superseded, modified or reversed, as hereinafter shown, the decrees and judgments of the Court are final;<sup>11</sup> and executions, writs of possession, and all other proper pro-

<sup>5</sup> The Act of 1907 prohibits the Supreme Court from assigning cases to the Court of Civil Appeals. See sec. 7 of Act.

<sup>6</sup> The meaning of the Act seems to be, 1st, that in all cases tried in the Chancery Courts involving not exceeding one thousand dollars, exclusive of costs, except cases involving the constitutionality of statutes, contested elections and revenue and ejection suits; and 2d, that in all civil cases, without limit or restriction, tried in the Circuit and Common Law Courts, all appeals, or appeals in the nature of writs of error, and all writs of error, shall be to the Court of Civil Appeals, and not to the Supreme Court. Why cases involving the constitutionality of a statute, contested elections, and revenue and ejection suits, brought in the Circuit Courts must be appealed to the Court of Civil Appeals, when like suits in the Chancery Courts must be appealed to the Supreme Court, is not apparent; nor are some other features of the Act. It would, perhaps, have been better to have had no restrictions on appeals, appeals in the nature of writs of error, and writs of error,

from one Court that do not apply to all Courts alike; and the Act will, probably, be so amended.

When it is doubtful which appellate Court has jurisdiction of an appeal, it might be advisable to take the appeal to the Court of Civil Appeals; for this Court has authority to transfer the case to the Supreme Court, which it would do, of course, on reaching the conclusion that the appeal should have been taken to that Court. However, if either appellate Court should dismiss an appeal, or writ of error, for want of jurisdiction over the case it could be taken to the other Court by a writ of error.

<sup>6a</sup> *Ibid.*, § 7.

<sup>7</sup> Acts of 1895, ch. 76, § 13.

<sup>8</sup> *Ibid.*, § 10. The Act of 1907, does not repeal the Act of 1895, but only amends it.

<sup>9</sup> Cowan v. Murch, 13 Pick., 590. *Ubi major pars ibi totum.* (Where the majority is there is the whole.) So of the Supreme Court. Art. VI., § 2; Code, § 58.

<sup>10</sup> See, *post*, §§ 1294-1323.

<sup>11</sup> Act of 1907, § 8.

cess may issue thereon. The fact that a cause has been *certiorated* by the Supreme Court will neither prevent the issuance of final process on the judgments and decrees of the Court of Civil Appeals, nor stay the enforcement of such process after its issuance.<sup>14</sup> Final process can be stayed by a *supersedeas*, only.

The Court of Civil Appeals may affirm, modify or reverse any decree brought before it for review, or it may remand the cause for further proceedings.

The decrees and judgments of the Court of Civil Appeals are as conclusive as those of the Supreme Court, unless changed as herein shown, and are a lien on the debtor's land.<sup>15</sup> On affirmance of a money decree of the Court of Civil Appeals by the Supreme Court, interest thereon from the date of its rendition to the day of affirmance will be allowed.<sup>16</sup>

The forms of decrees in the Court of Civil Appeals are the same as those in like cases pronounced by the Supreme Court, except, of course, their commencements. The following forms will serve as illustrations :

**DECREE AFFIRMING DECREE BELOW, WITH MODIFICATION.**

John Doe, *et al.*,  
*vs.*  
 Richard Roe, *et al.* } Affirmed as Modified.

This cause came on to be heard before the Honorable Court of Civil Appeals upon the transcript of the record from the Chancery Court of ..... county, the assignment of errors by the appellants and the reply of the appellees thereto and argument of counsel, from all of which it appears that there is no error in the decree of the Chancellor dismissing the bill, and that portion of his decree is affirmed.

But this Court is of opinion, and does accordingly adjudge and decree that the Chancellor was in error in reinstating the injunction in this cause, and said injunction is hereby dissolved, the error assigned to that portion of the decree by the defendant being sustained, but all other errors assigned are overruled.

It is further ordered, adjudged and decreed by the Court that complainants John Doe and John Den as principals, and Frank Friend as surety on the prosecution bond, pay all the costs of the cause both in this Court and in the Chancery Court, for which execution may issue.

**DECREE REVERSING THE DECREE BELOW.**

John Den, *et al.*,  
*vs.*  
 Richard Fen, *et al.* } Reversed.

This cause came on to be heard before the Honorable Court of Civil Appeals, upon the transcript of the record from the Chancery Court of ..... county, the assignment of errors by the appellants, the reply of the appellees thereto, the briefs and arguments of counsel, on consideration of all which the Court is of opinion, and so adjudges and decrees, that there is manifest error in the decree of the Chancellor, and the same is reversed accordingly.

The Court is of opinion, and so adjudges and decrees that [*Here insert the matters decreed, and adjudge the costs; or if the cause is remanded for further proceedings, so show, and specify what is to be done on remandment.*]

**§ 1291. How the Decrees and Judgments of the Court May be Reviewed in the Supreme Court.**—No appeal, nor appeal in the nature of a writ of error, lies from the judgments and decrees of the Court of Civil Appeals to the Supreme Court. The Act, however, provides two methods by which the revisory power of the Supreme Court may be exercised over such judgments and decrees.

1. **The Court of Civil Appeals, on its Own Motion,** may certify to the Supreme Court any case on its docket, as to which it desires the opinion and decision of the latter Court, in which event the Supreme Court will take jurisdiction of such case, and finally determine the same, upon the original transcript filed in the Court of Civil Appeals. It would be proper for the latter Court to exercise this discretion in any case, 1st, where the magnitude of the case, or the importance of the question involved, made it proper that the Supreme Court should determine it; and 2d, where it was doubtful whether the case should

<sup>14</sup> *Ibid.*  
<sup>15</sup> Acts of 1897, ch. 131, § 12.

| <sup>16</sup> Cowan, McClung & Co. v. Donaldson, 11 Pick., 327.

have been brought before it for review, or should have been taken directly to the Supreme Court.<sup>17</sup>

2. **Upon Petition of a Party Aggrieved.** Any party dissatisfied with a final decree or judgment of the Court of Civil Appeals may present to the Supreme Court, or to one of the Judges thereof, a petition sworn to, stating the substance of the case he complains of, accompanied by an assignment of error, or errors, and brief in support thereof, and pray for a writ of *certiorari*, [error;]<sup>18</sup> and, also, for a writ of *supersedeas*. On a *prima facie* case being thus presented, the Supreme Court, or one of its Judges, in term time or in vacation, may award a writ of *certiorari*; and, in a proper case, and on such terms and bond as the Court, or one of its Judges, may prescribe, a writ of *supersedeas* may be ordered in aid of the *certiorari*.<sup>19</sup>

Upon the award of such *certiorari*, the cause in question is, *ipso facto*, transferred to the Supreme Court, where it stands to be heard, in its order upon the docket, upon the original transcript, the petition for the *certiorari*, the assignment of errors, the brief and the writs of error<sup>20</sup> and *supersedeas* when issued—these constituting the record in the Supreme Court.

But no such *certiorari*, or *supersedeas*, shall be issued after the lapse of ninety days from the final decree or judgment of the Court of Civil Appeals.<sup>21</sup> If no *supersedeas* issues the decree or judgment can be enforced, in spite of the award of a *certiorari*; but if the decree or judgment should be reversed by the Supreme Court it will award a writ of restitution, or a writ of restitution in the nature of a writ of *feri facias*, as right and justice may require.<sup>22</sup>

The following is a form of a petition to remove a case from the Court of Civil Appeals to the Supreme Court:<sup>23</sup>

**PETITION FOR A WRIT OF ERROR AND SUPERSEDEAS.**

To the Honorable Supreme Court of Tennessee, sitting at Knoxville, [or Nashville, or Jackson,] or to any of the Judges thereof:

John Doe, }  
 vs. } In the Court of Civil Appeals, on appeal from the Chancery Court of  
 Richard Roe, et al. } Knox County.

Your petitioner, the said John Doe, complainant in said cause, respectfully represents:

I.  
 That he is much aggrieved by a final decree made in said case by the Court of Civil Appeals on the....day of....., [giving the date,] dismissing his bill, and taxing him with the costs, and awarding an execution therefor to the Sheriff of Knox county.

II.  
 That the substance of said case is as follows: [Here set out briefly what the bill charged, what the answer was, and what the proof showed. If the bill was dismissed on motion, or demurrer, give the ground of the motion, or demurrer.]

III.  
 Petitioner avers that said decree is erroneous because the law and the facts are not as found by said Court, in these particulars: 1st, [Here give briefly the errors complained of. See, post, §§ 1303 and 1306.] All of which will more fully appear in the brief hereto attached, and made a part hereof, marked A. [For form of brief see § 1306, post.]

IV.  
 Petitioner more than five days ago had notice served on the defendants that he would present this petition here and now. A copy of said notice is hereto attached marked B.

V.  
 The premises considered, petitioner prays [Etc., as in § 1275, ante, where forms of fiat and notice will be found, the changes necessary being obvious.]

17 This discretion will, perhaps, be oftener exercised in civil cases brought up from the Circuit Courts, as there is no limit to the jurisdiction of the Court of Civil Appeals in such cases.

The Act will, probably, be amended so as to impose the same limits on appeals from the Circuit Courts as arc imposed on appeals from the Chancery Courts. See note 6, supra.

18 The Act says, "writ of *certiorari*," but evidently a writ of error is intended. See note 20, infra.

19 Act of 1907, § 8.

20 The language "writs of error and *supersedeas*," in the 9th section of the Act of 1907, shows that the words "writ of error" are used as synonymous with *certiorari*. See note 18, supra. But, in fact, no writ issues as the record is already in the custody of the Clerk of the Supreme Court, he being, also, *ex-officio*,

Clerk of the Court of Civil Appeals.

21 The ninety days will, probably, begin to run from the day the decree or judgment is entered on the minutes of the Court. Bank v. Johnson, 21 Pick. 521; unless there be a petition for a rehearing, and then from the day such petition is finally disposed of by an entry on the minutes. But on this point, see Patterson v. Bank, 17 Pick., 511.

22 See, ante, § 657, sub-sec. 1. In the head-line of this sub-section the word "*injunction*" should be "*execution*."

16a See, ante, § 1263a, note 15a.

23 See, ante, § 1275, for a form of petition. The practice and forms in §§ 1270-1279, relating to writs of error and *supersedeas* apply to like writs in bringing up cases from the Court of Civil Appeals.



## CHAPTER LXXV.

## THE SUPREME COURT: ITS HISTORY AND JURISDICTION.

§ 1292. Short History of the Supreme Court.

§ 1292a. Great Duties of the Supreme Court.

§ 1293. Nature of its Jurisdiction.

§ 1293<sup>a</sup>. How Causes are Heard in the Supreme Court.

§ 1292. **Short History of the Supreme Court.**—Prior to the year 1809 the Superior Courts of Law and Equity, which were the predecessors of our Circuit and Chancery Courts, were the highest Courts in our State; and their decisions were final, except when reviewable by the Supreme Court of the United States. In the year 1809, a Supreme Court of Errors and Appeals was established, composed of two Supreme Judges and one of the Circuit Judges. The Judges were elected by the Legislature, and the Court was held at Jonesboro, Knoxville, Nashville and Clarksville; and writs of error lay to it from the Circuit Courts.<sup>1</sup> In 1811, this Supreme Court of Errors and Appeals was given exclusive original jurisdiction in all causes in Equity; and the Equity causes then pending in the Circuit Courts were transferred to it, the original files being sent up, along with transcripts of the entries on the minutes in each case.<sup>2</sup> Its powers and jurisdiction in Equity causes were the same the Circuit Courts had previously possessed, except that issues of fact had to be tried by a jury in the Circuit Court most convenient to the parties. The same statute repealed the former law requiring one of the Circuit Judges to sit in the Supreme Court, and enacted that unless both of the Supreme Judges should concur in a reversal, the judgment of the Circuit Court should be affirmed.

In 1813, the Circuit Courts were vested with concurrent original jurisdiction of all causes in Equity, this jurisdiction to be governed by the rules and regulations governing the Supreme Courts of Errors and Appeals.<sup>3</sup> In 1819 an appeal was allowed from what the statute terms the "Chancery Circuit Court" to the Supreme Court of Errors and Appeals, where the cause was re-examined upon the whole matters of law and fact as though originally commenced in the Supreme Court.<sup>4</sup> In 1815, the number of the Judges of the Supreme Court of Errors and Appeals was increased to three, and they were required, by arrangements among themselves, to hold a Court of Equity twice a year at various places, each Court being held by one of the Judges only.<sup>5</sup> In 1823, the number of Judges was increased to four, and in 1824 to five, and then reduced to four again.<sup>6</sup> In 1827, all laws giving the Judges of the Supreme Court of Errors and Appeals original Chancery jurisdiction were repealed, and two Chancellors were chosen by the Legislature to hold the Chancery Courts of the State, the State being divided into two Chancery Divisions: 1, the Eastern, whose Courts were held at Rogersville, Greeneville, Kingston, Carthage and McMinnville; and 2, the Western, whose Courts were held at Franklin, Columbia, Charlotte, Jackson and Paris.<sup>7</sup>

In 1825, it was enacted that where the Chancellor was incompetent, the cause should be transferred to the Supreme Court;<sup>8</sup> and in 1829, there was a similar enactment, this being after the creation of the office of Chancellor: in these

<sup>1</sup> Acts of 1809, ch. 49, §§ 23-26. Circuit Courts were established by the same Act. <sup>1</sup> Scott's Rev., 1148. The itinerant life of the Judges is graphically alluded to by Judge Peck, in *Cox v. Breedlove*, 2 Yerg., 518-519.

<sup>2</sup> Acts of 1811, ch. 72, §§ 4-8; 16; 2 Scott's Rev., 36; 39.

<sup>3</sup> Acts of 1813, ch. 78, §§ 2-3; 2 Scott's Rev., 146.

<sup>4</sup> Acts of 1819, ch. 31, § 2; 2 Scott's Rev., 485.

See Code, § 3155. This is the first statute that

speaks of *Chancery* Courts, and the first that allows an appeal to the Supreme Court. Errors of the Circuit Courts before this Act were reviewed on writs of error. See acts of 1809, ch. 4, § 26.

<sup>5</sup> Acts of 1815, ch. 70; Hay. & Cobbs' Stats., 175; Preface to 1 Tenn., (Overt.), XI.

<sup>6</sup> 1 Tenn., (Overt.), preface, XI; Hay. & Cobbs' Stats., 170.

<sup>7</sup> Acts of 1827, ch. 79; Hay. & Cobbs' Stats., 175.

<sup>8</sup> Acts of 1825, ch. 54; Hay. & Cobbs' Stats., 176

transferred cases, the original papers were sent up, and the cause heard *de novo*, the Supreme Judges being given the power to revise all orders and decrees made prior to the transmission of the cause.<sup>9</sup>

In 1834, an amended Constitution was adopted by which a Supreme Court was established, composed of three Judges, elected by the Legislature for twelve years, one of whom should reside in each of the three Grand Divisions of the State: its jurisdiction was declared to be appellate only.<sup>10</sup> In 1835, it was enacted that this Supreme Court should sit once a year at Nashville, Knoxville, and Jackson; and various laws were passed in reference to the appellate jurisdiction of the Court, and when and how appeals and writs of error would lie from the inferior Courts, being substantially the same as those now in force.<sup>11</sup> In 1853, by a special amendment to the Constitution, the Judges were made elective by the people.<sup>11a</sup> The Constitution of 1870 increased their number to five, and provided that one of them should preside as Chief Justice; but made no material change in the status, powers or jurisdiction of the Court, except to fix its sessions at Knoxville, Nashville, and Jackson.<sup>12</sup>

§ 1292a. **Great Duties of the Supreme Court.**—1, To see that the rights and privileges reserved to themselves by the People in their Constitution are maintained inviolate;<sup>12a</sup> 2, To keep the Legislature,<sup>12b</sup> the Courts, municipal corporations, and all other creatures of the law, within their Constitutional and lawful jurisdiction; 3, To revise and correct, or remand for correction, every error made by any inferior Court, whereby the complaining litigant was in any way injured, or deprived of his legal rights; and 4, To issue all process, and make all orders, rules, judgments, and decrees necessary to fully effectuate its appellate jurisdiction, or to fully enforce its own mandates.<sup>12c</sup>

§ 1293. **Nature of its Jurisdiction.**—The object of the People in ordaining and establishing the Supreme Court was to have a tribunal to supervise all the other Courts of the State; to keep them within the limits of the law and the Constitution; to see that right and justice are duly administered by them; to revise all their rulings, orders, judgments, and decrees, and correct all errors therein, or remand the cause for their correction in the Court where made; and finally to give a uniform and harmonious exposition and construction of the law, so that the law might be one and the same in all the counties, Circuits and Divisions of our State.<sup>13</sup> To effectuate these great objects, the Constitution declares that the jurisdiction of the Supreme Court shall be appellate only, with such other jurisdiction as was conferred by law at the adoption of the Constitution.<sup>14</sup> This other jurisdiction is confined exclusively to such matters as are necessarily incident to, or are absolutely necessary to carry out and complete, its appellate jurisdiction.<sup>15</sup> The Supreme Court has no original jurisdiction;<sup>16</sup>

<sup>9</sup> Acts of 1829, ch. 79; Hay. & Cobbs' Stats., 176.  
<sup>10</sup> Const. of 1834, Art. VI, §§ 1-2. The Court was previously designated the Supreme Court of Errors and Appeals.

<sup>11</sup> Acts of 1835, chs. 3; 19; 68; Car. & Nich. Stats., 235-239.

<sup>11a</sup> Acts of 1853-4, Res. xvi.

<sup>12</sup> Const. of 1870, Art. VI, §§ 1-3.

<sup>12b</sup> Const., Art. XI, § 16.

<sup>12c</sup> While the Supreme Court cannot restrain the Legislature directly, it can enjoin the enforcement of its unconstitutional acts, and declare them null and void. "The judiciary must magnify and protect the supreme law." Caruthers, J., in *Alexandria v. Dearmon*, 2 Sneed, 103, 125.

<sup>12c</sup> As to the appellate jurisdiction of the Supreme Court, see 2 Meigs' Dig., § 928. It would seem that the Supreme Court, while sitting in one Grand Division of the State, has no jurisdiction of any cause originating in another Division. *Baird v. Turnpike Co.*, 1 Lea, 394.

<sup>13</sup> The Supreme Court, in exercising its appellate functions, keeps in mind the following considerations:

1. To review causes from the Courts below on the hypothesis that all things have been rightly and regularly done; and not be actuated by a spirit of censoriousness or hyper-criticism.

2. To so rule that all inferior Courts will be kept within the orbits of their respective jurisdictions.

3. To give a healthy tone to the practice of the lower Courts, and the general jurisprudence of the State.

4. Where there are questions of doubt in matters of law, not controlled by our own decisions or statutes, to resolve them according to the decisions of the Supreme Court of the United States, for thus a uniform national jurisprudence is built up.

5. Where there are doubts arising from a difference between the common law and the principles of Equity, to prefer the latter, for thereby our jurisprudence is made more consonant to the essential requirements of perfect justice.

6. But, in all cases, and at all times, to keep in mind that the welfare of the People is the object of all law and the purpose of all government.

The Supreme Court was constituted by the People in their sovereign capacity, and the Legislature cannot impair its Constitutional powers, or limit its Constitutional jurisdiction.

<sup>14</sup> Const., Art. VI, § 2.

<sup>15</sup> *Bank v. Cannon*, 2 Heisk., 428; *Ward v. Thomas*, 2 Cold., 565; *Memphis v. Halsey*, 12 Heisk., 214.

<sup>16</sup> Code, § 4496; Acts of 1822, ch. 13, § 4.

and none can be conferred upon it by the Legislature, or assumed on its own motion, or obtained by consent of parties. And it can issue no process except in aid of its appellate jurisdiction, or in enforcement of its orders, rules, judgments and decrees. It can exercise jurisdiction over litigation and litigants only after suit has been instituted in a lower Court, and after some party to such suit has brought up the record thereof in some legal mode for the purpose of having some, or all, of the proceedings in the cause in the lower Court revised, reversed, or superseded.

By the Act of 1907, the appellate jurisdiction of the Supreme Court is confined to appeals, appeals in the nature of a writ of error, and writs of error, 1st, in all criminal cases, and 2d, in all cases brought up from Courts of Equity, or Chancery Courts, (1) where the amount involved<sup>18</sup> exceeds one thousand dollars, exclusive of costs, or (2) where the constitutionality of a Tennessee statute is involved, or (3) contested elections for office, or (4) revenue, or (5) ejectment suits. The Court has no jurisdiction of any civil case tried in the Circuit or common law Courts; and no jurisdiction of any cases tried in the Chancery Courts except the five classes above stated.

But the Supreme Court may, by writ of error, (called a writ of *certiorari* in the Act of 1907,) bring up and review any case wherein the Court of Civil Appeals has pronounced a final decree, or judgment; and may affirm, modify or reverse such decree, or judgment, or may remand the cause to be further proceeded in, as right and justice may require.<sup>19</sup>

§ 1293a. **How Causes are Heard in the Supreme Court.**—The rules of practice, the course of procedure, and the forms of orders, decrees and writs, in the Supreme Court, are set out in the next Chapter,<sup>20</sup> somewhat generalized so as to adapt the Chapter to the practice, procedure, and forms of the Court of Civil Appeals.

<sup>18</sup> See, *ante*, §§ 1263a, note 15a; 1288.

<sup>19</sup> Act of 1907, § 8.

<sup>20</sup> The following letter from the then Judges of the Supreme Court is here given as evidence of the correctness of the exposition of the Supreme Court rules given herein:

"SUPREME COURT OF TENNESSEE, }  
KNOXVILLE, TENN., Oct. 21, 1891. }

"HON. HENRY R. GIBSON,

"Dear Sir: We have examined your late work on Suits in Chancery, and take pleasure in congratulating you on the completion of a work which manifests great research, and the utmost precision.

"The arrangement of subjects, and system of sub-heads, is excellent. We are certain that it is a work which will find a permanent place in the legal

literature of the State; and that it will prove to be of *inestimable value to the practitioner* in our Courts of Chancery.

"We are particularly gratified to find a Chapter devoted to the Exposition of the Recent *Rules of the Supreme Court*.

"The forms you give for *briefs, assigning errors, and reply briefs* of appellees, will be of *great value as a guide* to practice under these rules.

"Very respectfully,

"P. TURNEV,

"WALLER H. CALDWELL,

"HORACE H. LURTON,

"BENJ. I. LEA,

"D. L. SNODGRASS."

CHAPTER LXXVI.

PROCEEDINGS AND PRACTICE IN THE APPELLATE COURTS.

- ARTICLE I. Matters Relating to their Jurisdiction and Powers.
- ARTICLE II. Briefs in the Appellate Courts.
- ARTICLE III. Motions in the Appellate Courts.
- ARTICLE IV. The Hearing and Decrees.

ARTICLE I.

MATTERS RELATING TO THEIR JURISDICTION.

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| <p>§ 1293b. Proceedings in Both Appellate Courts Substantially the Same.</p> <p>§ 1294. How their Jurisdiction is Obtained.</p> <p>§ 1295. <i>Supersedeas</i> of Interlocutory Decrees of the Lower Courts.</p> <p>§ 1296. <i>Mandamus</i> in Aid of their Jurisdiction.</p> | <p>§ 1297. <i>Certiorari</i> in Aid of their Jurisdiction.</p> <p>§ 1298. Their Powers to Make Rules of Practice.</p> <p>§ 1299. Their Powers in Enforcement of their own Decrees.</p> <p>§ 1300. Receivers and Restraining Orders.</p> <p>§ 1301. Revivor of Causes and Decrees.</p> |
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§ 1293b. **Proceedings in Both Appellate Courts Substantially the Same.** Inasmuch as the practice and procedure, the motions and hearings, the writs, orders and decrees, in the Court of Civil Appeals are substantially the same as those in the Supreme Court, they are all considered in this Chapter, immaterially generalized, to avoid unnecessary repetition and to economize space; and both Courts are treated of under the general name of "Appellate Courts."

§ 1294. **How their Jurisdiction is Obtained.**—In the lower Courts, original jurisdiction is obtained by the issuance of original writs to bring the defendant before the Court. The appellate Courts, however, having no original jurisdiction, can issue no original writs. All the cases brought within their jurisdiction must first have originated in some lower Court, and must have been there proceeded in until some order, judgment, or decree was made or rendered which some party thereto desires to have reviewed, in some method sanctioned by law.

The various methods provided for bringing causes from the Chancery Courts into the appellate Courts are:

1. By a *Supersedeas*, which is granted by the appellate Court, or by any of its Judges, on petition, accompanied by the record of the cause; and which operates not to remove the cause permanently, but to stay some affirmative interlocutory order of the lower Court, until final decree, when the whole cause may be removed and reviewed, by one of the methods following.

2. By an *Appeal*, which is prayed and granted in the Chancery Court and which brings up the whole case for re-examination as to every question of law and fact in the record.

3. By an *Appeal in the Nature of a Writ of Error*, which is practically the same as an appeal, and is obtained in the same way, and has mainly the same effect, except in case of trials by jury.

4. By a *Writ of Error*, which is obtained after a final decree below by filing a transcript of the cause with the Clerk of the appellate Court, or by petition to the proper appellate Court, or to one of its Judges.

§ 1295. **Supersedeas of Interlocutory Decrees of the Lower Courts.**—Sometimes the inferior Courts make affirmative orders or decrees, and issue executions or other final process in enforcement thereof, before final decree, in cases or under circumstances not warranting such orders or process; and, as no appeal or writ of error will lie except from a final decree, the party aggrieved is

without remedy in the Court below. In such a case he may, on a sworn petition, obtain from the appellate Court in term time, or from any one of the Judges in vacation, a *supersedeas* to such interlocutory order, or decree, or to the execution or other final process thereon.<sup>20</sup> A *supersedeas* will not be granted, however, except to stay some affirmative interlocutory proceeding destructive of a party's rights, or some process enforcing an order or decree adjudicating rights in advance of a final decree.<sup>21</sup>

A *supersedeas* will not be granted to supersede (1) an order granting an injunction, or (2) an order dissolving an injunction previously granted;<sup>22</sup> or (3) an order appointing a receiver in a proper case; or<sup>23</sup> (4) an order adjudging interlocutory costs where discretionary; or (5) in any case where the discretion existed to make the order, or issue the writ, complained of;<sup>24</sup> or (6) in any case where the order or decree complained of is merely negative or prohibitory in its character, and not capable of execution affirmatively.<sup>25</sup>

A *supersedeas* does not operate to bring the cause into the appellate Court: it only stays proceedings under the interlocutory order or process complained of. The cause remains in the Court below, and is proceeded with there to a final hearing, when it may be appealed, and then the rightfulness of the order or exception superseded may be finally determined.<sup>26</sup>

The procedure on a *supersedeas* to an interlocutory order, having already been fully considered, will not be further treated of here.<sup>27</sup>

§ 1296. **Mandamus in Aid of their Jurisdiction.**—The appellate Court can issue any writ adequate to overcome any attempt to prevent a party entitled from taking a cause to that Court for review;<sup>28</sup> and if it be necessary to compel a Judge, Clerk, or other officer to do some act necessary to enable a party entitled to obtain a proper record of the proceedings he complains of, or to perfect his appeal, or to obtain a transcript, the appellate Court will issue a mandamus to the Judge or other officer in default, to do the act sought to have done, or show cause why he should not be compelled to do it. Thus, if a Judge of an inferior Court improperly refuses to sign a bill of exceptions, the appellate Court will award an alternative writ of mandamus to compel him to sign it, or show cause to the contrary.<sup>29</sup> To entitle a party to a mandamus, however, he must have done, himself, everything necessary to entitle him to the grant of the appeal, or to the signature of the Judge to the bill of exceptions, or to the other act he seeks to have done. Thus, to entitle him to an appeal, he must pray for one at the proper time and place, and must tender a proper appeal bond, or pauper oath: and to entitle him to a bill of exceptions, he must tender one at the proper time and place, and it must contain the truth of the case fairly stated. If it does not fairly state the truth of the case, the Chancellor should so change it as to make it conform to the facts.<sup>30</sup>

§ 1297. **Certiorari in Aid of their Jurisdiction.**—The writ of *certiorari* is one of the recognized agencies whereby the appellate Court brings up the record of another Court, or tribunal, in enforcement of its appellate jurisdiction, and is resorted to in two cases:

1. In cases of a judicial nature where an appeal, or an appeal in the nature of a writ of error, will not lie, or is improperly refused. In such a case a

<sup>20</sup> Code, §§ 3933; 3934; 4513; 3178. For the form of a petition, see, § 1278, *ante*. An appellate Court, while sitting in one Grand Division of the State, will not supersede an order in a cause originating in another Grand Division; but the Judge to whom the record in such a case is assigned will act on the application. Baird v. Turnpike Co., 1 Lea, 394.

<sup>21</sup> Blake v. Dodge, 8 Lea, 466.

<sup>22</sup> M. & M. R. R. v. Huggins, 7 Cold., 218.

<sup>23</sup> Baird v. Turnpike Co., 1 Lea, 394; Troughber v. Akin, 1 Cates, 451.

<sup>24</sup> Roberson v. Roberson, 3 Lea, 50.

<sup>25</sup> M. & M. R. R. v. Huggins, 7 Cold., 218; Baird

v. Turnpike, 1 Lea, 394; Enoch v. Wilson, 11 Lea, 232.

<sup>26</sup> M. & M. R. R. v. Huggins, 7 Cold., 218; Blake v. Dodge, 8 Lea, 466.

<sup>27</sup> *Ante*, §§ 1277-1279.

<sup>28</sup> King v. Hampton, 3 Hay., 59.

<sup>29</sup> State v. Hall, 6 Bax., 7; Ing. v. Davey, 2 Lea, 276; Vanvabry v. Staton, 4 Pick., 334. State v. Sneed, 21 Pick., 711.

<sup>30</sup> Vanvabry v. Staton, 4 Pick., 341. The Courts will not require the Chancellor to sign a particular bill of exceptions when he disputes its correctness. *Ibid*.

*supersedeas* will, also, be granted on application, when necessary. These writs are granted on a petition addressed to the appellate Court.<sup>31</sup>

2. A writ of *certiorari* will, also, issue in order to perfect the record of a case already before the Court. It would often little benefit a party to take an appeal to an appellate Court, if the Clerk and Master should fail to send up a perfect transcript of the record; and the power of the Court to do justice would be well nigh destroyed, if the Clerks could strain out of a record what they thought immaterial, to say nothing of the effect of undue influences being brought to bear on them to suppress matters essential to the vindication of the rights of the appellant. If it be made to appear to the Court, in due form and in due season, that the transcript is imperfect, the Court will award a *certiorari* to the Clerk in default, commanding him without delay to make out, certify, and transmit instantly, or to the next term of the Court, a full, true, and perfect transcript of the record in the particular cause, on file in his office. The writ usually contains at its foot a memorandum specifying what parts of the record are missing.<sup>32</sup> If the Clerk should certify that the missing paper is lost and cannot be found, the appellate Court will remand the cause that the lost paper may be supplied under the statute,<sup>33</sup> but if the Clerk certifies that no such paper is on file, and that he has made diligent search for the missing papers, a *certiorari* will not be awarded.<sup>34</sup>

The appellate Court, when hearing an Equity cause, is a Court of Equity; and may, like any other Court of Equity, award a *certiorari*, or take any other steps to perfect the record, on its own motion.<sup>35</sup>

§ 1298. **Their Power to Make Rules of Practice.**—Every Court has inherent power to make and enforce rules for the proper conduct of causes, parties, and Solicitors, provided that such rules deprive no party of a legal right, and violate no law of the State; and these rules it may change from time to time as it may deem expedient, and especially as the exigencies of the Court may require, arising from the increase of litigation and the necessity of keeping its dockets clear.<sup>36</sup> The Court has, also, the inherent authority to make and enforce all rules of practice, necessary to effectuate its appellate jurisdiction.<sup>37</sup>

§ 1299. **Their Powers in Enforcement of their Own Decrees.**—It is a fundamental rule that every Court has inherent power to enforce all its lawful rules, orders, and decrees. The grant of jurisdiction to determine a cause is impliedly a grant of power to enforce that determination, by all necessary and appropriate process. Each appellate Court is clothed with this power, both by necessary implication and by statute;<sup>38</sup> and it may be stated generally, that it has the right to issue any writ or process in the enforcement of its rules, orders, and decrees that the Circuit or Chancery Courts could issue in a like case. Thus, it awards executions, writs of possession and restitution, and writs of attachment for the person; and may issue a mandamus to compel the levying of a tax to satisfy a judgment against a county,<sup>39</sup> or municipality.

Executions<sup>40</sup> may be issued on its final decrees at any time after the ten days allowed for filing a petition to rehear.<sup>41</sup>

§ 1300. **Receivers and Restraining Orders.**—When an Equity cause goes to an appellate Court, it stands there, in many respects, as it stood in the Chancery Court before the hearing, and the powers of the appellate Court in the cause are very similar to, if not identical with, those of the Chancery Court

<sup>31</sup> *Tenn. Central R. R. v. Campbell*, 1 Cates, 640. This was a case where a railroad was proceeding to condemn land.

<sup>32</sup> For the form of a *Certiorari*, in such a case, see, *post*, § 1311.

<sup>33</sup> *Mynatt v. Huhbs*, 1 Heisk., 323. The lost paper in this case was a deposition.

<sup>34</sup> *Nave v. Nave*, 1 Heisk., 324. There seems to have been no motion for a *certiorari* in this case.

<sup>35</sup> See *Newport v. Rowen*, 4 Hay., 195; and *ante*, §§ 539-541.

<sup>36</sup> Code, § 4504; *Wood v. Frazier*, 2 Pick., 506.

<sup>37</sup> *Pond v. Trigg*, 5 Heisk., 540. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* *Ante*, § 61, sub-sec. 4.

<sup>38</sup> Code, § 4503; *Newman v. Justices*, 1 Heisk., 787; *Riggs v. White*, 4 Heisk., 505.

<sup>39</sup> *Newman v. Scott County*, 1 Heisk., 788.

<sup>40</sup> The term "execution," in the statute, may be construed to include all final process. See, *ante*, § 647, note 8.

<sup>41</sup> Acts of 1903, ch. 58.

at the hearing, except the former Court has, in addition, full power to revise any interlocutory ruling, order, or decree. If, therefore, while the cause is pending in the appellate Court, any party is entitled under the rules of Chancery practice, to have a receiver appointed,<sup>42</sup> or a restraining order issued, the Court will exercise the jurisdiction, provided all persons to be affected are parties to the cause in which the motion is made. And when a receiver is appointed, the Court will grant a writ of possession to put him in possession of the property.<sup>43</sup>

§ 1301. **Revivor of Causes and Decrees.**—If any Equity cause abates in the appellate Court, either before or after decree, it may be revived in the same way as in Chancery. The party seeking to revive may file a bill of revivor according to the practice in Chancery, or may adopt the statutory method by *scire facias*. The parties entitled to revive, or liable to be revived against, may enter their appearance, and have the cause revived in their names on motion, without the issuance or service of process. If the parties against whom a revivor is sought are non-residents, or their names or residences are unknown, and cannot be ascertained on diligent inquiry, a bill of revivor is the better practice in Chancery causes, for in such cases publication must be made.<sup>44</sup> A bill of revivor, however, in the appellate Court cannot bring new parties or new matters before the Court, but must be strictly a bill of revivor, pure and simple; for if new parties or new matters were brought before the Court, to that extent the bill would be original, and a new suit.<sup>45</sup> But an administrator *ad litem* cannot be appointed in the appellate Court.<sup>46</sup>

## ARTICLE II.

### BRIEFS IN THE APPELLATE COURTS.

§ 1302. Some Fundamental Rules of Adjudication in the Appellate Courts.  
 § 1303. Briefs: Their Character.  
 § 1304. When and Where Briefs Must be Filed.

§ 1305. Rules Limiting Hearings in the Appellate Courts Necessary.  
 § 1306. Form of Briefs.  
 § 1307. Suggestions in Reference to Briefs.

§ 1302. **Some Fundamental Rules of Adjudication in the Appellate Courts.** There are some fundamental rules of adjudication in the appellate Courts, which, if observed by counsel, would not only greatly lessen the bulk of their briefs, and the number of supposed errors assigned, but would lessen the labors of the Judges. The following are some of these rules:

1. **The Appellate Courts have no Original Jurisdiction,** and can exercise none, not even when attempted to be conferred by the Legislature,<sup>1</sup> or by consent of parties.<sup>2</sup>

2. **The Appellate Courts will not Search a Record to Find Errors:** the party appealing must point out the errors he complains of in the record he brings up, and must plainly show that injustice has been done him, or the decree will be affirmed.<sup>3</sup>

<sup>42</sup> Darnsmont v. Patton, 4 Lea, 597.

<sup>43</sup> Darnsmont v. Patton, 4 Lea, 597.

<sup>44</sup> Foster v. Burem, 1 Heisk., 785. In this case, the Supreme Court adopted rules of practice for the revivor of causes in that Court. The words "bills of review" in said rules, on page 786, should read "bills of revivor." See, also, Supreme Court Rules of 1891; Rules, 12-15; 5 Pick., 772. These rules, and all other rules of practice of the Supreme Court, are effective in the Court of Civil Appeals.

<sup>45</sup> Justices v. McBroom, 1 Lea, 558. Parties

standing in the shoes of deceased parties, and the husband of a newly married party, are not new parties, but mere representatives of former parties.

<sup>46</sup> Ragio v. Collins, 17 Pick., 662.

<sup>1</sup> State v. Gannaway, 16 Lea, 124, 129; Ward v. Thomas, 2 Cold., 565; State v. Hall, 6 Bax., 7.

<sup>2</sup> Gibson v. Widener, 1 Pick., 16; Gurley v. Railroad, 7 Pick., 486.

<sup>3</sup> Supreme Court Rule, 20; Denton v. Wood, 2 Pick., 37; Wood v. Frazier, *Ibid.*, 500; Loveman v. Taylor, 1 Pick., 1, 8.

3. The Appellate Courts will Presume Everything the Record will Permit<sup>4</sup> to sustain a decree, but nothing to reverse it.

4. The Appellate Courts will not Reverse a Decree on a Question of the Chancellor's Discretion, unless the exercise of such discretion was not only clearly erroneous, but oppressive.<sup>5</sup>

5. The Appellate Courts will not Reverse a Decree as to Facts Found by the Master on a proper reference, when his finding is confirmed without exceptions, or concurred in by the Chancellor on exceptions.<sup>7</sup>

6. The Appellate Courts will not Reverse a Verdict for want of evidence when there is any evidence, at all, to sustain it.<sup>8</sup>

7. The Appellate Courts will not Reverse a Decree which is Substantially Correct even though errors were committed in the progress of the cause,<sup>9</sup> or though the decree be based on incorrect grounds, or unsound reasons.<sup>10</sup>

8. The Appellate Courts will not Reverse, or Rule Out, a Decree When Collaterally Attacked, except for want of jurisdiction in the Court to render it; and this want of jurisdiction must affirmatively appear on the face of the record itself.<sup>11</sup>

9. The Appellate Courts will not Rehear a Cause unless it be plainly shown, by petition duly filed, that the opinion is manifestly erroneous in some important particular, by reason of some controlling matter of law or fact having been *obviously overlooked* by the Court.<sup>12</sup>

§ 1303. Briefs: Their Character.—The appellate Courts have established certain rules of practice in the hearing of causes at their bars;<sup>13</sup> and especially rules prescribing the frame of the brief to be filed. According to these rules the brief must contain in the order following:

1. A Statement of What the Case is, and the precise points raised by the pleadings, with such reference thereto as may be necessary.<sup>14</sup>

2. The Substance of the Verdict and Judgment Thereon, or judgment without verdict, or decree, with reference to the pages of the transcript wherein each appears.<sup>15</sup>

3. A Statement of the Errors of Fact, or Law, Relied Upon to reverse the judgment or decree; and, 1, in case it is an *error of fact*, the brief shall refer to the evidence relied on to show the error, citing the pages of the record on which it appears; and, 2, in case it be an *error of law*, the propositions of law relied on shall be stated; and following such propositions the authorities relied on to sustain the same shall be cited.<sup>16</sup>

<sup>4</sup> *Omnia presuntur legitime facta donec probeur in contrarium.* (All things are presumed to be rightly done until there is proof to the contrary.) *Betts v. Demumbrance*, Cook, 39; *McGavock v. Ward*, *Ibid.*, 403; *Denton v. Wood*, 2 Pick., 37; *Wood v. Frazier*, 2 Pick., 500; and see *Stanly v. Crippen*, 1 Head, 116; *Cornelius v. Merrit*, 2 Head, 97, 100; *Nolen v. Wilson*, 5 Sneed, 340; *Gilchrist v. Cannon*, 1 Cold., 583; *Wolfe v. Tyler*, 1 Heisk., 317; *Mitchell v. McKinney*, 6 Heisk., 83. See, *ante*, §§ 61; subsec. 6; 565, note 11.

<sup>5</sup> *Crawford v. Insurance Co.*, 12 Heisk., 154; *Cheek v. Bank*, 9 Heisk., 489, 492; *Owen v. Owen*, 5 Hum., 352; *Pitts v. Gilliam*, 1 Head, 530; *Trabue & Lucus v. Higden*, 4 Cold., 620, 624; *Buchanan v. McMannus*, 3 Hum., 449; *Low v. Morris*, 4 Sneed, 69; *Helm v. Rogers*, 5 Hum., 105; *Grosvenor v. Bethell*, 9 Pick., 577; *Tyler v. Walker*, 17 Pick., 306, 310; *Crawford v. Life Insurance Co.*, 12 Lea, 154; *Cheek v. Bank*, 9 Heisk., 489, 492; *Dupuy v. Gorman*, 9 Lea, 144; *Peterson v. Turney*, 2 Ch. Apps., 549. *Judicium semper pro veritate accipitur.* (A judgment is always taken to be true.) What is meant by "oppressive" is that it prevented the appellant from exercising some right in the preparation of his case for the hearing.

<sup>7</sup> *Turley v. Turley*, 1 Pick., 251; *Allen & Hill, exrs.*, 5 Shanks, 6 Pick., 359; *Hicks v. Porter*, 6 Pick., 1; *Fitzsimmons v. Johnson*, *Ibid.*, 416; *Dollman v. Collier*, 8 Pick., 660. See, *ante*, §§ 619; 620. But this rule does not cover findings on questions of law, or on mixed questions of law and fact. *Railroad v. Knoxville*, 14 Pick., 1; *Grimstead v. Huggins*, 13 Lea, 728; *Hascall v. Hafford*, 23 Pick., 355. Nor findings based on mere opinions or estimates,

especially as to fees of Solicitors and guardians *ad litem*, and as to the compensation of executors, administrators, guardians and trustees. *Pearson v. Gillenwaters*, 15 Pick., 446.

<sup>8</sup> *Kirkpatrick v. Jenkins*, 12 Pick., 85, 87; *Railway Co. v. Mahoney*, 5 Pick., 311; *Young v. Cowden*, 14 Pick., 577, 581. *Nance v. Haney*, 1 Heisk., 177, 181, which attempted to modify this rule to suit the exigencies of the times, and can no longer be considered as authority on this point. See *Minton v. Stahlman*, 12 Pick., 98, 111; *Nailing v. Nailing*, 2 Sneed, 630; *Iron Co. v. Pace*, 17 Pick., 482; *Railroad v. Kenley*, 8 Pick., 207, 219; *Walker v. Galbraith*, 3 Head, 316; *Wolfe v. Tyler*, 1 Heisk., 313, 317. An assignment of error on this point should aver "that there is no evidence to sustain the verdict." *Felton v. Clarkson*, 19 Pick., 457; *Record v. Cooperage Co.*, 24 Pick., 657, 660.

<sup>9</sup> *Allen & Hill v. Shanks*, 6 Pick., 359, 383; *Watkins v. Land Company*, 7 Pick., 683; *Mitchell v. McKinney*, 6 Heisk., 83; *Cannon v. Blakemore*, 10 Hum., 227; *Bentley v. Hurxthal*, 3 Head, 379; *Cornelius v. Merritt*, 2 Head, 97; *Langford v. Love*, 3 Sneed, 311; *Boyd v. Sims*, 3 Pick., 771, 774; *Sewell v. Tuthill*, 4 Cates, 271; *Code*, § 4516.

<sup>10</sup> *Turrell v. Murray*, 2 Yerg., 384; *Chambers v. Chambers*, 8 Pick., 707, 714; *McGuire v. Gallagher*, 11 Pick., 349; *Harper v. Lovell*, 21 Pick., 614, 622.

<sup>11</sup> See, *ante*, §§ 446; 565; 576.

<sup>12</sup> See, *post*, § 1319.

<sup>13</sup> 5 Pick., 773-777. See letter of Supreme Judges, *ante*, note 20 to § 1293a.

<sup>14</sup> Rule 20, § 1; 5 Pick., 774.

<sup>15</sup> *Ibid.*

<sup>16</sup> Rule 20, § 2.



4. **All Points of Fact and Law Relied on Must be Stated** as required in the preceding paragraph, and all authorities relied on must be cited; but counsel will not be confined to the authorities cited, nor required to cite when none are known to counsel.<sup>17</sup>

5. **When the Error Assigned is to the Action of the Court Upon a Preliminary Motion, Demurrer, or Plea,** the substance of such motion, demurrer or plea must be stated, and the action of the Court thereon set forth, citing the pages of the transcript where the same appears.<sup>18</sup>

6. **When the Error Alleged is as to the Admission or Rejection of Evidence,** the specification must quote the full substance of the evidence admitted or rejected, citing the pages of the record where the evidence and the ruling thereon may be found.<sup>19</sup>

7. **When the Error Alleged is as to the Charge of the Court,** the specification must set out the part of the charge referred to, whether it be instructions given, or instructions refused, citing the pages of the transcript wherein such instructions are found.<sup>20</sup>

8. **When the Error Alleged is as to a Ruling Upon a Report of a Master,** the brief must set out the exception to the report, and the ruling of the Court thereon, so that it may plainly appear what the question was; and, if it be a question of fact, the brief must state whether the Master and Chancellor have concurred or disagreed in reference thereto.<sup>21</sup>

9. **Assignments of Errors in General Terms are Treated as Nullities.** To say that the Court erred in doing so and so amounts to nothing, unless the assignment goes further, and specifies how, wherein and wherefore the Court erred, so the appellate Court may see the error from the facts stated in the assignment, without resorting to the record.<sup>22</sup> Such assignments as (1) "that the Court erred in giving complainant a decree," for so and so; or, (2) "in dismissing the bill;" or, (3) "in dismissing the cross bill;" or, (4) "in overruling the demurrer;" or, (5) "in sustaining the demurrer;" or, (6) "in admitting or rejecting certain evidence;" or, (7) "in its charge to the jury;" or, (8) similar general assignments, are all *nullities*; and will be noticed only to be overruled.

10. **The Failure to File the Brief Required by the Rules of the Court** will be taken as an abandonment of the appeal, or writ of error, as the case may be; and errors not specified in the brief will be treated as waived. The Court, however, may at its option, notice an error overlooked by counsel.<sup>23</sup>

11. **Brief by the Appellee.** The counsel for the appellee must file with the Clerk of the Court, *a brief in support and defence of the judgment or decree assailed.* This brief must be of like character with that above described, except that no specifications of error are required, and no statement of the case unless that already filed is controverted.<sup>24</sup>

12. **References to Text-Books and Reports** must be to the side pages, if any; but if none, then to the top pages, except that the references to books which treat of subjects by sections must be to the sections.<sup>25</sup>

13. **Mechanical Execution of Briefs.** Briefs are required to be written in a large and legible hand-writing with black ink and upon law paper, or printed, or type-written.<sup>26</sup>

<sup>17</sup> Rule 20, § 2.

<sup>18</sup> Rule 20, § 3; 5 Pick., 774-775.

<sup>19</sup> *Ibid.* Such an assignment should so show the exact point raised that the Judges will be able to understand it without examining the record. *Gowell v. Mayor*, 1 Ch. Apps., 133. Every assignment should be intelligible in and of itself.

<sup>20</sup> *Ibid.*

<sup>21</sup> Rule 20, § 3. The brief should give the substance of that part of the report to which the exception applies.

<sup>22</sup> *Cheatham v. Pearce*, 5 Pick., 671; *Powers v. McKenzie*, 6 Pick., 167; *Grundy County v. Tennessee Coal Co.*, 10 Pick., 295.

<sup>23</sup> Rule 20, § 4. The appellate Court presumes that every ruling, decree and judgment of the lower

Court is correct in form, lawful in substance, and just in results; and, therefore, requires a party who disputes this presumption to plainly point out, in the proper manner and time, any errors in such rulings, decrees and judgments, which clearly show that substantial injustice has been done him; and if such party fail so to do, the Court will presume there are no such errors, and will affirm the judgment or decree appealed from. See, *ante*, §§ 565, note 11; 1302, sub-secs. 2 and 3, notes 3 and 4.

<sup>24</sup> Rule 20, § 5; 5 Pick., 775.

<sup>25</sup> Rule 23; 5 Pick., 776. In citing authorities give the style of the cause as well as the name and page of the report.

<sup>26</sup> *Ibid.*

14. **Written Arguments are Not the Briefs Required by the Rules.** There seems to be a disposition on the part of the bar to distinguish between the assignment of errors and the brief.<sup>27</sup> Such distinction is not warranted by Rule 20, which clearly shows that “*the brief shall contain \* \* a statement of what the case is, and the precise points raised, \* \* a statement of the errors of fact and law relied upon to reverse or modify, \* \* the authorities relied on, \* \* the exceptions to the Master’s report and the ruling of the Court thereon,*” and so on. Said Rule further declares that “*the failure to file a brief as required by this Rule (20) will be taken as an abandonment of the appeal; \* \* \* and that the counsel for a defendant-in-error or appellee shall file a \* \* \* like brief in support and defence of the judgment, or decree, assailed.*”

This Rule (20) evidently contemplates that the appellant’s whole case should be concisely summarized in the “*brief*,” but a practice seems to have gradually grown up of making the “assignment of errors” *one* thing and the “*brief*” *another* thing, using the brief not for the assignment of errors, but to bolster up and fortify the assignment; construing the word “*brief*” to mean the “*written argument*” counsel are allowed to present by Rule 21, which written argument, however, the Rule explicitly declares “*will not supersede the necessity of a brief.*”

As, however, substance, and not forms or names, determines the rights of litigants, it will continue to be immaterial whether a “*brief*” is an “assignment of errors” or a “*written argument*,” so long as errors are assigned as required by Rule 20.<sup>28</sup> It seems to the author, however, from an examination of our reports, that the practice of converting the “*brief*” into a “*written argument*” has largely augmented the labors of the appellate Judges, by requiring them to go through both the assignment of errors and the so-called brief, which latter is often attached to the assignment and declared to be “*a part thereof*,” and the assignment often declares that the “*brief hereto attached is made a part thereof*,” and thus they are so wedded as to make a voluminous compound out of what was originally intended to be a concise “*brief*.”

§ 1304. **When and Where Briefs Must be Filed.**—It is of great importance to the appellant to have his brief duly filed; for, if not so filed, he will be deemed to have abandoned his appeal,<sup>28a</sup> and the Chancellor’s decree will be affirmed, as of course, when the case is called for hearing; and errors not specified will be treated as waived. The rules of the appellate Courts on this subject are as follows:

1. **When and Where the Appellant Must File his Brief.** The counsel for appellant, or plaintiff-in-error, in all civil causes shall file with the Clerk of the Court, at least ten days before the call of the county from which the cause comes, a written or printed brief, which shall be attached by the Clerk to the transcript. If the record be filed at so late a date as not to permit the brief to be filed for the time required before the hearing, then such brief may be filed at any time after the filing of the transcript, and before the cause is called for argument.<sup>29</sup>

2. **When and Where the Appellee Must File his Brief.** The counsel for a defendant-in-error, or appellee, shall file with the Clerk of the Court, at least three days before the calling of the cause (if the record is filed in time; if not, then at any time before the calling of the cause,) a brief in support and defence of the judgment or decree assailed. This brief shall be of like character with that required of the plaintiff-in-error or appellant, except that no specification of error shall be required, and no statement of the case, unless that already filed is controverted.<sup>30</sup>

<sup>27</sup> See *Simmons v. Bailey*, 21 Pick., 155.

<sup>28</sup> This disposition to denominate the brief an “assignment of errors,” and to denominate the written argument a “*brief*,” probably originated in the practice of the Supreme Court Commission, where the assignment of errors was so called, and the argument in support of the assignment was often

called a brief; but it is a misnomer to so name the brief under Supreme Court Rule 20.

<sup>28a</sup> Rule 20, § 4.

<sup>29</sup> Rule 20; 5 Pick., 774-775. The Court of Civil Appeals will, for good cause, relax both this and the next rule.

<sup>30</sup> Rule 20, § 5; 5 Pick., 775.

§ 1305. **Rules Limiting Hearings in the Appellate Courts Necessary.**—Formerly the Supreme Court had time to hear the whole record read when a suit in Chancery was appealed, and then the appeal opened up the whole case, and it was tried *de novo*, the trial often consuming several days. But now, in consequence of the enormous increase in the number and importance of cases appealed, the appellate Courts to avoid being overwhelmed by the accumulation of cases upon its dockets, has been forced to adopt rules that so limit the hearings in cases appealed from the Chancery Courts as to leave a decree appealed from in such force that, unless reversible error be pointed out in accordance with these rules, it will be affirmed. The result of these rules is that the decree is considered to be *prima facie* correct, and all interlocutory proceedings are presumed to be regular.<sup>31</sup> Whoever challenges the correctness of such proceedings and decree must put his finger upon material errors; and on his failure so to do, in the manner and time prescribed by said rules, the record of the case will be closed against him, and the decree appealed from affirmed, and put in force.

§ 1306. **Form of Briefs.**—As some aid to the young Solicitor, the following briefs are presented, showing alleged errors both of law and of fact:<sup>32</sup>

**IN THE SUPREME COURT, [OR, IN THE COURT OF CIVIL APPEALS.]**  
**BRIEF OF THE APPELLANTS.<sup>33</sup>**

John Doe,  
*v.s.*  
 Richard Roe, *et al.* } From the Chancery Court, at Knoxville.

**STATEMENT OF THE CASE.**

Complainant, who is a creditor of Richard Roe, filed this bill to set aside an alleged fraudulent conveyance of a stock of goods by said Richard Roe, to his brothers and co-defendants, Robert and Roland Roe, and to sell the goods to satisfy his debt. The defendants all answered, denying the fraud and denying that the transfer was voluntary, Robert and Roland answering separately from Richard. The only issue on the pleadings is one of fact: Was the transfer fraudulent?

The deposition of John Brown was taken by the complainant, but was suppressed by the Chancellor on exceptions. This deposition fully proved that the transfer was both fraudulent and voluntary. No other proof was taken by the complainant, and no proof at all was taken by the defendants. At the hearing, the Chancellor dismissed the bill as to the defendants, Robert and Roland Roe, and gave complainant a decree for his debt against Richard Roe, but taxed him with all the costs of the cause down to the decree. Complainant appealed. [*Transcript, p. 44.*]

**I. ERRORS OF LAW RELIED ON.<sup>34</sup>**

1. *The Chancellor erred in ruling out the deposition of John Brown, a witness for the complainant.*

The deposition was excepted to by the defendants on the ground that its certificate showed that it was reduced to writing by the commissioner's clerk. This exception was sustained by the Master, and, on appeal, was sustained by the Chancellor. [*Trans. p. 42.*]

No objection having been made to the commissioner's clerk at the time he was acting, the defendants were estopped from objecting afterwards.

Herman on Estoppel, § 1984.

Jones. *v.* Brown, 1 Cal., 963.

See "Waiver," Gibson's Suits in Ch., § 71.

<sup>31</sup> *Omnia presumuntur solemniter esse acta.* (All Court proceedings are presumed to have been properly done.)

<sup>32</sup> See letter of Supreme Judges, § 1293a, note 20, *ante*. On an appeal, the appellant may show any and all errors committed by the Court below, at any time between the beginning and the ending of the suit, provided they appear in the record. The appellate Court will review any and all rulings of the Chancellor upon its attention being properly called to them, by the party complaining, in the manner and time prescribed by the rules of the Court. The most ordinary matters complained of in the appellate Court, outside of the final decree, are: 1, the overruling of demurrers; 2, the overruling of pleas; 3, the allowance or disallowance of amendments of pleadings; 4, the extension, or refusal of extension, of time to take proof; 5, the admission of illegal evidence, or the exclusion of legal evidence; 6, the suppression of, or refusal to suppress, depositions;

7, the allowance or disallowance of exceptions to reports; 8, the refusal to recommit reports, and, 9, in jury cases, the refusal to grant a new trial, on allegations of errors in empanelling the jury, or of errors of the Chancellor in admitting or excluding evidence, or in misdirecting the jury, or in refusal to give proper directions on request, or of misconduct of the jury, or of surprise at the introduction of adverse testimony, or of the discovery of new evidence, or of other grounds for a new trial.

<sup>33</sup> The appellant in his assignment of errors must not only state the action of the Court complained of, but must show why or wherein it is erroneous. Powers *v.* McKenzie, 6 Pick., 167.

<sup>34</sup> Assign no errors that are not material: select the most material. Ten assignments are better than twenty, and five are better than ten. Make no fine points, no hypercriticisms. *Apices juris non jura.* Judges use no microscopes.

This deposition, if admitted, would have proved that the transfer was fraudulent; and its suppression was a grievous error.

2. *The Chancellor erred in ruling that the burden of proving that there was no consideration for the transfer was on the complainant.* [Tr., p. 38.]

When the consideration is impeached, and the proof casts suspicion upon it, the burden is then on the conveyee to show that a valid consideration was paid.

Alley vs. Connell, 3 Head, 579.

Dunlap vs. Haynes, 4 Heisk., 478.

The proof showed the defendants were brothers; [Tr., p. 17.] None of the defendants testified: this casts suspicion on the transaction.

**II. ERRORS OF FACT RELIED ON.**

1. *The Chancellor erred in finding that there was no fraud.*

John Brown clearly proves the fraud. [Tr., p. 41.]

The Chancellor refused to consider this deposition; but it was in the file, and a part of the record; and this Court will consider it.

Jones vs. Brown, 2 Cal., 928.

Stokes vs. Stiles, 1 N. C., 792.

The defendant conveyees admitted in their answer that they were brothers of the conveyor. [Tr. p. 9.]

The defendants all declined to testify. This raised a presumption of guilt against them.

Dunlap vs. Haynes, 4 Heisk., 476.

Howard vs. Massengale, 13 Lea, 577.

**III. ADDITIONAL ERROR OF LAW.**

*The Chancellor erred in taxing the complainant with all the costs of the cause down to the decree.* [Tr., p. 44.]

There is abundant proof of the bad faith of the defendants; and of the good faith of the complainants.

2 Dan. Ch. Pr., 1381.

Arnold v. Kyle, 8 Bax., 319.

Richard Roe should, at least, have been taxed with the costs of the cause. A decree for the amount of the debt was rendered against him. [Tr., p. 44.]

LEDGERWOOD & CARTY, Solicitors.

**IN THE SUPREME COURT, [OR, IN THE COURT OF CIVIL APPEALS.]**

**BRIEF OF THE APPELLEES.<sup>35</sup>**

John Doe, }  
vs. } From the Chancery Court, at Knoxville.  
Richard Roe, et al. }

**STATEMENT OF THE CASE.**

In addition to the facts set forth in the Appellant's brief, the record shows that the answer of the defendants *on oath* was called for; [Tr., p. 4;] and that the defendants, Robert and Roland, the transferees, answered on oath, emphatically and explicitly denying all fraud, and specifying the consideration paid, and in what it was paid, showing good faith and full value. [Transcript, pp. 14-16.]

Complainant having made witnesses of the defendants, is bound by their answers, unless overturned by two witnesses, or one witness and corroborating circumstances; and there is no contrary evidence.

**I. REPLY TO ALLEGED ERRORS OF LAW ASSIGNED BY THE APPELANT.**

1. *The Chancellor ruled correctly in suppressing John Brown's deposition.*

The commissioner's certificate does not show that his clerk was not of kin or counsel, or not interested. [Tr., p. 40.]

Railway Co. vs. Arnold, 5 Pick., 107.

2. *The Chancellor was correct in holding that the burden of proof was on the complainant.* [Tr., p. 38.]

The proof did not cast any suspicion on the consideration. There was no proof, except the answers of the defendants.

Relationship, alone, is not enough to raise a suspicion of fraud.

Wait's Fraud. Convey., § 242.

Robinson v. Frankel, 1 Pick., 478.

<sup>35</sup> See letter of the Judges of the Supreme Court; ante, page 1041, note 20.

## II. REPLY TO ALLEGED ERRORS OF FACT ASSIGNED BY THE APPELLANT.

### 1. *The Chancellor was correct in finding there was no fraud.*

(1) John Brown's deposition cannot be looked at here. That would take the defendants by surprise.

Besides, the deposition having been suppressed, and not having been made a part of the record by a bill of exceptions, or order of record, or by authentication of the Chancellor, *is not properly a part of the Transcript*, and cannot be looked to in this Court, *for any purpose.*

Perry *vs.* Pearson, 1 Hum., 431.

Spurlock *vs.* Fulks, 1 Swan, 289.

Steele *vs.* Frierson, 1 Pick., 430.

Gibson's Suits in Ch. §§ 538; 1213, sub-secs. 4 and 6.

(2) If looked at it will not overcome the sworn answers of the defendants.

(3) The defendants had already testified in their answers, and had no need to testify again.

## III. REPLY TO ADDITIONAL ALLEGED ERROR OF LAW ASSIGNED.

*The Chancellor did not err in taxing complainant with all the costs of the cause down to the decree.* [*Tr.*, p. 44.]

There is an express statute requiring the costs to be taxed as they were.

Code, § 4292; Gibson's Suits in Ch., § 590.

The decree of the Chancellor is manifestly correct, in all the particulars wherein it is assailed; and should, therefore, be affirmed.

H. H. INGERSOLL, Solicitor.

§ 1307. **Suggestions in Reference to Briefs.**—Nothing is so valuable to a Court as a good brief that is brief; and nothing is more worthless than a poor brief, especially one that is long, confused, obscure, diffuse, and digressive. In constructing a brief, the following suggestions may be of value:

I. **The Statement of the Case.**<sup>37</sup> This statement should not be an abstract of the whole cause, nor an abstract of the pleadings; it should be exactly what the appellate Court Rule declares it should be: a statement of *what* the case *is*, and the precise *points* raised by the pleadings. 1. "*A statement of what the case is*" may often be made in a few words, thus: This is a suit to set aside an alleged fraudulent conveyance; or, This is a suit to specifically enforce a contract; or, The object of the bill in this case is to partition a tract of land; or, The bill in this case was filed to enforce a mechanic's lien. 2. "*The precise points raised by the pleadings*" may, generally, be very briefly expressed, thus: The questions raised by the pleadings are two: 1st, Was there a contract in writing actually signed by the defendant. 2d, If so, are its terms sufficiently proved; or, The issues raised by the pleadings are: Whether, 1st, there ever was a mechanic's lien in favor of the complainant, who was a mere journeyman; and 2d, if so, whether he did not waive that lien by taking a note and security for the amount of his debt?

II. **The Substance of the Verdict and Decree.**<sup>38</sup> This is ordinarily stated in a few words, thus: The jury found the issues of fact in favor of the complainant, and the Court thereupon granted him the relief prayed in his bill, [*the character of this relief having been given in the statement of the case;*] or, the Court found that there had been a contract of sale duly signed by the defendant, and that its contents were sufficiently proved, and thereupon decreed that the contract be specifically performed; or, the Court decreed that the complainant had a mechanic's lien, and that he had not waived it by taking a note and security for the amount thereof.

The brief must contain such a statement of facts that, when the specific errors are assigned, the Court will be able to see, from the brief itself, that a *prima facie* case of error is made out.<sup>39</sup> Errors of law arise out of the facts, and the facts must be so stated that the pertinency and truth of the errors of law alleged will appear.

<sup>37</sup> Rule 20, § 1; 5 Pick., 774. These suggestions are all based on the Supreme Court Rules, and are intended as a mere commentary on them, to aid

young Solicitors in complying with them. See, *ante*, note 20 to § 1293a.

<sup>38</sup> Sup. Court Rule, 20, § 1; 5 Pick., 774.

<sup>39</sup> Correll *v.* Mayor, 1 Ch. Apps., 133.

**III. The Statement of the Errors of Fact.**<sup>40</sup> The success of a brief as to the facts depends largely upon its clearness and conciseness in stating the errors of fact relied on to reverse or modify the decree complained of. The following illustrations will show how these statements may be made:

1. *The Court erred in finding that there was a contract of sale.* [Tr., p. 65.]

(1) Witness, John Brown, who proves it, could not read, and never heard it read. [Tr. p. 28, xqs., 9 and 10.]

(2) The complainant's history of the case is in conflict with Brown's. [Tr., pp. 21, q. 4; and p. 26, xq. 9.]

(3) The defendant positively denies that he ever signed the writing. [Tr. p. 31.]

(4) Susan Brown, wife of witness John Brown, says she was in the room, and had a good chance to see and hear what was done, and that she did not see any writing of any kind done there by any one; and that there was no ink in the house. [Tr. pp. 35-36.]

The existence of the unsigned writing is not disputed: the one question of fact is: *Did the defendant sign it?*

Where the witnesses and facts are numerous, the error of fact may be well stated in this form:

2. *The Court erred in finding that the true boundary between the parties ran from the walnut to the white oak stump. The Court should have found that the line ran to the standing white oak, twenty poles south of the said stump.*

Three witnesses saw the standing oak marked as a corner.

(1) John Smith. [Tr. p. 91, q. 6.]

(2) Wm. Brown. [Tr. p. 94, q. 4.]

(3) Henry James. [Tr. p. 96, q. 2.]

Three witnesses heard the defendant admit that the standing oak was the corner.

(1) Wm. Brown. [Tr. 93, q. 2.]

(2) George Stokes. [Tr., p. 89, q. c.]

(3) Samuel Jones. [Tr., p. 40, xq. 9.]

He is the defendant's witness.

The standing oak is on the line according to the course called for, after allowing for the variation of the needle.

(1) Prior Leë, [Tr., p. 36, qs. 6-7.]

His deposition was taken by the defendant, but read by the complainant.

(2) George Stokes. [Tr., p. 97, q. 17.]

**IV. The Statement of the Errors of Law.**<sup>41</sup> Solicitors must keep in mind that a brief is one thing, and an argument is another thing. A brief is the mere skeleton of an argument, an argument stripped to the bone. Many otherwise good briefs are rendered ineffective by having arguments injected into them. Errors of law should be stated with preciseness and conciseness, thus:

1. *The Chancellor erred in holding that a wife's earnings could not, by contract with her husband, become her separate estate.* [Tr., p. 116.]

The law may once have so been, but it is otherwise now.

Carpenter vs. Franklin, 5 Pick., 142.

3 Pom. Eq. Jur., § 1103.

2. *The Chancellor erred in refusing the defendants a trial by jury on their demand.* [Tr., p. 112.]

(1) The rule promulgated by the Chancellor requiring the demand for a jury to be made on the 1st day of the term is in violation of the statute, and void.<sup>42</sup> [See Rule, Tr., p. 113.]

<sup>40</sup> Sup. Court Rule, 20, § 2. The assignment of errors must be specific. The day of generalities has passed. Demurrers must be special. Exceptions to Masters' reports must be special. Exceptions to depositions or to evidence must be special. Whoever finds fault in Court must put the tip of his finger on the error. Hence, errors complained of in the action of the lower Court must be specified. See Denton v. Wood, 2 Pick., 37; Wood v. Frazier, 2 Pick., 500. The appellate Court does not hunt for errors: the Solicitor of the appellant must flush the game. The Court presumes the decree below to be correct. See, ante, § 1302, sub-sec. 3.

<sup>41</sup> The brief should consider the errors of fact separately from the errors of law. Sup. Court Rule, 20, § 2; 5 Pick., 774.

As a rule, briefs are greatly overloaded with superfluous law. The Court needs but little aid from counsel in matters of law; and if many authorities

are cited, few, or none, of them will be examined. The Court has no time to hunt up, or run down, twenty-five or fifty citations. One or two authorities on any given point of law, and these the latest and most direct, are sufficient; one is better than two, ordinarily; and ten are worse than none. The main use the Court makes of the citations in a brief is as an aid in citing authorities in their written opinions. The point must be a very novel one, indeed, that requires authorities. None of the authorities cited in the briefs contained in this Article would be of any value to the Court, the law on the various points being as familiar to the Judges as the letters of the alphabet. If you take care of the facts, the Judges will take care of the law; and if you make your brief of the facts short and specific, it will be read and appreciated.

<sup>42</sup> The Supreme Court has sustained such a rule. Ante, § 547.

M. & V's. Code, § 4467.

Duncan *vs.* King, 1 Tenn., (Overt.) 79.

Allen *vs.* Saulpaw, 6 Lea, 481.

Acts of 1889, Ch. 220.

(2) But the rule, if valid, is not absolutely binding, and could have been departed from; and ought so to have been, for the reasons stated in defendant's affidavit. [*Tr.* p. 94.]

Marsh *vs.* Crawford, 1 Swan, 116.

Lowe *vs.* Morris, 4 Sneed, 72.

Gibson's Suits in Ch., § 62, sub-sec., 8, on "Showing Cause."

**V. Statement of Error of the Court Upon a Motion, Demurrer, or Plea.**<sup>43</sup> What the appellate Court wants in a case of this kind is a clear statement, based on the record, showing what was done, and why, and giving the substance of the motion, demurrer, or plea. The following forms are given:

1. *The Chancellor erred in discharging the attachment levied on the defendant's property.*

This action was taken on motion of the defendant after he had answered the bill. The ground of the motion was that the bill did not aver it was the first application for an attachment.

(1) No such averment was necessary, the ground of attachment being statutory.

Gibson's Suits in Ch., § 872.

(2) The ground of motion had been waived by answer to the bill.

See "Waiver," Gibson's Suits in Ch., § 71.

2. *The Chancellor erred in sustaining the defendant's demurrer to the bill.*<sup>44</sup> [*Tr.*, p. 9.]

The bill was filed as a detinue bill to recover an iron safe valued at two hundred dollars. The demurrer disputed the jurisdiction of the Chancery Court to try such a case. This involves the construction of the Act of 1877, Ch. 97.

This statute has been liberally construed, and held to cover cases of mandamus, ejectment, money lost at gaming, covenants running with land, damages on bonds, and conversion of property.

Hawkins *vs.* Kercheval, 10 Lea, 542.

Frazier *vs.* Browning, 11 Lea, 253.

McGrew *vs.* City P. Exchange, 1 Pick., 572.

Williams *vs.* Burg, 9 Lea, 455.

Glenn *vs.* Moore, 11 Lea, 256.

State *vs.* Keller, 11 Lea, 399.

Coal Co. *vs.* Moses, 15 Lea, 300.

The above cases are not less *legal* in their nature than is the one raised by the bill and demurrer. The statute is *all-comprehensive*, and the Legislature having named the exceptions to it, the Courts can add no others.

*Expressio unius est exclusio alterius.*

Broom's Max., 638.

Guion *vs.* B. Academy, 4 Yerg., 253.

Cocke *vs.* McGinnis, Mart & Yerg., 361.

3. *The Chancellor erred in overruling appellant's motion for a new trial.* [*Tr.*, p. 74.]

There was an overwhelming preponderance of evidence against the verdict. The following witnesses swore positively that the defendant signed the contract in controversy.<sup>45</sup>

(1) John Jones, [*Tr.* p. 32, q. 5.]

(2) Henry Brown. [*Tr.* p. 36, q. 6.]

This contract was the foundation of appellant's suit.

**VI. Statement of Errors in Admitting or Rejecting Evidence.**<sup>46</sup> The appellate Court will not consider an objection to evidence, unless the objection is specific, and duly made at the hearing in the Court below, and ruled on against the appellant.<sup>47</sup> A brief relying on such an error may state it thus:

1. *The Court below erred in admitting the statement by the witness, Wm. Brown, that George Jones, the tenant of the complainant, told him that the land in dispute really belonged to the defendant.* [*Tr.*, p. 29.]

<sup>43</sup> Sup. Court Rule, 20, § 3; 5 Pick., 774.

<sup>44</sup> Rule 20, § 3. In such a case, the preceding statement of the case should show the points raised by the bill and the demurrer.

<sup>45</sup> This assignment is negatory: so are all similar ones. See, *ante*, § 1302, sub-sec. 6. The appellate Court will not reweigh the evidence: if there be any

evidence at all to sustain the verdict the appellate Court will not consider the *maius* or *minus* of it. The only assignment the Court will consider is: "There is no evidence to sustain the verdict."

<sup>46</sup> Sup. Court Rule 20, § 3.

<sup>47</sup> Bridge Co. *v.* Barnes, 14 Pick., 409.

This statement was objected to when made, on the ground that it was *res inter alios acta*; and that the complainant could not be bound or affected by such a declaration by his tenant.

*Stranahan vs. Terry*, 9 Lea, 560.

2. *The Court below erred in rejecting the evidence of what the wife of the defendant Roe said to the witness, Jones.* [*Tr.*, p. 48.]

Where a wife is acting as the agent of her husband, what she says about the business of such agency is admissible against the husband as principal. She was proved to be his agent. [*Tr.* p. 46.]

*Reilly vs. English*, 9 Lea, 16.

She told the witness, Jones, that her husband got the money complainant gave her for him. [*Tr.* p. 48.]

**VII. Statement of Errors in the Charge of the Court.**<sup>48</sup> In stating such errors the particular part of the charge objected to must be set out, whether it be instructions given, or instructions refused, in substance as follows:

1. *The Chancellor erred in charging the jury that "if corner marks of the proper age were on the white oak tree, that would be very strong and almost conclusive evidence that it was the true corner."* [*Tr.*, p. 61.]

This charge has been several times determined to constitute reversible error.

*Marr vs. Marr*, 5 Sneed, 385.

*James vs. Brooks*, 6 Heisk., 158.

This case strikingly resembles the one at bar.

2. *The Chancellor erred in refusing to charge the jury that "if they should believe that the clerk of the defendant illegally appropriated the money left with him, without the knowledge or assent of the defendant, the defendant would not be liable for it."* [*Tr.*, pp. 82-83.]

This request went to the very heart of the controversy, and its ground was not covered by any part of the charge. This is a reversible error.

*Crumbless vs. Sturgess*, 6 Heisk., 190.

**VIII. Statement of Errors in Rulings Upon a Master's Report.**<sup>49</sup> One of the most arduous tasks of a Court is in dealing with exceptions to Master's reports; and it requires great skill in preparing a brief that will aid the appellate Court reaching a conclusion. The following may be of some aid in making such a brief:

1. *The Chancellor erred in sustaining defendant's 1st exception to the Master's report.* [*Tr.*, pp. 89-91.]

The Master reported that the painting done on the house was worth \$219.80; whereas the proof shows that it was not worth exceeding \$150.00. [*Tr.* p. 89.]

George Jones puts it at \$140.00. [*Tr.*, p. 41.]

Wm. Brown puts it at \$137.50. [*Tr.*, p. 47.]

Henry Stokes puts it at \$150.00. [*Tr.*, p. 39.]

These witnesses are all practical painters, and disinterested.

Complainant's witnesses, four in number, put it from \$150 to \$250. [*Tr.*, pp. 89; 54; 73.]

But they were all in the complainant's employ.

2. *The Chancellor erred in sustaining the complainant's 3d exception to the Master's Report.* [*Tr.*, pp. 86-87.]

The Master reported that defendant had paid complainant \$1640.10; but on complainant's exception that the amount was only \$1431.10, the Chancellor so held. [*Tr.*, p. 92.]

The contest is over an alleged payment of \$209.00.

This payment was proved by the defendant and another.

By defendant. [*Tr.*, p. 64.]

By Wm. Brown. [*Tr.*, p. 51, q. 10.]

The Court held that this payment was on a different matter. [*Tr.*, p. 92.]

**IX. The Mechanical Execution of Briefs.** The Rule requires that briefs shall be written in a large and legible handwriting, with black ink, and upon law paper, or printed, or type-written.<sup>50</sup> It matters not how excellent a brief is, if it be illegible it is a light put under a bushel, and may as well never have been written. As between a poor brief printed or plainly written, and a good brief poorly written, the former will prevail.

<sup>48</sup> Sup. Court Rule 20, § 3.

<sup>49</sup> Sup. Court Rule, 20, § 3. The assignment should show whether the Chancellor and Master concurred. When they concur as to facts, the appellate

Court will not reverse if there be any evidence to support their finding. See § 1302, sub-sec. 5.

<sup>50</sup> Sup. Court Rule, 23; 5 Pick., 776.



## ARTICLE III.

## MOTIONS IN THE APPELLATE COURTS.

§ 1308. Motions, When and How Heard.

§ 1309. Motions to Dismiss Appeals.

§ 1310. Motions to Dismiss Writs of Error.

§ 1311. Motion for a *Certiorari* to Perfect the Record.

§ 1312. Other Motions in the Appellate Courts.

§ 1308. **Motions, When and How Heard.**—The Clerk keeps a motion docket, on which must be entered all motions which are made in Court, and not at once disposed of. Thursdays and Fridays are motion days, when motions may be made, and the motion docket called. All motions not disposed of when made must be entered on the minutes and on the motion docket, and notice thereof immediately be given to opposite counsel. Motions are disposed of only on written briefs,<sup>1</sup> if there be any contest, or litigated matter involved. The Court will not, ordinarily, hear oral arguments, either in support of, or against motions.

Counsel should not rise to make a motion in the appellate Court unless: 1, The time therefor is clearly mature; 2, the particular kind and character of motion has been definitely determined on; 3, the necessary evidence in support of the motion is in hand ready to be presented; and 4, due notice of the motion given the adverse side, when such notice is necessary.

§ 1309. **Motions to Dismiss Appeals.**—If for any cause the appellate Court ought not to entertain an appeal it may be dismissed on motion.<sup>2</sup> The ordinary grounds for dismissing an appeal are the following:

1. Because the appeal was not granted,<sup>3</sup> or was improperly granted,<sup>4</sup> or prematurely granted, or granted to the wrong term,<sup>5</sup> or granted to the wrong appellate Court.<sup>5a</sup>

2. Because the appellant failed to perfect his appeal in the Court below by giving a proper bond; or by failing to give it, or to take the oath, in the time allowed for that purpose.<sup>6</sup>

3. Because the appellant was not entitled to an appeal, for the reason (1) that he was not a party or a *quasi* party to the suit, or (2) that he consented to the decree appealed from.<sup>7</sup>

A motion to dismiss an appeal because of any deficiency or irregularity in granting or obtaining it, or in filing the record, or other ground not affecting the merits of the controversy, must be made at the term after the appeal was granted.<sup>8</sup> Where, however, the ground of the motion to dismiss is a defective bond or pauper oath, the Court will not sustain the motion if the appellant file a sufficient bond or oath within some short time designated by the Court.<sup>9</sup> And

<sup>1</sup> Sup. Court Rule, 16.

<sup>2</sup> The doors of the appellate Court do not swing loosely inward, and no litigant can enter without a wedding garment in the shape of (1) an order of record by the Court below granting an appeal, or an appeal in the nature of a writ of error; or (2) a writ of error granted by the appellate Court itself, or one of its Judges or Clerks; or (3) a writ of *supersedeas*; or (4) a writ of *certiorari*.

<sup>3</sup> An appeal must not only be prayed in the Court below, but granted; and the record must so show. *Teasdale & Co. v. Manchester Co.*, 20 Pick., 267. An appeal not granted confers no jurisdiction on the appellate Court, and the case will be stricken from the docket. *Bailey v. State*, 11 Pick., 391. The recital in an appeal bond, or in bill of exceptions, that an appeal was granted, is not sufficient: the record must show it. *Sellers v. Sellers*, 17 Pick., 606. But a final decree which recites the prayer for an appeal

and gives time to file an appeal bond sufficiently shows the appeal was granted. *Bank v. Johnston*, 21 Pick., 521.

<sup>4</sup> As to what decrees may be appealed from, see, *ante*, § 1265.

<sup>5</sup> In *Pond v. Trigg*, 5 Heisk., 532, it was held that an appeal prayed to the *next* term of the Supreme Court when the Supreme Court of that Division of the State is in session, may be dismissed at the term of the Supreme Court then being held.

<sup>5a</sup> See, *ante*, § 1263a.

<sup>6</sup> *Staub v. Williams*, 1 Lea, 36.

<sup>7</sup> *Williams v. Neil*, 4 Heisk., 280.

<sup>8</sup> *Greer v. Williford*, Peck, 290; *Snyder v. Summers*, 1 Lea, 481; *Gillespie v. Goddard*, 1 Heisk., 777; *Tedder v. Odum*, 2 Heisk., 51.

<sup>9</sup> *Wilson v. Corry*, 2 Leg. Rep., 215; *Staub v. Williams*, 1 Lea, 36.

even after an appeal has been dismissed, if the decree is one that may be appealed from as a matter of right, the appellant may file the record and obtain a writ of error, and in a proper case a *supersedeas*, also.

§ 1310. **Motions to Dismiss Writs of Error.**—A writ of error may be dismissed on motion if any of the prerequisites to the writ are wanting, or if the complainant in error was, for any reason, not entitled to the writ. The principal grounds on which to base a motion to dismiss are:

1. Because the decree complained of was not a final decree. A writ of error will lie from a final decree only, and a final decree is one which may be appealed from as a matter of right.<sup>10</sup>

2. Because the record was not filed in the time allowed by law for suing out a writ of error.

3. Because a cost bond, or pauper oath in lieu, was not filed in the time prescribed by law.<sup>11</sup>

4. Because notice of the intention to apply for the writ was not given the adverse party within the time required by law.<sup>12</sup>

A motion to dismiss a writ of error must be made at the first term after the defendant-in-error has notice of the filing of the writ. He cannot move to dismiss for want of notice, as his motion shows that he has notice.<sup>13</sup>

Where the ground of dismissal is some defect in the bond or pauper oath, the Court will allow a sufficient bond or oath to be filed, if tendered, or if given within some short period designated by the Court, on application therefor.

§ 1311. **Motion for a Certiorari to Perfect the Record.**—It frequently happens that the Clerk fails to incorporate some material paper in the transcript, and the side injured thereby may be unwilling to have the cause heard on the imperfect record. In such a case, if the omission does not appear from the record itself, or is not admitted by adverse counsel, an affidavit must be made specifying the omission. On motion, supported by such affidavit or other proof, the Court will award a *certiorari* to the Clerk and Master commanding him without delay, to make out, certify and transmit a full, true and perfect transcript of the record in the cause, on file in his office. There is usually a note placed at the foot of the writ specifying the particular paper called for.<sup>14</sup>

The Rules of the Court require suggestions of the diminution of the record to be made before the cause is called for trial, and at such time as will give opportunity to have the record perfected for the hearing, or the imperfection will be considered as waived, and the cause heard on the record as it exists. The Court will, however, ordinarily consider any amendment brought before it previous to the announcement of its opinion in the cause.<sup>15</sup> But if a party goes to trial upon an imperfect record, it will be too late for him, after the cause has been decided, to petition for a rehearing in order that the defect in the record may be supplied.<sup>16</sup> The suggestion of a diminution, and the award of a *certiorari* may be as follows:

<sup>10</sup> *Ante*, § 1265; *Gibson v. Widener*, 1 Pick., 16.

<sup>11</sup> 2 Meigs' Dig., § 958.

<sup>12</sup> In *Chester v. Foster*, 6 Pick., 515, it was decided that unless this notice was given within the two years, the writ would, on motion, be dismissed. See *ante*, § 1273.

<sup>13</sup> *Moody v. McNeily*, 3 Heisk., 545; *Cox v. Gurdard*, 1 Heisk., 777; *Snyder v. Summers*, 1 Lea, 481; 2 Meigs' Dig., § 958, sub-sec. 3.

<sup>14</sup> See *infra*.

<sup>15</sup> *Sap. Court Rule*, 26. This rule is as follows: Suggestions of diminution of record shall be made before the cause is called for trial, and at such time as gives opportunity to have the record perfected for the hearing, or the imperfection of the record will be waived; *Provided, however*, that any amendment thus supplied, brought before the Court before the cause is finally disposed of after hearing, may be considered. See *ante*, § 1297; and *LaFollette Co. v. Smith*, 7 Cates, 584.

<sup>16</sup> *Railway Companies v. Hendricks*, 4 Pick., 720. A party will not be allowed to experiment with the Court in any such way. See *Hubbard v. Fravell*, 12 Lea, 310. If he goes to trial on a record, he is conclusively deemed to waive all defects therein. See *Waiver, ante*, § 71. If the defect is discovered too late to move for a *certiorari*, the appellant may dismiss his appeal, and then file a perfect transcript for a writ of error. This shows the importance of an early and careful scrutiny of the transcript, and an early suggestion of a diminution, if any exist.

Nevertheless, if manifest justice required it, and counsel or parties have satisfactory excuse for not suggesting a diminution before the hearing, the Court may, in a clear case, disregard its rule, and award a *certiorari*, and rehear the cause. See *Trott v. West*, Meigs, 163.

## ORDER FOR A CERTIORARI FOR PERFECT TRANSCRIPT.

John Doe, *et al.*,  
*vs.*  
 Richard Roe, *et al.* }

In this cause, the Solicitor of the appellant suggested to the Court that the transcript in the cause is imperfect, and the Court being satisfied thereof by his affidavit, (*or, by the admission of adverse counsel, or, by an inspection of the transcript, when the transcript on its face shows the omission,*) on his motion a *certiorari* will issue to the Clerk and Master of the Chancery Court at Bristol, commanding him without delay to file in this Court a full, true and perfect transcript of the record on file in his office in this cause.

The writ of *certiorari* in such a case usually has an *addendum* specifying the parts of the record that have been omitted from the transcript, and may be as follows:

## CERTIORARI FOR PERFECT TRANSCRIPT.

State of Tennessee,

To the Clerk and Master of the Chancery Court at Bristol:

Whereas, in the case of John Doe, *et al.* *vs.* Richard Roe, *et al.*, now pending in our Supreme Court [*or the Court of Civil Appeals,*] at Knoxville, on a suggestion that the transcript was imperfect, a *certiorari* was ordered to issue for a perfect transcript;

You are, therefore, hereby commanded without delay to make out, certify and transmit to the present term of our said Court, a full, true and perfect transcript of all the record in said cause, on file in your office, and make due return of this writ, showing how you have obeyed the same.

Witness, S. E. Cleage, Clerk of our said Court, at office in Knoxville, the second Monday in September, 1906. S. E. CLEAGE, Clerk.

N. B.—The missing parts of the record specially desired are, [*Here insert the parts specified by the parties, or their Solicitors, and add.*] and any other part of said record found to be omitted. S. E. CLEAGE, Clerk.

§ 1312. **Other Motions in the Appellate Court.**—The principal other motions made in the appellate Court are the following:

1. **Motion for Further Time for the Argument.** If the case is very complicated, or very novel in its questions of law, or of unusual importance, or if several causes have been consolidated, or if for any other reason one hour's time to each side is insufficient for the argument, on motion and due presentation of the facts, made in advance of the hearing, the Court may allow further time, such further time, however, not exceeding one hour to the side, and often not exceeding half an hour.

2. **Motion That More Than One Counsel May be Heard on a Side.** If, for any of the foregoing reasons, or for any reason, it is important or desirable that more than one counsel may be heard upon any side, the Court may, on motion in advance of the hearing, allow two to be heard. An increase in the number of counsel heard does not, however, imply an increase of the time for argument. Counsel not heard can always file briefs, or written arguments.

3. **Motion for a Writ of Error.** Any party entitled to an appeal of right may, without praying an appeal, or after failing to prosecute an appeal, present the record of the cause to the appellate Court while in session, and move for a writ of error thereon, which motion will be allowed of course if bond, or pauper oath, be filed; provided the motion is made, and the transcript and bond or oath filed, and the notice to the adverse side given, within two years after the final decree complained of.<sup>17</sup> On making such a motion, counsel must present a perfect transcript of the record and a petition for the writ, containing the brief to be used on the trial, and accompanied by a copy of the notice served on the adverse party, or by a good excuse for not giving such notice.<sup>18</sup>

4. **Motion for a Supersedeas.** A *supersedeas* will be granted on motion, in a proper case, whether the decree sought to be superseded is a final decree or an affirmative interlocutory decree. On making such a motion, the transcript, petition, brief, and notice will be required in support thereof as where a writ of error is moved for; but the bond, in case of a *supersedeas* of a final decree,

<sup>17</sup> *Chester v. Foster*, 6 Pick., 515. A writ of error may be had from the Clerk, as a matter of course, if applied for within a year. See, *ante*, § 1273.

<sup>18</sup> Sup. Court Rule, 27. This excuse should be in

the form of an affidavit. Any excuse that would be sufficient to sustain an *ex parte* application for a receiver would probably be sufficient. See, *ante*, § 903, note 8.

will be the same as in case of appeal,<sup>19</sup> and if the *supersedeas* is to an interlocutory decree the bond will be such as the Court may require.<sup>20</sup>

5. **Motions to Revive.** When a party dies, or a female party marries, there must be suggestion and proof of the death or marriage, and a revivor, in the same cases and manner, and by and against the same persons, as in like cases pending in the Chancery Court. Revivors may be had before the Clerk in vacation, as in Chancery; and publication may be had as to non-residents and others.<sup>21</sup>

6. **Motion by Appellee for an Affirmance of the Decree Below.** It is the duty of the appellant to see that the transcript is duly filed in the appellate Court; and if he fail so to do, the appellee may at any term subsequent to the one to which the appeal was taken, produce the transcript in open Court, and move for an affirmance of the decree appealed from. Before making the motion, however, he must give the appellant reasonable notice of his intention to make such motion.<sup>22</sup> If the delay, however, is caused by the neglect of the Clerk, the Court will overrule the motion to dismiss.<sup>23</sup> There is no limit of time within which the motion to affirm must be made.<sup>24</sup>

7. **Motion for Declaration of a Lien on the Recovery.** Counsel who obtain a recovery for their clients are entitled to a lien on such recovery to secure their reasonable fees in the cause; and such a lien will be declared by the Court, on motion therefor, and thus perpetuated. The declaration of a lien in the Court below is vacated by the appeal, and it is important to have it renewed in the appellate Court, in the event of a recovery there.<sup>25</sup>

In the Court of Civil Appeals there is no set limit to argument, either as to time, number of counsel, or amount involved.

ARTICLE IV.

THE HEARING AND DECREES IN THE APPELLATE COURTS.

- § 1313. Decrees of the Appellate Courts.
- § 1314. The Hearing in the Appellate Courts.
- § 1315. How the Appellant Should Present His Case.
- § 1316. How the Appellee Should Present His Case.
- § 1317. When Causes Will be Reversed.
- § 1318. When Causes Will be Remanded.
- § 1319. Petition to Rehear.

- § 1320. When and by Whom Decrees Must be Prepared.
- § 1321. Forms of Orders and Decrees in the Appellate Courts.
- § 1322. What Cases Can be Carried to the Supreme Court of the United States.
- § 1323. How Cases are Carried to the Supreme Court of the United States.

§ 1313. **Decrees of the Appellate Courts.**—In hearing and determining Chancery suits brought up by appeal, the appellate Court sits as a Court of Chancery. Formerly, when the business of the Court was not so great, a Chancery cause was re-examined as to all matters of law and fact appearing in the record: it was tried *de novo*, as though originating in the appellate Court;<sup>1</sup> but the accumulation of business in the Court is so great that it has become absolutely necessary to confine the re-examination of law and facts to such matters as are specially complained of in the brief of the appellant.

The Court pronounces such a decree as the Chancellor should have pronounced. It is in no way restricted by the decree appealed from, or by any antecedent order or decree, but has unlimited power of adjudication.

19 Code, § 3184.  
 20 Code, § 3933.  
 21 Sup. Court Rules, 12-15; 5 Pick., 772. For the practice in Chancery, see, *ante*, §§ 698-722.  
 22 Furber v. Carter, 2 Sneed, 1; Freeman v. Henderson, 5 Cold., 647.  
 23 Laymance v. Laymance, 15 Lea, 476. See Pyett v. Hatfield, 15 Lea, 475.

24 Spalding v. Kincaid, Thomp. Cases, 48.  
 25 See, *ante*, §§ 1180-1182.  
 1 See Dibbrell v. Eastland, 3 Yerg., 533. In this cause, Catron, Ch. J., said, that the decrees appealed to the Supreme Court were "generally, in some respects, altered, and often reversed and entirely changed."

1. When the Chancellor Has Denied Any Relief and dismissed the bill, the appellate Court may: 1, affirm *in toto*; or 2, affirm in part, and grant partial relief; or 3, reverse *in toto*, and grant the full relief prayed.

2. When the Chancellor Has Granted Some of the Relief prayed but denied the remainder, the appellate Court may: 1, affirm *in toto*; or 2, affirm in part, and reverse in part; or 3, reverse *in toto*, and dismiss the bill.

3. When the Chancellor Has Granted all of the Relief prayed the appellate Court may: 1, affirm *in toto*; or 2, affirm in part, and reverse as to the remainder; or 3, reverse *in toto*, and dismiss the bill.

4. Without Either Affirming or Reversing the Decree of the Chancellor, the appellate Court may remand the cause: 1, that new parties may be made; or 2, that the pleadings may be amended; or 3, that new pleadings may be filed, such as a supplemental bill, or a cross bill; or 4, that additional proof may be filed as to a particular matter; or 5, that some other thing may be done necessary to complete justice, or to proper practice, the Court in such cases having all the powers and discretion of the Chancellor, and statutory powers of its own.<sup>2</sup>

The appellate Court in Chancery causes has the same discretion as to the taxation of costs that the Chancery Court has; and may tax the costs in a different manner, and against different parties, than did the lower Court.<sup>3</sup>

§ 1314. **The Hearing in the Appellate Courts.**—The business of each circuit is taken up and disposed of by counties in the order in which they stand on the docket. The entire business of each county is disposed of when such county is called, before proceeding to the business of the other counties of the circuit. There is only one call of the docket of each county of every circuit; on that call every cause is tried or continued. The law causes are disposed of before the Equity causes are called, and so of the Equity causes before the State causes are called. State causes in counties are taken up immediately after the civil docket has been tried.<sup>4</sup> The Equity causes are heard in the appellate Court in the same manner as in the Chancery Court, except:

1. **The Record in the Cause is Not Read Previous to the Argument.** Counsel may, however, during argument refer to and read such parts of the record as may be necessary to illustrate, or establish, the points made and relied on.<sup>5</sup>

2. **The Argument Must be Exclusively Oral, or Exclusively in Writing,** as counsel prefer.<sup>6</sup> Counsel are not allowed to expatiate orally while reading a written argument, nor are they allowed to sandwich an oral argument with parts of a written argument. A written argument, however, does not supersede the necessity of a brief.<sup>7</sup>

3. **Only One Counsel and One Hour Allowed Each Side,** unless otherwise ordered by the Court before the hearing of the case is begun,<sup>8</sup> on application therefor by motion. Other counsel, if any, can file briefs, or written arguments.<sup>9</sup>

4. **No Oral Argument, When.** All civil cases in which the subject in dispute is of value less than five hundred dollars, exclusive of costs and interest, except 1, those involving the constitutionality of a statute; 2, a question of revenue; or 3, the title to real estate, will be heard upon the assignment of errors and briefs, and written argument if desired; but no oral arguments will be heard in such cases.<sup>10</sup>

5. **The Reading of Books, or Reports of Opinions, Not Allowed During Argument.** Counsel may quote therefrom, if they desire, either in their written or oral argument; but they must quote from memory, if their argument is oral. The Court may, however, call on counsel to read any authority quoted, in which

<sup>2</sup> Code, § 3170. For cases illustrating the exercise of these powers, see, *post*, § 1318.

<sup>3</sup> But where the appellate Court affirms a decree on the merits it will not ordinarily disturb the taxation of costs made by the Chancellor. *Grosvenor v. Bethell*, 9 Pick., 577; *Tyler v. Walker*, 17 Pick., 306.

<sup>4</sup> Sup. Court Rules, 9-10.

<sup>5</sup> *Ibid.*, 19.

<sup>6</sup> Rule 21; 5 Pick., 775.

<sup>7</sup> *Ibid.* The reason of this rule is that a mixture

of oral and written arguments greatly prolongs the argumentation in words without any compensating augmentation in force.

<sup>8</sup> *Ibid.*

<sup>9</sup> Rule 24; 5 Pick., 776.

<sup>10</sup> Rule 21, amended. In the Court of Civil Appeals there is no set limit to argument, either as to time, number of counsel heard, or the value of the subject in dispute.

case no comments during the reading will be allowed, but such comment, if any, must precede or follow the reading.<sup>11</sup>

**§ 1315. How the Appellant Should Present His Case.**—Counsel will find that their arguments will be of the greatest benefit to their cause and the Court if the following suggestions are duly observed:

1. **Their Statement of the Facts of the Case.** A case well stated is half won. Counsel should remember that the Court knows absolutely nothing about the case; and that all the Court needs to know, or wishes to know, is enough of the case to enable it to understand the errors of fact or law relied on for a reversal. In making their statement of the case, counsel should address themselves exclusively to the intellect of the Court, and endeavor, by a plain, short, clear statement, made in a conversational tone and style, to possess the mind of the Court of the material facts of the case, if the question be one of fact; and if the question be one of law, counsel should, in the same manner, state such facts as are necessary, and no more, to enable the Court to understand the question of law raised, and to perceive its pertinency to the issues involved. In making their statement of the facts, counsel should be careful to keep absolutely inside the record, and to say nothing not fairly warranted by the record. Chancery causes often raise no questions but those of fact; and in such a case it should be the aim of counsel to photograph the more prominent features of the cause upon the mind of the Court, not going into the minute details unless necessary in weighing the testimony of witnesses. As a rule, counsel pay too little attention to their statement of the facts, and pay too much attention to the supposed questions of law. The law arises from the facts, and is, as it were, the shadow of the facts. As the Court understands the facts, so it adjudicates the issues. The Solicitor who gets a Court to see the facts as he sees them is far more apt to win the suit than the Solicitor who gets the Court to see the law as he sees it. The Judges know the law, but are ignorant of the facts: give them the information they need, and let the other side give them the law they do not need.<sup>12</sup>

2. **Their Statement of the Law of the Case.** Ordinarily, counsel quote too much elementary law. The Court needs but little aid from counsel, in matters of law. Ordinarily, all that is necessary is to state the facts out of which the question of law springs, and then to state how the Chancellor held, and wherein you think he erred. The Court will apply the law, and judge the right of the case as you proceed. Having stated what you maintain is the law, you may then cite the authorities contained in your brief on that point. In general, if you possess the Court of the facts, the Court will possess you of the law.

**§ 1316. How the Appellee Should Present His Case.**—The object of the appellant is to reverse or change the decree of the Chancellor, and he will be strongly tempted to omit, or hurry over, matters deemed by the Chancellor material to the case. These matters the counsel of the appellee should fully, clearly and dispassionately present, without any criticism of adverse counsel for failing to give them their due weight. This supplying of omissions is the main duty of the counsel of the appellee in his argument before the Court on questions of fact. He should not undertake to restate the whole case, unless adverse counsel has so misstated it that a new and correct statement is absolutely necessary to enable the Court to understand the grounds on which the Chancellor based his ruling, order or decree.

His argument on the points of law involved should consist (1) in showing that the argument of counsel for the appellant is unsound, or the authorities cited by him do not apply, or have been overruled or modified, or are mere *dicta*; or (2) in presenting authorities or arguments of his own in support of the Court below; in doing all which he should maintain a calmness of demeanor, and a

<sup>11</sup> *Ibid.*, 22.

<sup>12</sup> Judges take a downright pleasure in listening to a lucid statement of the facts of a case; whereas,

they are nauseated by hearing counsel gravely cite and expound law too elementary for even a moot Court.

good-natured, courteous manner, using a conversational style of delivery, and forbearing to make any reflections or animadversions on the manner or argument of his opponent.

§ 1317. **When Causes Will be Reversed.**—It is a fundamental rule of the appellate Courts not to reverse any decree of the Chancery Court except for errors which affect the merits.<sup>13</sup> The appellate Court in Equity causes regards substance and not form, and will not reverse where the equities of the case have been attained by the decree, even though the steps taken have been irregular or informal, the Court looking at the correctness of the results reached by the Chancellor, rather than at the process by which they were reached. But if the Chancellor's decree is illegal or inequitable, and not such as should have been rendered, the appellate Court will reverse the Chancellor, and render such a decree as in their judgment should have been rendered in the Court below. And if the Chancellor, by some interlocutory order, denied a party a right affecting the merits, or gave a party an advantage he was not entitled to, the Court will, on complaint of the party injured, relieve against such action, by a final decree, if practicable, or if not, then by remanding the cause with proper directions to effectuate the ends of justice.

In jury cases, however, where the jury has been demanded by one of the parties, the appellate Court will grant a new trial, and reverse the decree, for any error connected with the jury trial that would have entitled the appellant to a reversal if the cause had been appealed from the Circuit Court, in a cause tried by a jury.

§ 1318. **When Causes Will be Remanded.**—It may be laid down as a general rule that the appellate Court will remand a Chancery cause (1) whenever complete justice cannot be done the appellant on the merits by reason of some error of the Chancellor in an interlocutory order, or in his rulings in excluding evidence, whereby the appellant was not enabled to properly present his case; or (2) whenever, for any other reason, not resulting from the misconduct, or culpable negligence of the party complaining, he has not had a fair opportunity to amend his pleadings, or prepare his proofs.

As illustrations of this rule, causes will be remanded in the following cases:

1. Where the bill was improperly dismissed on motion, demurrer, or plea.
2. Where the bill was improperly dismissed in consequence of some rule, or interlocutory order.<sup>14</sup>
3. Where the Chancellor erroneously refused to allow a material amendment of a pleading.
4. Where a reference, or account, or the recommittal of a report was erroneously denied, and such denial not cured by other action of the Court.
5. Where, by an improper ruling of the Chancellor, the party complaining was prevented from taking or using material evidence, or was erroneously denied a continuance.
6. Where, in a jury trial demanded by one of the parties, the Chancellor committed some material error in admitting or excluding evidence, or in charging, or failing to charge the jury, or in refusing a new trial on some other ground.
7. Where, on the facts proved, the complainant shows a probably meritorious cause of action, but the facts are not sufficiently alleged, or the pleadings do not raise the necessary issues, or a cross bill is necessary, and the complainant asked, but was refused, leave to make the proper amendments.<sup>15</sup>

<sup>13</sup> Code, § 4516.

<sup>14</sup> *Kain v. Ross*, 1 Lea, 76.

<sup>15</sup> In *Governor v. Montgomery*, 2 Swan, 613, on remanding the cause, the Supreme Court suggested the adding of a new count to the declaration; in *McEwen v. Troost*, 1 Sneed, 186, the case was remanded with leave to complainant to amend his bill, and leave to a defendant to file a cross bill if she thought proper; in *Dulaney v. Dunlap*, 3 Cold., 306,

the case was remanded, with leave to the defendant to amend its cross bill, or, at its option, proceed by motion at law; in *Charles v. Taylor*, 1 Heisk., 528, the cause was remanded to make new parties; so, also, in *Saylors v. Saylors*, 3 Heisk., 525; in *Stewart v. Glenn*, 3 Heisk., 581; in *Humberd v. Kerr*, 8 Bax., 291; and in *Oneal v. Smith*, 10 Lea, 343. But the appellate Court will not remand for amendment of pleadings unless the right to relief on amendment

8. Where the record shows that there is more satisfactory evidence obtainable which will enable the Court to come to a more satisfactory conclusion.<sup>16</sup>

9. Where complete justice cannot be done by reason of some defect in the pleadings, or want of proper parties, or oversight without culpable negligence.<sup>17</sup>

10. Where the complainants have a meritorious cause of action, but complete justice cannot be done for want of necessary parties.<sup>18</sup>

11. Where in any way the party complaining has been erroneously prevented from so presenting his case as to enable the appellate Court to do him full justice on the merits.

12. Where a part of the record is lost, the cause may be remanded with directions to supply the loss.<sup>19</sup>

§ 1319. **Petition to Rehear.**—If it appear from the opinion of the Court, whether such opinion be oral or written, that the Court has made a manifest mistake, oversight, or omission, in some controlling matter of law or fact, which results in manifest injustice, the party aggrieved by such mistake may petition the Court to rehear the cause; and on such petition the Court will correct the mistake, if any appear. Petitions to rehear should be filed only (1) to raise some new question of controlling importance, not considered in the Court's opinion; or (2) to bring to the attention of the Court some decisive matter of law or fact which was manifestly overlooked; or (3) to bring forward some other matter as to which the decree of the Court is manifestly erroneous.<sup>20</sup> The Court has the right to presume that a petition to rehear seeks to raise some one or more of such questions or matters; and it is on the faith of this presumption that a petition is allowed to be filed. A petition, therefore, that merely seeks to have a rehearing of matters already heard, or a reconsideration of questions already considered, or a re-argument of matters already argued, is both a gross misuse of the office of a petition to rehear, and a gross abuse of the confidence of the Court in allowing it to be filed; and approaches dangerously near the borders of bad faith.<sup>21</sup>

A petition to rehear should clearly and briefly state the matter wherein the

be clear. *Randolph v. Merchants' Bank*, 9 Lea, 63. In several of the foregoing cases, the Court seems to have remanded and given leave to amend, on its own motion. See *Ross v. Ramsey*, 3 Head, 17; *Furman v. North*, 4 Bax., 296; *Bond v. Montague*, 13 Pick., 727, 736; also, *McEwen v. Troost*, 1 Sneed, 186, which was remanded with leave to amend pleadings and file a cross bill; *Dulaney v. Dunlap*, 3 Cold., 306, where the cause was remanded with leave to amend the cross bill. Code, § 1170. But the appellate Court will not remand for amendment of the pleadings if the party so asking has been guilty of culpable negligence in not making the amendment. *Bank v. White*, 6 Cates, 62. On a remandment, where there has been some negligence or oversight, the party in default will ordinarily be taxed with all the costs of the cause. *Hearst v. Proffitt*, 7 Cates, 560.

<sup>16</sup> *Cowan v. Dodd*, 3 Cold., 278; *Grider v. Harbison*, 6 Cold., 208; in which two cases the Supreme Court made remandment that the parties might have the opportunity of adducing additional proof, as injustice might otherwise result; *Wood v. Neely*, 7 Bax., 586, which was remanded by the Supreme Court to enable the complainant to prove that the note sued on had been assigned to the complainant; *Smith v. Carter*, 16 Lea, 527, which was remanded by the Supreme Court to enable complainants to prove that the lots they were claiming as a homestead were worth less than one thousand dollars; *Smith v. Hinson*, 4 Heisk., 250, which was remanded with leave to complainant to prove additional debts.

<sup>17</sup> Code, § 1170; *Wood v. Neely*, 7 Bax., 590; *Bank v. Jefferson*, 8 Pick., 537; *Hearst v. Proffitt*, 7 Cates, 560.

<sup>18</sup> *Saylors v. Saylors*, 3 Heisk., 526; *Stewart v. Glenn*, 3 Heisk., 581; *Birdsong v. Birdsong*, 2 Head, 299; *Thurman v. Jenkins*, 2 Bax., 426.

<sup>19</sup> *Seay v. Hughes*, 5 Sneed, 155; *Mynatt v. Hubbs*, 1 Heisk., 321; *Denton v. Woods*, 11 Lea, 506.

So, if the record should be tampered with after appeal in the Court below, or spurious matter injected into it, before or after the transcript was made out or filed by the Clerk and Master, it would seem to be proper to remand the cause and transcript with proper directions to have the transcript conform to the true state of the record in the Court below.

<sup>20</sup> *Andrews v. Crenshaw*, 4 Heisk., 151. The appellate Courts lay down these rules substantially once or twice, at almost every term. They were stated fully by Caldwell, J., in *Cate v. Bell*, at Knoxville, in 1890. A petition to rehear should not be presented unless to bring to the attention of the Court some plain, and obvious, and palpable error, or omission, or mistake, in something material to the decree. *Jenkins v. Eldredge*, 3 Story, 299, cited in note to *Sto. En. Pl.*, § 421. And see *Hubbard v. Fravell*, 12 Lea, 305. The case of *Blaidron v. Pilot Mountain C. & M. Co.*, 5 Pick., 204, gives an illustration of a petition to consider what had not been considered at all. See form of petition in this section. The other petition is based on *Williams v. Coal Creek M. & M. Co.*, 7 Cates, 578. See *Senter v. Bowman*, 5 Heisk., 14; *Briegs v. Hinton*, 14 Lea, 224; *Hooper v. Rhea*, 3 Shan. Cas., 153.

The case of *Nicholson v. Patterson*, 2 Hum., 448, was a proper case for a petition to rehear. See, *Nicholson v. Patterson*, 6 Hum., 394. Meigs was the attorney by whose oversight the point was not made, and the plaintiff in error was himself an eminent lawyer, and afterward Chief Justice of the State. *Lindsay v. Thompson*, 1 Tenn. Ch., 272; 275. See, *ante*, § 537, note 27.

<sup>21</sup> Of a majority of petitions to rehear it may be said that they present nothing important that is new, and nothing new that is important.



error, omission, or mistake consists; and should contain no argument or elaboration. The following is a form:

**PETITION TO REHEAR ON A QUESTION OF FACT.**

C. F. G. Bleidorn, *et al.* }  
*vs.* } From the Chancery Court of Morgan county.  
 Pilot Mountain C. & M. Co. }

To the Honorable Supreme Court of the State of Tennessee:

Your petitioners, the complainants and appellants in this cause, respectfully show to the Court that they are much aggrieved by the opinion announced [or decree rendered] in this cause, on September 30, 1890, whereby it was adjudged that they had no title as to any land inside of entry 1727. This decision is based on the assumption that Scarborough's possession No. 2 has perfected the title to entry 1727. In making this decision, the Court manifestly overlooked the fact that this possession was inside of entry 1925, and, therefore, could not have been adverse to 1949, 1925 being a superior outstanding title.

Petitioners, therefore, pray for a rehearing on this particular point; and that said decree be so corrected as to give petitioners all the lands inside of the interlap of 1727 and 1949, and outside of 1925; and for general relief.

PICKLE & TURNER, Solicitors.

A petition for a rehearing, before being presented to the Court, must be furnished to the opposite counsel; and after both sides have prepared briefs on the points raised by the petition, the record, together with the petition and briefs, will be presented to the Court, without argument. If the Court determines that the cause shall be reheard, the counsel will be notified, and the point or points on which re-argument is desired will be indicated, and the time for the re-argument designated. But petitions for rehearing must, in all cases, be presented to the Court within ten days after the announcement of the opinion in the case which is sought to be re-examined, except decisions made within the last ten days of the term, and in such cases, the petitions must be presented as soon after the decisions are made as practicable. No such petitions will be received on the last day of the term.<sup>22</sup>

**PETITION TO REHEAR ON A QUESTION OF LAW.**

R. A. Williams, }  
*vs.* } From the Chancery Court of Morgan County.  
 Coal Creek M. & M. Co., *et al.* }

To the Honorable Supreme Court:

Your petitioners, the defendants (and appellees) in this cause, respectfully represent to the Court that they are much aggrieved by so much of the Court's opinion in this cause as holds that the recovery of the complainant, as a tenant in common with others not parties to this suit, enures to their benefit, and entitles the complainant to the possession of the entire tract for his and their benefit.

Petitioners are advised that, while there are authorities sustaining the Court's holding, the question is a new one in our State, and the weight of authority confines the complainant's recovery in such a case to his own interest, and does not entitle him to the possession of the whole tract.

Petitioners, therefore, pray for a rehearing on this particular point; and that complainant's recovery be limited to his own undivided interest; and for general relief.

LUCKY, SANFORD & FOWLER,  
 Solicitors for Defendants.

**BRIEF IN SUPPORT OF ABOVE PETITION.**

Petitioners cite and rely on the following authorities:

- Newell on Ejectment, 130.
- Barrow *v.* Nave, 2 Yerg., 227.
- Dewey *v.* Brown, 2 Pick., (Mass.) 387.
- Moberly *v.* Bruner, 59 Pa. St., 483.
- Gray *v.* Givens, 26 Mo., 303.
- Marshall *v.* Palmer, 91 Va., 344.
- Overcash *v.* Richie, 89 N. C., 384.
- King *v.* Hayayy, 51 Kans.
- Mathis *v.* Boggs, 19 Neb., 698.
- Kirk *v.* Boling, 20 Neb., 261.
- Johnson *v.* Hardy, 43 Neb., 358.

<sup>22</sup> Sup. Court Rule, 17. Merely filing the petition within the ten days is not sufficient: it must be presented to the Court within the ten days. Adams *v.* Sharon, 5 Pick., 335.

Attention is called to the fact that Mr. Freeman, who in his work on Cotenancy and Partition, § 300, sustains the opinion of the Court, admits in a note to *Marshall v. Palmer, supra*, that there is "a growing inclination to restrict the recovery of a tenant in common" to his undivided interest.  
 LUCKY, SANFORD & FOWLER, Solicitors.

When the question raised is a mere point of law the authorities relied on may be subjoined to the petition, as above shown. But if the brief covers several pages it should be separate from the petition.

**BRIEF OF PETITIONER FOR A REHEARING.**

John Doe, }  
*vs.* } Brief of Petitioner.  
 Richard Roe. }

Petitioner respectfully shows to the Court that its opinion in this case is erroneous in the following particulars:

I.

[Here set out the error of fact alleged in the petition.]  
 The Court will see by reference to the record [R. p. 94] that [So and so, showing a controlling fact which was evidently overlooked, and which manifestly makes the opinion (and decree) erroneous.]

II.

[Here set out the error of law alleged in the petition.]  
 In the opinion of the Court the case of *Gudgeon v. Juggler*, 1 Fox, 00, was evidently not considered. This case is later than *Den v. Fen*, relied on in the opinion, and overrules it, laying down the law as petitioner contends.

III.

[Here set out any other matter alleged in the petition, and cite the pages of the record where the matter to the contrary is found, if it be a question of fact; and if a question of law cite the authorities relied on to controvert the opinion.]

Respectfully submitted, X Y Z, Solicitor.

§ 1320. **When and by Whom Decrees must be Prepared.**—Counsel may present decrees at any time when the Court is not engaged in hearing a cause; but decrees about which counsel do not differ may be entered without being presented to the Court. The decrees and judgments will be prepared by counsel of the successful party, and submitted to counsel on the other side. In the event of disagreement about a decree, the party disagreeing must note his objections, in writing, and these objections, along with the decree or judgment prepared, and such briefs as counsel on either side may desire to present therewith, will be handed to the Court, when the decree or judgment will be examined and corrected, if necessary, or further instructions given counsel. If found correct, it will be given to the Clerk with order to enter it.<sup>23</sup>

§ 1321. **Forms of Orders and Decrees in the Appellate Courts.**—Counsel must always keep in mind that in determining all Chancery causes brought up by appeal, (but not by an appeal in the nature of a writ of error,) the appellate Court is a Chancery Court, composed of five appellate Chancellors; and that in determining all questions that arise in such causes, they are governed by the doctrines and principles of Equity Jurisprudence, and the rules and procedure of Equity Practice. Hence, in drawing decrees in Chancery causes in the appellate Court, the same form of phraseology will be observed as in like cases in the Chancery Court. The following forms may be of service as guides:

**MOTION TO ALLOW FURTHER TIME FOR ARGUMENT.**

John Doe, *et al.*, }  
*vs.* }  
 Richard Roe, *et al.* }

In this cause the complainants (appellants) moved the Court to allow them the further time of thirty minutes in which to make their argument, which motion was allowed [or, disallowed; or, taken under advisement.]

**DECREE REVERSING THE DECREE BELOW.**

John Doe, }  
*vs.* } Appeal from the Chancery Court, at Knoxville.  
 Richard Roe, *et al.* }

REVERSED.

This cause came on to be heard this September 25, 1891, before the Honorable Supreme

<sup>23</sup> Sup. Court Rule, 25.

Court, [or before the Honorable Judges of the Supreme Court,] upon the transcript of the record in the cause from the Chancery Court of Knox county, [or, at Knoxville,] and the briefs and argument of counsel; upon consideration of all which the Court is of opinion that the decree of the Chancellor [or, of the said Chancery Court, or of the Court below,] is manifestly erroneous, and that the complainant is entitled to no relief whatever [or, that the equities alleged in the complainant's bill are fully met and denied by the answers of the defendants, and are not sustained by the proof.]

It is, therefore, ordered, adjudged, and decreed by the Court, that the complainant's bill be, and the same is, dismissed, and the complainant and Daniel Doe, his prosecution surety, will pay all the costs of the cause in the Court below, [or, in the Chancery Court,] and the complainant will pay all the costs incident to the appeal [or, all the costs accrued in this Court,] for all of which executions are respectively awarded.

**DECREE AFFIRMING DECREE BELOW.**

John Doe, }  
*vs.* } From the Chancery Court at Kingston.  
 Richard Roe. }

AFFIRMED.

This cause was this day heard, [or was heard on a former day of the present term,] upon the transcript of the record from the Chancery Court at Kingston, and the briefs of the appellants and appellees, and argument of counsel, upon consideration of all which the Court is of opinion that there is no error in the record:

It is therefore ordered and decreed that the decree of the Chancery Court be, and the same hereby is, in all things affirmed; and that the complainant, the said John Doe, have and recover of the defendant, Richard Roe, and John Jones, his surety on the appeal bond, the sum of four thousand dollars, the amount of the said decree, and the further sum of two hundred dollars interest thereon to this day, aggregating four thousand and two hundred dollars, and all the costs of the cause in this Court and in the Court below, for which an execution will issue.

On motion of T. L. Carty, Esq., a lien is declared in his favor on the above decree to secure his reasonable fee as complainant's Solicitor in this cause.

**DECREE OF AFFIRMANCE WHEN NO ASSIGNMENT OF ERRORS.**

[Here insert the style of the cause: see preceding decree.]

This cause came on this day to be heard upon the transcript of the record from the Chancery Court at Cookeville, and there being on file no brief assigning errors, as required by the rules and practice of this Court, it is therefore ordered and adjudged that the decree of the said Chancery Court be in all things affirmed, [and that the bill be dismissed, and that complainant, and John Jones, his prosecution surety, pay the costs accrued in the Chancery Court, and complainant and James Smith, his surety on the appeal bond, pay all the costs incident to the appeal, for which executions will issue respectively. [If the decree below was in favor of the complainant, omit all after the word "affirmed," and add:] and that complainant have and recover of the defendant [here set out verbatim the decree below, and adjudge the costs of the appeal, award executions, and if necessary, remand for further proceedings.]

The only material difference between decrees pronounced by the Supreme Court in cases heard on appeal or writ of error from the Chancery Court, and cases heard on *certiorari* or writ of error from the Court of Civil Appeals, is in their commencement and recitals, as will appear by the following form:

**DECREE OF SUPREME COURT ON DECREE OF COURT OF CIVIL APPEALS.**

John Den, }  
*vs.* } From the Chancery Court of.....County.  
 Richard Fen. }

AFFIRMED, [OR MODIFIED, OR REVERSED.]

This cause was heard before the Supreme Court upon the transcript of the record from the Chancery Court of.....county, the decree of the Court of Civil Appeals, the brief of the appellant and reply by the appellee, and argument of counsel, from all of which the Court is of opinion that [&c., as shown in the following forms:]

**DECREES AFFIRMING, REVERSING AND MODIFYING THE DECREES OF THE COURT OF CIVIL APPEALS.**

John Doe, }  
*vs.* } From the Chancery Court at .....  
 Richard Roe. }

AFFIRMED, [REVERSED, MODIFIED.]

This cause was heard this day, [or, on a former day of the present term,] upon the transcript of the record from the Chancery Court at....., the decree of the Court of Civil Appeals, the briefs of the parties and arguments of counsel, upon consideration of all which, it appears to the Court that there\* [is no error in the decree of the Court of Civil Appeals.]

It is therefore ordered, adjudged and decreed, that the said decree be, and the same hereby is, in all things affirmed: and that [Follow the decree of the Court of Civil Ap-

peals in every particular; but if the Supreme Court reverses said decree, then proceed as follows, omitting everything after the asterisk (\*) above:] are manifest errors in the decree of the Court of Civil Appeals as set forth in the first and fifth assignments of error, (which are sustained, and all other assignments overruled,) and that the equities of the bill are fully met and denied by the answer, and not sustained by the proof, it is therefore ordered, adjudged and decreed, that the decree of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the decree of the Chancery Court in all things affirmed, and that the bill of complaint be and hereby is dismissed, and that the complainant and John Jones, his prosecution surety, pay all the costs of the cause in the Chancery Court, and that complainant pay all the costs incident to the appeal,<sup>24</sup> for which let executions issue respectively. [If the decree of the Court of Civil Appeals is modified, then omit all after the asterisk (\*) above, and proceed as follows:] are manifest errors in the decree of the Court of Civil Appeals as set forth in the first, third and fifth assignments of error, said assignments are sustained, and all other assignments are disallowed and overruled, and the balance of said decree is affirmed.

It is therefore ordered, adjudged and decreed, that [Here set out the decree of the Court of Civil Appeals as modified by the Supreme Court. If the decree of the Supreme Court requires the remandment of the cause, then add:] It is therefore ordered that the cause be remanded to the Chancery Court at ....., to be further proceeded in according to this decree and to the opinion of the Supreme Court in the cause. [Then adjudge the costs according to the said opinion.]

**DECREE AFFIRMING DECREE OF COURT OF CIVIL APPEALS.**

John Den, }  
 vs. } From the Chancery Court at Cookeville.  
 Richard Fen. }

AFFIRMED.

This cause was heard this day [or, at a former day of the present term.] upon the transcript of the record from the Chancery Court at Cookeville, the decree of the Court of Civil Appeals, the briefs of both parties, and the arguments of counsel, upon consideration of all which, the Court is of opinion that there is no error in the decree of the Court of Civil Appeals.

It is therefore ordered, adjudged and decreed, that the decree of the Court of Civil Appeals be, and the same is hereby, affirmed; and that the complainant, John Den, have and recover of the defendant, Richard Fen, and John Smith, his surety on the appeal bond, the sum of twelve thousand and nine hundred and ten dollars, the amount of said decree and interest thereon to date, and all the costs of the cause, for which execution will issue.

And on motion of James C. Ford, Esq., a lien is declared in his favor on the above recovery to secure his reasonable fee as complainant's Solicitor in this cause.

**DECREE AFFIRMING THE DECREE BELOW.**

John Den. }  
 vs. } Writ of Error<sup>25</sup> to the Chancery Court, at Athens.  
 Richard Fen, et al. }

AFFIRMED.

This cause was heard upon the record thereof from the Chancery Court at Athens, and upon the briefs of counsel, and was argued by counsel, at a former day of the term, and taken under advisement by the Court; and on consideration of all which the Court is of opinion that there is no error in the record, and in the decree of said Chancery Court.

It is, therefore, ordered, adjudged, and decreed, that the writ of error be dismissed, and that the decree of said Chancery Court be, and the same is, in all things affirmed; and that [Here set out the mandatory part of the decree below.<sup>26</sup>]

It is further ordered and decreed that the *supersedeas* be discharged, and that the defendants, Richard Fen and Frank Fen, who alone prosecuted the writ of error, and John Brown and Jesse Jones, their prosecution sureties, pay all the costs of the same, for which an execution is awarded.

And the complainant, having moved the Court for judgment on the bond for a *supersedeas* executed by the defendants in this cause, it is ordered and adjudged by the Court that Richard Fen and Frank Fen as principals, and John Brown and Jesse Jones as sureties, to said bond, pay complainant said sum of [naming the amount of complainant's recovery.] dollars, for which an execution will issue.

<sup>24</sup> In this case the defendant is supposed to have appealed.

<sup>25</sup> When a Chancery cause is taken to an appellate Court by appeal, it retains its style in the appellate Court; and such is the practice when a Chancery cause is taken up by an appeal in the nature of a writ of error, or by a writ of error. But when a cause, from the Circuit Court, is carried up by an appeal in the nature of a writ of error, or by a writ of error, the party so doing, whether plaintiff or defendant in the Court below, is termed plaintiff-in-error, and is treated in the appellate Court as the

plaintiff in that Court, and as prosecuting a suit there to reverse the action of the lower Court.

<sup>26</sup> This is not necessary in case of a writ of error, but is good practice in cases of appeal, or of appeal in the nature of a writ of error, for then the decree appears in full on the records of each Court. If, however, the decree is wholly affirmed without modifications and remanded for execution, all that is necessary is to adjudge that the decree of the Chancellor be in all things affirmed. *Clift v. Clift*, 3 Pick., 28.

**DECREE MODIFYING THE DECREE BELOW.<sup>27</sup>**

Joseph E. Frazier,

*vs.*

E. T., V. & Ga. R. R. Co., *et al.* }

MODIFIED.

This cause came on to be heard, on the transcript of the record from the Chancery Court of Knoxville, on the appeal of respondent, the East Tennessee, Virginia & Georgia Railway Company, the writ of error of the complainant, Joseph E. Frazier, and the briefs of both of said parties; and was argued by counsel, and taken under advisement by the Court; and thereupon on consideration, it was, on this, 26th day of October, 1889, ordered, adjudged, and decreed by the Court, as follows:

1st. That the assignment of errors by the complainant is well taken, and the same is therefore sustained.

2d. That the decree of errors by the respondent is not well taken, and is therefore overruled.

3d. That the decree of the Chancellor, that there should be deducted from the amount of liability of the East Tenn., Va. & Ga. R. R. Co., to the complainant, such sums of money as he may have made by his work in other employment or business after the 6th of January, 1885, and accordingly deducting from the amount specified in the contract sued on the sum of \$1,491, be reversed; and that complainant, Joseph E. Frazier, accordingly have and recover of the defendant Company the full amount promised him in said contract without deduction or abatement, to-wit: Principal \$3,834.10, and interest thereon from August 1st, 1889, to this date, \$54.82, amounting to three thousand eight hundred and eighty-eight 92-100 dollars (\$3,888.92.)

4th. That in all other particulars the decree of the Chancellor is correct and is affirmed.

5th. That the cause be remanded to the Chancery Court at Knoxville, for the execution of the decree and further proceedings, according to the opinion of this Court.

6th. That the costs of this cause in this Court be paid by the appellant, the East Tenn., Va. & Ga. Railway Company, and its sureties, John Doe and Richard Roe, and in the Court below as decreed by the Chancellor, for which executions are awarded.

7th. And on application of Messrs. Ingersoll & Peyton, Solicitors for complainant, the lien for fees in their favor on complainant's recoveries, declared by the Chancellor, is continued and enlarged, so as to include services in this cause, in this Court.

**§ 1322. What Cases Can be Carried to the Supreme Court of the United States.**—If the judgment or decree of the Supreme Court of the State involves what is termed a "Federal question," in certain cases such judgment or decree may be reviewed in the Supreme Court of the United States, on a writ of error. The statutes of the United States provide that a final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be had, may be re-examined, and reversed, modified, or affirmed, in the Supreme Court of the United States, upon a writ of error, in any of the following cases:

1. Where the validity of a treaty or statute of the United States has been drawn in question, and the decision of the State Supreme Court has been against its validity.

2. Where the validity of an authority exercised under the United States has been drawn in question, and the decision has been against its validity;

3. Where the validity of a statute of any State has been drawn in question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, and the decision has been in favor of its validity;

4. Where the validity of an authority exercised under any State has been drawn in question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, and the decision has been in favor of its validity;

5. Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of the United States, or under any commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

In any of these cases, the judgments and decrees of the Supreme Court of the

<sup>27</sup> This decree was taken by the defendants to the Supreme Court of the United States; but was there affirmed. It puts each resolution of the Court in a

separate paragraph, which is the best form of a decree.

State, when final, may be re-examined, and reversed, modified or affirmed in the Supreme Court of the United States, upon a writ of error; and the latter Court may, in its discretion, award execution, or remand the cause to the State Supreme Court.<sup>28</sup> The right to prosecute a writ of error in such cases does not depend on the amount in controversy.<sup>29</sup>

**§ 1323. How Cases are Carried to the Supreme Court of the United States.**

A case is carried to the Supreme Court of the United States from the Supreme Court of the State by a writ of error. If you desire to have the Supreme Court of the United States pass on the Federal question involved in the case, if decided against you in the State Courts, you should raise that question clearly in your pleading, if it can be there done; or in a request to the Chancellor for an instruction to the jury, if there be a jury trial; and in your brief in the State Supreme Court; and also, have the State Supreme Court distinctly adjudicate the question in its decree.<sup>30</sup>

If the decision is against you, you will then prepare a petition to the Chief Justice of the State Supreme Court for a writ of error, giving therein enough of the record to show that a Federal question is so involved in the case that the petitioner is entitled to have the case reviewed in the United States Supreme Court, on a writ of error; and praying that such a writ may be allowed. You will then apply for a writ of error to the Clerk of the Supreme Court of the United States at Washington, or to the Clerk of the United States Circuit Court in the District wherein the decision of the State Supreme Court was made.<sup>31</sup> You will, thereupon, present your petition, and the writ of error, and a bond for the prosecution of the writ, to the Chief Justice of the State Supreme Court, who, if satisfied with the sufficiency of the bond, and that a Federal question exists,<sup>32</sup> will approve the bond, and write on the writ of error, to the left of the Clerk's signature, his allowance thereof, thus "*Allowed by W. D. Beard, Chief Justice.*" The Chief Justice will, at the same time, issue a citation notifying the adverse party to appear before the Supreme Court of the United States at Washington, and show cause why the decree complained of should not be corrected, and speedy justice done.

The petition, writ, bond, and citation when served, and an affidavit of the service of the citation, will all be filed with the Clerk of the State Supreme Court, who will, thereupon, forward to the Clerk of the United States Supreme Court, a transcript of the cause, including the opinion of the State Supreme Court in the cause, along with the bond, citation, affidavit of service, and the writ of error and his return thereon.<sup>33</sup>

<sup>28</sup> U. S. Rev. Stats., § 709.

<sup>29</sup> Curtis' Jur. U. S. Courts, 46.

<sup>30</sup> This course is highly expedient, but not absolutely necessary.

<sup>31</sup> It being more convenient for local practitioners to apply to the Clerk of the U. S. Circuit Court, that Clerk usually issues the writ of error. Curtis' Jur. U. S. Courts, 46; 81; U. S. Rev. Stats., 1004. The U. S. Circuit Court Clerk, in such a case, is a sort

of statutory deputy for the United States Supreme Court Clerk.

<sup>32</sup> The Chief Justice of the State Supreme Court will, ordinarily, allow the writ of error on petition therefor; and leave it to the Supreme Court of the United States to determine whether a Federal question is involved, or not.

<sup>33</sup> All of this fully and at large will appear in the books giving the practice in the Federal Courts, but is outside of the plan of this treatise.

## PART XI.

## CHANCERY SUITS IN THE CIRCUIT AND COUNTY COURTS.

## CHAPTER LXXVII.

## CHANCERY SUITS IN THE CIRCUIT COURT.

§ 1324. What Chancery Suits May be Brought in the Circuit Court.	§ 1326. Chancery Suits in the Circuit Court Particularly Considered.
§ 1325. How a Chancery Suit in the Circuit Court is Conducted.	

§ 1324. **What Chancery Suits May be Brought in the Circuit Court.**—The North Carolina Act of 1782 gave the Courts of Law exclusive Equity jurisdiction; and these Courts continued to exercise that jurisdiction until separate Chancery Courts were established, as heretofore shown.<sup>1</sup> In some cases, this Equity jurisdiction is still retained by the Circuit Courts, concurrently with the Chancery Courts. Such jurisdiction, however, is seldom exercised, complainants generally preferring to institute such suits in the Courts of Chancery. The ordinary cases of concurrent jurisdiction are the following:

1. Suits for divorce and alimony;
2. Suits to partition lands between tenants in common, or to sell lands for partition among them;
3. Suits to sell the lands of decedent to pay his debts;
4. Suits for the allotment of dower, and of homestead;
5. Suits to release testamentary and other trustees, and suits to appoint trustees in place of those released or dead;
6. Suits on petition of trustees by will or otherwise, to sell the trust property, real or personal;<sup>2</sup>
7. Suits in the name of the State against corporations, and suits to prevent the usurpation of office;<sup>3</sup> and
8. Suits by a distributee or legatee against the personal representative to compel the payment of his distributive share or legacy.<sup>4</sup>

In entertaining and determining any of these suits, the pleadings, processes, procedure and forms of orders, reports and decrees, are the same as in like suits in the Chancery Courts, as will be more fully shown in the next section. The common law forms will not be used, being wholly inapplicable.

The equitable jurisdiction of the Circuit Court is exclusively statutory; and, as a consequence, in order to maintain its jurisdiction in any matter of exclusive equitable cognizance, a state of facts must be shown to exist coming within the provisions of some statute, giving jurisdiction thereof to the Circuit Court.<sup>5</sup> The Chancery Courts having exclusive original jurisdiction of all cases of an equitable nature, where the debt exceeds fifty dollars, unless otherwise provided by law,<sup>6</sup> the presumption is that every such case must be instituted in those Courts, and where a suit of an equitable nature is brought in the Circuit Courts, the complainant, on the question of jurisdiction being properly raised, must be able to point out some statute specifically conferring upon the Circuit Courts jurisdiction of that particular suit. This concurrent equitable jurisdiction of the Circuit Courts cannot be extended by construction, but must be strictly confined to the express limits designated by the statutes.<sup>7</sup>

<sup>1</sup> See Article on the History of our Chancery Courts, *ante*, § 16.

<sup>2</sup> Code, §§ 4232-4233.

<sup>3</sup> Code, § 3411.

<sup>4</sup> Code, § 2312.

<sup>5</sup> *Arrington v. Grissom*, 1 Cold., 522; *Thompson v. Mebane*, 4 Heisk., 377.

<sup>6</sup> Code, § 4280.

<sup>7</sup> *State v. Alder*, 1 Heisk., 547; *Lane v. Marshall*, 1 Heisk., 34; *Thompson v. Mebane*, 4 Heisk., 377; *Talbot v. Provine*, 7 Bax., 510.

§ 1325. **How a Chancery Suit in the Circuit Court is Conducted.**—In every case where the suits mentioned in the preceding section are commenced in the Circuit Court, the procedure, from the filing of the bill or petition to the final decree, and the procedure in enforcing the final decree, are precisely the same as in like suits in the Chancery Court, except (1) the name and title of the Circuit Judge will, in all cases, be substituted for the name and title of the Chancellor; (2) the word Circuit will be substituted for the word Chancery in all pleadings, processes, orders, reports, and decrees, and (3) the name and title of the Clerk will be substituted for the name and title of the Clerk and Master.<sup>8</sup>

A bill or petition in the Circuit Court will begin as follows:

**ADDRESS AND COMMENCEMENT OF A BILL IN THE CIRCUIT COURT.**

To the Hon. William R. Hicks, Judge of the Second Judicial Circuit, holding the Circuit Court at Jacksboro', for the County of Campbell:

John Doe, a resident of Anderson county, complainant, }

*vs.*

Richard Roe, a resident of Campbell county, defendant. }

The complainant respectfully shows to the Court:

I.

[Here set out the facts on which the suit is based, in the same manner as in a Chancery bill based on the same facts, dividing the bill into proper sections; and]

II.

[Pray for the same process, and the same special and general relief, as in a Chancery bill seeking the same relief; and swear to the bill, if a verification would be necessary in a like case in the Chancery Court.]

The statute provides that the suits above mentioned, when brought in the Circuit Court, shall be conducted after the manner of suits in Equity, and according to the practice and procedure in the Chancery Court;<sup>9</sup> and in such cases the Clerks of the Circuit Courts are vested with all the powers of the Clerks and Masters of the Chancery Courts.<sup>10</sup>

The Clerk of the Circuit Court will take the prosecution bond, file the bill, issue a copy of the bill with the summons, take bills for confessed, appoint guardians *ad litem*, set aside an order *pro confesso*, make reports, sell lands, revive causes, and will do any other thing, or make any other order, necessary or proper for the Clerk and Master to do, in a like case.<sup>11</sup>

The defendant to a Chancery suit in the Circuit Court must make his defence in precisely the same manner as though the suit had been brought in the Chancery Court. He may (1) plead in abatement, or (2) move to dismiss, or (3) demur to the bill, or (4) plead in bar, or (5) answer, or (6) may file his answer as a cross bill, or file a separate cross bill.<sup>12</sup> These defences must also be made in the same order and manner as in like suits in the Chancery Court. The answer may be excepted to for insufficiency, impertinence or scandal, as in Chancery; and the same proceedings will be taken, and the same rulings and orders made, on such exceptions, as on exceptions to answers in Chancery.

The Circuit Court may, also, make all such references to the Clerk, and require all such reports by him, as would be necessary or proper in like cases in the Chancery Court; and the orders and decrees of the Court will be enforced in the same way the Chancery Court enforces its decrees. In short, all suits of an equitable nature brought in the Circuit Court, are brought, defended and litigated, and heard and determined, in accordance with the pleadings, prac-

<sup>8</sup> These differences are insignificant, and yet they are all. The forms of pleadings, processes, orders, reports and decrees in the Chancery Court can thus be easily adapted to the Circuit Court.

<sup>9</sup> As to divorce suits, see, Code, § 2454; as to suits in partition cases, see Code, § 3274; as to suits to sell lands of a decedent to pay his debts, see Code, § 2269; as to suits for distributive shares, see Code, 2314; as to suits in the name of the State against corporations and against usurpation of office, see Code, §§ 3415-3417; and as to all Chancery suits in the Circuit Court, see Code, §§ 2949; 4236.

10 Code, § 4051.

11 Code, §§ 4051; 4420-4428.

12 But he cannot, by means of a cross bill, enlarge the equitable jurisdiction of the Circuit Court. In his cross bill, he cannot pray for any affirmative relief except such as the Circuit Court has jurisdiction to grant on an original bill, or original petition. Thus, in a divorce suit, the defendant may file a cross bill praying a divorce; but a defendant in a partition suit cannot, by cross bill have a deed reformed, nor can he enforce a vendor's lien against any of the other parties to the suit.



tice, proofs and principles prevailing in the Chancery Court; and in such suits the Circuit Court has power to perform all the functions of the Chancery Court.<sup>13</sup>

All depositions, exhibits, and other documentary evidence actually read at the hearing, become parts of the record, and on appeal, no bill of exceptions is necessary as to them; but depositions or documents rejected at the hearing must be made a part of the record by a bill of exceptions.<sup>14</sup> And appeals are prayed and granted, and time given to execute appeal bonds, in the same manner as in Chancery.

**§ 1326. Chancery Suits in the Circuit Court Particularly Considered.** While the pleadings and practice in Equity causes are the same in the Circuit Court as in the Chancery Court, nevertheless the Circuit Court jurisdiction in such causes is not always entirely co-extensive with that of the Chancery Court.

1. **Divorce Suits in the Circuit Court.** The forms of bills, answers, orders, references, reports and decrees, and the measures of relief, in divorce suits in the Circuit Court, are the same as those already given in the Chapter on Divorce Suits in the Chancery Court; and, therefore, need not be repeated.<sup>15</sup> The Circuit Court, however, could not, it would seem, decree maintenance to a wife, except as an incident to a perpetual, or a temporary divorce.

2. **Partition Suits in the Circuit Court,** and suits to sell lands for partition, are conducted in the same manner as in Chancery. The bills, answers, references, reports and decrees being precisely the same in both Courts.<sup>16</sup> The Circuit Court cannot, however, entertain jurisdiction to adjudicate equities between the parties that are not incidental to the partition.

3. **Suits to Sell the Lands of a Decedent to Pay His Debts** are brought, proceeded in and concluded in the same manner, whether brought in the Chancery or the Circuit Court, as has already been fully shown.<sup>17</sup> The pleadings, proofs, orders, references, reports, decrees, and proceedings to execute the decrees, are the same in both Courts. In the Circuit Court, however, no equities between the parties can be adjudicated in this proceeding, the jurisdiction of the Court being limited to the sale of the property, and the disbursement of the proceeds.

4. **Suits in the Name of the State Against Corporations,** and to Prevent the Usurpation of Office, are commenced, conducted and concluded in the same manner in both the Circuit and Chancery Courts, and the jurisdiction of both Courts is substantially the same, except that the Chancery Court has fuller powers and better processes for reaching all the assets of a corporation, and settling all the equities between the corporation, its stockholders, debtors, and creditors.

5. **Suits for Distributive Shares** are begun, prosecuted and determined in the same manner in the Circuit Court as in the Chancery Court, as will fully appear by reference to that subject.<sup>18</sup>

6. **Suits for the Allotment of Dower and Homestead** are fully considered in the Article on that subject in the Chapter treating of Chancery suits in the County Court.<sup>19</sup> The Circuit Court, however, has a larger jurisdiction in such suits than the County Court in determining the legal rights of the parties to the land, in case of disputed title.

<sup>13</sup> Code, §§ 2949; 4236; and sections of the Code above cited.

<sup>14</sup> Hill v. Bowers, 4 Heisk., 274.

<sup>15</sup> See, ante, §§ 1088-1105. While the Circuit Courts undertake, in divorce suits, to exercise unlimited equitable jurisdiction, declaring and enforcing liens and trusts, setting aside fraudulent conveyances, declaring deeds to be mortgages, granting injunctions and *ne exeat*, and marshalling securities, when deemed necessary to alimony, it is very ques-

tionable whether there is any authority for such exercise of jurisdiction, aside from common usage. *Communis error facit jus.* (Common error becomes law.) *Consuetudo pro lege servatur.* (Custom is considered law.)

<sup>16</sup> See Chapter on Partition, ante, §§ 1058-1072.

<sup>17</sup> See Article on Suits to Sell the Lands of a Decedent to pay his Debts, ante, §§ 988-996.

<sup>18</sup> See, ante, § 927.

<sup>19</sup> See, post, §§ 1329-1333.

CHAPTER LXXVIII.

CHANCERY SUITS IN THE COUNTY COURT.

- ARTICLE I. Chancery Suits in the County Court generally Considered.
- ARTICLE II. Assignment of Homestead and Dower.
- ARTICLE III. Suits to Settle Insolvent Estates.

ARTICLE I.

CHANCERY SUITS IN THE COUNTY COURT GENERALLY CONSIDERED.

§ 1327. What Chancery Suits May be Brought in the County Court. | § 1328. How Chancery Suits in the County Court are Conducted.

§ 1327. **What Suits may be Brought in the County Court.**—In the following cases the statute has conferred Equity powers and jurisdiction upon the County Court:

1. Suits for the allotment of homestead and dower.<sup>1</sup>
2. Suits to partition land by division, or sale.<sup>2</sup>
3. Suits to partition and distribute the estates of decedents; and for these purposes the power to sell the real and personal property belonging to such estates, if necessary to make the partition and distribution, or if manifestly for the interest of the parties.<sup>3</sup>
4. Suits to sell the land of a decedent to pay his debts in cases where the whole estate is not insolvent.<sup>4</sup>
5. Suits to settle insolvent estates, and for this purpose to sell real or personal property belonging thereto, at the instance of the personal representative, or the creditors, where the amount of the estate does not exceed three thousand dollars.<sup>5</sup>
6. Suits to enforce vendors' liens when the amount is less than fifty dollars.<sup>6</sup>
7. Suits by a distributee or legatee against the personal representative to compel the payment of his distributive share, or legacy.<sup>7</sup>

The County Courts are not Courts of general jurisdiction, as are the Circuit and Chancery Courts: their jurisdiction is statutory and limited, especially in those cases where their jurisdiction is concurrent with the Circuit and Chancery Courts.<sup>8</sup> In order to ascertain the jurisdiction of the County Courts, the statutes must be consulted; and, unless a statute can be found expressly giving them jurisdiction in a particular matter, no such jurisdiction exists. The County Courts derive no jurisdiction from the common law; and they have no

<sup>1</sup> Code, §§ 2407; 4201. The statute does not expressly give the County Court jurisdiction to assign homestead; but seems to proceed on the supposition that such jurisdiction already existed. While jurisdiction is not generally conferred by implication, the implication in this case seems to be sufficiently strong; and the County Courts throughout the State are exercising the jurisdiction without question. See *M. & V.'s Code*, §§ 3250; 3255; 3997; 4020; 4036; *Rhea v. Meredith*, 6 Lea, 605; *Steel v. Maness*, 15 Lea, 141. *Contemporanea expositio est optima et fortissima in lege*. *Broom's Leg. Max.*, 654.

<sup>2</sup> Code, § 3266.  
<sup>3</sup> Code, §§ 3206; 4201; Acts of 1873, ch. 64. But the County Court cannot partition land when it is necessary, as a preliminary step, to settle questions as to the title. Nor will the want of jurisdiction be waived by the defendant answering the bill. *Dean*

*v. Snelling*, 2 Heisk., 485; *Walsh v. Crook*, 7 Pick., 388.

<sup>4</sup> Code, §§ 2327 a; 4233; Acts of 1873, ch. 64; *Linnville v. Darby*, 1 Bax., 307; *Burgner v. Burgner*, 11 Heisk., 731; *Kindell v. Titus*, 9 Heisk., 727; *Norville v. Cobb*, 1 Lea, 467.

<sup>5</sup> Code, §§ 4201-4205. In the administration of insolvent estates, the County Court has exclusive jurisdiction, where the real and personal estate does not amount, in value, to one thousand dollars. Code, §§ 2327; 2362; 2364; Acts of 1871, ch. 106; *Connell v. Walker*, 6 Lea, 709; *Steel v. Maness*, 15 Lea, 141. <sup>6</sup> Acts of 1887, ch. 141.

<sup>7</sup> Code, § 2312; *Stewart v. Glenn*, 3 Heisk., 581.  
<sup>8</sup> But in matters of administration the jurisdiction of the County Courts is general. *Railway Co. v. Mahoney*, 5 Pick., 311; *Franklin v. Franklin*, 9 Pick., 119.

jurisdiction of any matter of equitable cognizance, unless it be expressly conferred by some statute.<sup>9</sup>

§ 1328. **How Chancery Suits in the County Court are Conducted.**—In suits to partition lands, or to sell lands for partition, and in suits to sell the lands of a decedent to pay his debts, the pleading, practice and procedure in the County Court are the same as in Chancery, with the exception of the change in the style of the Court and of its Clerk.<sup>10</sup> In such cases, the following is a form for the address and commencement of a

**BILL, OR PETITION:**

To the Worshipful County Court of Davidson county:  
John Doe, a resident of Davidson county, complainant,

*v.s.*  
Richard Fen, a resident of the same county, defendant.

The complainant [*or*, petitioner,] respectfully shows to the Court:

I.

[Proceed to set out the facts on which the suit is based, in the same manner as in a Chancery bill; and]

II.

[Pray for the same process, and the same special and general relief, as in a Chancery bill of like character; and swear to the bill, if a verification would be necessary in Chancery.]

The Clerk will issue a copy of the bill with the summons, and the defendants will make defence by plea in abatement, motion to dismiss, demurrer, plea in bar, or answer, as in like suits in the Chancery Court. The County Court may make such references to the Clerk, and order such reports as would be necessary and proper if the suit were in Chancery; and may make any and all orders, and decrees necessary to adjust, determine, and enforce, the rights of the parties in the subject-matter of the suit, or necessary to enforce its decrees, and may appoint special commissioners to make sales, and may render judgment on notes given in the cause, and open the biddings, set aside sales, issue writs of possession, and, in general, do anything necessary for the purpose of exercising and effectuating its jurisdiction that the Chancery Court might lawfully do in a like case.<sup>11</sup>

The Clerk of the County Court, in all Chancery causes in his Court, is vested with all the powers of a Clerk and Master; and may take bills for confessed, appoint guardians *ad litem*, set aside orders *pro confesso*, extend time for taking proof, hear suggestion and proof of party's marriage or death, issue *scire facias* to revive, order a revivor of the cause, and, in an equity cause, do any other act in vacation that a Clerk and Master may lawfully do.<sup>12</sup>

The law, pleadings, practice and procedure, decrees and proceedings thereon, and appeals therefrom, and process to enforce decrees, in suits to partition lands or sell lands for partition, and in suits to sell the lands of a decedent to pay his debts, will be found fully set forth in the Articles especially devoted thereto; and need not be repeated here.<sup>13</sup>

<sup>9</sup> *Young v. Shumate*, 3 Sneed, 369; *Bond v. Clay*, 2 Head, 379; *Dean v. Snelling*, 2 Heisk., 484; *Bowers v. Lester*, 2 Heisk., 459; *Linnville v. Darley*, 1 Bax., 310. The County Court has no jurisdiction, on a bill by an executor and trustee, to sell the lands of minor legatees for the purpose of converting them. *Cross v. Bloomer*, 6 Bax., 75. Nor has the County Court jurisdiction of a bill, by an administrator with the will annexed, to sell lands for a division between legatees. *Barton v. Cannon*, 7 Bax., 402.

<sup>10</sup> Code, §§ 2269; 2314; 2327 a; 2949; 3274; 4196;

Acts of 1873, ch. 64. In Chancery cases in the County Court, the depositions, exhibits and documentary evidence actually read at the hearing, become parts of the record without being incorporated in a bill of exceptions. *Hill v. Bowers*, 4 Heisk., 274.

<sup>11</sup> Code, §§ 4202-4205. Acts of 1873, chs. 64 and 88.

<sup>12</sup> Code, §§ 4051; 4420-4428.

<sup>13</sup> See Article on Partition, *ante*, §§ 1058-1072; and Article on Sale of Land to Pay Debts, *ante*, §§ 988-996.

ARTICLE II.

ASSIGNMENT OF HOMESTEAD AND DOWER.

- § 1329. Application for Homestead and Dower, How Made.
- § 1330. Frame and Form of the Petition.
- § 1331. Proceedings in Court Upon the Application.

- § 1332. Proceedings and Report of the Commissioners.
- § 1333. Confirmation of the Report, and Final Decree.

§ 1329. **Application for Homestead and Dower, How Made.**—The widow may make application verbally, or in writing, to the County Court of the county where her husband last resided before his death, to have her homestead and dower assigned her,<sup>1</sup> having previously given five days' written notice of her application to the personal representative, if there be one, and to the heirs or devisees, or to their guardian if any be minors and have a guardian. The notice may be in the following form:

**NOTICE OF APPLICATION FOR HOMESTEAD AND DOWER.**

To A B, the administrator [*or*, executor,] and C F, the heir [*or*, devisee,] of E F, deceased: You are hereby notified that I will make [*verbal or*] written application to the County Court of Davidson county on the first Monday of April next, to have homestead and dower assigned me as the widow of said E F, out of the real estate of which he died seized and possessed. This March 3, 1891. G. F.

This notice may be acknowledged or served, and service proved, in the same manner as in case of notices to take depositions.<sup>2</sup> Where the application is verbal, the entries on the minutes showing the application should recite enough facts to show that the Court has jurisdiction of the matter, and that notice of the application was given as required by the statute, and should describe the land out of which homestead and dower are to be assigned.

Where a suit is pending to which a widow entitled to homestead and dower is a party, she may, on answer or petition filed in the cause, praying therefor, have homestead and dower assigned, without being compelled to institute original proceedings for that purpose.<sup>3</sup>

When land encumbered by right of dower is sold on a bill by an administrator to pay debts, or on a bill by tenants in common for partition, or in any other proceeding in Court to which the widow is a party, she may consent to have her dower sold along with the fee, and to take her dower out of the proceeds of the sale.<sup>4</sup>

§ 1330. **Frame and Form of the Petition.**—The better practice, however, in making application for homestead and dower, is to file a petition alleging: 1, the husband's death; 2, the fact that he died seized and possessed of certain lands, describing them; 3, that the petitioner is his widow; 4, that, if there be a will interfering with her homestead and dower right, she has duly dissented therefrom;<sup>5</sup> and 5, praying that the administrator and heirs, or devisees interested in the real estate, naming them, be made parties, and that homestead and dower be assigned her according to law.<sup>6</sup> The same notice may be given of

<sup>1</sup> Code, § 2411; Acts of 1873, ch. 98. As to Homestead, see M. & V.'s Code, §§ 2935-2946; and as to Power, see 1858 Code, §§ 2398-2419. As to the jurisdiction of the County Court to assign homestead, see, *ante*, §-1327, note 1.

<sup>2</sup> Code, § 2410.

<sup>3</sup> *Martin v. Lincoln*, 4 Lea, 289; Code, § 2411. The case of *Lane v. Courtney*, 1 Heisk., 331, in so far as it intimates that a widow cannot by answer set up her claim to dower, is not law. See case above cited, and also, Code, §§ 2411, 2414. But, of course, an answer will not avail unless the heirs are before the Court.

<sup>4</sup> See Code, §§ 3305-3307. For the method of ascertaining the value of the life estate, see Article on Great Value of Life Estates, *ante*, §§ 1070-1072.

<sup>5</sup> If she has not already signified her dissent in open Court, and her petition for homestead and dower is filed in the County Court, she may signify her dissent in said petition. The safer and better practice in such cases is to signify her dissent from her husband's will in open County Court, and to have the fact of such dissent duly entered on the minutes of the Court. Code, § 2404.

<sup>6</sup> If her bill is filed in the Chancery or Circuit Court she may also pray for and recover rents for the time her dower has been wrongfully withheld. *Walker v. Walker*, 6 Cold., 581; *Loudon v. Loudon*, 1 Hun., 1. In the latter case, there is the form of a decree adjudging dower and back rents. See, also, *Clift v. Clift*, 3 Pick., 17.

the filing of such petition as is required to be given in case of a verbal application for homestead and dower; or a subpoena to answer the petition may be issued by the Clerk. The following is a form of a

**PETITION FOR HOMESTEAD AND DOWER.**

To the Worshipful County Court of Davidson county:

G F, widow of E F, deceased, a resident of Davidson county, }  
petitioner, }

*vs.*  
A B, the administrator, and C F, the heirs of said E F, de- }  
ceased, all residents of Davidson county defendants. }

The petitioner respectfully shows to the Court:

I.

That she is the widow of E F, who died intestate in the county of Davidson, wherein he last resided before his death. The defendant, A B, has been duly appointed administrator of his estate, and C F is his only child and heir, she being an infant less than one year old, and without a general guardian. [If the decedent died testate so state, state that A B is his executor, and add:] The petitioner has, heretofore, in open Court, duly signified her dissent from the will of her said husband, and said dissent has been entered on the minutes of your Worshippers' Court.

II.

The said E F, at the time of his death, was seized and possessed of the following tract of land in the Ninth civil district of Davidson county; bounded as follows: Beginning on a walnut at [describing the land by metes and bounds, according to the title papers.]

III.

Petitioner, therefore, prays the Court:

1st. That a notice of the petition be duly served on said defendants [If notice has already been served, this prayer is unnecessary and will be omitted.]

2d. That homestead and dower be assigned her out of said tract of land, in the manner and to the extent prescribed by law, and for general relief. G. F.

The petition need not be sworn to, in an ordinary case in the County Court.

If the widow does not know of what lands her husband died seized and possessed, she may, if her bill is filed in Chancery, pray for a discovery against the heirs, and the Court will compel them to produce the title papers, and to discover any matter necessary to enable her to ascertain the extent of her husband's landed estate: she would probably not be entitled to a discovery in any other Court; but she could have a subpoena *duces tecum* served on the heir, and thus make a witness of him to prove the facts.

§ 1331. Proceedings in Court upon the Application.—No answer or other defence to the application will be necessary, unless (1) the petitioner is not the lawful widow of E F, never having been lawfully married to him, or else having been divorced from him; or (2) unless there is a marriage contract waiving, for a consideration, all rights of dower and homestead; or (3) unless there is a will, and she has failed to dissent therefrom in the time and manner prescribed by law; or (4) unless the land belongs to the heir unencumbered by rights of homestead and dower, as when his father had a mere life-estate with remainder to his heir, or when the land was bought and paid for with the heir's money, and a trust results to the heir.

The proceedings upon the application for homestead and dower are summary, and are heard and determined at the first term after notice. If the averments of the petition be proved, the prayer of the petition will be granted. The fact that petitioner lived with decedent as his wife is, ordinarily, sufficient proof of a legal marriage; his death may be proved by any neighbor, or by herself; and the deed or actual possession will ordinarily be sufficient proof that the decedent owned the land. She is not bound to introduce the original deed, but may produce a certified copy from the Register's office.<sup>8</sup>

<sup>7</sup> Clift v. Clift, 3 Pick., 17. This is important when dower is sought in lands held in common, and in mines.

<sup>8</sup> Walker v. Walker, 6 Cold., 573.

The following is the form of an

**ORDER APPOINTING COMMISSIONERS TO LAY OFF HOMESTEAD AND DOWER.**

G F, widow of E F, deceased,

*vs.*

A B, the administrator, and C F, the heir of said E F, deceased. }

G F, the widow of E F, deceased, this day made application to the Court, [by petition, if such be the fact,] for the appointment of Commissioners to assign to her homestead and dower out of the lands of which the said E F lately died seized and possessed. And it duly appearing to the Court that she is the widow of said E F, who resided in this county at the time of his death; and that the said E F died seized and possessed of the following tract of land in the Ninth civil district of this county, bounded as follows: [*describing it by metes and bounds;*] and it appearing that five days' notice in writing of this application was given the defendants, it is ordered by the Court that said application be granted; and I J and K L, two free-holders of the Court, and M N, the County Surveyor, all of whom are unconnected by affinity or consanguinity with any of the parties, are appointed Commissioners to allot and set apart to said G F, out of said tract, first a homestead of the value of one thousand dollars, and then one-third of the remainder of the tract, according to quality and quantity, as dower. The Commissioners will make their report, accompanied by a plat, to the next term of the Court.

When the application for homestead and dower is made in the Circuit or Chancery Court, a third person, claiming title paramount to the widow's husband, may, on his own petition, intervene and be made a party defendant, and as such resist her claim to homestead or dower. In strict practice, he would be required to file an original bill in the nature of a cross bill;<sup>9</sup> but under the statute, on his sworn petition showing that he has a superior title to the widow's husband, he may be allowed to appear and defend against her claim.<sup>10</sup> Such third person may, also, in a summary way, show the County Court that the land is his, and thus defeat the widows' application.

§ 1332. **Proceedings and Report of the Commissioners.**—The statute prescribes what the Commissioners shall do in laying off homestead and dower. They must in their report describe the homestead by metes and bounds, if less than the entire tract is assigned as a homestead; and they must describe the dower by metes and bounds, unless the balance of the homestead tract, or a whole tract, is assigned as dower; and where a part of a tract is assigned as homestead or dower, the Commissioners' report must be accompanied by a plat showing plainly the metes and bounds set apart to the widow.<sup>11</sup> The following is a form of a

**COMMISSIONERS' REPORT OF HOMESTEAD AND DOWER.**

G F,

*vs.*

A B, admr., &c., et al. }

To the Worshipful County Court of Davidson county:

The undersigned commissioners appointed in this cause at the last term of this Court, and duly sworn, to allot and set apart to G F her homestead and dower out of the tract of land described in the order appointing them, respectfully report as follows:

1st. They have allotted and assigned to her the following portion of said tract as her homestead: Beginning on a cedar: [*giving the metes and bounds*] to the beginning, containing twenty acres, and including the family residence, and the appurtenances.

2d. They have allotted and assigned to her, as dower, the following portion of the remainder of said tract: Beginning on a cedar, a corner of said homestead and [*giving the metes and bounds*] to the beginning, adjoining the said homestead, and containing sixty-seven acres, being one-third in value in said remainder.

Said homestead and dower are shown on the plat<sup>12</sup> herewith exhibited as a part of this report, marked "A."

BILL OF COSTS:

I J, 2 days' service,	\$2.00
K L, 2 " " "	2.00
M N, 2 " " (Surveyor)	3.00

March 5, 1891.

K L, }  
I J, } Commissioners.  
M N, County Surveyor.

<sup>9</sup> Stretch v. Stretch, 2 Tenn. Ch., 140.  
<sup>10</sup> Hill v. Bowers, 4 Heisk., 272; Hunt v. Wing, 10 Heisk., 150; Code, § 2799.  
<sup>11</sup> Code, § 2417. See Article on Partition, for further information as to a Commissioner's report in such a case. *Ante*, §§ 1062-1064. The object of the law in associating the County Surveyor, or his dep-

uty, with the Commissioners is to enable them to make the plat, and to describe the homestead and dower by metes and bounds. The law requires their report and plat to be entered in full on the minutes of the Court. Code, § 2417; James v. Fields, 5 Heisk., 399.

<sup>12</sup> This plat is of great value, and should always

§ 1333. **Confirmation of the Report, and Final Decree.**—The report may be excepted to by the heir, or his vendee, because too much has been allowed; or it may be excepted to by the widow because too little has been allowed. These exceptions will be heard summarily in open Court, on oral or other evidence. The Court may overrule these exceptions,<sup>13</sup> or sustain them and set aside the report, with instruction to the Commissioners how to proceed. When the report is confirmed it will be incorporated in the decree.

**DECREE CONFIRMING REPORT.**

G F,  
vs.  
A B, &c., *et al.* } Dower.

This cause coming on this day to be heard on the report of the Commissioners appointed at the last term, which report is as follows:

[*Here copy it, and the plat, in full.*]

And said report being unexcepted to, is in all things confirmed; and the said G F is vested with all the right, title, and interest in and to said homestead and dower tracts to which she is rightfully entitled according to law, as the widow of E F, deceased, and, on her application, a writ of possession will issue to put her in possession of said lands.

It is further decreed by the Court that the petitioner, G F, pay all the costs of this cause, for which execution may issue.

If any of the defendants to the petition are in possession of the homestead and dower assigned, the Court may award a writ of possession to put the widow in possession of the land decreed her.

**ARTICLE III.**

**SUITS TO SETTLE INSOLVENT ESTATES.**

- |  |   |
|--|---|
| <p>§ 1334. Extent of the Jurisdiction of the County Court.</p> <p>§ 1335. Suggestion and Advertisement of Insolvency.</p> <p>§ 1336. Effect of the Suggestion of Insolvency.</p> <p>§ 1337. Filing Claims and Proceedings Thereon.</p> | <p>§ 1338. Schedule of Assets.</p> <p>§ 1339. Petition to Sell the Lands.</p> <p>§ 1340. Proceedings Upon the Petition, and Decree of Sale.</p> <p>§ 1341. Distribution of the Assets.</p> <p>§ 1342. Proceedings Upon the Clerk's Report of Assets and Claims.</p> |
|--|---|

§ 1334. **Extent of the Jurisdiction of the County Court.**—The County Court has exclusive jurisdiction to administer the assets, real and personal, of an insolvent estate, when the amount thereof is less than one thousand dollars;<sup>1</sup> and concurrent jurisdiction with the Chancery Court in all cases where the amount of the estate exceeds one thousand dollars.<sup>1a</sup> As an incident to such jurisdiction, the Court may order all necessary accounts, declare pro ratas, sell the decedent's real estate, and do all such other things as may be necessary to distribute the entire net estate among the creditors.

An estate is insolvent, in the meaning of the statute, when the personal assets are insufficient to pay the decedent's debts.<sup>2</sup>

§ 1335. **Suggestion and Advertisement of Insolvency.**—When the executor or administrator ascertains that the estate committed to his charge will probably be insolvent, he should at once make suggestion thereof to the Clerk of the County Court, or to his legally appointed deputy.<sup>3</sup> Any creditor may, also,

be made. *James v. Fields*, 5 Heisk., 399. The Surveyor is made a Commissioner expressly to make the survey and plat, and he should be allowed no compensation unless he discharges this duty. The only excuse for not making a survey and plat is the fact that the whole of a tract or of a lot was assigned; and, hence, no survey and plat was necessary. If a stream make a natural boundary of the homestead or dower, it would be a sufficient designation to assign all of the tract on one side of such stream.

<sup>13</sup> See *Exceptions to Master's Report*, *ante*, §§ 615-617.

<sup>1</sup> *Connell v. Walker*, 6 Lea, 709; *Steel v. Maness*, 15 Lea, 141; Code, §§ 2327; 2362-2364; Acts of 1871, ch. 106.

<sup>1a</sup> But see, *ante*, § 1327, sub-sec. 5.  
<sup>2</sup> *Fleming v. Talliafer*, 4 Heisk., 352; *Norville v. Coble*, 1 Lea, 467; *Ewing v. Manry*, 3 Lea, 388.

<sup>3</sup> Code, § 2328. The legal import of the suggestion of insolvency is, that the personal assets of the estate are probably insufficient to satisfy all the decedent's debts and liabilities. *Fleming v. Talliafer*, 4 Heisk., 352; *Ewing v. Maury*, 3 Lea, 388.

suggest the insolvency of an estate.<sup>4</sup> On such suggestion being made, the Clerk will order the administrator to give due notice to all creditors to file their claims by a stated time. This order and the suggestion of insolvency must be entered by the Clerk, or his deputy, in the Minute Book of Insolvent Estates,<sup>5</sup> as follows:

**SUGGESTION OF INSOLVENCY, AND ORDER OF PUBLICATION.**

Estate of }  
                  } No. 490.

John Smith, deceased.

On this March 5, 1890, came Samuel Smith, the administrator of the estate of John Smith, deceased, and suggested to me the insolvency of said estate. It is, therefore, ordered by me, that the said Samuel Smith, as such administrator, give notice by advertisement in the Knoxville Journal, [or some other newspaper published within the State,] and also at the Court House door in Knoxville, for all persons having claims against said estate to appear and file the same in this Court, authenticated in the manner prescribed by law, on or before the first day of August next, [or some other day, to be fixed in the notice, which day shall not be less than three nor more than six months after the date of the notice,] and warning them that any claim, not filed within said date, will be forever barred, both in law and equity.<sup>6</sup>

JOHN W. CONNER, Clerk.

The administrator will thereupon, at once give the notice required by the Clerk's order. This notice may be in the following form:

**NOTICE OF INSOLVENCY.<sup>7</sup>**

**To the creditors of John Smith, deceased:**

By order of the Clerk of the County Court of Knox county, notice is hereby given to all persons having claims against the estate of John Smith, deceased, to appear and file the same with the Clerk of the said Court, authenticated in the manner prescribed by law, on or before the 1st day of August next. The insolvency of said estate having been suggested, any claim not filed on or before said day, will be forever barred, both in law and equity. March 5, 1890.

SAMUEL SMITH, administrator of John Smith, deceased.

**§ 1336. Effect of the Suggestion and Publication of Insolvency.**—The object of the statute in providing for the administration of insolvent estates is: 1, To prevent the assets of the estate being consumed by the costs incident to multiplicity of suits; and 2, To so distribute the net assets among the various creditors that each one may receive his ratable share thereof. To effectuate this object, the statute provides that the suggestion of insolvency, and the advertisement thereof, shall operate as an injunction, in all cases, against the bringing of any suit, in any Court whatever, against the personal representative of the insolvent estate. In case of suits instituted before such suggestion, the Court, or Justice, before whom the same is pending, shall, upon the fact of the suggestion of insolvency being proved, proceed in the cause no further than to render final judgment; and if such judgment is against the personal representative, the Court, or Justice, rendering the same shall, instead of awarding execution, cause it to be certified to the County Court before which the suggestion is made.<sup>8</sup>

Another effect of the suggestion and advertisement of insolvency is to confer upon the Clerk of the County Court before whom the suggestion is made, exclusive jurisdiction to hear and determine all claims, large and small, legal and equitable, against the estate, on which suit has not been brought before the advertisement of insolvency, his decisions, however, being subject to the ap-

<sup>4</sup> Code, § 2329. But if the suggestion is made falsely and fraudulently, the creditor will be liable for all costs resulting from his suggestion.

<sup>5</sup> Code, §§ 2330; 2358.

<sup>6</sup> The statute prescribes that any claim not filed on or before the day fixed in the notice, or before an appropriation of the funds of the estate is made among the creditors, shall be forever barred, both in law and Equity. Code, § 2330.

<sup>7</sup> In publishing this notice, this title should be omitted; and the publication should begin with the words: **To the creditors of John Smith, deceased.** These words should be in bold face type,

to attract attention. See, *ante*, §§ 198; 877; 1001; 1035.

<sup>8</sup> Code, §§ 2332-2333. If a suit should be instituted against the personal representative after such suggestion and advertisement, he may plead the same in abatement of the suit, or may have the plaintiff attached for violating the injunction, or the judgment may be treated as a nullity. *Latta v. Sumerow*, 4 Lea, 492. But a suggestion of insolvency is not operative to prevent suits against the administrator unless and until publication thereof is duly made. *Bashaw v. Temple*, 7 Cates, 596.



proval of the County Court, and to the right of appeal to the Circuit and Supreme Courts.

§ 1337. **Filing Claims, and Proceedings Thereon.**—Upon the suggestion and advertisement of insolvency, all creditors and claimants must file their claims with the Clerk of the County Court. If his claim is not due, or if suit has been brought and no judgment yet recovered, he must, nevertheless, file his claim within the time fixed in the advertisement, or before an appropriation of the funds of the estate is made, or it will be forever barred.<sup>9</sup> The personal representative must in like manner and time file any claim he, in his own right, may have against the estate. No particular formality is necessary in filing claims. A sworn petition may be filed giving a history of the claim when an explanation is advisable; or the claim, if an open account, may be sworn to in writing and filed. If the claim is a note, or other written acknowledgment of indebtedness, signed by the decedent, it is conclusive, unless the execution thereof is denied under oath by the personal representative, according to the best of his knowledge, information and belief.<sup>10</sup> The following is the form of

**A SWORN ACCOUNT.**

John Smith, Dr.	To William Brown.
1890. March 7. To 100 lbs. of Bacon,	\$10.00
" 100 " " Flour,	5.00
" 20 " " Sugar,	2.00
	<hr/>
" April 2. By cash,	17.00
	3.00
	<hr/>
Balance due,	14.00

State of Tennessee, }  
Knox County. }

William Brown, being duly sworn, makes oath that the foregoing account against John Smith, now deceased, is correct; that he has given John Smith all just credits, and that the balance of fourteen dollars is justly due and owing by Samuel Smith, the administrator of said John Smith. WILLIAM BROWN.

Sworn to and subscribed before me, and filed }  
March 10, 1891. W. T. JONES, Deputy Clerk. }

If the personal representative deny the account, or other claim, on oath, it must be proven. The denial may be as follows:

**DENIAL OF AN ACCOUNT.**

William Brown, }  
vs. } No. 490.  
Samuel Smith, admr. of John Smith, deceased. }

Samuel Smith, administrator of John Smith, deceased, makes oath that the foregoing account of William Brown against John Smith for fourteen dollars, is wholly incorrect and unjust, according to the best of his knowledge, information and belief.

[*Jurat as above.*]

SAMUEL SMITH, Admr.

**DENIAL OF THE EXECUTION OF A NOTE.**

William Brown, }  
vs. } N. 490.  
Samuel Smith, admr., &c. }

The defendant, Samuel Smith, for plea to said note, [*bond, or other written evidence of debt.*] says it was not executed by his intestate, John Smith, or by any one authorized to bind said John Smith in the premises. SAMUEL SMITH, Admr.

The defendant makes oath that the above plea is true according to the best of his knowledge, information, and belief.<sup>11</sup> SAMUEL SMITH.

Sworn to and subscribed before me, and filed }  
March 10, 1891. W. T. JONES, Deputy Clerk. }

Whether the claim be allowed or disallowed, the Clerk will endorse on it the fact and date of its allowance or disallowance, and sign his name thereto; and if an appeal is prayed and granted, that fact also should be stated,<sup>12</sup> thus:

<sup>9</sup> Code, § 2330. If the suit against the administrator is brought by the creditor before the two years and six months elapse, he may file his judgment at any time before the funds are distributed.

Hearn v. Roberts, 9 Lea, 365; Hurley v. Murrell, 2 Tenn. Ch., 620.  
<sup>10</sup> Code, §§ 3777-3778.  
<sup>11</sup> Code, §§ 2940; 3777-3778.  
<sup>12</sup> Code, § 2336.

**ADJUDICATION OF CLAIMS.**

This claim allowed, [or disallowed, or ten dollars of this claim allowed,] and appeal prayed by the administrator, [or claimant,] to the next term of the Circuit Court; and he having given an appeal bond with surety, said appeal is granted.

March 20, 1891.

JOHN W. CONNER, Clerk.

The Clerk should set a day for the hearing of any and all parties who have filed claims. Ordinarily, when the personal representative admits a claim, it will be allowed unless 1, some creditor or other claimant disputes its amount or validity, or 2, it is barred by the statute of limitations, or bears on its face other evidence of its invalidity. Any creditor has a right (1) to contest any claim of the personal representative, or of any other claimant; and has the right (2) to show that the personal representative has not filed a true and perfect schedule of all the assets of the estate; and either the personal representative, or any claimant, may appeal to the next term of the Circuit Court from any adjudication of the Clerk, disallowing his own claim, or allowing any other claim, or from any other decision of the Clerk as to claims or assets. The party appealing must give bond with surety, as in case of an appeal from a Justice of the Peace; and thereupon the Clerk must certify his decision to the next term of the Circuit Court where such an issue will be made up under the direction of the Court as will present the questions in issue for decision, without any formal pleading.<sup>12a</sup> The judgment of the Circuit Court, or of the Supreme Court, if an appeal be taken to it, shall be certified back to the County Court.<sup>13</sup>

**§ 1338. Schedule of Assets.**—After the time fixed in the advertisement for filing claims has expired, and the claims contested have all been adjudicated, the Clerk must make an order on the administrator, or executor, that on or before a day to be appointed in such order, he shall file with the Clerk a true and perfect schedule of the estate, consisting of the available funds, choses in action, and other effects, including real estate.

**ORDER TO FILE SCHEDULE.**

Estate of }  
John Smith, deceased. } No. 490.

In this case, it is ordered by me that Samuel Smith, the administrator, file with me, on or before August 25, 1891, a true and perfect schedule of the amount of said estate, including therein the available funds, choses in action, and other effects, also, the real estate.

August 5, 1891.

JOHN W. CONNER, Clerk.

The schedule may be in the following form:

**SCHEDULE OF ASSETS.**

To the Worshipful County Court of Knox county, and to its Clerk:

In obedience to the order of the Clerk of this Court, I submit this schedule of the assets of the estate of John Smith, deceased:

1. Proceeds of personal property. (See Account of Sales on file.) - - \$ 310.00
2. One note on George Brown, and interest to date, - - - 220.00
3. One judgment against Henry Jones in the Circuit Court at Knoxville, and interest, - - - 70.00
4. One tract of land, containing 300 acres, in the 12th district of Knox county, worth about - - - 2,000.00
5. A lot of notes and accounts probably worthless, (See list herewith filed, marked A.) - - -

Total available assets, - - - \$2,600.00

August 20, 1891.

SAMUEL SMITH, Admr.

Samuel Smith makes oath that the foregoing is a true and perfect schedule of the assets of said estate, including all available funds, choses in action, real estate, and other effects.

[Jurat, as in § 1337, ante.]

<sup>12a</sup> Code, § 2336; Brien v. Baker, 5 Sneed, 213. The words "questions for discussion," in this section of the Code should read "questions for decision." Acts of 1849-50, ch. 73, § 3, carried in the Act of 1851-52, ch. 283, § 10.

<sup>13</sup> Code, §§ 2334-2336. If the estate is of less value than one thousand dollars, the appeal will be

to the Circuit Court; if of greater value, the appeal will be to the Supreme Court. But where an appeal would properly lie to the Circuit Court, by consent of both parties it may be taken direct to the Supreme Court. Code, §§ 3147-3148; Phillips v. Hoffman, 5 Cold., 252.

§ 1339. **Petition to Sell the Lands.**—When the schedule filed by the personal representative contains real estate, he must file a petition to have it sold. The petition will be addressed to the County Court of the county in which the estate is being administered; and will state: 1, the death of the decedent; 2, his testacy or intestacy, as the case may be; 3, the appointment of complainant as executor, or administrator; 4, the suggestion and advertisement of the insolvency of the estate; and 5, the necessity for a sale of the decedent's lands to pay his debts, and will 6, describe the lands and pray for their sale. The widow and heirs, or devisees, must be made defendants; and they must be brought before the Court by service of subpoena, or summons, and a copy of the petition, if residents; and by publication, if non-residents.<sup>14</sup>

This petition may be substantially as follows:

**PETITION TO SELL THE LANDS OF AN INSOLVENT DECEDENT.**

To the Worshipful County Court of Knox county:

Samuel Smith, administrator of John Smith, deceased, a resident of Knox county, }  
petitioner, }

Martha Smith, the widow, and Charles J. Smith, and James Smith, the heirs of }  
said John Smith, deceased, all residents of Knox county, defendants. }

Petitioner respectfully shows to the Court:

I.

That John Smith, late of Knox county, is dead, intestate, and petitioner has been duly appointed his administrator by this Court. The defendant, Martha Smith, is the widow of said John Smith, and the other two defendants, Charles J. and James Smith, are the only heirs of said John Smith.

II.

The estate of said John Smith is insolvent: its insolvency has been duly suggested, and due advertisement thereof been made. The claims that have been filed and adjudicated, aggregate more than two thousand and three hundred dollars, whereas the total personal assets, as will be seen by reference to petitioner's schedule thereof, heretofore filed in this Court, amount to only about six hundred dollars.

III.

The said John Smith died seized and possessed of the following tract of land in the 12th civil district of Knox county. Beginning on a maple, [*describing it fully by metes and bounds to the beginning.*] containing three hundred acres, more or less. The said widow is now living on said tract, and claims homestead and dower therein. It will be necessary to sell said tract to pay said decedent's debts.

IV.

The premises considered, petitioner prays:

1st. That the said widow and heirs be made defendants hereto by service of process, and copy of this petition, and be required to make answer hereto, but not on oath.

2d. That if said widow claims homestead and dower in said tract, and is entitled thereto, that the same be laid off to her by commissioners at her expense, in the manner provided by law.<sup>15</sup>

3d. That said tract, or so much thereof as is proper, be sold on a credit of not less than six, nor more than twenty-four months, and in bar of all right of redemption; and, that its proceeds be inserted in said schedule, and applied to the satisfaction of the indebtedness of said estate.<sup>16</sup>

4th. That petitioner have such further and other relief, as may be necessary to enable him fully and properly to discharge his duties in the premises.

SAMUEL SMITH, Admr.

If any of the parties are non-residents or minors, or of unsound mind, the petition so alleging must be sworn to, or the facts made to appear by a separate affidavit.

§ 1340. **Proceedings upon the Petition, and Decree of Sale.**—If there be non-residents, publication must be made as in a Chancery cause;<sup>17</sup> and if any of the defendants are minors, or of unsound mind, a guardian *ad litem* must be appointed for them, as in suits in the Chancery Court.<sup>18</sup>

If the defendants are all adults, and make no defence when duly brought

<sup>14</sup> Code, § 2338.

<sup>15</sup> In such a case, the widow must pay all costs of laying off her homestead and dower, and all costs incident thereto. Code, § 2418.

<sup>16</sup> Code, §§ 2338-2341.

<sup>17</sup> See Article on Process by Publication, *ante*, §§ 196-198.

<sup>18</sup> See Article on Guardians *ad litem*, *ante*, §§ 106-108.

before the Court,<sup>19</sup> an order *pro confesso* may be entered against them in open Court. If any of them are minors, or of unsound mind, they must answer by their guardian *ad litem*, as in a Chancery suit.<sup>20</sup> Upon proof of the insufficiency of the personal assets to pay the adjudicated claims against the estate, the Court will order the land to be sold. The usual proof is made by the administrator and the Clerk, the administrator proving the amount of the available personal assets, and the Clerk, or administrator, proving the amount of the allowed claims. The administrator's schedule of assets, if properly sworn to, will be *prima facie* proof of the amount of the personal assets available for the payment of debts; and the Clerk's report of adjudicated claims will be *prima facie* proof of the indebtedness of the estate.

If the widow claims her homestead and dower, which she may do orally, or in answer, and shows herself entitled thereto, the Court will appoint commissioners to assign the same.<sup>21</sup> The petition to sell the land may be heard, and a decree of sale made, at the first term after the petition is filed, provided the defendants have all been duly brought before the Court, and the answers of the minors, if any, are in by their guardians *ad litem*, duly appointed by the Clerk,<sup>22</sup> or by the Court. For good cause, however, a continuance may be had by either party.<sup>23</sup>

The decree for sale may be in the following form:

**DECREE TO SELL LANDS OF A DECEDENT.**

Samuel Smith, Admr.,

*vs.*

Martha Smith, Charles J. Smith, and James Smith.<sup>24</sup>

} No. 490.

This cause coming on this day to be heard upon the petition to sell the lands of John Smith, deceased, to pay his debts, and upon the answers of the widow and heirs of said John Smith, [*or, upon judgment pro confesso heretofore taken and entered against the widow and heirs of said John Smith,*] and upon the proof, from all of which it duly appears to the Court that the insolvency of the estate of said John Smith has been duly suggested and advertised; that the personal assets are wholly insufficient to pay the claims allowed against said estate, and that a sale of the real estate of which said John Smith died seized and possessed is necessary to satisfy the *bona fide* unpaid claims against said estate; it is, therefore, ordered and decreed by the Court that the Clerk of this Court proceed, as required by law for execution sales,<sup>25</sup> to sell on the premises, [*or, at the Court House door in Knoxville,*] the tract of land described in said petition; which tract is situated in the 12th civil district of Knox county, and bounded as follows: [*describing it fully by metes and bounds to the beginning,*] containing three hundred acres, more or less. Said tract will be sold on a credit of six and twelve months, subject to the homestead and dower rights of Martha Smith, the widow of said John Smith, as heretofore defined and decreed by this Court. The sale will be in bar of all right of redemption, the complainant so praying in his petition and now at the bar of the Court. The Clerk will take notes bearing interest from date, with good security, from the purchaser, and will retain a lien on the land for further security. The Clerk will report to the next term of the Court.

§ 1341. **Distribution of the Assets.**—The proceeds of the sale of the land, after the payment of the costs incident to the petition and sale, and of any taxes that are a lien thereon, are inserted in the administrator's schedule of assets, and completes the fund to be applied in discharge of the indebtedness of the estate. The Clerk, thereupon, takes and states an account showing therein:

1. Any articles exempt from execution in the hands of the decedent at his death, specifying them, that went into the hands of the administrator, if any.
2. The widow's year's support, if set apart in kind, and not paid over to her.
3. All fees, costs, commissions, and compensation legally due in the administration of the estate (1) to the personal representative, (2) to his Solicitor, and (3) to the Clerk, specifying the amount due each, and on what account.
4. Claims allowed, or adjudicated, that are entitled to priority of satisfaction,

<sup>19</sup> They may make any of the defences specified in § 991, *ante*.

<sup>20</sup> See Answer of Guardian *ad litem*, *ante*, § 383.

<sup>21</sup> For proceedings to Assign Homestead and Dower, see preceding Article, §§ 1329-1333.

<sup>22</sup> Code, §§ 4051; 4420.

<sup>23</sup> Code, § 2339.

<sup>24</sup> The better practice is to set out all the names of the defendants in the decree of sale, or in the decree confirming the sale, because the petition may get lost or mislaid. The names of the parties may be all inserted in the body of the decree confirming the sale: this is the best practice. *Ante*, § 580.

<sup>25</sup> Code, § 2340.

such as express and statutory liens,<sup>26</sup> giving the name of each preferred creditor, the character of his lien, the amount due him, and on what particular fund the lien rests.

- 5. Claims for funeral expenses; and
- 6. Debts and arrearages due the State, specifying their amount and character.

These items will be deducted from the fund for general distribution, and will be paid over to the parties entitled in full, if there be sufficient; if not, they will be paid in the order of priority above given. After the above items have all been deducted, the balance of the assets, real and personal, will be distributed among the unpreferred creditors.

The Clerk, after setting out in his account the names of the owners of the above six preferred items, and the amount due each, and after deducting the total amount thereof from the total amount of assets, will then proceed with his account, and set out therein the name of each preferred creditor, and the amount due him, and the amount of his *pro rata* of the assets remaining after making the deduction above stated.

This account is to be reported to the Court, and may be in the following form:

**REPORT OF ASSETS, CREDITORS, AND PRO RATA.**

To the Worshipful County Court of Knox county:

I respectfully submit to the Court the following report of the assets and creditors of the estate of John Smith, deceased, and the amount due each creditor:

Total amount of assets,	-	\$2,600.00
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**I. Preferred Claims Allowed:**

1. Administration fees due the Clerk:		
(1) For receiving and filing suggestion of insolvency, and making order for publication thereof,	-	\$ .50
(2) For receiving and filing ten claims against said estate,	-	1.00
(3) [And so on, specifying each item of cost.]	-	8.50
Total amount due the Clerk,	-	\$10.00
2. Compensation allowed the administrator,	-	40.00
3. Fee to James Comfort, Solicitor, for services in suit to sell the land for the administrator,	-	35.00
4. One exempt cow, sold by mistake,	-	20.00
5. Widow's year's support in cash,	-	160.00
6. James Brown, express vendor's lien on land sold. (See decree of the Chancery Court at Knoxville.)	-	310.00
7. John Crape, for coffin and digging grave,	-	25.00
Total amount of preferred claims,	-	600.00
Amount for distribution among the general creditors,	-	\$2,000.00

**II. General Creditors Whose Claims have Been Allowed:**

	TOTAL AMOUNT.	PRO RATA.
1. William Johnson, note,	\$ 800.00	\$640.00
2. George Jones, judgment,	1,200.00	960.00
3. John Cobb,	500.00	400.00
	-	\$2,000.00

Each of these creditors is entitled to a *pro rata* of 80%.  
Nov. 1, 1891.

JOHN W. CONNER, Clerk.

§ 1342. **Proceedings upon the Clerk's Report of Assets and Claims.**—The Clerk's report may be objected to by any person interested, and such exceptions may be taken to the account as he may think proper.<sup>27</sup> The persons interested in excepting to the account are: (1) the personal representative; (2)

<sup>26</sup> The statute providing for a *pro rata* distribution of an insolvent estate does not affect liens acquired in the life-time of the decedent. All such liens must be satisfied before the general creditors can receive anything. The following are the principal liens entitled to preference: 1, Liens obtained by the levy

of an attachment, or execution; 2, Liens of judgments or decrees; 3, Vendors' express liens; 4, Mortgages, or deeds of trust; and 5, Other liens fixed on the property in the life-time of the decedent. 1 Milliken's Meig's Dig., § 75; 1 King's Dig., § 142. 27 Code, § 2343.

any claimant whose claim has been allowed, and (3) any claimant whose claim has been disallowed. A claimant whose claim has been allowed may except to the report because another claim has been allowed, or because more has been allowed to another claimant than he was justly entitled to.

The form of exceptions to the report, and the manner of disposing of such exceptions, are the same as in like cases in the Chancery Court.<sup>28</sup> The County Court may confirm the report, or may modify it, or may recommit it to the Clerk for such alterations as may to the Court seem just. Any person interested in the decision of the Court upon exceptions to the report, may appeal therefrom to the Circuit or Supreme Court, or Court of Civil Appeals, on giving bond with surety for costs as in other cases.<sup>29</sup> The following is a form of a

**DECREE CONFIRMING REPORTS, AND APPEAL THEREFROM.**

In the matter of the Estate }  
of John Smith, deceased. }

This cause came on this day to be heard upon the Clerk's report of assets, creditors and pro rata, and upon the exceptions of William Brown because his claim was disallowed, and upon the exceptions of George Jones to the action of the Clerk in allowing William Johnson eight hundred dollars, on consideration of all, which it is ordered and adjudged by the Court, that said exceptions be all overruled and disallowed, and that said report be in all things confirmed. The Clerk will record said report in his book of Accounts of Insolvent Estates;<sup>30</sup> and Samuel Smith, the administrator of said estate, will forthwith make distribution of the assets reported in his hands among the creditors, according to said report, paying to each unpreferred creditor eighty per cent. of the amount of his claim; and an execution will issue on demand of any creditor for the amount due him upon said report after due notice of such demand.<sup>31</sup>

From this decree William Brown and George Jones pray an appeal to the next term of the Supreme Court at Knoxville, and each of them having given bond with surety for costs, said appeal is granted. In making out the transcript for the Supreme Court the Clerk will copy<sup>32</sup> (1) the account of William Brown, and the adjudication thereof; (2) the report in so far as it refers to the claim of William Johnson; (3) the note of said Johnson; (4) the exceptions of said Brown and said Johnson to the report; (5) the depositions relating to said account and said note; and (6) this decree. The original note of said Johnson will be sent up with the transcript.

The appeal, however, shall not affect so much of this decree as is not appealed from, and the administrator will pay all the preferred creditors in full, and seventy per cent. of the *pro rata* allowed the other creditors, except William Johnson, retaining the balance of the assets subject to the further orders of this Court, after the decision of said appeal.<sup>33</sup>

The report when confirmed is recorded in the Accounts of Insolvent Estates.<sup>34</sup>

Any legatee, distributee, widow or creditor, may, at any time before the final settlement of an estate, suggest to the County Court, and show by proof, that the personal representative has not returned a complete inventory, and have the omissions charged to him. When an administrator's account has been finally settled by the County Court any party interested therein may appeal from the judgment of such Court confirming such settlement, to the Circuit or Chancery Court.<sup>35</sup>

<sup>28</sup> See Exceptions to Master's Report, *ante*, §§ 615-620. The following are forms of

**EXCEPTIONS TO THE CLERK'S REPORT.**

[The exceptions may be written at the foot of the report, or on a separate sheet of paper attached thereto, as follows:]

William Brown excepts to the foregoing report, because the Clerk has disallowed his account filed in this cause for fourteen dollars.

WILLIAM BROWN.

George Jones excepts to the foregoing report because the Clerk has allowed William Johnson eight hundred dollars on a note which is barred by the statute of limitations.

GEORGE JONES.

Exceptions filed, Nov. 1, 1890.

JOHN W. CONNER, Clerk.

<sup>29</sup> Code, §§ 2344-2345. As to whether the appeal should be to the Circuit or a higher appellate Court, see, *ante*, § 1337, note 13.

<sup>30</sup> Code, § 2358.

<sup>31</sup> Code, §§ 2343-2353. The creditor must give the administrator, or executor, written notice of his intention to apply for an execution. Code, § 2353.

<sup>32</sup> Code, § 2346.

<sup>33</sup> Code, 2347-2349.

<sup>34</sup> Code, §§ 2344; 2358.

<sup>35</sup> Code, § 2304. See, *ante*, § 536, where the practice on such an appeal is considered.

# GENERAL INDEX

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## HOW TO USE AN INDEX.

A perfect index to the contents of a book would be larger than the book itself, as is proved by Cruden's Concordance to the Bible, which, though a mere index, is much larger than the Bible. A perfect index, then, to a law book is not to be expected.

In an index, the same matters are often repeated under different heads: thus, *the same matters* may be indexed under depositions, evidence, proof, testimony, and, to a limited extent, under documents, exceptions, exhibits, and notice. So, many incongruous matters may be put under the same head: thus, under *exceptions* may be put exceptions to answers, to bills, to depositions, to evidence, to reports, to witnesses, to the rulings of the Court, and bills of exceptions; and under *notice* may be put notice of prior equities and rights, notice to take depositions, notice by *scire facias*, notice by publication, notice to take accounts, notice to creditors, notice of motions, notice of suing out writs of error *coram nobis*, and notice of writs of error in the Supreme Court. It requires, therefore, no little discernment to prepare a good index that will not be too voluminous; and it requires a corresponding amount of discernment to successfully use an index. The following rules may aid you in finding what you seek:

- 1. The Principal Subject Must be Consulted, and not the Secondary.** Thus, if you are looking for exceptions to depositions, look under depositions; if you are looking for exceptions to answers, look under answers.
- 2. The Noun Must be Looked for, not the Adjective, or Participle.** Thus, for speaking demurrers, look under demurrers, and not under speaking; and for constructive fraud, look under fraud, and not under constructive.
- 3. The Most Pertinent Subject Must be Consulted.** Thus, for notice to take depositions, look under notice, or depositions, and not under evidence, or proof, or testimony, or witnesses.
- 4. The Table of Contents,** in the front of the book, may greatly aid you in finding what you seek. This table gives a complete analysis of the book, and shows the plan of its arrangement, and the location of the matter you are seeking.
- 5. All References are to the Sections, and not to the Pages,** unless otherwise expressly stated. In a few instances, where the sections are very long, the references are to the pages, and are so noted.
- 6. Index to Forms.** While all the forms are included in the General Index, nevertheless for your convenience, and to enable you more quickly to find any form in the book, a separate Index of Forms is given.
- 7. Cross-References in the Indexes.** The cross-references in the Indexes are used both to aid the user of the Index, and to economize space by thereby avoiding unnecessary repetitions.
- 8. References in the Foot Notes.** The foot notes often refer to other sections of the book where further and frequently fuller information on the same subject may be found, and are in the nature of special indexes to the matters treated of.

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#### ERRATA.

Errors on the part of both author and printer appear in all books.<sup>1</sup> Those who have read many proofs in a printing office know how this is, but those without such experience often consider such errors the results of ignorance, or carelessness.

Some errors have already been detected in the foregoing pages, all however immaterial; and no doubt others exist of, perhaps, no greater importance. It may be proper to state that some apparent errors of phraseology are the results of the author using, *verbatim*, the language of the statute, or other authority he cites, he not having felt at liberty to make any changes therein.

The following are the most important errors detected down to the day of publication:

- Page 20, note 5: "at the *hearin*" should read "at the *hearing*."
- Page 32, § 38, sub-section 8: "precedents *absolote*" should read "precedents *obsolete*."
- Page 43, § 49, line 9: "wronged as do" should read "wronged as *to do*."
- Page 47, § 56, line 7: "labor or *proprty*" should read "labor or *property*."
- Page 52, § 62, sub section 1, line 10: "*sit judicii*" should read "*sit judici*."
- Page 223, chapter xiv: head-line of § 274 should be inserted in table of head-lines.
- Page 270, note 44: *Goodloe v. Goodloe* is reported in 8 Cates, page 252.
- Page 472, § 588: the number of this section should be 598.
- Page 486, § 616: in Decree on Exceptions to a Report, after the words "second exception taken as aforesaid," at the end of line 8, insert: "*is not well taken, the same is overruled. And upon the third exception, taken as aforesaid.*"
- Page 522, § 657, sub-sec. 1: the words "Nature of an *Injunction*," in the head-line should be "Nature of an *Execution*."
- Page 572, note 35: "See, *ante*, § 524, note," should be: "See, *ante*, § 437."
- Page 631, § 825, line 2: "*obilgations* of the contract" should be "*obligations* of the contract."
- Page 702, § 908: the words "five *housand* dollars," at the beginning of the 9th line of the Fiat for an Injunction, should read "five *thousand* dollars."
- Page 744, § 954: the words, "When the *bill* is Open" at the end of the 4th line should be "When the *account* is Open."

<sup>1</sup> A single *erratum* may knock out the brains of a whole passage.—Cowper.

THE END.















