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A Manual of Equity Pleading and Practice

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Recommended Citation

Thompson, B.M. *A Manual of Equity Pleading and Practice.* Detroit: Free Press Printing Company, 1889.

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A MANUAL

OF

EQUITY PLEADING

AND

PRACTICE.

BY

B. M. THOMPSON,

JAY PROFESSOR OF LAW IN MICHIGAN UNIVERSITY.

DETROIT:
FREE PRESS PRINTING COMPANY.
1889.

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TO THE STUDENTS OF THE LAW DEPARTMENT OF MICHIGAN UNIVERSITY.

THE following manual is intended simply as an introduction to the study of Equity Pleading and Practice, and to the course of lectures delivered upon that subject. The manual has been divided into lectures for the purpose of indicating the ground which a particular lecture will cover. It is expected that the student will master the printed synopsis before attending a given lecture. The lectures will not be confined to the synopsis, and the class will be quizzed and examined, both upon the manual, and the lectures as actually delivered. The court rules are to be considered a part of the manual, and are to be studied in connection with the lectures.

The work in the equity Moot Courts cannot be successfully performed without a careful study of the court rules. Under the Michigan rules will be found references to the decisions of this State construing them. The United States rules have the

valuable annotations of WALTER S. HARSHA, Clerk of the United States Circuit Court for the Eastern District of Michigan. Mr. HARSHA very generously placed these annotations at my disposal, and they are taken bodily from his Annotated Federal Court Rules, a work indispensable to the practitioner in the United States Courts.

B. M. THOMPSON.

MICHIGAN UNIVERSITY,
October 1, 1889.

A SUIT IN EQUITY.

The jurisprudence of the United States, and of many of the several states, is divided into two departments, Common Law, and Equity. These two departments grew up side by side in England and came to us as a part of our fatherland inheritance. The powers of the High Court of Chancery in England and the principles upon which it administered justice at the time of the revolution, except so far as they have since been modified by statute, or are inapplicable to our institutions, are still in force in the United States and the several states. We shall hereafter treat of the jurisdiction of the Court of Equity. We propose first to examine the method of conducting business in that court. We shall be able to do this more satisfactorily by giving a sketch of a suit in equity from its commencement to its close, under the present practice of the United States Circuit Courts and the Circuit Courts of this state.

COMMENCEMENT IN A SUIT OF EQUITY.

A suit in equity is commenced by filing in the court having jurisdiction of the cause and the parties, a bill or petition setting forth in a full, clear and methodical

manner, the facts and circumstances upon which the complainant bases his claim for aid and relief, and praying that he may be given such relief as he believes he is entitled to or as is agreeable to equity and good conscience. The bill or petition in equity takes the place of a declaration at common law.

The ordinary form of a bill in equity is not due to any statute, but to the practice of the court, and has been established by long usage. It was formerly supposed that every bill must consist of nine parts, and, although at no time were they all essential, and some have been superseded by the rules of the court, it is desirable in examining a bill that we should retain the old divisions. Those parts consisted of, 1. The address. 2. The introduction. 3. The premises or stating part. 4. The confederating part. 5. The charging part. 6. The clause of jurisdiction. 7. The interrogating part. 8. The prayer for relief. 9. The prayer for process.

I. ADDRESS OF THE BILL.

In England the bill was addressed to the Lord Chancellor or other person having for the time the custody of the great seal. In a circuit court of the United States: "In the Circuit Court of the United States in and for the District of ————. To the Judges of the Circuit Court of the United States within and for the District of ————, sitting in equity." In this state the bill is addressed: "To the Circuit Court for the County of ————, in Chancery."

II. THE INTRODUCTION.

This part of the bill should state the name, description and residence of the complainant in full and the character in which he sues, whether in his own behalf or in *autre droit*. This is necessary to fix the identity of the parties and to enable the defendant to resort to the complainant for his costs or to enforce compliance with any other order that may be made by the court during the progress of the proceedings; *e. g.*,

"Your orator, A. B., of the city of Ann Arbor, Washtenaw County, in this state, humbly complaining, respectfully shows unto this Honorable Court that, etc."

III. STATING PART.

This part of the bill should contain a full narrative of all the facts and circumstances of the complainant's case. It is upon this part of the bill that he must ground his right to relief. It must show that the court has jurisdiction to hear and determine the matter in controversy and assuming that the statements made are true, that the complainant is entitled to the aid and assistance of the court. The testimony necessary to establish the facts stated need not be set out in full, but enough must be affirmed so that the complainant may introduce his proof, because no evidence will be considered by the court not having reference to some fact put in issue by the pleadings. The complainant is not required to set forth any fact of which the court is bound to take judicial notice. Facts are to be stated, not conclusions of law; *e. g.*,

(3 Danl. Chy. p. 1907):

"That your orator being seized, or well entitled in fee simple of and to a certain messuage and dwelling house, with the appurtenances situate at ——— and hereinafter described, and being desirous of selling such premises, and D. E., of ———, being minded to purchase the same, your orator and the said D. E., on or about the ——— day of ———, entered into and signed a memorandum of agreement respecting the said sale and purchase in the words and to the purport and effect following, that is to say (stating the agreement fully), as by the said memorandum of agreement, to which your orator craves leave to refer, when produced will appear. And your orator further shows that the said D. E. paid to your orator the sum of one thousand five hundred dollars, part of the said purchase money, at the time of signing said agreement. And your orator has always been ready and willing to perform his part of said agreement, and, on being paid the remainder of his said purchase money with interest, to convey the said messuage to the said D. E. and his heirs, and to let him into the receipt of the rents and profits thereof, from the time in the said agreement in that behalf mentioned."

IV. CHARGE OF CONFEDERACY.

This part of the bill charges that the defendants intending to injure and defraud the complainant have, with divers other persons at present unknown to the complainant, but when known he prays may be made defendants to his bill, confederated and combined together for the purpose of injuring and defrauding him out of his rights. This clause is never necessary unless there has been in truth an actual conspiracy upon which fact the complainant relies as making a

part of his case. It is said to have arisen from a two-fold error; first, that parties could not be added to the bill by amendment, whereas there never was a time when this could not have been done; and, second, that an allegation of a confederacy would be sufficient of itself to sustain the jurisdiction of the court, but a simple confederacy and combination was never sufficient to give the court of equity jurisdiction; *e. g.*,

"But now so it is, may it please the court, that the said C. D., combining and confederating together to and with divers other persons, as yet unknown to your orator (but whose names, your orator prays, when discovered, may be inserted herein as defendants and made parties to this suit, with proper and sufficient words to charge them with the premises), in order to oppress and injure your orator do absolutely refuse, etc." (here insert their refusal to do what the complainant claims should be done and what he asks the aid of the court in compelling to be done, in this particular case a demand for the balance of the money due upon the land contract and the refusal of the defendant to make the payment.) This part of the bill is omitted from 3 Danl. Chy. p. 1907.

V. CHARGING PART.

This part of the bill alleges the pretences which it is supposed that the defendant will make as his defence to the case made by the complainant in the stating part of his bill. It is used for the purpose of obtaining a discovery of the defendant's case, or to put in issue some matter which it is not for the interest of the complainant to admit. The example given by Lord Redesdale (Mitford's Pl. and Pr. in Eq. 36) is

as follows: He states the case of an heir filing a bill upon any equitable ground, and who apprehends that his ancestor has left a will. He may state, by way of pretence, that the defendant claims under such will, and thus make it a part of his case, without admitting it; and the heir then denies the existence or due execution of the will and charges that it is fraudulent. Under the rules of the supreme court and those of most of the states retaining chancery practice, this portion of the bill may be inserted in the stating part or altogether omitted; *e. g.*,

"But now so it is, may it please the court, that the said D. E. alleges that he is, and always has been, ready and willing to perform the said agreement on his part in case your orator could have made or can make a good and marketable title thereto; whereas your orator charges that he can make a good title to said messuage and premises." 3 Danl. Ch. p. 1908.

VI. AVERMENT OF JURISDICTION.

This clause avers that the acts complained of are contrary to equity, that the complainant has no remedy at law and can only obtain relief in a court of equity. This averment was intended originally apparently to give the court jurisdiction, but it no longer answers that purpose, if it ever did. No mere assertion of the complainant will give the court jurisdiction. If the facts and circumstances set forth do not make a case coming within the jurisdiction of the court, the suit will not be entertained; and if they do, the court will entertain the bill without any allegation on the part

of the complainant that the court has jurisdiction to hear and determine the matter and ought so to do. This clause seems therefore equally nugatory with that of confederacy; *e. g.*,

"All of which actings, doings and pretences of the said defendant are contrary to equity and tend to the manifest injury of your orator. In tender consideration whereof, and for that your orator is remediless by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable."

VII. INTERROGATING PART.

The bill having up to this point been drawn with a view of showing that the complainant is entitled to relief and that the court has jurisdiction to grant such relief, now prays that the defendants may answer all the matters therein set forth, not only according to their positive knowledge of the facts stated, but also according to their remembrance, the information they may have received, and the belief they have been able to form on the subject. At the first this clause closed with this general request, that being supposed sufficient to procure the discovery sought for. But it was soon found that the ingenious solicitor could answer in such general terms that the substance of the question would not be touched. To meet this difficulty it became customary to set out specific interrogatories covering every specific fact material to be answered, and also as to all facts and circumstances surrounding the main fact. The defendant cannot be

interrogated as to any fact not charged in the bill. He is simply required to answer the complainant's case and these interrogatories are to enable him to do so fully and fairly. He cannot be required to do more than that, therefore he is not required to answer any interrogatory the answer to which would not be responsive to some fact charged in the bill; *e. g.*,

"To the end therefore that the said D. E. and the rest of the confederates when discovered, may upon their several, respective and corporal oaths, to the best and utmost, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged, and that as fully and particularly as if the same were here repeated and they distinctly interrogated thereto, and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their respective information, hearsay and belief, and more especially that they may answer and set forth:

1. Whether he said D. E., &c.
2. Whether he said D. E., &c."

Since in most of the States parties may be examined as witnesses, it is customary now, in most cases, to expressly waive an answer under oath, and to omit interrogatories altogether.

VIII. PRAYER FOR RELIEF.

The prayer for relief is usually, first, a special prayer for the particular relief that the pleader thinks he is entitled to, and then for general relief, so that should the court refuse to grant the specific relief asked, he may obtain such relief as the court thinks he is entitled

to, at the hearing. It is therefore never proper or safe to omit a prayer for general relief. Indeed, unless the plaintiff asks for an injunction or a *ne exeat*, the prayer for general relief is sufficient to entitle him to such a decree as his case merits, provided the relief asked for at the hearing is authorized by the facts stated in the bill. If an injunction or a writ of *ne exeat* is desired, it must be specially prayed for; *e. g.*,

"And that the said D. E. may be compelled by a decree of this Honorable Court specially to perform said agreement with your orator, and to pay to your orator the balance of said purchase money, with interest on the same from the time when such purchase money ought to have been paid, your orator being willing, and hereby offering specially to perform the said agreement on his part, and on being paid the said remaining purchase money and interest, to execute a proper conveyance of said messuage and premises to the said D. E., and to let him into the possession of the rents and profits thereof from the ——— day of ———. And that your orator may have such further and other relief in the premises as the nature of his case shall require and to the court shall seem meet."

IX. PRAYER FOR PROCESS.

The bill in the last place prays that a writ of subpœna may issue requiring the defendants to appear and answer the matters alleged against them, and abide the determination of the court on the subject. The rules of the United States Supreme Court require that the prayer for process in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be

infants under age, or otherwise under guardianship, shall state the fact so that the court may take order thereon as justice may require. When a corporation is made defendant, the bill should pray that it appear according to law. If an injunction or a writ of *ne exeat* is desired, there must be a special prayer therefor, and it must be also asked for in the prayer for process; *e. g.*,

"May it please the court to grant unto your orator the people's writ of subpœna, to be directed to the said D. E., commanding him at a certain time, and under a certain penalty, therein to be inserted, personally to appear before said court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to perform and abide by such further order and direction as said court shall deem necessary."

If an injunction is asked, add: "And that said D. E., his counselors, attorneys, solicitors, officers or agents, may be restrained by an injunction issuing out of this court directed to him from ——— (here follow an accurate description of all the acts he is to be enjoined from doing)—until the further order of this court."

JURAT AND SIGNATURE.

The bill of complaint need not be signed by the complainant, but it must be signed by his solicitor. Certain bills, bills for divorce and those asking an injunction, for instance, must be sworn to.

Chancery, rule eight of the Supreme Court of this State, prescribes that the oath administered to the party shall be in substance as follows: "That he has read the bill, or heard it read, and knows the contents

thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon information or belief, and as to those matters he believes it to be true, and that the substance of the oath shall be stated in the jurat."

The following is the form of the jurat when the bill is sworn to by the complainant:

STATE OF MICHIGAN, } ss.
——— COUNTY, }

Personally appeared before me X. Y.—(official character stated)—this —— day of ——, D. E., who, being sworn, deposeth and says, that he is the complainant named in the foregoing bill of complaint; that he has read said bill of complaint (or has heard read), and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be upon his information or belief, and as to those matters he believes it to be true, and further saith not.

X. Y.
Add Official Character.

Although not required by any rule, still it is advisable to divide a bill into paragraphs, and number each paragraph for convenience of reference, or of amendment if necessary. The statute of this state requires that all pleadings and proceedings shall be fairly and legibly written. In entitling and endorsing papers, made by either party, the complainant's name must be placed first. At least one copy of the bill should be made and retained as an office copy.

The bill is then to be filed with the register of the court. No process can issue in this state until the

filing of the bill, when it issues as a matter of course, but in a United States court a *præcipe* must also be filed with the clerk, directing the issuance of a subpœna, and naming the rule day to which process is to be made returnable. (Rules 7, 11, 12.)

SUBPŒNA TO APPEAR.

The subpœna is a writ under the seal of the court directed to the defendant, requiring him to appear on a certain day and answer the bill. It must contain the names of all the defendants, be tested in the name of the court from which it issues, and made returnable on some day certain, except Sunday, either in vacation, or term not less than ten days from its issue. It must be signed by the register of the court or his deputy, and endorsed with the name of the solicitor. (Mich. Ch. Rule.) *e. g.*,

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF ——— IN CHANCERY. } TO WIT:

In the name of the People of the State of Michigan. To D—— E——, ——, Greeting.

You are hereby notified that a Bill of Complaint has been filed against you in the Circuit Court for the County of ———, in Chancery, by A. B., as Complainant, and that if you desire to defend the same, you are required to have your appearance entered with the Register of said Court at his Office in the Court House, in the City of ———, in person or by solicitor, within twenty days after the —— day of ——, in the year 188—, which is the return day of this writ: Hereof fail not under the penalty of having said bill taken as confessed against you.

WITNESS, The Honorable A. B., Circuit Judge at ———, this —— day of ——, in the year of Our Lord one thousand eight hundred and eighty ——.

C. D., *Register.*

L. M., *Solicitor for Complainant.*

The subpœna is to be served on or before the return day, by delivering to the defendant a copy, inscribed copy, endorsed by the solicitor, and by exhibiting to him the original under the seal of the court. It may be served in any part of the state. The service need not be made by an officer of the court, but if made by an individual, such service must be shown by affidavit. If it is made by an officer, he makes his return of service on the subpœna.

When the subpœna has been properly served, the defendant is bound to appear and answer to the charges preferred against him in the bill, within the time limited by the practice of the court, or, if required by the complainant, compulsory process will be awarded against him for his contempt in neglecting the requisitions of the subpœna. Appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court, and it is necessary in every case before a decree can be rendered against him that he appear. Formerly when the defendant did not voluntarily appear after being served with a subpœna, a number of successive processes were resorted to, ending in a sequestration of his property for the purpose of compelling an appearance. At the present time in all the states there are statutory enact-

ments making the process of the court more effectual, and providing under certain circumstances that the appearance of the defendant may be entered by an order of the court and the bill taken *pro confesso*. Process for effecting the compulsory appearance has fallen into disuse since the enactment of these statutes. Only one is in use in this state—attachment—and that is only resorted to when the answer of the defendant is essential to the complainant.

Under the practice in this state the defendant, after being served with a subpœna, may enter his appearance in the Register's office. This appearance is to be made within twenty days after the return day of the subpœna.

The practice in the United States Court is regulated by Ch. Rules 2, 11, 12.

The defendant having appeared, proceeds to defend himself against the allegations of the complainant's bill. The character of his defence will depend upon the nature of the case made in the bill, and is either by disclaimer, by demurrer, by plea, or by answer. All of these several defences may be joined, if some one of them is the appropriate defence to some part of the bill.

DISCLAIMER.

If the defendant has no interest in the subject concerning which the suit is brought, he may avoid the plaintiff's claim by a disclaimer, which is a renunciation on his part of all interest or claim in the subject-matter of the plaintiff's claim. For instance, suppose

the bill is filed by A to quiet his title to a certain messuage, and B is charged with claiming title to or an interest in said land, when in point of fact he has no interest and claims none, he may defend by filing a disclaimer. Supposing the bill to have been filed in this state and county, the disclaimer might be in the following form :

STATE OF MICHIGAN — IN THE CIRCUIT COURT OF THE COUNTY OF WASHTENAW — IN CHANCERY.

A. B.,
Complainant,
vs.
C. D.,
J. L.,
C. F.,
J. A.,
Defendants.

The disclaimer of C. D., one of the defendants, to the bill of complaint of A. B.

This defendant saving and reserving for himself now and at all times hereafter, all manner of advantage and benefit of exception and otherwise that can or may be had or taken to the many untruths, uncertainties and imperfections in said complainant's bill of complaint contained, for answer thereto or unto so much, or such part thereof as is material for this defendant to make answer unto, he answers and says : that he doth fully and absolutely disclaim all manner of right, title, and interest whatsoever, in and to the following described real estate, viz. : (describe land) being the same real estate mentioned and described in said bill of complaint, and to each and every part and parcel thereof. And this defendant further answering says, that he never had or claimed or pretended to have any title to or interest in said land.

And this defendant denies all and all manner of

unlawful combination and confederacy wherewith he is by the said bill charged, without this, that any other matter, cause or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby, well and sufficiently, answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is willing to aver, maintain and prove as this Honorable Court shall direct; and asks to be hence dismissed with his reasonable costs and charges in this behalf sustained.

C. D.

J. C., *Solicitor for Defendant C. D.*

DEMURRER.

If there appears on the face of the plaintiff's bill any defect or objection which can be offered in bar of his suit, it should be presented by a demurrer. A demurrer admits the facts as alleged in the bill to be true, but denies that they are sufficient to require the defendant to answer. The demurrer may be to some part or to the whole bill; *e. g.*,

TITLE.

The demurrer of J. L., one of the defendants to the bill of complaint of A. B.

This defendant, by protestation, not confessing any of the matters in and by said bill complained of to be true in manner and form, as the same are set forth, says that he is advised that there is no matter or thing in said bill, good and sufficient in law, to call this defendant to account in this Honorable Court for the same; but that there is good cause of demurrer thereunto, and he does demur accordingly, and for cause of

demurrer says, that said bill, in case the same were true, contains no matter of equity whereon this court can ground any decree, or give complainant any relief as against this defendant. Wherefore, and for divers other errors in said bill contained and appearing on the face thereof, this defendant does demur thereto, and humbly craves the judgment of this Honorable Court, whether he is compellable or ought to make any answer thereunto otherwise than as aforesaid. And this defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

J. L.

A. B. D., *Solicitor for Defendant J. L.*

The above form of demurrer extends to the whole bill. When the demurrer does not extend to the whole bill, it should designate the particular parts which it is intended to embrace, for otherwise the court would be compelled to examine the whole bill to discover them. In case only a part of the bill is demurred to, an answer to the remainder of the bill may be coupled with the demurrer; *e. g.*,

TITLE.

The demurrer of J. L. to that part, including paragraphs numbered 3, 4 and 5, and his answer to the residue of the bill of complaint of A. B.

(Set forth the demurrer as above, and add:)

"And as to the residue of said bill, this defendant not waiving his demurrer, but relying thereon, and saving and reserving to himself now, and at all times hereafter, all manner of benefit and exception which can be had, to the residue of said bill, for answer thereto, or to so much thereof as this defendant is

advised is in any wise material or necessary for him to answer unto, answers and says that, &c."

Every species of defence to a bill in equity is required to be signed by counsel as evidence of its propriety and sufficiency. Since a demurrer alleges no facts, but rests upon matters appearing in the bill, it need not be signed by the defendant. The rules of the Supreme Court, and many of the state courts, require that the counsel for the defendant shall file with the demurrer his certificate that in his opinion it is well founded in point of law, and also the affidavit of the defendant that it is not interposed for delay merely.

When the defendant demurs to the whole bill, a question of law is presented to the court which is brought on for argument. If the court sustains the demurrer that will end the proceedings, unless under an order of the court the complainant can so amend the bill as to cure the defect pointed out by the demurrer. In case the demurrer is overruled, the defendant will be given leave to plead to, or to answer the bill.

A PLEA.

If there are defects in the complainant's case, which do not appear upon the face of the bill, that constitute a special defence to his recovery, they may be taken advantage of by plea. A plea is defined as a *special answer*, showing or relying upon one or more things, as a cause why the suit should be either dismissed, delayed or debarred; it does not, like a demurrer, rest on facts charged in the complainant's bill, but alleges

other facts, to which the complainant may reply. The office of the plea is to bring forward a fact which, if true, displaces the equity of the bill.

Pleas have been arranged under four classes. 1. To the jurisdiction. 2. To the person of the plaintiff. 3. To the bill or the form thereof. And, 4. In bar.

The form of a plea, like that of a demurrer, commences with a protestation against confessing the truth of any matter in the bill. It should distinctly show whether it goes to the whole bill or only a part of it. The defendant's grounds of objection to the jurisdiction of the court, the person of the plaintiff or in bar of suit, must be supported by averments, so clear, positive and distinct of every fact and circumstance essential to render it a complete equitable bar, that the complainant may be enabled to take issue upon its validity.

1. A plea to the jurisdiction does not dispute the right of the complainant in the suit, but asserts that his claim is not a fit subject of cognizance in a court of equity or that some other tribunal is vested with the proper jurisdiction. Most jurisdictional defects can be reached by a demurrer; but the truth may not appear on the face of the bill. For instance, the Circuit Court of the United States has no jurisdiction to hear and determine causes between citizens of the same state, and if the bill should allege that the complainant and defendant were citizens of different states, the fact that they were citizens of the same state could only be contested by the defendant by a plea to

the jurisdiction. The plea must contain something more than a mere allegation of a want of jurisdiction, the court of chancery having general jurisdiction, jurisdiction will be presumed unless the specific fact is pointed out which deprives the court of jurisdiction.

2. A plea to the person merely disputes the right of the complainant to sue; for instance that he is an infant, an idiot or a lunatic.

3. The usual plea to the bill or the frame of the bill are either, 1, the pendency of another suit for the same matter in another court of equity, or, 2, the want of proper parties to the bill.

4. Pleas in bar are, 1, pleas founded on some bar created by the statute. The most usual of this character are the statute of limitations and the statute of frauds. 2. Pleas founded on matter of record, that there has been a judgment at law of a court of record between the same parties for the same cause of action, or a final decree or order of a court of equity in a suit between the same parties and for the same subject-matter. 3. Pleas of matter *in pais* are pleas of stated account, of a release, of a purchase for a valuable consideration without notice, &c., &c.

PLEA TO BILL.

TITLE.

The plea of C. F., one of the defendants to the bill of complaint of A. B.

This defendant, by protestation not confessing any of the matters in said bill contained to be true in man-

ner and form, as the same are therein set forth does plead thereunto, and for cause of plea says, that heretofore, and before complainant exhibited his present bill in this Honorable Court on the 9th day of February, 1885, the said complainant did exhibit his bill of complaint in this Honorable Court against these said defendants for the same matters and to the same effect and for the like relief, as the said now complainant doth by his present bill demand and set forth; to which said first bill these defendants did put in there joint and several answers, and the said complainant thereunto did reply; and other proceedings were thereupon had, and the said former bill is still depending in this court, and the matters thereof undetermined; and, therefore, this defendant does plead the former bill, answer and proceedings, in bar to the present bill; and humbly prays the judgment of this Honorable Court, whether it behooves him to make any other or further answer thereto than as aforesaid, and prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

C. F.

J. K., *Solicitor for Defendant C. F.*

In case the complainant thinks the plea insufficient he may notice it for hearing, when the question of its validity will be passed upon by the court. If the court sustains the plea as good in form and substance, the complainant may take issue as to the truth of its alleged statements of fact by filing a replication; *e. g.*,

TITLE.

The replication of A. B., complainant to the plea of C. F., defendant, this repliant saving and reserving to himself now and at all times hereafter, all and all manner of advantage of exception which may be taken

to the manifold insufficiencies of the said plea, for replication thereunto, says that he will now maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the said plea is uncertain, untrue and insufficient, to be replied unto by the repliant without this, that any other matter or thing whatever, in said plea contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays that as in and by his said bill he has already prayed.

A. L.,
Solicitor for Complainant.

The replication admits that the plea is good in form and substance and puts in issue the truth of its allegations of fact, and the parties proceed to take proofs the same as when a replication is filed to an answer.

ANSWER.

If there is nothing in the bill of the complainant to which the defendant is able or willing to demur; and if he have no extrinsic matter, which he can offer by way of plea; or if his plea or demurrer has been overruled, he may proceed to controvert the claims of the plaintiff by filing an answer to the bill. The answer need have no particular form as to that part which sets forth the defendant's case. It is usually drawn so as to admit in the first instance all the allegations contained in the complainant's bill which are true, and then follows denials of all the allegations made

which are in controversy. If there are any statements in the bill upon which the defendant has no knowledge or information he states that fact and leaves the complainant to his proofs. Then follows a statement of all facts and circumstances sustaining the equities of the defendant's position. Each interrogatory is to be answered separately and the answers numbered to correspond with the numbers of the interrogatories. When the defendant submits to answer at all, he must make a full, frank and explicit disclosure of all matters material or necessary to be answered, whether resting within his own knowledge or upon information or belief; *e. g.*,

TITLE.

The answer of J. A., one of the defendants to the bill of complaint of A. B.

This defendant, now and at all times hereafter, reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or unto so much, or such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says (here follows a full and explicit answer to all the allegations in the bill and answers to the interrogations), and this defendant denies all unlawful combination in said bill charged, without this, that any other matter or thing material for him to make answer to, and not herein sufficiently answered, avoided or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver and prove as this court shall direct, and prays to be hence dismissed, with his reasonable

costs and charges, in this behalf most wrongfully sustained.

J. A.

L. S., *Solicitor for Defendant J. A.*

The answer must be signed by the defendant and must be sworn to, unless his answer under oath is waived in the bill.

The defendant may claim in his answer the benefit of a general demurrer. In case he desires to do so he inserts, immediately preceding the closing part given above, the following:

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

It sometimes happens that the defendant will, in order to obtain some affirmative relief to which he conceives he is entitled, and which he could not obtain under his answer, be compelled to file a cross bill. This is in the nature of an original bill, there are the same parties, reversed, and the two bills are heard together.

If the complainant conceives that the admissions in the defendant's answer are alone sufficient to entitle him to such a decree as he desires he may set down the cause for hearing upon bill and answer.

EXCEPTIONS TO THE ANSWER.

If the discovery contained in the answer is incomplete, or the allegations contained in the bill are insufficiently replied to, the complainant may prefer exceptions to the defendant's answer and require it to be more full and particular. The exceptions must be in writing and signed by counsel, and they must also state with precision and accuracy, the points in which the defendant's answer is defective, or they will be rejected as vague and impertinent. Care must be taken also to omit no point to which an exception would lie, as the rules of the court do not permit any others to be afterwards added. It may be stated generally that any answer will be considered insufficient in which the defendant does not fully respond, according to the best of his knowledge, remembrance or belief, to every material allegation, charge or interrogatory in the bill;

TITLE.

Exceptions taken by the said complainant A. B. to the answer of the said defendant J. A. to his bill of complaint in this cause.

First Exception.—For that the said defendant has not, according to the best of his information, knowledge and belief set forth and discovered in his said answer whether, &c.

Second Exception.—For that, &c.

In all of which particulars the complainant is advised that the answer of the defendant is altogether evasive, imperfect and insufficient. Wherefore said complainant doth except thereto, and prays that the defendant

may be compelled to amend the same, and to put in full and sufficient answer to the complainant's bill."

F. L., *Solicitor for Complainant.*

Exceptions may also be made to scandalous and impertinent matter in the bill.

When exceptions are taken to the sufficiency of the answer and the defendant does not amend his answer, the exceptions are referred to a master, in this state to a circuit court commissioner, who is directed to report whether the answer is sufficient in the points excepted to or not. If the master reports it to be insufficient, the defendant must submit to answer more fully, unless by exceptions to such report of the master, he appeals to the judgment of the court, and obtains a determination in his favor.

INTERLOCUTORY PROCEEDINGS.

During the progress of a suit in equity it frequently becomes necessary to make what are known as interlocutory orders and decrees. The most important and usual are those which relate to amendments of the pleadings, the appointment of a receiver, payment of money into court, issue of an injunction and reference to a master. These orders are made by the court upon motion made orally or upon petition in writing.

AMENDMENTS.

In a court of equity matters of form are never suffered to prejudice the rights of a party; and the liberty of amendment, often upon condition however,

is allowed to all kinds of pleading. It the bill has not been sworn to, under the rules in this state, the complainant can amend of course, without the payment of costs, before the demurrer plea or answer is put in. And in certain other cases he may amend of course afterwards, but usually application must be made to court by motion or leave to amend. The amendments must have reference to matters existing before the commencement of the suit; a matter which has occurred since the commencement of the suit must be brought before the court by a supplemental bill. When amendments are made by leave of the court, or of course, a copy of the bill as amended is filed and a copy served on the defendant's solicitor, or a copy of the amendments referring to the paragraphs and folios amended is filed and a copy of such amendments served. The amended and original bill are considered, for most purposes, as one, and make up the same record; *e. g.*,

TITLE.

Amendments to the bill of complaint in this cause, made pursuant to an order of this court dated the —— day of —— instant.

First. In the third line of the second folio of the bill after the word "testator" interline "to-wit, on or about the 5th day of June, 1880."

Second. After the word "satisfaction" in the tenth line of the fifth folio insert the amendment marked "A" which is annexed to the bill on file, and is as follows: "After," &c. * * *

Third. Strike the names of C. D. and M. F. out of the sixth line of the third folio.

SIR — Take notice that the foregoing is a copy of the amendments as set forth.

F. L., *Solicitor for Complainant.*

To J. L., *Solicitor for Defendant.*

APPOINTMENT OF A RECEIVER.

Whenever in the progress of a suit a proper showing is made to the court that there is danger of the waste and destruction of property which is the subject of the litigation, a receiver may be appointed, charged with the duty of caring for such property.

PAYMENT OF MONEY INTO COURT.

Whenever it appears to the court that there is a balance of money which it is admitted is due to the complainant in the hands of the defendant, he will, by an order of the court, be directed to pay it into the hands of the register. And the court may make a still further direction and order the money so paid into court to be deposited or invested on good security.

REFERENCES.

Whenever it is necessary in the progress of a cause to take an account, to investigate the title of persons to property in suit, or make any other inquiries necessary to satisfy the conscience of the court, or to perform some special ministerial act, such as to sell property, etc., the court refers the matter to a circuit court commissioner. References are of such frequent occurrence, and so important, that they form the subject of

a subordinate system of practice. (See *Hoffman's Master in Chancery.*)

There is such a variety of orders that in this short synopsis we can only indicate what the practice is. In case, for instance, the defendant has money in his hands belonging to the complainant, which the complainant desires to have paid into court, he notifies the defendant's solicitor that he will make a motion to that effect; *e. g.*,

NOTICE OF MOTION, ETC.

TITLE.

Sir:—Take notice that I intend to move this Honorable Court, on the ——— day of ——— next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at ———, in the city of ———, for an order that the above named defendant may, on or before the ——— day of ——— next, pay into the hands of the Register of this court, in trust, in this cause, the sam of $——, admitted by the answer of said defendant to be due from him, and that the same, when paid in, may be deposited in trust by the Register in such bank, or invested by him in trust, in such manner as this court shall direct, with costs. And for such further, or for such other order, or relief, as the court may think proper to grant; which motion will be founded on the bill and answer in this cause.

L. M., *Solicitor for Complainant.*

To J. C., *Solicitor for Defendant.*

At the time and place mentioned in such notice, an oral motion is made and argument had. If the court grants the motion, an order is entered in accordance therewith, or such an order as the court deems proper under the circumstances; *e. g.*,

ORDER, ETC.

STATE OF MICHIGAN, THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW—IN CHANCERY.

TITLE.

At a session of said court, held at Ann Arbor, on the ——— day of ———, 1888.

Present, Hon. C. D., Circuit Judge.

On reading the bill and answer filed in this cause, and on motion of L. M., solicitor for the complainant, and on hearing J. C., solicitor for the defendant, in opposition thereto: It is ordered that the defendant, A. B., do, on or before the ——— day of ——— next, pay into the hands of the Register of this court, in trust, in this cause, the sum of $——, admitted by the answer of said defendant to be due from him; and that when such money be paid in, it be deposited by said Register in the First National Bank of Ann Arbor, to the credit of this cause, there to remain until the further order of this court.

C. D., *Circuit Judge.*

Another most important interlocutory proceeding is that of granting an injunction restraining the defendant from doing some particular act or acts which will do irreparable injury to the complainant. When an injunction is issued during the pendency of the suit, it is called a preliminary injunction; when it is made a part of the final decree it is called a final injunction. When the bill prays for an injunction it will be granted if the court is satisfied that the plaintiff is entitled to this relief.

INJUNCTION.

STATE OF MICHIGAN, IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW, ss—IN CHANCERY.

In the name of the people of the State of Michigan: To L. G., and to his counsellors, attorneys, solicitors and agents, and each and every of them, greeting:

Whereas, it has been represented to us, in the Circuit Court for the county of Washtenaw, in chancery, on the part of C. D., complainant, that he has lately exhibited his bill of complaint against you, the said C. D., defendant, to be relieved, touching the matters therein complained of, in which bill it is stated, amongst other things, that you are combining and confederating with others to injure the said complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said C. D., and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from selling, mortgaging and doing any other act which will effect the title or change the possession of the following described property, situated in the city of Ann Arbor, in the county of Washtenaw, and State of Michigan, viz. (here follow description), until the further order of this court.

Witness the Honorable A. K., Circuit Judge, and the seal of said circuit court, at Ann Arbor, this ——— day of ———, in the year one thousand eight hundred and eighty-eight.

D. F., *Register.*

L. M., *Solicitor for Complainant.*

The injunction must be served on the defendant. Service upon his solicitor is not good. The service is made in the same manner as service of a subpœna, by the sheriff who makes his return upon the original writ as follows:

STATE OF MICHIGAN, } ss.
COUNTY OF WASHTENAW. }

I hereby certify that on the ——— day of ———, A. D. 188–, I served the within writ of injunction upon the within named L. G., the defendant in person, within the said county, by delivering to him a copy of the said writ, subscribed by the complainant's solicitor, and inscribed "copy," and showing the original, under the seal of the court, at the time of such delivery to the said defendant.

Dated this ——— day of ———, A. D. 188–.

A. J., *Sheriff.*

REPLICATION TO ANSWER.

As we have already said, if the answer is such that the complainant is satisfied that he can obtain the relief he desires on the admissions made therein, he notices the cause for hearing on the pleadings. If, however, the answer controverts the facts charged in the plaintiff's bill, or sets forth new facts and circumstances, which the plaintiff is not disposed to admit, he files a replication to the defendant's answer. This replication is identical with the replication to a plea —already given—except where the word "plea" occurs in that, the word "answer" is to be inserted. Formerly, if the defendant's answer stated new facts, in opposition to those alleged in the bill, the com-

plainant was accustomed to reply by a special statement of other facts, not before charged. This produced a rejoinder by the defendant. A sur-rejoinder frequently followed the rejoinder, and a rebutter the sur-rejoinder, and so on as long as new facts were set forth by one party and denied by the other.

TESTIMONY.

The cause being at issue, by the filing of a replication, the parties may proceed to their proofs under the rules of court for the purpose of establishing their respective cases.

There have been within the past few years such important and radical changes in this part of chancery practice that we will confine our attention to the practice in this state. Similar changes have been made in other states.

Within ten days after the cause is at issue either party may give notice and have the testimony taken in open court. If neither party has obtained the right to an examination of witnesses in open court, then either may within thirty days thereafter enter an order of course, and give notice to the opposite party, for the taking of testimony within sixty days before a circuit court commissioner, or they may stipulate to have it taken before a notary public. At any time within the sixty days from the service of notice of such order, either party by giving ten days' notice to the opposite party of the names and places of abode of the witnesses to be examined, and of the time and

place of such examination, may take the testimony of his witnesses before such commissioner or notary public. The testimony is taken orally, questions upon the direct and cross-examination being asked by the respective solicitors of the parties, which are written out in full by the commissioner, together with the witnesses answer. If any question is objected to such objection is taken down by the commissioner and then the answer. After the testimony is taken it is read over to the witness who signs it. At the expiration of the sixty days either party, on filing an affidavit of the service, or receipt of such notice, may enter an order of course that the proofs be closed. When an order is entered closing the proofs the testimony taken is filed in the cause. The time for taking testimony may be extended by stipulation or by order of the court on cause shown.

In case witnesses reside out of the state or more than thirty miles from the residence of the commissioner, either party wishing to examine them may, during the time the order to take proofs is in force, present a petition to the Register, stating the names and residences of the witnesses and of the persons proposed as commissioners, asking for the issuance of a

COMMISSION TO TAKE THE TESTIMONY

of such witnesses. The adverse party, if he wishes, may join in such commission.

Formerly all the testimony taken in chancery proceedings was upon written interrogatories, but at the

present time it is only necessary to resort to written interrogatories when the witnesses reside out of the state. The interrogatories, direct and cross, are settled by the commissioner, the practice being for the solicitor, whose witness is to be examined, to serve upon the opposing solicitor a copy of the direct interrogatories and a notice of the time and place of their settlement. And such solicitor may, at such time and place, have cross interrogatories settled; *e. g.*,

COMMISSION TO TAKE TESTIMONY.

STATE OF MICHIGAN, } ss.
COUNTY OF WASHTENAW, }

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW—IN CHANCERY.

In the Name of the People of the State of Michigan: To John Jackson, Notary Public, of the City of San Francisco, in the State of California, greeting:

Know Ye, that in confidence of your prudence and fidelity, the said Circuit Court for the County of Washtenaw in Chancery, has, by a rule entered upon the records thereof, in a certain cause now pending in said Court, wherein A. B. is complainant and C. D. is defendant, and now at issue have nominated and appointed, and do, by these presents, nominate and appoint you, and give unto you full power and authority, to examine upon oath (or affirmation) John Felix and James Dale, of the City of San Francisco, in the State of California, witnesses to be produced, sworn and examined on the part and behalf of said complainant, upon certain written interrogatories hereto annexed; and we therefore command you, that at a certain day and place, to be by you appointed, you do cause the said John Felix and James Dale to come

before you, and then and there examine them, and each of them, on his oath (or affirmation), first taken before you (which oath or affirmation you may administer), touching the matters and things referred to in said interrogatories; and that you cause the examination of said witnesses to be reduced to writing, and to be subscribed by said witnesses, which examination is also to be certified by you. And when you shall have so taken the said depositions, you are to annex the same, with any exhibits produced and proved before you, to this commission, and to return the same into said Court, according to the direction of this commission. And you are in all things to be governed in the premises by the instructions hereto annexed.

Witness, the Honorable A. K., Circuit Judge of said Circuit Court, at the Court House, in the City of Ann Arbor, in said County, this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty-eight.

L. D., *Register.*

C. G. and M. L., *Solicitors for Complainant.*

Michigan chancery rule No. 52 requires the following instructions to be annexed to such commission:

INSTRUCTIONS.

RULE 52. To every commission for the examination of witnesses out of the State, a copy of this rule shall be annexed, as instructions to the commissioner on the execution of the commission:

First. Any one of the commissioners may execute the commission.

Second. The witness, before he is examined, must take an oath or affirmation, to be administered by the commissioner, that the answers to be given by him to the interrogatories annexed to the commission, shall be the truth, the whole truth, and nothing but the truth.

Third. The examination of the witness must be

reduced to writing by the commissioner, or by some one in his presence, and under his direction, and must be signed by the witness, and certified by the commissioner as follows:

"Examination taken, reduced to writing, and sworn to (or affirmed), this ——— day of———, A. D. 188—, before me.

———. *Commissioner.*"

Fourth. Exhibits must be annexed to the deposition of the witness, and be signed by him and the commissioners.

Fifth. The commissioner must subscribe each sheet of the deposition, annex the deposition and exhibits to the commission, and endorse his return on the back of the commission:

"The execution of this commission appears in certain schedules hereunto annexed.

———, *Commissioner.*"

Sixth. The commissioner must inclose the commission, interrogatories, expositions and exhibits in a packet, and bind it with tape, and set his seal at the several meetings or crossings of the tape, and direct it "To the Register of the Circuit Court for the County of Washtenaw in Chancery, at Ann Arbor, State of Michigan."

Seventh. He must then deposit the commission in the postoffice, unless there are written directions on the commission to return the same another way.

To such commission are annexed the interrogatories and cross interrogatories upon which the witnesses are to be examined, as the same have been settled by the commissioner; *e. g.*,

Direct and cross interrogatories to be administered to the witness John Felix in pursuance of the commission annexed.

DIRECT INTERROGATORIES.

First. What is your name, age, occupation and place of residence?

Second. Do you know the complainant and defendant in this cause, and if so, how long have you known them?

Third. Do you know, &c., &c.

Lastly. Do you know or can you set forth any other matter or thing which may in any wise tend to the benefit of the complainant in this cause? If so, set forth the same and all the circumstances and particulars thereof, according to the best of your knowledge, remembrance and belief, with your reasons at large.

L. G., *Solicitor for Complainant.*

CROSS INTERROGATORIES.

First. Did you during the month of October, 1885, reside in the City of Sacramento in the State of California?

Second. Did you during the month of October, 1885, and about the 15th, see the complainants at the Park Hotel in said City of Sacramento?

Third. If you answer yes to the second cross interrogatory above, state if you had any conversation with said complainant at said time and place?

Fourth. If you answer yes to the third cross interrogatory above, state such conversation in full.

Fifth. Did not the complainant say to you, &c., &c.

Lastly. Do you know or can you set forth any other matter or thing which may in any way tend to the benefit of the defendant in this cause? If so, set forth the same and all the circumstances and particulars thereof according to the best of your knowledge, remembrance and belief, with your reasons at large.

M. M., *Solicitor for Defendant.*

Upon the return of the commission, the register is required to open and endorse upon it the date of its receipt. He is also to notify the solicitor in whose behalf the testimony was taken of its receipt, and such solicitor must notify the opposite solicitor. If there has been any irregularity or informality in the taking of the deposition which the opposing solicitor wishes to take advantage of, he must to do so by making a motion to suppress the deposition, and give notice of such motion to the other solicitor within the time prescribed.

Proofs having been closed and the testimony taken filed in the court, the cause is ready for hearing upon pleadings and proofs.

NOTICE OF HEARING.

Either party may notice the cause for hearing. Such notices must be in writing and served upon the opposing solicitor; *e. g.*,

TITLE.

SIR—Take notice, that the above entitled cause will be brought on for hearing at the next term of said court, on pleadings and proofs (or on bill and answer or on &c., as the case may be), at the opening of the court on the first day thereof, or as soon thereafter as counsel can be heard.

Dated this ——— day of ————.

J. K., *Solicitor for Complainant.*

To M. M., *Solicitor for Defendant.*

NOTE OF ISSUE.

The solicitor noticing the cause for hearing at any term of court must furnish the register with a note of issue, so that he may place the cause on the court calendar. Causes in equity may be noticed during term. In such case no note of issue need be given; *e. g.*,

TITLE.

The above entitled cause will be brought on for hearing at the next term of this court, notice having been served on the part of the complainant on M. M., Esq., solicitor for defendant. You will place said cause on the issue docket of this court. This cause belongs to the 4th class and is to be heard on pleadings and proofs and is entitled to priority from July 1, 1888.

J. K., *Solicitor for Complainant.*

To the Register of said court.

HEARING OF THE CAUSE.

Upon the hearing of a cause the rules require that the court shall be furnished with certain abstracts of the proceedings. Rules 62 and 65. When it is heard on pleadings and proofs, the court is to be furnished by the complainant with a statement showing when the bill, answer and other pleadings were filed, the names of the original parties in full, the change of parties, if any has taken place pending the suit, a brief history of the proceedings in the cause containing an abbreviation of the pleadings not exceeding one-sixth of the folios contained in the original pleadings

respectively, *and also* with copies of the pleadings and of the depositions, and with short abstracts of the exhibits. These rules are not enforced in many of the circuit courts, but a solicitor alive to the interests of his clients will not disregard them, and he will, in addition to what the rules require, furnish the court with a carefully prepared abstract of all the testimony in his favor, containing extracts from such testimony with references to the page of the proofs on file from which they are taken.

CASE AND ABBREVIATIONS OF PLEADINGS.

TITLE.

The bill in this cause was filed ———.
The answer was filed ———.
The replication was filed ———.
An order to take proofs was entered ———.
The following witnesses have been examined, viz: A. B., C. D., and E. F., on the part of complainant, and A. L., D. M., and P. M., on the part of defendant.
The object of the bill is to (state the object as shown by the prayer for relief).

ABSTRACT OF PLEADINGS.

Bill states that (give all the facts charged in the stating part of the bill in as condensed a form as possible, and by paragraphs, numbering the paragraphs 1, 2, 3, &c.) Answer on oath waived.

ANSWER.

1. Admits all the facts in paragraph one of bill above except, &c.
2. Denies that, &c., as stated in paragraph two, but admits, &c.

A. C., *Solicitor for Complainant.*

Upon the hearing complainant opens the argument. It is usual for the court to request the solicitor for complainant to give a statement of the case made by the bill and a statement of the testimony sustaining the complainant's contention, and then to call upon the solicitor for defendant to make a brief statement of the defence, as shown by the pleadings and proofs. When the court has obtained in this manner a clear conception of the case in all its bearings, the regular argument is made and the cause submitted to the court. At the time the cause is submitted, or on some other day, the court announces its decision. This decision is frequently given orally, the solicitors being present. Sometimes a written memorandum of the decision is made and filed by the court, at the time he announces his decision, and sometimes the register makes a minute of the decision in his minute-book. The party in whose favor the decision is made then prepares a draft of such a decree as he thinks he is entitled to in accordance with the terms of the decision, and serves a copy upon the other solicitor, who has a right to propose amendments to it, if he thinks proper so to do. The draft and amendments, if any, are then submitted to the court, and the solicitors are heard upon the settlement thereof.

When the decree has been settled it is entered by the register upon the journal. It is considered as entered from the time it is settled and filed with the register.

A DECREE IN EQUITY.

Decrees in general consist of three parts: 1. The date and title. 2. The recitals. 3. The ordering part, to which is sometimes added: 4. The declaratory part. When this latter part is made use of, it generally precedes the ordering part.

The decree commences with the name of the court and the place where it is held, the term at which it is pronounced and the title of the cause. It was the practice at one time to recite at length the pleadings and evidence in the cause, but now the decree merely recites the substance of the pleadings and the facts on which the court founds its judgment. After the recitals comes the ordering or mandatory part of the decree, containing the specified directions of the court upon the matter before it, which, it is obvious, must depend upon the nature of the particular case which is its subject. When the suit seeks a declaration of the right of the parties, the ordering part of the decree should be prefaced by such declaration.

The following is the form of a decree as formerly rendered by the Court of Chancery in England:

DATE AND TITLE.

This cause, coming on this day to be heard and debated before the Honorable the Lord High Chancellor of Great Britain, in the presence of counsel learned on both sides, the substance of the complainant's bill seemed to be that, &c. (Here the complainant's bill is shortly recited.) Therefore, that the said defendant may pay, etc. (the prayer of the bill), and

to be relieved, is the scope of the complainant's bill; whereto the counsel for the defendant alleged that he by answer admits, etc. (the substance of the answer stated); whereupon, and upon debate of the matter, and hearing the answers of the defendants, etc., and the proofs taken in this cause read, and what was alleged by the counsel on both sides, his lordship declared that, etc (the decree of the court).

THURLOW C.

WINTER, *for the Complainant.*

DECREE AND ORDER OF SALE IN FORECLOSURE OF MORTGAGE.

The following is the usual form of a final decree and order of sale in this State in a suit to foreclose a mortgage:

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW—IN CHANCERY.

C. D.,
Complainant,
vs.
D. F.,
Defendant.

At a session of said court held at Ann Arbor on the first day of October, one thousand eight hundred and eighty-eight.

Present, Hon. C. K., circuit judge.

This cause came on to be heard, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

On reading and filing the report of L. F., one of the circuit court commissioners of Washtenaw county, which report bears date the third day of August in in the year one thousand eight hundred and eighty-eight, and was made in pursuance of an order of this court heretofore made in this cause, referring it to one of the circuit court commissioners of this county

to compute the amount due to the complainant on the note and mortgage mentioned and set forth in the bill of complaint, from which it appears that there was due to the said complainant at the date of said report, for said principal and interest the sum of three thousand and twenty dollars, and on reading and filing the affidavit of B. J., solicitor for complainant, showing the regularity of the proceedings in this cause, to take said bill of complaint as confessed; and on motion of B. J., counsel for the complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged and decreed, that the defendant pay or cause to be paid to said complainant or to B. J., his solicitor, the amount so reported due as aforesaid, together with the interests and costs, on or before the first day of December, in the year one thousand eight hundred and eighty-eight, and in default thereof, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the complainant for the principal, interest and costs in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of L. F., one of the circuit court commissioners of this county at any time after the first day of December in the year one thousand eight hundred and eighty-eight, that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said L. F. give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause may become the purchaser; that the said L. F. execute a deed to the

purchaser or purchasers of the mortgaged premises on the said sale; and that the said L. F., out of the proceeds of said sale, pay to the complainant, or his solicitor, costs in the suit to be taxed, and also the amount so reported to be due as aforesaid, together with the legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said L. F. take the receipt for the amount so paid, and file the same with his report; and that he bring the surplus money arising from said sale, if any there be, into court without delay, to abide the further order of this court. And it is further ordered, adjudged and decreed, that the defendant and all persons claiming or to claim from or under said D. F., defendant, be forever barred and foreclosed of and from all equity of redemption, and claim of, in and to said mortgaged premises, and every part and parcel thereof. And it is further ordered, that the purchaser or purchasers of said mortgaged premises at such sale, be let in possession thereof; and that any of the parties of this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the circuit court commissioner's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainant with interest and costs and expenses of sale as aforesaid, that said L. F., circuit court commissioner, specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the defendant D. F., who was personally liable for the debt secured by said mortgage, pay

to the complainant the amount of such deficiency, with interest thereon from the date of such report, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, are as follows, viz.: Lot one in block two, according to the original plat of the village, now city, of Ypsilanti, in the county of Washtenaw, according to the recorded plat thereof in the register's office in said county.

C. K., *Circuit Judge.*

RECTIFYING DECREES.

After the court has formally announced its decision and until the decree has been settled and entered, either party feeling himself aggrieved may move the court for a re-argument of the cause or that certain parts of the decision be modified.

After the decree has been settled and entered and before it is enrolled, either party may petition the court for a re-hearing. The petition must state particularly the objections which are conceived to lie against the decree, that the court may be competent to decide upon the propriety of the application; and if the whole decree is objected to, the case of the petitioner and the decretal part of the order are shortly set forth, and an intimation is given of the decree which the petitioner is advised ought to be entered. If any of the facts stated in the petition do not appear on the records of the court, they must be verified by affidavit. The petition for re-hearing must be accom-

panied by the certificate of two counsel, setting forth that they have examined the case, and that in their opinion the decree is erroneous for the reasons stated. This precaution is taken as a security that the application is not made for the purpose of delay merely.

AFTER ENROLLMENT.

The general rule is that a decree regularly obtained and enrolled cannot be altered except by a Bill of Review.

COSTS.

It is a general doctrine of courts of equity that costs are entirely in the discretion of the court, to be awarded or withheld according to the equity of each particular case. This discretion is not a mere whimsical one, however, but is based upon certain fixed principles, and as a general rule the prevailing party is entitled to costs. When a party is entitled to costs, he must apply for them and have their payment made a part of the order or decree. When a definite sum is allowed, as on overruling a motion, no further proceedings are necessary to fix the liability of payment upon the party against whom the costs are given. In final decrees the order is usually upon payment of costs to be taxed. In that case the party in whose favor the costs are to be allowed makes out a taxed bill of costs which he thinks he is entitled to, verified by affidavits, serves a copy upon the solicitor of the opposing party, with notice that application will be made to the register to have the same taxed at a cer-

tain time and place. At such time and place the costs are taxed by the register.

TAXED BILL OF COSTS.

TITLE OF CAUSE AND COURT.

COMPLAINANT'S BILL OF COSTS.

Solicitor fee by rule		$30 00
Sheriff's fees		10 00
Register's fees		15 00
Circuit Court Commissioner's fees		28 00
Witness fees, viz.:		
A. B., 2 days and 20 miles travel	$4 00	
C. D., 1 day and 10 " "	2 00	
L. G., 5 days and 30 " "	8 00	— 14 00
		$97 00

STATE OF MICHIGAN. } ss.
WASHTENAW COUNTY. }

L. C., being duly sworn, says that he is the solicitor for the complainant in the above entitled cause, and that the several items of disbursement and fees of officers of the court, charged in the foregoing bill of costs, have been actually and necessarily incurred or paid, according to his best information or belief.

L. C.

Subscribed and sworn to before me this ——— day of ———, 188—.

X. Y., *Notary Public.*

ENROLLMENT OF DECREE.

The decree is enrolled in the following manner: The register of the court in which the decree is entered attaches together the bill, pleadings and such other papers as the general rules direct, together with the taxed bill of costs therein, and annexes thereto a fair engrossed copy of the decretal order, signed by the

circuit judge and countersigned by the register who entered the same. The register then annexes to the papers so attached together his certificate, under the seal of the court, wherein he certifies according to the fact, the time when the papers were attached together, for the purpose of enrollment, and the names of the parties at whose instance the same was done.

BILL OF REVIEW.

If, after the enrollment of the decree, any new matter of evidence be discovered, which could not have been had or used when the decree was rendered, or if any apparent error of judgment appear on the face thereof, it may be reconsidered by means of a bill of review.

When the bill of review is founded upon errors apparent on the face of the decree, it may be filed without leave of the court. When it is founded upon newly discovered evidence, leave of the court must be first obtained, and such leave will be given or withheld in the discretion of the court.

This bill must recite the former bill and the proceedings had under it and the former decree of the court. If it is founded upon error apparent on the face of the decree, such error is specifically pointed out. If upon facts which have come to light since the hearing, those facts are stated, and when and how they come to the knowledge of the complainant, after which it is usual to add, just before the prayer for subpœna:

"For all which errors and imperfections in the said decree, your orator has brought this his bill of review, and humbly conceives he should be relieved therein. In tender consideration whereof, and for that there are divers other errors and imperfections in said decree and proceeding, by reason whereof the same ought to be reviewed and reversed, added to, altered and amended, and that the said C. D. may answer the premises, and that your orator may be relieved in all and singular therein, according to equity and good conscience.

May it please, etc."

Besides bills of review, there are two other classes of bills which are exhibited subsequently to a decree, namely: Bills to impeach a decree on account of fraud, and bills to carry decrees into execution. If a decree has been obtained by fraud, it may be impeached by an original bill without the leave of the court, because the fraud used in obtaining the decree being the principal point at issue, and necessary to be established by proof before the propriety of the decree can be investigated. When a decree has been thus obtained, the court will restore the parties to their original situation, whatever their rights may be. The prayer of such a bill must be varied to meet each case —especially if the decree has been executed.

Sometimes from the neglect of the parties, or other reason, it becomes impossible to carry a decree into execution without the further order of the court. This happens, generally, when the rights of parties under the decree have become so entangled and embarrassed, from their neglect to proceed under it, by sub-

sequent events, that it is necessary to have a decree of the court to settle and ascertain them. This is obtained by filing a bill in the nature of an original bill to carry into execution the former decree. The court in such cases merely determines in what manner the former decree shall be executed, so as to do equity to all the parties.

APPEALS.

There is usually a court to which the party, who deems himself aggrieved by the decree of the court in which the suit is commenced, may appeal, and if both parties desire, both may appeal. In this State an appeal is taken from the Circuit Court in Chancery to the Supreme Court. This is a purely statutory right, and the provisions of the statute must be strictly complied with.

Notice of claim of appeal is to be filed with the register, together with the bond provided for in the statute, and notice that an appeal has been taken served upon the opposite solicitor. When the appeal has been perfected, the register transmits the records to the Supreme Court.

In the Supreme Court no further proof is taken, but the cause is heard there upon the same pleadings or pleadings and proofs as were before the Circuit Court, when it made the final order or decree from which the appeal was taken.

The practice in the Supreme Court and the enforcement of a decree, its execution, we do not examine, but close our analysis of a suit in equity at this stage of the proceedings.

EQUITY PLEADING AND PRACTICE.

LECTURE I.

PARTIES TO A SUIT IN EQUITY.

It is necessary for the pleader to determine, first of all, what persons he shall make parties to the bill. It is a rule of law, recognized by all courts, that no one's rights, either of person or property, shall be adjudicated unless he is present in court. Every one is entitled to be heard, to have his day in court. It follows, therefore, from this rule that every person against whom the pleader desires to obtain a personal decree, that is a decree requiring him to do or to refrain from doing some particular act, must be made a party. Again a court of equity insists that all persons whose interests will be affected adversely by the decree shall be before the court, to the end that one litigation may put at rest forever the controversy in all its ramifications. Combining these two rules we have the general rule as to the proper parties to a suit in equity. "All persons having an interest in the subject and object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, must be made parties."

Stevenson v. Austin, 3 Met. 474, 480; West v. Randall, 2 Mason 181; Walkins v. Worthington, 2 Bland 509; Russell v. Clark, 7 Cranch 74; Williams v. Bankhead, 19 Wal. 563; McArthur v. Scott, 113 U. S. 340.

The parties to a suit in equity are styled plaintiffs and defendants as at law, but while at law the interests of all the plaintiffs is adverse to that of all the defendants, in equity the interest of the party does not determine the question as to whether he is plaintiff or defendant. It frequently happens that some of the defendants to a suit have interests which are identical with those of some of the plaintiffs. It is desirable that all the persons having interests that will be affected in the same manner should be arranged on the same side, but it is far from necessary, and if any person whose natural position is among the plaintiffs refuses to so appear he can be made a defendant, and the fact that he is a defendant will not affect his rights. The court in ascertaining and determining the rights and interests of the several parties to the controversy does so without considering at all the fact as to whether they are plaintiffs or defendants.

Contee v. Dawson, 2 Bland 264, 292; Fawkes v. Pratt, 1 Pere Wm. 593; Bedford v. Leigh, 1 Dickens 707.

"All persons having an interest in the subject-matter of the suit" refers to those having an interest which will be affected by the decree rendered.

Mich. State Bank v. Gardner, 3 Gray 305, 308.

The court will in its discretion, modify the rule that all persons having an interest in the subject-

matter must be made parties when its strict enforcement would be equivalent to denying relief altogether.

Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 349; Hallett v. Hallett, 2 Paige 15; Cullen v. Duke of Queensbury, 1 Br. C. C. 101; Whitney v. Mayo, 15 Ill. 251; Society for the Propagation of the Gospel v. Hartland, 2 Paine C. C. 536.

When it appears that one or more who of right ought to be made parties, are out of the jurisdiction of the court, or that making them parties would oust the court of jurisdiction, the court may proceed without their presence, provided the interests of those made parties are such that the controversy can be satisfactorily determined as to them, without prejudicing the rights of those not made parties.

Mulligan v. Melledge, 3 Cranch 220; Elmendorf v. Taylor, 10 Wheat. 152; Mallow v. Hinde, 12 Wheat. 193; Payne v. Hook, 7 Wall. 425; Bank v. Campbell, 14 Wall. 87; Story v. Livingstone, 13 Pet. 359.

And when the parties on either side are very numerous, and cannot, without inconvenience and delay, be all brought in, the suit may proceed if all the adverse interests are sufficiently represented by the parties before the court.

Mandeville v. Riggs, 2 Pet. 482; Williams v. Bankhead, 19 Wall. 563; Robinson v. Smith, 3 Paige 222.

When parties who are known to be interested in the suit are not made parties to the bill, the reason for not making them parties should be set forth, because if the interest of those not made parties is such that a final decree cannot be made without injuriously

affecting their interests, the court will require them to be made parties, and if that cannot be done the bill will be dismissed.

Riddle v. Mandeville, 5 Cranch 322; Russell v. Clark, 7 Cranch 74; Marshall v. Beverly, 5 Wheat. 313; Mallow v. Hinde, 12 Wheat. 193; Barney v. Baltimore, 6 Wall. 280; Bank v. Railroad, 11 Wall. 624; Bank v. Campbell, 14 Wall. 87; Ribon v. Railroad, 16 Wall. 446; Ober v. Gallagher, 93 U. S. 199; Cassidy v. Shimin, 122 Mass. 406; McPike v. Wells, 54 Miss. 136; Tyler v. Peatt, 30 Mich. 63.

Persons incapable of instituting suits for themselves may sue by guardian or *prochein ami*, and the court will appoint a guardian *ad litem* to defend a suit on behalf of such a person.

U. S. Rule 87; Puterbaugh Ch. Pr., Chap. 40, § 1.

To illustrate the rule as to parties, take the case of the foreclosure of a mortgage. 1. All persons against whom a personal decree is desired must be made parties; that is, the maker of the note, the mortgage was given to secure and other persons liable upon the note as endorsers, &c. 2. All persons who have a right to redeem from the mortgage lien must be made parties; that is, all who have any interest in the premises covered by the mortgage, and all who hold liens upon them created subsequent to the mortgage being foreclosed.

Cummings v. Fearey, 44 Mich. 39, 44; McGown v. Yerks, 6 Johns. Ch. 450; Reed v. Marble, 10 Paige 409; Goodenow v. Ewer, 16 Cal. 461.

And it has been held that prior incumbrancers are proper although not indispensable parties.

Haines v. Beach, 3 Johns. Ch. 459; Finley v. Bank, 11 Wheat. 304.

In a partition suit, all persons having an interest in the premises, whether in possession or otherwise, even a dower interest, which has not been admeasured, must be made a party.

Striker v. Mott, 2 Paige Ch. 387.

In proceedings to enforce a mechanics' lien, all persons having interests in the property affected or to be affected by the lien, and all persons holding like liens must be made parties.

Lomax v. Dore, 45 Ill. 379; Raymond v. Ewing, 26 Ill. 329.

Parties to a suit are sometimes designated as *nominal*, *proper* or *necessary*, and *indispensable*. A nominal party is one who has no legal or equitable interest to be affected by the decree, but who stands in such a relation to some of the other parties that he is made a party for the sake of conformity.

A proper or necessary party is one who has such an interest in the suit that he should be made a party to enable the court to adjust all the rights involved.

An indispensable party is one whose interests are such that a decree cannot be made without affecting him.

Tobin v. Walkinshaw, 1 McAllister 26, 31; Shields v. Barrow, 17 Howard 130, 139.

The distinction between an interest in the suit and an interest in the subject-matter of the suit, must be borne in mind. One may have an interest in the

subject-matter of the suit and have no interest in the suit; but having an interest in the suit presupposes an interest in the subject-matter. For example, sup pose A and B both claim title to a parcel of land, one from the National and the other from the State government, and that several persons are interested as mortgagees or otherwise under A, and others are interested in like manner under B. Now, to a suit involving the conflicting titles of A and B, both A and B and all the persons interested under either of them are necessary parties, but in a suit for the foreclosure of a mortgage given by A, neither B nor any person claiming under him is a proper party, because the foreclosure of A's mortgage does not affect B or any one claiming under him.

You must, therefore, in determining who ought to be made parties to a particular suit, ascertain first who are interested in the subject-matter, and secondly, which of those so interested will be affected by the decree you hope to obtain. The latter are to be made parties and they only. If you make the others parties, there will be a misjoinder.

When the pleader is in doubt as to whether or not a particular person is a proper party, it is advisable to omit him, since if it should be found afterwards that he is a necessary party he may be added. And if such a person is made a party in the first instance, he should be made a party defendant rather than complainant. When parties are improperly joined as complainants, the misjoinder is usually fatal, but when

there has been a misjoinder of defendants, the suit will usually be dismissed as to those who are not proper parties and proceed as to the others.

Daniel Ch. Pr., Chap. 5.

MULTIFARIOUSNESS.

Not all persons whose interests will be affected by the decree are indispensable parties, and they are not always proper parties. The rule that the whole of a given controversy must be determined in one proceeding is limited by another rule which prohibits uniting in one suit two or more causes of action. For example, suppose A is about to erect on a stream a mill-dam which B claims will necessarily cause the water to overflow a portion of his lands above the dam, and C claims that such dam will necessarily interfere with his rights in the stream below the dam. Both B and C desire that A should be enjoined from erecting such dam, and both are interested in and will be affected by a suit instituted for that purpose, but they may not unite in a bill filed to enjoin A from erecting such dam, for the reason that there are two separate and distinct contentions, and the flooding of B's land above the dam has no connection with C's rights in the stream below the dam. They must bring separate suits, and if they join in the same bill it is said to be multifarious.

1 Don. Ch. Pr. 382, note.

Again, suppose there are several persons having land in the same situation as B, which will be affected

by the proposed dam in the same manner, they are all proper parties complainant, having all the same plaint, but they are not required to unite, and if any of them refuse to do so they may not be made parties defendant, for this reason, that they have no interest in the other lands flooded, and as to their own lands they may not be compelled to litigate. The subject-matter of the controversy is the effect of the dam upon the lands mentioned in the bill, and its effect upon other lands is outside the record.

Judge Campbell, of this State, has given the following rule as to multifariousness: "The general rule of equity is that every several grievance must be redressed by a several proceeding. The only recognized exception to it (and they are considerably qualified) are instances where there is a single right asserted on one side which affects all the parties on the other side in the same way, or a single wrong which falls on them all simultaneously and together. The instances which are most familiar are rights in common which are resisted by the owner of the estate which is charged, tax rolls assessing all parties on an equal ratio, frauds by trustees affecting all the *cestius que trustent*, and the like. * * * * If there is any distinction in the proportion or character of the several grievances, there can be no joinder."

"When the cause of grievance does not arise out of the same wrong, affecting all at once as well as similarly, there is no foundation for such joinder."

Winslow v. Jenness, 64 Mich. 84-87; Kerr v. Lansing, 17 Mich. 34; Walsh v. Varney, 38 Mich. 73; Bigelow v. Booth, 39 Mich. 622; Woodruff v. Young, 43 Mich. 548; Brunner v. Bay City, 46 Mich. 236; Jones v. Garcia Del Reo, 1 Turn. & R. 297; Yeaton v. Lennox, 8 Pet. 123.

One of the instances mentioned by Judge Campbell is that of several taxpayers who may unite when a particular tax has been assessed against all of them upon the same roll upon the same basis. But in this class of cases they must not only have a common grievance, but that common grievance must be the result of the same facts and circumstances. They must not only all object to the same tax, but they must have one common objection. For instance, if it is a tax levied for the cost of some public improvement, a paving tax, ditch tax, or the like, the irregularity complained of must affect them all alike. One cannot complain of one irregularity which makes the tax void as to him, and another of some other irregularity which makes the tax void as to him. If each has a separate grievance, although it goes to the whole tax or to some part of the tax, each must bring a separate suit.

Kerr v. Lansing, 17 Mich. 34; Barker v. Vernon, 63 Mich. 516-519; Scofield v. Lansing, 17 Mich. 437; Sherlock v. Wenitka, 59 Ill. 389.

A bill is not multifarious because it unites several parties as defendants, each of whom is not interested in the whole of the subject-matter of the suit. As when a bill is filed against several persons, for instance, for an accounting for a stock of goods which

one of the defendants has fraudulently disposed of to the others, who had knowledge and were parties to the fraud.

Ingersoll v. Kerby, Walk. Ch. 65; Blake v. Van Tilbury, 21 Wis. 679; Fellows v. Fellows, 4 Cow. 682; Brinkerhoff v. Brown, 6 Johns. Ch. 139; Salvidge v. Hyde, 5 Madd. 138.

A bill filed for a partition of land between tenants in common is not multifarious, because it asks for an accounting as to the property and that a tax title obtained by one of the tenants for a tax levied while the land was owned in common.

Page v. Webster, 8 Mich. 263; Williams v. Gray, 3 Greenl. 207; Overton v. Woolfolk, 6 Dana, 374; Woodruff v. Young, 43 Mich. 548.

When several persons hold each a separate and distinct claim of title to a parcel of ground, one of them filing a bill to quiet title cannot unite the others in the same bill as defendants; but if, before the suit is commenced, the others should have each conveyed his title to some one person, then all these several titles, or claims to title, could be litigated in the same suit.

Hunter v. Platt, 11 Mich. 264; Blackwood v. Van Vleet, 11 Mich. 252; Woods v. Monroe, 17 Mich. 237; Finch v. Martin, 19 Ill. 105. *Contra*, Alterauge v. Christiansen, 48 Mich. 60; Hammontree v. Lott, 40 Mich. 190-193.

To determine whether a bill is multifarious, you must look to the stating part and not to the prayer. The prayer may ask for separate and distinct relief, only a part of which the plaintiff is entitled to under the case made in his bill.

Hammond v. Bank, Walk. Ch. 214, 247.

If the defendant thinks that a bill is multifarious, and he desires to take advantage of that defect, he should demur, for if he answers, and the objection is made for the first time at the hearing, the court will act wholly upon its own judgment as to whether, under the pleadings and proofs, a decree can conveniently be made which will readily settle the adverse interests of all the parties. The proofs may have eliminated the objection altogether. And the court will, after the proofs are taken, dispose of the whole matter upon the merits rather than submit litigants to further expense and delay.

Ryan v. Shawneetown, 14 Ill. 20; Burnett v. Lester, 53 Ill. 325; Beach v. Shaw, 57 Ill. 17; Greenwood v. Churchill, 1 Myl. & K. 546; Olion v. Piatt, 3 How. Sup. Ct. 333; Nelson v. Hill, 5 How. (U. S.) 127; Campbell v. McKay, 1 Mylne & Craig 603, 618, 624; Chew v. Bank, 14 Md. 299; Bartlett v. Boyd, 34 Vt. 256; Hoggart v. Cutts, 1 Craig & Phil. 204, 205.

LECTURE II.

CHANCERY PLEADINGS AND PRACTICE

By chancery pleadings we understand the written allegations of the respective parties; the plaintiff's statement of the facts upon which he relies in order to obtain the aid of the court, and the defendant's reply thereto, his defence.

By the practice of the court we are to understand all of the various proceedings in the suit, outside the pleadings, from its commencement to its final determination. In theory and upon principle, pleadings and practice are entirely separate and distinct, and that fact should be continually kept in mind, but since in the conduct of a suit, there is necessarily a step taken in pleading followed by one in practice, it will be more convenient and satisfactory to consider pleadings and practice together, as questions touching the one or the other naturally arise in the conduct of a suit.

THE FRAME OF THE BILL.

Before noticing the different parts of the bill it may be said generally, that the whole bill should be drawn with the utmost care. All the facts necessary to be set forth at all should appear clothed in language simple, precise and certain, omitting nothing which ought to be said and stating nothing which ought to have

been omitted. Speaking of the degree of certainty with which the allegations in the bill must be made, Justice Story says "that there are three kinds of certainty applicable to different parts of the pleadings; the first kind is certainty to a common intent, and that is sufficient as a bar, which is sufficient to defend a party, and to excuse him. The second is, certainty to a certain intent in general, as in counts, replications and other pleadings of the plaintiff; that is, to convict the defendant as in indictments, etc. The third is, certainty to a certain intent in every particular, as in estoppels, which are odious in the law."

Story Eq. Pl. §240; Co. Litt. 303 a.

It is somewhat difficult to clearly distinguish these different degrees of certainty from each other and especially to indicate clearly the distinction between the first and second which are often confounded both by text writers and courts. There is a certainty to a common intent, when the usual meaning of the words used convey to the ordinary mind a clear statement of a fact, although the same words may also have an artificial meaning.

Dovastin v. Payne, 2 H. Black 530.

It is a rule of construction. Do the words used express a clear and well defined idea, or is their meaning uncertain or ambiguous? If there is uncertainty or ambiguity they are not certain to a common intent. As an illustration a suit of replevin was brought for certain cattle. There was an avowry on the part of

the defendant that the animals were distrained doing damage to his close. The plaintiff to this pleaded that the cattle were in the highway and from there escaped into the close, which was not fenced as by immemorial custom the defendant was required to fence it. To this plea the defendant demurred specially, for that the plaintiff did not state that the animals were rightfully in the highway. The demurrer was held good for the reason that the plea did not state with certainty, to a common intent, that the cattle were rightfully in the highway. The certainty to a common intent must appear from the language of the pleader and other words cannot be added thereto to make his language certain and unambiguous.

Dovastin v. Payne, 2 H. Black 530. Fuller v. Hampton, 5 Conn. 416.

Certainty to a certain intent in general is required in indictments charging a crime and may be illustrated as follows: Suppose a party is charged with publishing a libel and the meaning which he intended to convey is certain, plain and unambiguous to the ordinary reader, but it is thus plain, certain and unambiguous because the reader reads between the lines, as it was intended he should do by the writer, and there finds the real meaning. The language is sarcastic. In such a case the pleader cannot set forth the anguage simply, he must by innuendo, that is by comment, charge explicitly the meaning the writer intended to convey.

Rex v. Home, Cowp. 672, 682. Rex v. Linn, Regis. Doug. 158.

Certainty to a certain intent in every particular is when the pleader after pleading with certainty to a common intent goes on to negative any and every other possible construction of which the language used is susceptible.

Certainty to a common intent is usually all that is required of the pleader in equity. But this certainty is made up of two distinct elements. 1. Certainty as to the matter and 2. Certainty as to the manner of charging it.

As to the matter. All the facts necessary to constitute a case for the complainant must be stated with the requisite certainty. For instance, if the pleader desires to charge that the defendant has been guilty of a fraud, since fraud is not a fact but a conclusion of law, the pleader must set forth with certainty to a common intent all the requisite elements constituting the particular fraud of which he complains.

Or, again, if the pleader desires to compel the defendant to carry out and fulfill a verbal contract with regard to land, since a verbal agreement with reference to land is within the statute of frauds and not enforceable in a court of equity any more than at law, unless it has been partially performed, or some other equitable reason exists, the pleader must with certainty to a common intent show that this particular verbal contract has been taken out of the statute of frauds by part performance or in some other manner.

So much for the matter. As to the manner each of the allegations of fact, or circumstance, which it is

necessary for the pleader to allege in order to constitute a fraud or to show that the complainant is entitled to a specific performance of the verbal contract, must be stated with the requisite degree of certainty.

FORM OF THE BILL.

The address must contain a proper description of the court in which it is filed, and since that differs in the different states the bill must be varied accordingly. (U. S. Ch. R. 20, and Mich. Ch. R. 4.) A bill which is not properly addressed is defective.

Bow v. Butters, 2 Chicago Legal News 33.

INTRODUCTION.

Owing to the fact that the jurisdiction of the United States is limited, it is necessary that the fact of jurisdiction should appear upon the face of the record. Therefore, the particular facts which give the federal court jurisdiction should be clearly set forth in the bill, whether they have reference to the diverse citizenship of the parties, or the subject-matter in controversy, otherwise the bill will be demurrable, or may be dismissed by the court of its own motion.

Hornthal v. Collector, 9 Wall. 560; Hancock v. Holbrook, 112 U. S. 229; Everhart v. Huntsville College, 120 U. S. 223.

A corporation is deemed to be a citizen of the state under whose laws it is organized. When a corporation is a party it should be described by its proper name, followed by an averment that it is a corporation

created and organized under the laws of the state of ———, and has a place of business at ———.

Winneposaugee v. Young, 40 N. H. 420; Central Mnfg. Co. v. Hartshorne, 3 Conn. 199; Penn. Co. v. Railroad, 118 U. S. 290; Goodlett v. Railroad, 122 U. S. 391.

The court will take judicial notice of a public corporation.

Withers v. Warner, 1 Str. 309.

A voluntary association has no right to sue in the name of the association. The action must be brought in the names of the persons composing the corporation.

Story Eq. Pl. § 386; 1 Daniel Chy. Pr. 29, 30.

When a bill is filed by a person in a representative capacity, the averment must be sufficiently full and explicit to show that he has a right to maintain the suit. Thus, when a bill was filed by persons who described themselves as executors of the last will and testament of A. B., but did not aver the death of A. B., nor the probate of the will, the bill was held fatally defective. But when the complainants described themselves as administrators, who had been duly appointed and were acting as such, the averments were held sufficient.

Middlesworth v. Nixon, 2 Mich. 425; Manning v. Drake, 1 Mich. 34.

When a bill is filed by one of a class, it must be so stated.

Bedford v. Leigh, 2 Dickens 707; Cosby v. Wickliffe, 7 B Mon. 120.

LECTURE III.

STATING PART OF THE BILL.

The very marrow and pith of a bill in equity is found in the stating part. It is here that the ability, learning and tact of the pleader is made to appear. Outside of the stating part, the bill can be built up and padded out with the dry formula supplied by precedent, but in the stating part, precedents and formula can render little service, since in each instance it must be varied to embody the particular facts and circumstances of the particular case in hand. General rules only, for the guidance of the practitioner, can be given; his success will depend upon that skill which comes from a union of learning and practice.

In drafting the stating part, the pleader must bear in mind:

1. That he must state facts, and that such facts must be stated directly and positively, and not inferentially.

2. He must show that the court has jurisdiction.

3. That the complainant is entitled to the relief prayed for.

4. That all the persons interested in the subject-matter of the controversy are made parties to the suit.

The order in which such facts shall be set forth is left wholly to the judgment and taste of the pleader. The arrangement should be such that the narration

will arrest the attention and interest the court, and each statement should be set forth with that precision, force and felicity of expression as will insure recollection, and the spirit pervading the whole must, while it is vigorous and aggressive, be so tempered with fairness and justice, that the judgment of the court will be unconsciously convinced of the manifest equity of the plaintiff's cause.

The bill should contain allegations of fact, and not mere recitals of circumstantial evidence from which a fact may be inferred. The allegations must be plainly and distinctly made, so that the defendant may be explicitly informed of the claim made against him, and the theory upon which the complainant intends to rely.

Wilson v. Eggleston, 27 Mich. 257; Search v. Search, 12 C. E. Green 137.

When the facts are within the knowledge of the complainant, they must be charged positively, but when such facts are not within his knowledge, they may be stated upon the information and belief of complainant, followed by the averment, that he charges them to be true.

Wells v. Bridgeport, 30 Conn. 316; Campbell v. Railroad Co. 71 Ill. 611.

Charging a fact upon information and belief alone is insufficient, because a traverse of such an allegation puts in issue, not the existence of the fact, but the information and belief.

Ex parte Reid, 50 Ala. 439.

It is sometimes difficult to determine whether a particular fact has been averred directly or inferentially. If from the facts which are directly and positively averred, the existence of some other fact is necessarily and conclusively presumed, such other fact has been sufficiently alleged, but anything short of such conclusive presumption is regarded as mere inference, and will not be considered.

And it has been held that when the statute required the agreement set forth in the bill to be in writing, and there was no direct averment that it had been reduced to writing, but a positive allegation of an agreement, that the court would presume it was a legal agreement. But on the other hand, if it appeared elsewhere in the bill, that the agreement was in parol, the objection could be taken advantage of by demurrer.

Dudley v. Bachelor, 53 Me. 403; Cozine v. Graham, 2 Paige 177; Macy v. Childers, 2 Tenn. Ch. 438, 442; Redding v. Wilkes, 3 Bro. C. C. 400.

The facts constituting the plaintiff's case must be so fully stated, that if they are admitted by the answer or established upon the hearing, that the court can render a decree upon them; the complainant must make a case by his bill and the case made must be established by admissions or proof. The allegations and the proofs must reciprocally meet and conform to each other. Facts established by the admissions of the defendant, or the testimony of witnesses, will not be considered by the court, unless they established some

distinct allegation made in the bill no matter of what weight and importance they may be intrinsically.

Harrison v. Wixon, 9 Peters 483, 503; Jackson v. Ashton, 11 Peters 229; Mead v. Askew, 56 Ala. 584; Moran v. Palmer, 13 Mich. 367; Conneston v. Miller, 41 Mich. 608; Fox v. Pierce, 50 Mich. 500.

Facts and not conclusions of law must be alleged. Therefore, if the bill seeks to have a tax deed set aside on the ground that the tax for which the land was sold was an illegal tax, the facts upon which the pleader relies to show that the tax was in fact void must be averred, and a positive allegation that the tax is void is not sufficient.

Gamble v. East Saginaw, 43 Mich. 367; Foster v. Hill, 55 Mich. 540; Le Baron v. Shepherd, 21 Mich. 263.

As a rule a general allegation of fraud is insufficient to support proof of facts establishing the fraud. Such facts should have been alleged. On the other hand if the allegations of fact clearly show that a fraud has been committed there need be no positive allegation of fraud.

Long v. Marvin, 15 Mich. 60; Hubbard v. McNaughton, 43 Mich. 221; Hale v. Chandler, 2 Mich. 531; Merrill v. Allen, 38 Mich. 487.

When the right of the complainant depends upon the performance of a condition which has not been performed, he must set forth the facts which excuse its performance, an allegation that there is a good excuse is not sufficient to support testimony as to the facts which excused performance.

Le Baron v. Shepherd, 21 Mich. 263.

If the bill shows that the injuries complained of are of such long standing that unexplained they impute laches to the complainant, the facts relied upon as excusing the delay must be set forth in the bill, or otherwise it may be attacked by demurrer or plea, or the court of its own motion may refuse to consider the case.

Sullivan v. Railroad, 94 U. S. 806: Hayward v. Bank, 96 U. S. 611; Spridel v. Henrici, 120 U. S. 377; Richards v. Mackal, 124 U. S. 183.

As an illustration of the necessity which rests upon the complainant of alleging all the facts in his bill necessary to constitute his case, a bill filed to enforce rights conferred by the statute is a good example. In such a case the bill must show a substantial compliance with every provision of the statute upon which the right depends.

Remeau v. Mills, 24 Mich. 15; Bangs v. Stephenson, 63 Mich. 661; Paine v. Newell, 66 Mich. (June 9, 1887.)

And when a complainant claims rights under any judicial proceeding the averments of the bill must show all the facts necessary to establish the validity of such proceedings.

Hobart v. Frisbie, 5 Conn. 592; Kunkel v. Markell, 26 Md. 390-408; Frost v. Flanders, 37 N. H. 549; Mayor v. Signoret, 50 Cal. 298.

When a bill is filed to enforce rights given by a statute, and there is an exception in the enacting clause of such statute, it must negative such exception; but where there is no exception in the enacting clause but an exemption in a proviso thereto, or in a subsequent

section of the act, the bill need not aver that the defendant does not come within the exemption. The exemption of the defendant, if it exists, is a matter of defence and must be shown by the defendant.

Attorney General v. Oakland Co. Bk., Wal. Ch. 90; Teel v. Fonda, 4 Johns. 304.

The bill must contain ~~arguments~~ allegations of every fact necessary to give the court jurisdiction. For instance, except in certain cases, the court of equity is not given jurisdiction unless the amount involved is at least a specified sum. In this state the minimum sum is one hundred dollars. When the bill on its face shows that the amount in controversy is not sufficient to give the court jurisdiction, the defect is fatal, and if called to the attention of the court, or discovered by the court, the bill will be dismissed.

Gamber v. Holben, 5 Mich. 331.

But although the bill may not contain the specific allegation that the amount in controversy is sufficient to give the court jurisdiction, still if there are averments which clearly and unequivocally show that it must necessarily be of sufficient value, such averments will be sufficient to give the court jurisdiction.

Abott v. Gregory, 39 Mich. 68; Glidden v. Morrell, 44 Mich. 202.

In setting forth the facts in the bill, the pleader should avoid, as far as possible, all unnecessary recitals of deeds, documents, contracts, or other instruments verbatim. After referring to a document, the pleader may add the following formula: "As by said inden-

ture (or agreement), when proved, will appear." This makes the whole document referred to a part of the record.

Harmer v. Gooding, 3 DeG. & S. 407–410; Swetland v. Swetland, 3 Mich. 482.

But the pleader must be careful that the body of his bill contains averments of all the facts which he claims are established by any such document, for while, by the above formula, he makes the document a part of the record, it is only a part of the record for the purpose of amplifying and more particularly and fully setting forth the particular allegations contained in the bill, and only those parts of the document will be considered that refer to averments in the bill.

Mayor v. Signoret, 50 Cal. 298; Moses v. Brodie, 1 Tenn. Ch. 397.

It is a maxim of equity that he who seeks equity must do equity. Therefore if, under the facts stated, any duty devolves upon the plaintiff which in good conscience he ought to perform, although its performance could not be compelled at law, he must aver a readiness and willingness on his part to perform it, otherwise he will not be heard to complain.

Perry v. Carr, 41 N. H. 371.

THE CONFEDERATING PART.

It is not necessary that the bill should aver that the defendant is confederating with unknown parties with intent to injure and defraud the complainant, unless such is the fact, and that fact is of importance to the

complainant. In case, however, that fact exists, and is important, it should be set out as fully and precisely as possible.

THE CHARGING PART.

The original purpose of the charging part was to meet and answer some special defence of the defendant. This was done by averring, by way of pretense, such special defence, and then adding matter of reply in the form of a charge.

Stafford v. Brown, 4 Paige 88; Van Riper v. Claxton, 1 Stockton 302; Conneston v. Miller, 41 Mich. 608.

THE JURISDICTIONAL CLAUSE.

This clause is usually retained in this state, although its omission does not render the bill defective. The averment that the court has jurisdiction is a mere conclusion of law at best, and does not strengthen the averments of fact, which show that the cause is cognizable in a court of equity, nor on the other hand will it make good the want of some necessary averment.

Bateman v. Wilboe, 1 Sch. & Lef. 201, 204; Story Eq. Pl. § 34.

In the United States court it is not necessary to insert in the bill the confederating or charging part or the jurisdictional clause.

U. S. Rule 21; Perry v. Corning, 7 Blatch. 195; Dunham v. Railroad, 1 Bond 492; Walden v. Bodley, 14 Pet. 156; Railroad v. Bradleys, 10 Wall. 299; Wilson v. Graham, 4 Wash. 53.

LECTURE IV.

INTERROGATING PART.

Formerly this was an essential and important part of the bill. When parties in interest were not permitted to testify, the complainant could in this way alone obtain from the defendant important admissions, but now, since the statute permits all parties to be examined as witnesses, the interrogating part of the bill in most cases is of no importance whatever. The rules permit the complainant to waive his right to have the answer made under oath, and unless for some reason he still desires a discovery, he adopts that course, since an answer not under oath has the force and effect merely of a pleading.

Hopkins v. Granger, 52 Ill. 504.

When an answer under oath is not waived, and the answer is put in under oath, so much of it as is responsive to the interrogating part of the bill is evidence for the defendant, and its force cannot be overcome except by the testimony of two witnesses. Putting an answer in on oath, when an answer under oath has been waived, does not make it evidence for the defendant.

Wallwork v. Derby, 40 Ill. 527.

When an answer on oath is waived no relief can be prayed which rests solely upon the necessity of dis-

covery, for the reason that by waiving the right to an answer upon oath, the complainant has thereby waived all right to discovery.

Torrent v. Rogers, 39 Mich. 85.

Where discovery therefore is desired, an answer upon oath must not be waived and interrogatories should be added, so drawn that the defendant's attention will be particularly called to all those facts and circumstances as to which a full discovery is desired. The rules of the Supreme Court of the United States require that these interrogatories shall be numbered and that the complainant shall designate the particular interrogatories which each of the defendants is to answer, by a note at the end of the bill.

Rules 40 to 44 inclusive.

PRAYER FOR RELIEF.

Having fully stated to the court his cause of action and explained wherein the complainant has already been deprived of his just rights, or in what manner he is threatened with a deprivation of those rights, the pleader asks, in the prayer for relief, the aid and assistance of the court. The prayer usually is for specific and general relief. The prayer for specific relief may be in the alternative, that is the pleader may ask for some particular thing and then add a specific prayer for some other thing in lieu of the first, in case that should be denied. The pleader is frequently compelled to resort to this course. He may be in doubt in regard to the facts in controversy, or if

he is perfectly familiar with the facts he may be in doubt as to the conclusion the court will draw from them. In all such cases of doubt it is proper to have a prayer for specific relief drawn in the alternative. But a bill so drawn that specific relief in the alternative may be prayed for, must be consistent with itself. The bill must not contain distinct causes of complainant which are inconsistent with and defeat each other. The pleader must not blow hot and cold.

Lloyd v. Brewster, 4 Paige, 537; Cotton v. Ross, 2 Paige, 396; Hart v. McKeen, Wal. Ch. 417; Farwell v. Johnson, 34 Mich. 342.

If there is a prayer for special relief merely and upon the pleadings and proofs, the complainant is not entitled to that particular relief, he will not be given any relief at all and his bill will be dismissed, unless he is permitted to amend.

Polk v. Clinton, 12 Ves. 48; Story Eq. Pl. §§ 40, 41; English v. Foxall, 2 Peters, 595.

If, in addition to the prayer for special relief, there is added a prayer for general relief, in case the particular relief asked for is denied, the complainant will be allowed such other relief as is agreeable to the case made by the bill. It has been said that a prayer for general relief was sufficient, and that a prayer for special relief might be omitted in the bill and asked for at the hearing.

Hiern v. Mill, 13 Ves. 114; Colton v. Ross, 2 Paige, 396; Texas v. Heidenberg, 10 Wal. 68; Pleasants v. Glasscock, 1 Sm. & Mar. 17, 24, 25; Story Eq. Pl. § 41; Wilson v. Graham, 4 Wash. C. C. 53.

When a bill is filed for discovery merely and the complainant is not entitled to any relief in addition to the discovery, he must confine his prayer for relief to the particular relief to which he is entitled.

Wells v. Railroad, Wal. Ch. 35; Loker v. Roll, 3 Ves. 4-7.

If an injunction or a writ of *ne exeat regno* is required it must be specially prayed for.

Spooner v. McConnell, 1 McLean 337; Story Eq. Pl. §41; U. S. Ch. R. 21.

PRAYER FOR PROCESS.

The prayer for process is an essential part of the bill, and if it is omitted the bill may be demurred to.

Wright v. Wright, 4 Halst. Ch. 143.

In the prayer for process must be inserted the names of all the persons whom the complainant desires to make defendants and only those whose names are inserted are made defendants.

Verplank v. Ins. Co., 2 Paige 438; Lyle v. Bradford, 7 B. Monroe 113.

If a suit is against a person both in his individual and representative capacity, process must be asked against him in both capacities.

Carter v. Ingraham, 43 Ala. 78.

Ordinarily the bill need not be sworn to but there are certain exceptions. Bills must be verified when they are filed.

1. To obtain the benefit of an instrument upon which an action at law will lie.

March v. Davidson, 9 Paige 580; Bennett v Waller, 23 Ill. 97.

2. To perpetuate the testimony of witnesses.

Laight v. Morgan, 1 Johns. Cas. 429; Story Eq. Pl. §§304, 309.

3. To obtain a divorce.

Mich. Ch. Rule 95.

4. Bills of interpleader.

Edrington v. Allsbrook, 21 Tex. 186; Monks v. Holroyd, 1 Cow. 691.

5. Bills praying for a preliminary injunction.

Holdredge v. Gwynne, 3 C. E. Green 26; Moore v. Cheeseman, 23 Mich. 327.

6. Bills praying for a writ of *ne exeat.*

Rice v. Hale, 5 Cush. 238.

The bill having been drafted, signed by counsel, verified when necessary and properly endorsed, is filed, with the clerk in the United States court, with the register in the circuit court in this state. The county clerk in this state is clerk of the circuit court, and register of the circuit court in chancery. But since in popular language he is spoken of as clerk simply and the same officer in the United States court is styled clerk, to prevent confusion we shall refer to him as clerk.

In this state upon filing the bill a subpœna issues as a matter of course under the seal of the court dated and tested of the day of issue and made returnable on a day certain (except Sunday) in term time or vacation, not less than ten days from the issuing thereof.

Anderson v. Brice, 3 Mich. 280; Peck v. Cavell, 16 Mich. 8; Fenton v. Kyle, 27 Mich. 454; Hemmens v. Bently, 32 Mich. 89; Torrens v. Hicks, 32 Mich. 307; Mich. Ch. R. 9.

When there are several defendants more than one subpœna may issue for convenience in service. The names of all the defendants must be inserted in the subpœna.

Mich. Ch. R. 10; Richardson v. Thompson, 41 Ill. 202.

Formerly the subpœna required the defendant to appear under a certain penalty, mentioned therein, but to remove the danger of mistake among defendants ignorant of the meaning of this command, the rules now provide that the penalty shall be omitted and the defendant shall be notified simply that a bill has been filed and that unless he appears within a given time his default may be entered. This same rule also requires that there shall be underwritten a notice designating against what defendants a personal decree is desired.

Mich. Rule 122; U. S. Rule 12.

In the United States court when the bill is filed a *præcipe* must also be filed with the clerk, directing the issuance of a subpœna and naming the rule day to which it is made returnable, which must be the first or second rule day occurring twenty days after its issuance.

U. S. Rules 7, 11, 12.

A subpœna issued out of the United States court is served by the marshal, his deputy, or by some other person specially appointed by the court.

U. S. Rule 15, Re. St. §922.

It is served by the officer making the service

delivering a copy thereof to the defendant personally or leaving a copy at his usual place of abode, with some adult person who is a member or resident in the family.

U. S. Rule 13.

A subpœna issued by the state circuit court in chancery may be served anywhere within the state on or before the return day thereof. It may be served by the sheriff of any county or by any other person. It is served by delivering a copy of the writ subscribed by the complainant, his solicitor or the officer or person serving the same, inscribed copy and showing the original, under the seal of the court, at the time of such delivery, to the defendant.

Mich. Ch. Rule 10; Creveling v. Moore, 39 Mich. 563; Soule v. Hough, 45 Mich. 418-422.

If service is made by an officer he makes an official return of the fact. If service is made by a person delegated by the United States court or by a private person in this state the return of service must be under oath.

U. S. Rule 15.

If a subpœna is returned not served upon a defendant, the complainant is entitled to another subpœna against such defendant, until due service is made.

U. S Rule 14, Mich. Rule 9.

The statutes of this State provide that when personal service cannot be had on account of the defendant being a non-resident, absent from his home, or

concealed, that substituted service may be obtained by publication.

How. St. §§ 6670–6686.

The U. S. Statutes provide for substituted service by publication in suits to enforce a lien upon, or claim to, or to remove any incumbrance, lien or cloud, upon the title to any real or personal property within the district wherein the suit is brought, if one or more of the defendants shall not be an inhabitant of, or found within the district.

18 Statutes at Large, 472.

Under the U. S. Statute the defendant may appear within one year, have the decree opened and be permitted to defend. Under the Michigan Statute he has for that purpose seven years, unless notice of the decree has been served upon him, in which event the time within which the decree may be opened is limited to one year.

Since the time when parties to a suit were permitted to be examined as witnesses, it is seldom necessary to have answer from the defendant, and therefore if he fails to appear in the cause and answer, plead or demur, his default is entered and the cause proceeds *ex parte*. There may still be cases, however, when discovery is required, and in such a case the defendant may be compelled to appear by attachment.

U. S. Rule 18, Mich. Rule 12, 13; Riopelle v. Doellner, 26 Mich. 102; Thompson v. Wooster, 114 U. S. 104.

If the defendant's default is entered for his not

appearing and answering, pleading or demurring within the prescribed time, the effect is the same as though he had appeared and answered admitting all the material allegations of the bill.

Ward v. Jewett, Walk. Ch. 19, 45.

A decree may then be taken by the complainant, termed a decree *pro confesso*. Such decree must be limited strictly to the case made by the bill. Those allegations, and those only, has the defendant by his default admitted to be true. If, therefore, the complainant should find it necessary to amend his bill and add new and material allegations, the effect of the amendment will be to violate the order taking the bill as confessed, and new process must issue and be served upon defendant and the same proceedings had as though the suit had been commenced *de novo*.

Harris v. Deitrich, 29 Mich. 366.

If the order to take the bill as confessed is entered for default of the defendant's appearing, the cause proceeds *ex parte*, and the defendant is not entitled to notice of further proceedings, but if his default is for not answering, pleading or demurring having after appeared, the cause proceeds *ex parte* as before, but the defendant is entitled to notice of each subsequent step in the cause.

Mich. Rules 2, 15; Warren v. Juif, 38 Mich. 662; Watson v. Hinchman, 41 Mich. 716.

The entry of an order taking a bill for divorce *pro confesso* on account of defendant's default in not

appearing or answering, pleading or demurring, does not have the effect of making the allegations in the bill evidence for the complainant. The public are interested in preserving the marriage contract. As we have seen, such bills must be verified. They must contain distinct allegations that the bill is not filed in collusion with the defendant, directly or indirectly, and the allegations contained in the bill as to the grounds of divorce must be established by satisfactory proof. And the officer before whom the proofs are taken is required to make such full inquiries of the witnesses as shall be necessary to arrive at all the material facts in the case.

Emmons v. Emmons, Walk. Ch. 532; Pugsley v. Pugsley, 9 Paige 589.

LECTURE V.

APPEARANCE OF DEFENDANT, ETC.

The defendant having been personally served with process must cause his appearance to be entered in the common order book within the time prescribed by the rules and serve a notice of such appearance upon complainant, if he would prevent his default being entered and an order made taking the bill as confessed.

1 Barb. Ch. Pr. 78; Jennison Ch. Pr. 40; Mich. Rules 11, 14: U. S. Rules 17, 18.

The defendant having appeared, if the occasion exists, may except to the bill on the ground that it contains impertinent or scandalous matter, and in the United States Court if it is made unnecessarily prolix by recitals of matters not pertinent or relevant to the real cause of action, or by needless repetitions.

Upon exceptions of this nature being filed they may be referred to a master. If the master or the court find that the exceptions are well taken, the objectional matter will be expunged at the expense of complainant, and he may be adjudged to pay all the defendant's costs up to that time.

U. S. Rules 25, 26, 27; Mich. Rules 30, 31, 32, 33, 34.

Impertinences are wholly irrelevant or unnecessary allegations and statements, and they have been described to be "when the records of the court are stuffed with long recitals, or with long digressions of

matters of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a deed is unnecessarily set forth *in haec verba*." The test as to whether a particular allegation is or is not impertinent is this, is it material? If it is not material it is impertinent, but its immateriality must clearly appear. If the court is in doubt, the matter will not be stricken out as impertinent.

Rickards v. Attorney-Genl. 12 Cl. and Fl. 30; Railroad v. Stewart, 4 C. E. Green 343; Whaley v. Norton, 1 Vern. 483; Clark v. Periam, 2 Atk. 333, 337; Woods v. Morrell, 1 Johns. Ch. 103.

Scandal is an irrelevant allegation of some matter which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with the commission of a crime not necessary to be shown in the cause; in short, any unnecessary allegation bearing cruelly upon the moral character of an individual. Nothing is scandalous, however, which is relevant. A man may be called a thief when that fact is pertinent to the issue involved.

Fisher v. Owen, 8 Ch. Div. 645; Gleaves v. Morrow, 2 Tenn. Ch. 592; Goodrich v. Rodney, 1 Min. 195; Desplaces v. Goris, 1 Edw. Ch. 350.

The objection to the bill for impertinence must be taken before answering or submitting to answer, i. e., obtaining an extension of time within which to answer.

Anon, 2 Vesey Sen., 630; Ferrar v. Ferrar, 1 Dick. 173; Anon, 5 Vesey Jr., 656; Jones v. Spencer, 2 Tenn. Ch. 776.

But an objection for scandal may be taken after answer. The reason for the distinction is that impertinence involves merely a question of costs, while

scandal is regarded as an indignity to the court. Same authorities.

And the objection to the bill for scandal may be made by one not a party to the suit.

Coffin v. Cooper, 6 Ves., 513; Williams v. Douglas, 5 Beav., 82, 85.

No pleading may contain impertinent or scandalous matter, and if it does it may be excepted to for that reason.

Mich. Ch. Rules, 18, 30.

DISCLAIMER.

If the defendant has no interest whatever in the subject-matter of the suit, and never had any, or claimed to have had any, he may answer by disclaiming all interest in the proceedings. A simple disclaimer, however, is seldom sufficient, except in those cases where the defendant has been made a party by mistake. If, as a matter of fact, although the defendant may not, at the time the suit was commenced, have any interest in the subject-matter of the controversy, if he once had and has since parted with such interest, he may be called upon to disclose to whom he has assigned the interest, that the complainant may make the assignee a party defendant.

Spofford v. Manning, 2 Edw. Ch. 358; Elbsworth v. Curtis, 10 Paige 105.

A mere disclaimer is not sufficient if the defendant is charged with being a party to a fraud, or, if the allegations of the bill show that the defendant has so

entangled himself up with the whole transaction that the complainant was obliged to make him a party, for in such a case the complainant is entitled to an answer explaining the defendant's conduct.

Graham v. Cooper, 9 Sim. 93, 102; Glassington v. Thwaits, 2 Russ. 458.

If there is no objection to the bill on the ground that it contains impertinent or scandalous matter, and the defendant desires to interpose a defence, the next step for him to take will depend entirely upon the nature of his defence. For example, A may have filed a bill to enforce a contract made with B, by the terms of which B agreed to sell a certain parcel of land for a given sum to A. B's defence may be that the contract is void, not having been reduced to writing, and the fact that it was not reduced to writing may or may not appear upon the face of the bill, or B's defence may be that the contract is void on account of some fraud or imposition practiced by A whereby he was induced to execute the contract—or in other words, the defence may consist of:

1. Some objection to the case made by the bill which appears upon the face of the bill, showing that the complainant has no cause of action; or,

2. There may be some fact not appearing upon the face of the bill, and not going to the merits of the cause, which will prevent the court from taking cognizance of the cause; or,

3. The defence may go to the merits of the defendant's cause, the defendant claiming that upon all the

facts and circumstances that the plaintiff is not entitled to any relief.

The first two are called dilatory defences, because they merely postpone or at best prevent an investigation into the merits of the matters in controversy. The last is called a defence upon the merits, because it puts in issue the allegations upon which the complainant bases his right to relief, and the trial of the cause upon such an issue will result in a final disposition of the whole matter.

These several defences have each a particular form in which they are to be presented.

If the defence is based upon some matter which appears upon the face of the bill, it is by demurrer.

Insurance Co. v. Field, 2 Story 59.

If the defence rests upon some fact which does not appear upon the face of the bill, the defence is by plea, which brings to the attention of the court the fact relied upon.

Story Eq. Pl. § 437.

If the defence rests upon the actual merits of the defendant's case, the defence is by answer.

Story Eq. Pl. § 437.

DEMURRER.

A demurrer is the proper mode of defence, when the ground of defence is a defect in the frame of the bill or in the case made by it, or the matter contained it it.

Jones v. Earl of Strafford, 3 P. Wms. 79, 80; Mitford's Eq. 206.

The demurrer alleges in substance that if the matters contained in the bill were true they do not sustain the complainant's contention, or that, for some reason apparent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer, and 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 applies.

Mitford's Eq. 86.

When it is clear, absolute and certain, that taking the charges made in the bill to be true the bill will be dismissed at the hearing, a demurrer will lie, but not if there is uncertainty in that regard.

Atterson v. Mair, 2 Ves. 94; S. C. 4 Bro. C. C. 270; Havenden v. Ld. Annesley, 2 Sch. & Lef. 607; Brooks v. Hewitt, 3 Ves. 253.

But while the demurrer assumes and confesses, for the purposes of the argument, that the allegations in the bill are true, the admission extends only to such matters as are well pleaded, matters of fact, and not matters of law, arguments and inferences, nor false allegations of fact of which the court is bound to take judicial notice. And when there are matters of fact pleaded which are repugnant to some other, that one is admitted, which is of least benefit to the pleader.

Looke v. Rolle, 3 Ves. 4–7; Campbell v. Mackay, My. & Cr. 603, 613; Wales v. Bank of Mich., Har. Ch. 308; Griffing v. Gibb,

2 Black U. S. 519; Roby v. Cossitt, 78 Ill. 638; Croft v. Thompson, 51 N. H. 536; 1 Greenl. Ev. §§ 4, 6.

A demurrer may be to the relief prayed, or to the discovery or to both. But the demurrer must not be both to discovery and relief if the complainant is entitled to either. If the demurrer is to the whole bill and the complainant is entitled to either discovery or relief it will be overruled.

Livingstone v. Story, 9 Peters 633; Wright v. Dame, 1 Met. 237–241; Holmes v. Holmes, 36 Vt. 525, 537; Laight v. Morgan, 1 Johns. Cas. 434.

Demurrer to the relief may be:

I. To the jurisdiction.

II. To the person.

III. To the matter of the bill, either in substance or form.

I. TO THE JURISDICTION.

Demurrers to the jurisdiction are (1) either on the ground that the case made by the bill does not fall within that of any class of causes over which the court assumes jurisdiction.

A discussion of the cases that fall under this head properly belongs to the subject of equity jurisdiction.

Stephenson v. Davis, 56 Me. 73, 74; Cookney v. Anderson, 31 Beav. 452; Cookney v. Anderson, 8 Jur. N. S. Part I 1220; Boston Water Power Co. v. Railroad, 16 Pick. 512.

The demurrer to the jurisdiction may be (2) on the ground that the subject-matter of the suit is within the jurisdiction of some other court.

If it appears from the bill that the complainant has

as effectual and complete a remedy at law as in equity the bill is demurrable.

Lynch v. Williard, 6 Johns. Ch. 342; Bank v. Lee, 11 Conn. 111; Hammond v. Messinger, 9 Sim. 327; Ohling v. Luitjens, 32 Ill. 23; Parry v. Owen, 3 Atk. 740; Kemp v. Prior, 7 Ves. 237.

II. TO THE PERSON.

If it appears on the face of the bill that the complainant cannot maintain the suit on account of some personal disability that objection can be taken by demurrer.

LECTURE VI.

III. TO THE MATTER OF THE BILL.

Demurrers arising from objections to the matter of the bill are either to the substance of the bill or to the form in which it is stated.

Demurrers ~~of~~ to the substances are :

1. That the plaintiff has no interest in the subject.

2. That the defendant is not answerable to the plaintiff.

3. That the defendant has no interest.

4. That the plaintiff is not entitled to the relief he has prayed.

5. That the value of the subject-matter is insufficient to give the court jurisdiction.

6. That the bill does not embrace the whole of the subject-matter.

7. That there is a want of proper parties.

8. That the bill is multifarious.

9. That the plaintiff's remedy is barred by lapse of time.

10. The Statute of Frauds.

11. That there is another suit pending for the same matter between the same parties.

1. If there are several plaintiffs some of them having an interest and others none in the subject-matter, a general demurrer to the whole bill is a good defence.

King of Spain v. Machado, 4 Russ. 224; Clarkson v. DePeyster, 3 Paige 336-339; Dias v. Bouchaud, 10 Paige 445; Haskell v. Hilton, 30 Me. 419; Atwell v. Ferrett, 2 Blatch C. C. 39.

2 and 3. If the plaintiff has an interest the bill must show the defendant answerable to him.

Ld. Uxbridge v. Stoveland, 1 Ves. Sen. 55; Crossing v. Honor, 1 Vern. 180; White v. Smale, 22 Beav. 72.

4. When the plaintiff prays merely for some special relief to which he is not entitled, or to any relief of the same nature.

Rollins v. Forbes, 10 Cal. 299; Bleeker v. Bingham, 3 Paige 246; Dike v. Grant, 4 R. I. 285; Sayles v. Tibbitts, 5 R. I. 79.

5. If it does not appear on the face of the bill that the matter in controversy is sufficient to give the court jurisdiction, the defendant may move to strike the bill off from the file or demur.

Carr v. Inglehart, 3 Ohio St. 458; McElwain v. Willis, 3 Paige 505; S. C. 9 Wend. 548.

6. The court will not permit a bill to be brought for a part of the matter only, but requires that every bill shall be so framed as to afford ground for decision upon the whole matter at one and the same time.

Panfoy v. Panfoy, 1 Vern. 39; Margrov v. Le Hooke, 2 Vern, 207; Jones v. Smith, 2 Ves. 372.

7. When a defendant demurs to the bill for the arrest of parties, the demurrer must point out who are necessary parties, not necessarily by name, but in a manner clearly to indicate who they are.

Att'y-Genl. v. Poole, 4 M. & C. 17; Robinson v. Smith, 3 Paige 222; Story Eq. Pl. § 543.

8. A demurrer for multifariousness goes to the whole bill and it is not necessary to specify the particular parts of the bill which are multifarious.

Dimmock v. Bixby, 20 Pick. 368; Gibbs v. Claggett, 2 Gill & J. 14; Boyd v. Hoyt, 5 Paige 65.

9. The Statute of Limitations of 21 Jac. 1, c. 16, did not in terms include equitable actions, but courts of equity have been disposed to treat a claim as stale that was barred at law, and in short to be governed by the statute.

Miller v. McIntyre, 6 Peters 61; Denny v. Gilman, 26 Me. 149, 154; Robinson v. Hook, 4 Mason 139, 150; Brown v. Buena Vista, 95 U. S. 157.

10. If it closely appears on the face of the bill that the contract upon which the complainant rests his claims is within the statute of frauds, the objection can be taken advantage of by demurrer.

Field v. Hutchinson, 1 Beav. 599, 600; Crenston v. Smith, 6 R. I. 231; Dudley v. Bachelder, 58 Me. 403, 406.

11. If it appears, also, that there is another suit pending in another court, in which the complainant could obtain the same relief, the defendant may demur for that reason.

Low v. Rigby, 4 Bro. C. C. 60, 63; Peareth v. Peareth, 9 Jur. N. S. 1149.

The grounds of demurrer to a bill by reason of deficiency in matters of form are:

1. Omission to state complainant's residence.

2. Neglect to state positively, allegations within the complainant's knowledge.

3. Lack of certainty in the bill.

4. Failure of the complainant to offer to do equity.

5. Want of counsel's signature to the bill.

6. Neglect to verify in those cases where the statute or rules require the bill to be sworn to.

The above grounds of demurrer are simply an enumeration of the essentials of a bill in equity which we have already pointed out.

The defendant may not only demur to the relief, but he may demur to the discovery sought when the complainant is entitled by his bill to relief. The several grounds of demurrer to discovery are:

1. That the discovery may subject the defendant to some penalty or forfeiture. The defendant will not be required to either criminate himself or place himself in a position in which he may be prosecuted.

Harrison v. Southcote, 1 Atk. 539; Duke v. Harper, 66 Mo. 51; Allyn v. Hanna, 47 Iowa 264; McPherson v. Cox, 96 U. S. 404; Livingston v. Tompkins, 3 Johns. Ch. 452; U. S. v. Twenty-eight Packages, Gilpin C. C. 306.

2. Because in equity and good conscience the defendant's right is equal to the complainant's. If for example the defendant has in conscience as good a title, but not as perfect a legal title as the complainant, he will not be compelled to make a discovery which will endanger his own title.

Howell v. Ashman, 1 Stockt. (N. J.) 82; Glegg v. Legh, 4 Mad. 104; Story Eq. P. §§ 603, 604; Boone v. Chiles, 10 Peters 177; McNeil v. Magee, 5 Mason 269.

3. Because the discovery sought is immaterial to the relief prayed. The complainant is not entitled in

equity any more than at law to introduce immaterial evidence. Therefore, if he calls upon the defendant to answer interrogatories in reference to some matter which is immaterial, the defendant may demur to that much of the discovery for immateriality.

Lord Montague v. Dudman, 3 Ves. Sen. 396, 398; Baker v. Pritchard, 2 Atk. 388; Hincks v. Melthrope, 1 Vern. 204.

4. Because the discovery would be a breach of professional confidence. All confidential communications between attorney and client, husband and wife, physician and patient, priest and penitent, may not be disclosed in any proceeding, either at law or in equity. And if the plaintiff seeks to have the defendant make any such disclosure, he may demur to that part of the discovery, if it appears on the face of the bill that the information is in fact confidential.

State v. White, 19 Kan. 445; Insurance Co. v. Schaffer, 94 U. S. 457; Bigler v. Reyher, 43 Ind. 112; Barnham v. Roberts, 70 Ill. 19.

5. That the discovery relates only to the defendant's case. The complainant is not entitled to obtain from the defendant a disclosure of facts material only to the defence. For example, where the plaintiff and defendant claim through adverse sources of title, the one is not entitled to the other's evidences of title.

Ingilby v. Shafto, 33 Beav. 31; Joy v. Kekewick, 2 Ves Jr. 679; Baden v. Dore, 2 Ves. Sen. 445; Moore v. Caron, L. R. 7 Ch. App. 94, note.

6. That the discovery might be injurious to the public interest. This ground of objection is confined

to information which the defendant has obtained while occupying a public or semi-public position.

Smith v. East India Co., 1 Phil. 50, 55, 6 Jur. 1; Bellows v. Stone, 18 N. H. 465, 485; 1 Greenl. Ev. §§ 250, 251.

Any irregularities in the frame of the bill may be taken advantage of by demurrer, which will be deemed to have been waived if the defendant consents to answer.

Reedy v. Scott, 23 Wall. 352, 365; Hubbard v. Turner, 2 McLean, 519, 539; Campbell v. Foster, 2 Tenn. Ch. 402.

A demurrer cannot be good in part and bad in part, but the defendant may put in separate and distinct demurrers to separate and distinct parts of the bill for separate and distinct causes, and in that case one demurrer may be sustained and another overruled.

Mayor of London v. Levy, 8 Ves. 398, 403; Baker v. Mellish, 11 Ves. 68, 70; North v. Stafford, 3 P. Wms. 149; Roberleau v. Rous, 1 Atk. 543; Barstow v. Smith, Walk. Ch. 394; Railroad v. Schuyler, 17 N. Y. 592.

FORM OF DEMURRER.

The demurrer must be entitled in the cause. Indeed, all the papers filed in a cause, or served after the bill, are to be entitled. Following the title is the heading, indicating whether it is a joint or several demurrer, whether it is to the whole or a part of the bill, and if to a part, whether it is accompanied by a plea, or answer, or both. Then comes the protestation of the defendant as to the truth of the matters contained in the bill. The object of this protestation is

to avoid a tacit admission, either in this or some other, suit of the truth of the averments in the bill.

Story Eq. Pl. §§ 452, 457.

The demurrer then proceeds, if it is to a part and not to the whole bill, to point out distinctly those parts of the bill to which it applies. The rule as to this, given by Lord Redesdale, is: "That where a defendant demurs to part, and answers to part of a bill, the court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer; but it ought to be expressed in clear and precise terms what it is that the party refuses to answer, and I cannot agree that it is the proper way of demurring to say that the defendant answers to such a particular fact and demurs to all the rest of a bill; the defendant ought to demur to a particular part of the bill, specifying it precisely."

Deomsher v. Newenham, 2 Sch. Lef. 199, 205; Atwell v. Ferrett, 2 Blatch. C. C. 39; Story Eq. Pl. §§ 457, 458.

Since a demurrer cannot be good in part and bad in part, and the defendant is permitted to put in separate demurrers to separate parts of the bill, this should be done when the pleader is in doubt whether a given ground of demurrer covers more than one part of the bill. But where there are two or more separate demurrers to different parts of the bill, each must point out distinctly what part of the bill each is intended to cover.

Mynd v. Francis, 1 Anst. 5; Burch v. Coney, 14 Jur. 1009.

A demurrer is said to be general when it is to the

jurisdiction, or the substance of the bill, and special when it is to a defect in the form; but whether general or special it must assign some cause of demurrer, and it will not be good if the defendant says generally that he demurs to the bill.

Duffield v. Graves, Casey 87; Offely v. Morgan, Casey 107; Peache v. Twyecrosse, Casey 113; Nash v. Smith, 6 Conn. 421; Howland v. Kenosha, 19 Wis. 264; Wellborn v. Tiller, 10 Ala. 305.

A defendant may demur generally to the whole bill, and assign as cause want of equity, without being more specific:

1. When the facts stated are insufficient to entitle the plaintiff to relief.

2. When he has omitted to verify the bill, when that is necessary.

3. When he has neglected to offer to do equity in cases where such an offer ought to be made.

4. When the allegations of fact within the personal knowledge of the complainant are not made with sufficient positiveness.

The reason for the rule in all these cases is that the plaintiff, by his bill, does not bring his case within the description of cases over which the court exercises jurisdiction.

Caren v. Johnson, 2 Sch. Lef. 280; 2 Danl. Ch. Pr. 1 ed. 73.

But in all cases of general demurrer, the pleader may point out the specific objections, and in some cases he is required to do so. When there is a want

of parties, he must point out who the proper parties are, and for multifariousness, that specific objection.

Royner v. Julien, 2 Dick. 677.

Objections for want of jurisdiction and want of equity should be taken by separate demurrers.

Barber v. Barber, 5 Jur. N. S., Part I., 1197.

LECTURE VII.

DEMURRER CONTINUED.

In assigning cause for demurrer care must be taken that no new fact is imported into the bill. A bill which alleges a fact not contained in the bill is termed a speaking demurrer and for that reason will be overruled.

Edsall v. Buchanan, 4 Bro. C. C. 254; S. C. 2 Ves. Jr. 83; Brooks v. Gibbons, 4 Paige 375.

If the fact imported is immaterial and is not relied upon to support the demurrer it will be treated as surplusage.

Jones v. Charlemont, 12 Jur. 532; Knypus v. Reformed Dutch Church, 6 Paige 570; Davis v. Williams, 1 Sim. 5, 8.

Not only may more than one demurrer be filed, but more than one cause for demurrer may be assigned in the same demurrer.

Brinkerhoff v. Brown, 6 Johns. Ch. 139, 149; Robinson v. Smith, 3 Paige 222–231.

And the pleader at the hearing of a demurrer may also assign one or more causes of demurrer in addition to those already assigned. This is called demurring *ore tenus*. Causes of demurrer assigned *ore tenus* must, however, be co-extensive with the demurrer filed. A cause of demurrer which goes to a part of the bill cannot be assigned *ore tenus* upon the argument of demurrer to the whole bill.

Crouch v. Hicken, 1 Keen 385; Pitts v. Short, 17 Ves. 213, 216;

Rump v, Greenhill, 20 Beav. 512; Thompson v. University of London, 10 Jur. N. S. 669, 671.

While a defendant may demur as to a part of the bill, plead as to another part and answer as to another, these defences cannot be united as to any one part or the whole bill for the reason that they are defences which are inconsistent. The demurrer demands the judgment of the court as to whether the defendant shall be compelled to answer, if he then answers, it must be presumed that he has purposely waived the objection made. Formerly this rule was enforced with great strictness and it was held that the answer overruled the demurrer even if the part of the bill covered by the answer was immaterial, and that it had a like effect if it answered some part of the bill which might have been covered by the demurrer. And the effect of the plea is the same as an answer, it being regarded as a special answer.

Tidd v. Clare, 2 Dick. 712; Hester v. Weston, 1 Vern. 463; Clark v. Phelps, 6 Johns. Ch. 214; Pieri v. Shiedsborro, 42 Miss. 493; Chase's Case, 1 Bland 217.

The above rule has been modified by the rules of practice in the chancery court of this state, and of the United States.

Mich. Rule 41, 42; U. S. Rules 36, 37.

The demurrer must be signed by counsel, but, since it relies upon matters appearing upon the face of the bill it need not be signed by defendant or sworn to. It must be filed and a copy served upon the solicitor for the complainant within the time prescribed by the rules.

Mich. Rule 11; U. S. Rule 18.

By the 31st United States rule a demurrer cannot be filed unless it is accompanied by certificate of counsel, that in his opinion it is well founded in law, and supported by the affidavit of defendant that it is not interposed for delay merely.

Under the practice of this State (Rule 25) the complainant may within twenty days after the demurrer is filed amend his bill. If the bill is not amended either party may set it down for argument. In the United States courts complainant must set down the demurrer for argument, and if he neglects to do so, he will be presumed to admit its sufficiency, and the bill of complaint will be dismissed.

U. S. Rules, 33, 38.

Upon the arguments of the demurrer the facts in the bill, or that part of it covered by the demurrer, which are well pleaded, as we have said, are assumed to be true. If the demurrer is sustained the court in effect says that the bill is insufficient in whole or in part, and the plaintiff's cause would, to that extent be finally disposed of, if he was not permitted to amend his bill. This permission is always granted upon request if the defect upon which the demurrer was grounded is one that the plaintiff can cure by an amendment.

Lord Comingsby v. Jekyll, 2 P. Wms. 300; Bank of Michigan v. Niles, Walk. Ch. 398.

The effect of overruling a demurrer is to require the defendant to answer. The admission of the truths of the allegations of the bill made by the demurrer

are admissions for the purpose of the argument solely, and consequently such admission does not entitle the complainant to a decree. He is no nearer a decree than he was before, except he has obtained the judgment of the court that his bill in form and substance is good and sufficient. The defendant is not required to ask the leave of the court to answer. He is required to answer. He by his demurrer asked the judgment of the court if he should be required to answer, and he has obtained that judgment, and must answer.

Sometimes when the court is in doubt it will overrule the demurrer and reserve the question of the sufficiency of the bill to the hearing.

Brownsword v. Edwards, 2 Ves. Sr. 243, 247; Thomas v. Tyler, 3 Y. & Coll. 255; 1 Danl. Ch. Pr. (5th ed.) 267, 268, 465, 466; Trafford v. Wilkinson, 3 Tenn. Ch. 449; Forbes v. Turkeman, 115 Mass. 115.

It is discretionary with the court where a demurrer is meritorious, but is overruled on account of some technical defect, to permit the defendant to demur a second time.

Devonsher v. Newenham, 2 Sch. & Lef. 199; Glegg v. Legh, 4 Mad. 207; Thorpe v. Macauley, 5 Mad. 218; Baker v. Mellich, 11 Ves. 68.

And sometimes when the bill has been so artfully drawn that, admitting its several allegations, the demurrer must be overruled, the court will permit the defendant to make the defence he sought to make by demurrer, by plea, putting in issue some fact fatal to the plaintiff's cause. But since but one dilatory plea is permitted without leave of the court, if the defend-

ant desires to plead to the same part of the bill to which he has demurred, he must, before filing his plea, obtain the leave of the court.

Rowley v. Eccles, 1 S & S. 512; Hudson v. Hudson, 1 S. & S. 512, note; Mitford's Eq. (Tyler ed.) 310.

PLEAS.

There may be some fact which, while it does not go to the merits of the controversy, is decisive of the rights of the parties to the cause. As we have seen, if this appears upon the face of the bill the defendant can take advantage of it by demurrer. If it does not appear upon the face of the bill it may be taken advantage of by plea.

Pleas are divided into three classes.

1. Pure or affirmative.
2. Negative.
3. Anomalous.

This division is due primarily to the allegations contained in the bill with reference to the fact pleaded.

The complainant may, in his bill, make no reference whatever to a fact which is a complete bar to his action. In that case all that is necessary for the defendant is to plead such fact affirmatively, *i. e.*, to aver by plea the existence of such fact, that would be an affirmative plea. Again, the bill may state affirmatively the existence of some particular fact upon which his whole right of action depends, and that particular allegation may be false. It is necessary for the defendant in such a case to plead the non-existence

of that particular fact alleged, to negative that much of the bill. That would be a negative plea. Or again, the complainant may set forth in his bill the apparent existence of a fact which is a complete bar to his action, and then allege certain other facts and circumstances which show that in truth, it is no bar. In such a case the plea must affirm the existence of the fact admitted by the bill, and then negative all those facts and circumstances alleged in the bill tending to destroy its effect as a bar. That would be an anomalous plea.

It will be noticed at the outset that pleas differ materially from demurrers. A demurrer takes the bill as drawn and assuming that all its allegations are true, points out some defect appearing upon its face. Such defect very seldom goes to the very heart of the plaintiff's cause of action. It is usually some fact showing a disability in the parties, want of jurisdiction in the court, or some inherent defect in the case as stated. Pleas not only include all these special objections when they do not appear on the face of the bill, but they also include a large number of defences which go to the merits of the cause in some one particular, which are decisive of the suit upon the merits. The plea is therefore frequently in its nature a special answer to the case made by the complainant, and it is in its particular character as an answer which a plea possesses that we find the reason for certain rules that have been adopted with reference to them. As we

shall see hereafter, a plea is frequently ordered by the court to stand as an answer.

The plea must be single. It must present a single ground of defence which will be decisive of the controversy, or of so much of the plaintiff's claim for relief or discovery as is covered by the plea, and a plea presenting two or more grounds of defence is bad.

[a] Nobkissen v. Hastings, 2 Ves. 83; Whittred v. Brockhurst, 1 Bro. C. C. 404; Coath v. Jackson, 6 Ves. 11; Albany City Bk v. Dorr, Walk. Ch. 317, 322; Goodrich v. Pendleton, 3 Johns. Ch. 322; [b] Rhode Island v. Massachusetts, 14 Peters, 210; Loud v. Sargent, 1 Edw. Ch. 163.

This rule does not preclude the pleader from setting forth in the plea all the facts tending to establish his single defence. Multifariousness in a plea is not produced by the averment of several separate and distinct facts, all of which tend to establish a single proposition, but separate propositions, either of which is a separate defence.

[c] Fox v. Yeates, 24 Beav. 271; Harrison v. Southcote, 1 Atk. 528.

The pleader may, however, sometimes obtain leave of the court to file a double plea. This is sometimes necessary, especially when the bill has been drawn with a double aspect. Thus, where a bill was drawn seeking to charge real estate with certain debts of the ancestor, and alleged that they were: 1. Made a charge by the will; and, 2, if not made a charge by the will, they were a charge from the fact that the ancestor was a trader. The court permitted a plea to be filed denying the allegation that the will made the

debts a charge upon the real estate, and also as to the ancestor being a trader, which would make them a charge under the statute.

Gibson v. Whitehead, 4 Mad. 129, 241; Hardman v. Ellames, 5 Sim. 640; Kay v. Marshall, 1 Keen 190, 192.

The reason for the rule that a plea must be single is that the advantage which a plea has over an answer in shortening the proceedings, would be destroyed if the pleader were permitted to introduce into his plea more than one defence. When he is permitted, by leave of the court, to plead more than one defence to the same bill, or the same part of a bill, he must not unite the separate defences in the same plea, but file separate pleas.

Gibson v. Whitehead, 4 Mad. 129, 241; Scott v. Broadwood, 2 Coll. C. C. 447; Hardman v. Ellames, 5 Sim. 640; Benson v. Jones, 1 Tenn. Ch. 498; Brinkerhoff v. Brown, 7 Johns. Ch. 216; Saltiers v. Tobias, 7 Johns. Ch. 214.

A plea cannot be made to perform the office of a demurrer. If it sets forth no new matter, but relies upon the allegations contained in the bill, it will be overruled.

Black v. Black, 15 Ga. 445; Andrews v. Lockwood, 11 Jur. 956.

The plea must clearly and distinctly aver all the facts necessary to render it a complete defence to the case made by the bill so far as the plea extends. When such facts are within the knowledge of the defendant, they must be averred positively, but when they are not within his personal knowledge, they may be averred upon information and belief. All intend-

ments against the pleader must be excluded by proper averments of facts, and not conclusions of law.

Parker v. Parker, Walk. Ch. 457, 458; Drew v. Drew, 2 V. & B. 159; Madison v. Watertown, 5 Wis. 173.

For example:

1. When the defendant pleads want of proper parties, that fact not appearing on the face of the bill, the objection must be made in a clear and explicit manner, and the plea, like the demurrer, must show who are the proper parties.

Robinson v. Smith, 3 Paige 222; Mitchell v. Lennox, 2 Paige 280.

2. The plea of another suit pending for the same cause, and for like relief, is insufficient. The plea should set forth the general character and objects of such suit, and the relief prayed.

Bank of Michigan v. Williams, Har. Ch. 219; Bell v. Read, 3 Atk. 590; Lyon v. Brockway, 14 Johns. Rep. 501.

3. A plea of a stated account must aver that the accounts were just and fair, and those averments must be supported by an answer to the same effect.

Schwartz v. Wendell, Har. Ch. 395.

When the defence is based upon some fact which has arisen after the filing of the bill, and before other defence is put in, it can be taken advantage of by plea, but if the defence has been made, it must be taken advantage of by supplemental or cross bill.

Payne v. Beach, 2 Tenn. Ch. 708; Miller v. Fenton, 11 Paige 18; Lane v. Smith, 14 Beav. 49; Wallace v. Dunning, Walk. Ch. 416.

It is within the discretion of the court to permit a

plea to be amended when the application for the purpose shows mistake, inadvertence, etc.

Freeman v. Michigan Bank, Har. Ch. 311; Greene v. Harris, 11 R. I. 5.

We have seen that a demurrer admits, for purposes of the argument, that all the facts well pleaded in the bill are true, but introduces no new fact. The purpose of the plea on the other hand, is to call the attention of the court to a fact not appearing on the face of the bill, which is a bar to the plaintiff's action; but while the pleader may deny any allegation of fact made in the bill, yet the plea admits all the allegations of the bill, which it does not by averment deny. It follows, therefore, that when there are any allegations of fact in the bill inconsistent with the plea, such allegations must be negatived by specific averments in the plea, otherwise the pleader would by his plea aver a fact and by the same plea constructively, but none the less positively, admit the truth of an allegation in the bill wholly at variance with his averment. It is therefore necessary for the pleader in drawing his plea, to examine the bill and to negative by positive averment every allegation contained therein which is inconsistent with the truth of the plea.

Formerly, one of the principal objects gained by a plea, was to prevent a discovery on the part of the defendant. It is evident that if the defence made by the plea goes to the whole bill, that the complainant has no right to discovery, since he has no right of action. Therefore, if there are no allegations in the bill which

tend to negative the plea, or in other words, to disprove the existence of the particular fact which the plea avers and sets up as a special defence, the pleader is not required to make any answer to the bill whatever.

If, however, there are allegations of fact in the bill negativing the truth of the plea, the plaintiff is entitled to discovery. They are put in issue by the averments of the plea, and the plaintiff is entitled, as to them, to have the defendant's testimony. Therefor, the pleader must not only in his plea negative, by proper averments, all the allegations in the bill inconsistent with the truth of the plea, but he must also answer fully and explicitly, as to those allegations. Such an answer is said to be an answer in support of the plea.

These rules are applicable to all pleas whether pure, negative or anomalous.

LECTURE VIII..

PURE PLEAS.

A pure plea is one which avers some fact not appearing upon the face of the bill, as a bar to the plaintiff's claim.

2 Daniels Ch. Pr. (1 Ed.) 97.

The theory upon which the pleader proceeds with the affirmative plea is, assuming that the allegations of the bill are true, that there is a fact or circumstance not mentioned in the bill, which is a good and sufficient reason why the complainant should not be permitted to proceed with his suit. The court in order to save expense to the parties decides upon the validity of the objection, taking the bill so far as it is not contradicted by the plea as true.

NEGATIVE PLEAS.

But there are cases in which some allegation made in the bill and which is absolutely essential to the complainant's right to be heard is denied by the defendant. For instance A may file a bill against B, claiming to do so as the heir of C, and A may deny that he is in fact the heir of C. This is called a negative plea, and always by its averments denies the truth of some allegation in the bill which is vital to the complainant's case. It was at first held that such a plea could not be filed. Lord Thurlow so decided in

1787 in a cause where the complainant claimed to be the heir of a certain person and the defendant sought by plea to deny that allegation in the bill.

Newman v. Wallace, 2 Bro. C. C. 143, 146; Gunn v. Prior, 2 Dick. 657.

The Chancellor himself, however, afterwards admitted that he had arrived at a wrong conclusion, and since then negative pleas have been allowed.

Hall v. Noyes, 3 Bro. C. C. 483, 489; Jones v. Davis, 16 Ves. 262.

ANOMALOUS PLEAS.

An anomalous plea is resorted to in those cases where the bill admits the existence of a certain fact, and then by distinct allegations seeks to avoid the legal effect of such fact, by setting up fraud or mistake. The anomalous plea avers the existence of the fact admitted by the bill and then denies the allegations of mistake or fraud contained in the bill. For example, suppose A and B had been copartners and upon the dissolution of the copartnership had submitted the differences between them, growing out of the partnership business, to arbitrators who had duly made an award. A afterwards files a bill against B praying for an accounting of the partnership business. Now, if he said nothing about the arbitration and award in his bill, B could by an affirmative plea set that up. But in such a case the bill probably would not be silent on the subject of the arbitration, and would allege that there had been an arbitration and a pretended award, but that said award was null and void because, for

instance, there had been collusion between the arbitrators and B, and it would then set forth several alleged facts and circumstances which if true would tend to establish the collusion and fraud. In such a case B must resort to an anomalous plea, averring the arbitration and award, denying collusion and fraud and specifically denying each allegation of fact in the bill tending to establish such collusion and fraud, and this plea must be supported by an answer making a full disclosure in regard to all the allegations in the bill tending to show collusion and fraud. The complainant is entitled to have the allegations of fraud denied, because his right of actions, as appears from his bill, depends upon his showing collusion and fraud. Otherwise, when he filed his replication to the plea, he would put in issue, not the existence of the facts showing fraud, upon which he depends solely for relief, but upon the facts appearing in the plea, that is the existence of the award about which there is no dispute. But if the plea traverses the allegations of fraud, then a replication to the plea puts those allegations in issue. The defendant must traverse all the allegations tending to negative the plea, in the plea itself, but, as we have said, the plea must be accompanied by an answer in its support in which such allegations shall be fully and explicitly answered. The plea traverses the allegations in the bill tending to negative the plea, in order that the truth of those allegations may be put in issue. The plea must be supported by an answer as to those same allegations for a

very different but equally satisfactory reason. The complainant is entitled to a full discovery from the defendant of all the facts within his knowledge or belief which tend to establish the complainant's right to relief or to discovery even. Therefore, when relief is based upon the ground of fraud and the defendant is asked to discover certain facts within his knowledge tending to establish such fraud, he must answer and make the discovery asked, to the end that the complainant may have the advantage of the answer as evidence upon the hearing of the plea to establish his case by disproving the case made by the plea.

We have already called your attention to the rule that if an answer covers any material part of the bill demurred or pleaded to, the demurrer or plea will be overruled. In the case we have supposed where the bill is filed to set aside an award which, if good, would be a complete bar to the complainant's cause of action, and the defendant pleads the award, it would seem at first glance that if the defendant answered the averments in the bill showing that such award was void, that the answer covered the same part of the bill as the plea. It is not the case, however. The bill in such case is filed for the purpose of obtaining discovery *and* relief. The plea is to relief and not to discovery. The defendant relies upon the award as a complete bar to all relief. That it is a complete bar if valid the bill in substance admits, for the complainant asks to be relieved from its effects by having it set aside. The defendant, therefore, by pleading the

award and denying the allegations of fraud puts in issue the validity of the award. But the fact that there is a valid award and that therefore the complainant is not entitled to relief, is not a denial that the complainant is entitled to a full discovery from the defendant of all the facts within his knowledge or belief, tending to disprove the plea. The answer therefore which supports the plea does not cover any portion of the bill covered by the plea.

Sanders v. King, 6 Mad. 61; Thring v. Edgar, 2 S. & S. 274–277; Thring v. Edgar, 2 S. & S. 274–281; Hardman v. Ellames, 5 Sim. 640; Denys v. Lowck, 3 Myl. and C. 205.

The answer is said to support the plea, for the reason that the court will intend all matters alleged in the bill, to which the complainant is entitled to require an answer, to be against the pleader unless they are fully and clearly denied, and therefore, if in the case we have supposed, the defendant should plead the award and not fully and clearly answer as to the allegations of fraud, the court would assume that such allegations are susceptible of proof, and on that ground would overrule the plea. If there is a proper answer in support of the plea, such answer is no part of the defence, but only what the complainant is entitled to have to enable him to avoid the defence made by the plea and establish the case made by the bill, and the complainant is entitled to read the answer on the hearing of the plea.

Hildyard v. Cressy, 3 Atk. 303; Hony v. Hony, 1 S. S. 568, 580; Gordon v. Shaw, 14 Sim. 393; Roch v. Morgell, 2 Sch. and Lef. 721.

Whenever notice or fraud is alleged in the bill the plea must by positive averments negative the notice or fraud averred, and such notice or fraud must also be negatived by the answer which supports the plea.

Meadows v. The Duchess of Kingston, Amb. 756; Devie v. Chester, 1 Cox 224; Hoare v. Parker, 1 Bro. C. C. 578; Bicknell v. Gough, 3 Atk. 558.

DIFFERENT GROUNDS OF PLEA.

Pleas to relief are:

1. To the jurisdiction.
2. To the person of the complainant or defendant.
3. In bar of the suit.

1.

Pleas to the jurisdiction, do not deny the right of of the complainant in the subject of the suit or assert that there is any disability on the part of either the complainant or defendant, but asserts that a court of chancery is not the proper court to take cognizance of the cause.

Story Eq. Pl. §706.

2.

Pleas to the person, do not dispute the jurisdiction of the court, or the interest of the complainant, but assert that the complainant is incapacitated to sue, or that the defendant is not the person who ought to be sued.

Story Eq. Pl. §706.

3.

A plea in bar alleges some matter which displaces the equity of the bill.

FORM OF PLEA.

A plea is entitled in the cause, and like a demurrer is introduced by a protestation against the confession of the truth of any matter contained in the bill.

The extent of the plea, that is whether it is intended to cover the whole bill, and if not the whole, what portion, should be distinctly shown.

6 Leacroft v. Durprey, 4 Paige 124; Summers v. Murray, 2 Edw. Ch. 205.

Then follows a clear and positive statement of the matter relied upon as an objection to the suit accompanied, when necessary, by such averments as are necessary to its support. When the objection is to the frame of the suit, it must point out the particular defect and how it may be remedied.

Merrewether v. Mellish, 13 Ves. 435, 438.

The general requisites of a plea have already been given. They are:

1. It must be founded on matter not apparent on the face of the bill.

2. It must reduce the case to a simple point.

3. It must be supported by proper averments.

After the plea has been drawn, it is to be signed by counsel and sworn to by the defendant, that it is true in point of fact.

By the rules of the United States courts it is provided that no plea shall be filed unless it is accompanied by a certificate of counsel that it is, in his opinion, well founded in point of law, and by the affidavit of the defendant that it is not interposed

merely for the purpose of causing delay in the progress of the suit.

U. S. Rule 31.

When the plea is filed the complainant must either set the cause down for hearing on the plea, or file a replication to the plea. If the plea is set down for hearing the truth of all the averments in the plea well pleaded is admitted, and the only question for the court to pass upon is the sufficiency of the plea.

If a replication is filed to the plea, the complainant thereby admits the sufficiency of the plea in law, and the only question in issue is the truth of the matter pleaded.

It becomes very important therefore, for the complainant to determine in the first instance, whether the plea is good in form, because, if it should be bad in form, but the matters pleaded true in fact, and he should take issue upon the plea, by filing a replication the plea would be sustained, notwithstanding it was bad in form and the matters pleaded were no bar to complainant's bill, because, by filing the replication, the complainant admits that the matter as pleaded is a bar if true, and he denies merely the truth of the matters pleaded.

Bogardus v. Trinity Church, 4 Paige 178; Harris v. Ingledew, 3 P. Wms 94, 95.

If the plea is set down for hearing and the court holds that it is good in form, the complainant may then take issue upon it by filing a replication. After a replication is filed proofs are taken as to the truth of

the plea and then a hearing is had upon that issue. The sufficiency of the plea is no longer in issue, the court is simply called upon to determine whether or not the defendant has by his proofs maintained the truth of his plea.

McEwen v. Broadhead, 3 Stockt. (N. J.) 129-131.

If the plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers. If the defect in the bill can be cured by an amendment, it is usual for the court to permit the complainant to amend his bill. If the defect cannot be cured, then, of course, the controversy is at an end as to that much of the matter covered by the plea.

Story Eq. Pl. § 697.

If the court should consider that although the plea may be good and the facts pleaded true from the proofs then before the court but that there may be matter disclosed in evidence which would avoid it, in order that the complainant may not be deprived of his rights, it will direct that the benefit of the plea shall be reserved to the defendant at the hearing.

Lord Redesdale, 245.

LECTURE IX.

OVERRULING PLEAS.

When a plea has been set down for argument and on the argument the court is satisfied that the plea cannot under any circumstances be made use of as a defence, it will be overruled. And if it is a frivolous plea the complainant may, if he desires, have an order to take the bill as confessed.

Bowman v. Marshall, 9 Paige 78.

If the plea is not frivolous, the effect of overruling the plea is to impose upon the defendant the necessity of making a new defence. This he may do, by a new plea or by an answer.

Chadwick v. Broadwood, 3 Beav. 308, 316.

This rule giving the defendant a right to plead *de novo* does not permit him to rest his second plea upon the same ground as the first. And when a plea has been overruled upon the merits, the same matter cannot be set up in the answer as a defence without permission of the court.

Townshend v. Townshend, 2 Paige 413; Piatt v. Oliver, 1 McLean 295; Ringgold v. Stone, 20 Ark. 526.

And if the defendant desires to plead *de novo* he should obtain leave of the court; for a defendant may not interpose more than one plea without special leave of the court.

McEwan v. Sanderson, L. R. 16 Eq. 316.

The effect of allowing or overruling a plea upon the argument, and the effect of finding a plea true or false upon the hearing, are widely different in their effects upon the rights of both the complainant and defendant.

If the plea is allowed upon the argument, the effect is to hold that the plea is good in law, assuming that it is true in fact, and the complainant is still at liberty to take issue upon the facts pleaded.

If the plea is overruled upon the argument, the defendant may put in a new defence, as we have just seen.

On the other hand, the decision of the court upon the hearing of the plea is decisive and final as to so much of the bill as is covered by the plea. If the plea is found true, the bill is dismissed, and if found false, the complainant is entitled to a decree; for the reason that when issue is taken upon the plea, after argument and allowance, its validity as a complete bar to the complainant's suit has been found by the court, and nothing further remains, except to ascertain whether or not the facts upon which its validity depends are true. If the truth is established, then the plea is found to be both true in fact as well as good in law.

But if the complainant takes issue upon the plea by filing a replication before argument, and, consequently, before the court has passed upon its sufficiency, by so doing he admits that the plea, if true in fact, is a bar to his suit, and this admission is conclusive so far as the sufficiency of the plea is concerned, it being pre

cisely the same in effect as the allowance of the plea by the court. After the replication is filed, the only question in issue, as to so much of the bill as is covered by the plea, is the truth of the plea. The complainant says by his pleadings, in effect, if what the defendant has alleged in his plea is true, I am not entitled to my relief. While the defendant has, by his pleadings, admitted that all the allegations made in the complainant's bill are true, except so far as they are denied by the plea, and that his sole and only defence to the complainant's suit are the matters which he has pleaded, and if those matters are not established, that he has no further or other defence, and that the complainant is entitled to a decree.

Story Eq. Pl. § 697; U. S. Rule 33; Hughes v. Blake, 6 Wheat. 453.

It follows that where the complainant files a replication to a plea, which is true in fact, but insufficient in law, that the bill must be dismissed upon the hearing, because upon the hearing the court will not examine into the sufficiency of the plea, because under the pleadings it is admitted to be good in law.

Harris v. Ingledew, 3 P. Wms. 91, 94, 95; Bogardus v. Trinity Church, 4 Paige 178.

On the other hand, if the defendant has a complete defence to the complainant's suit, but rests his defence upon a plea of some matter which he cannot establish, he loses all the benefit of his defence upon the merits, and cannot prevent the complainant from obtaining a decree.

Hughes v. Blake, 6 Wheat. 453.

If the complainant, on the face of the bill, is entitled to a final decree, he may have such decree upon the plea being found false upon the hearing. If, however, he is not entitled to final and complete relief upon the case made, he is entitled to an order that the bill be taken as confessed, and for a reference to a master to take proofs. He may also, if necessary, examine the defendant upon interrogatories as to all matters which, by an answer, the defendant should have discovered.

Dows v. McMichael, 2 Paige 345; Brownswood v. Edwards, 2 Ves. Sen. 243, 247.

THE ANSWER.

From what has been said, you have learned that little or no advantage, except delay, is gained by a demurrer or plea, unless the cause for demurrer or the special defence made by the plea cannot be overcome or met by an amendment to the bill. Whenever the complainant can cure the defect pointed out by these dilatory defences through an amendment, the attack has had no other effect save that of strengthening and fortifying the complainant's position. When, however, the defect cannot be cured by amendment, these defences should be resorted to, as they shorten the litigation and save expense. And in case of want of parties, or a misjoinder of parties, or multifariousness, the benefit of a defence on that ground is frequently lost when not taken by demurrer or plea. (Turner v. Hart, 71 Mich. [July 11, 1888].) But since nearly

every defence that can be made by demurrer or plea can be taken advantage of equally well by an answer, they are usually set up in the answer. This practice more largely prevails at present than formerly, because since parties can now be witnesses, avoiding discovery called for by the bill is now of little consequence, while formerly it was of the utmost importance.

When the bill does not waive an answer on oath, the answer properly consists of two parts:

1. A statement of the defence.
2. Answers to the complainant's interrogatories.

It is not necessary that the answer should be divided into two separate and distinct parts, the one being devoted exclusively to setting forth the defendant's defence and the other to answering the complainant's interrogatories. The two may be interlaced, but the pleader in drawing the answer, should keep its twofold character in mind, and it should be so drawn as to set out clearly, distinctly and fully, all the separate grounds of the defence, and it should at the same time, answer fully and explicitly, all matters in regard to which the complainant asks and is entitled to discovery.

Youle v. Richards, Sexton (N. J.) 534; Warren v. Warren, 30 Vt. 530.

It is a general rule that the complainant cannot rely upon any ground for relief except those contained in the bill, and that the defendant cannot rely upon any ground of defence except that set up in his answer, and that all testimony introduced for the purpose of

establishing some matter not claimed in the bill as ground for relief or in the answer as ground of defence, is immaterial and irrevalent and will not be considered by the court.

Moors v. Moors, 17 N. H. 481; Buckley v. Sutton, 38 Mich. 1; Harrington v. Brown, 56 Mich. 301.

The defendant may set up in his answer any number of defences that are consistent with each other, or rather that are not inconsistent. But the defendant may not set up two or more grounds of defence which are inconsistent with each other, and the error will not be cured in such a case by stating the inconsistent grounds of defence in the alternative.

Hopper v. Hopper, 11 Paige, 46; Jesus College v. Gibbs, 1 Y. & C. Ex. 145, 160.

Not the same degree of certainty is required in an answer as in a bill. There must be such a degree of certainty, however, as is sufficient to inform the complainant of the nature of the defendant's case.

Cummings v. Coleman, 7 Rich. Eq. (S. C.) 509.

The same strictness is not requisite in an answer as in a plea, where the statute of limitations is set up as a defence. This defence if relied upon, must however be distinctly made, either by answer or plea, although the defence that the claim is stale may be made without any averment to that effect having been made in the answer.

Maury v. Mason, 8 Porter (Ala.) 211; Sullivan v. Portland, 94 U. S. 806.

When matters of defence are set up in the answer,

which might have been taken advantage of by demurrer or plea, and the defendant, as to those matters, claims the same benefit in his answer as though he had demurred or pleaded, it is only at the hearing of the cause that any such benefit can be insisted upon.

Wray v. Hutchinson, 2 M. & K. 235; Mulloy v. Paul, 2 Tenn. Ch. 155; Hume v. Com'l Bk., 1 Lea, 229; Zabel v. Harshman, 68 Mich. (Jan. 12, 1888.)

LECTURE X.

FORM OF THE ANSWER.

The answer must be entitled in the cause and agree with the bill as to the parties named therein. If a mistake as to the name of a defendant has been made in the bill, such mistake cannot be corrected in the title, but if the defendant has been misnamed in the bill, he may make the correction in the body of his answer; thus for instance: "The answer of Robert Sharp (in the bill by mistake called Roland Sharp)," etc.

Attorney General v. Worcester, 1 Coop. T. Cott. 181.

If there is such a defect in the heading of the answer, that it does not appear distinctly whose answer it is, or in what case it is filed, it will be taken off the file for irregularity.

Pritus v. Thompson, G. Coop. 249; Griffiths v. Wood, 11 Ves. 62; Fry v. Mantell, 4 Beav. 485; Upton v. Sowton, 12 Sim. 40.

If, however, it is evident, what bill is answered, it will not be stricken from the files although certain prescribed words have been omitted.

Bowes v. Farrar, L. R. 14 Eq. 71.

Two or more persons may join in the same answer, and when they appear by the same solicitor, and have the same defence, they ought to join, and the court will not, in case they should succeed in the suit, allow them any more costs in case they file separate answers

than would have been allowed, if they had filed a joint answer.

Story Eq. Pl. § 869; Woods v. Woods, 5 Hare 229, 230.

The answer should be divided into paragraphs numbered consecutively and each paragraph should contain a full and distinct statement of some allegation. Documents not on file in the case cannot be referred to and made a part of the answer, but may when so filed.

Wells v. Stratton, 1 Tenn. Ch. 328; Attorney-General v. Edmunds, 15 W. R. 138; U. S. C. C. Rule 4.

When two defendants answer jointly and one speaks positively for himself, the other may say that he has perused the answer, believes it to be true and that he makes it a part of his answer. This he may not do, however, if they answer separately.

Binney's Case, 2 Bland. 99; Warfield v. Banks, 11 Gill & J. 98; Carr v. Weld, 3 C. E. Green (N. J.) 41.

The answer must be signed by the defendant or defendants putting it in, unless leave has been obtained to file an answer not signed, because originally the answer was always under oath and was testimony in the cause.

Dennison v. Bassford, 7 Paige 370; Cook v. Dews, 2 Tenn. Ch. 496; Kimball v. Ward, Walk. Ch. 439; Supervisors &c. v. Miss. &c. R. R. 21 Ill. 337.

The answer must also be signed by counsel. When such counsel are a firm, the firm signature may be used.

Bishop v. Willis, 5 Beav. 83 n; Hampton v. Coddington, 1 Stew. Eq. 557; Henry v. Gregory, 29 Mich. 68; Eveland v. Stephenson, 45 Mich. 394; Dwight v. Humphreys, 3 McLean 104; U. S. Ch. Rule 24.

The copy of the answer served on the defendant is presumed to be a correct copy of the answer filed, and if the signature of counsel is omitted from the copy served, the complainant may move to take the answer off the files for irregularity.

Littlejohn v. Munn, 3 Paige 280.

The signing of the answer by the defendant may be waived by the complainant, and if an unsigned answer is put in and the complainant files a replication, that step on his part will be held to be such a waiver.

Fulton Bank v. Beach, 2 Paige 307; Collard v. Smith, 2 Beasley, (N. J.) 43, 45.

The court, under special circumstances will permit the defendant to file an answer not signed by him as when he resides at a distance, or has gone abroad before an answer could be prepared or the like.

Dumond v. Magee, 2 Johns. Ch. 240; Harding v. Harding, 12 Ves. 159.

Unless answer under oath is expressly waived in the bill the answer must be sworn to before the proper officer. Who is such proper officer depends upon the provisions of the local statute and the rules of the court.

Sitlington v. Brown, 7 Leigh (Va.) 271.

The answer of a corporation is put in under the corporate seal and not under oath. If it is put in not under seal it will be taken from the files as irregular.

Ransom v Stonington, Sav. Bk. 2 Beasley, (13 N. J. Eq.) 212; Mill Dam Foundry v. Hovey, 21 Pick. 417; Brumly v. Westchester Mnfg Co., 1 Johns. Ch. 365; Beecher v. Anderson, 45 Mich. 543.

But unless the answer of the corporation is sworn to

it cannot be made the basis of a motion to dissolve a temporary injunction; since an injunction will not be dissolved upon the filing of an answer not on oath denying the equities of the bill.

Fulton Bk. v. New York, etc., 1 Paige, 311; Griffin v. State Bk., 17 Ala. 258.

When the complainant desires to obtain from a corporation the answer of some officer of the corporation under oath, such officer must be named and made one of the defendants in the bill.

Buford v. Rucker, 4 J. J. Marsh. 551; Vermilyca v. Fulton Bk., 1 Paige 37; Beecher v. Anderson, 45 Mich. 543.

When the complainant waives an answer on oath, the answer is treated as a mere pleading and is not evidence for the defendant, but the plaintiff may take advantage of any admissions made in it.

Bartlett v. Gale, 4 Paige, 504; Wilson v. Towle, 36 N. H. 129; Durfee v. McClurg, 6 Mich. 223; Union Bk., etc. v. Geary, 5 Pet. 99, 110, 112.

When the bill waives an answer under oath the defendant cannot make his answer evidence by putting it in under oath. Under such circumstances the sworn answer will be considered as one not under oath.

Hyer v. Little, 5 C. E. Green 443; Symes v. Strong, 1 Stew. Eq. 131.

As we have stated, an unsworn answer cannot be made the foundation of a motion to dissolve an injunction; therefore, if an injunction bill waives an answer under oath, the defendant may still put in an answer under oath and so treat it, for the purpose of moving to dissolve the injunction granted on the bill.

Dougrey v. Topping, 4 Paige 94; Mahony v. Lazier, 16 Md. 69; Rainey v. Rainey, 35 Ala. 282.

When the answer is signed, drawn, and if necessary sworn to, it must be filed and a copy served upon the complainant within the time prescribed by the rules.

U. S. Rule 18; Mich. Rule 11.

If an answer on oath has been waived in the bill the complainant cannot except to the bill filed as not having fully answered the allegations contained in the bill. In such a case the answer is a mere pleading, but he may still except to the answer for impertinence or scandal, if it is padded with irrelative matter, or tainted with unnecessary comments affecting the moral character of any one. If an answer on oath has not been waived and it does not contain a full disclosure of all the matters in regard to which the defendant has been interrogated, it may be excepted to for insufficiency. The steps necessary for the complainant to take in excepting to the answer either for insufficiency, impertinence or scandal, are prescribed by the rules.

U. S. Rules 26, 27; Mich. Rules 27, 28; Brooks v. Byam, 1 Story 296; Stafford v. Brown, 4 Paige 88.

The exceptions are entitled in the cause and they must point out positively and distinctly the matters in the answer which are objected to as impertinent or scandalous, or those parts of the bill which have not been fully answered. They pray that the scandalous and impertinent matter may be expunged, or that the defendant may put in a full answer. They are signed by counsel, filed, and a copy served upon the opposing solicitor. The defendant may submit to make a further answer or to have the matter, objected to as impertinent or scandalous, expunged, if he does not,

the answer is referred to the proper officer to examine and report whether the exceptions are well taken.

Brooks v. Byam, 1 Story 296; Stafford v. Brown, 4 Paige 88; Evans v. Owen, 2 M. & K. 382; Craven v. Wright, 2 Peere Wms. 182.

AMENDING ANSWERS.

When an answer has been put in upon oath, the court will not permit it to be amended in matters of substance, except under very exceptional and special circumstances. Where the proposed amendment is to the form of the answer merely, or to correct some mistake of date, or a verbal inaccuracy, the court will not hesitate to grant leave to amend.

Campion v. Kille, 1 McCarter (N. J.) 229, 232; McKim. v. Thompson, 1 Bland 162; Bowen v. Cross, 4 Johns. Ch. 375: Dearth v. Hide and Leather Natl. Bk., 100 Mass. 540; Webster Loom Co. v. Higgins, 13 Blatchf. 349; Gainsborough v. Gifford, 2 P. Wms. 424.

The court will also allow the defendant to amend his answer, where new matter has been discovered since the answer was put in.

Tillinghast v. Champlin, 4 R. I. 128.

Or to correct a mistake, when owing to such mistake, an admission has been made to the prejudice of the defendant.

Hughes v. Bloomer, 9 Paige 269.

The court will not, however, permit amendments of this nature to be made merely on the ground that the defendant, when he made the admissions, was laboring under a mistake of law, and when no mistake of fact has been made.

Rowlins v. Powell, 1 P. Wms. 298; Pearce v. Grove, Amb. 65; Pearce v. Grove, 3 Atk. 522.

LECTURE XI.

SUPPLEMENTAL ANSWERS.

It is the usual practice, at the present time, to file a supplemental answer instead of amending the original answer. Application must be made to the court for leave to file such supplemental answer, and the same rules govern such applications as those for leave to amend.

Raincock v. Young, 16 Sim. 122; Arnand v. Grigg, 2 Stew. Eq. 1; Smith v. Smith, 4 Paige 92.

In making an application to file a supplemental answer, the defendant must show that justice requires that he should be permitted to make the correction in his answer or the additional defence. And the motion for leave to file the supplemental answer must be accompanied by an affidavit setting forth the facts upon which the motion is founded.

Thomas v. Doub, 1 Md. 252; McKim v. Thompson, 1 Bland 150; Wells v. Wood, 10 Ves. 401.

When a defendant has obtained leave to file a supplemental answer, he must confine such answer strictly to the matters set forth in his application and which he has received the leave of the court to embody in such answer. If he goes beyond that, his supplemental answer will be taken off the files.

Strange v. Collins, 2 V. & B. 163, 167.

There is no particular time within which the

defendant must make an application to file a supplemental answer, provided he make it as soon as the error or omission in his answer, or the newly discovered evidence, has come to his knowledge. He must not be guilty of inexcusable laches and furthermore, it must be possible to place the complainant in the same position that he would have been in, had the correction or new matter been stated in the original answer.

Martin v. Atkinson, 5 Ga. 390; Wilson v. Wintermute, 12 C. E. Green (N. J.) 63; Ruggles v. Eddy, 11 Blatch. 524; Fulton v. Gilman, 8 Beav. 154, 158; Furnam v. Edwards, 3 Tenn. Ch. 365; Smallwood v. Lewin, 2 Beasley (N. J.) 123.

TAKING ANSWERS OFF THE FILE.

As we have seen an answer may be taken off the file if any irregularity has occurred in its frame or form. But the plaintiff must apply to have the answer taken off the file before he excepts to it, otherwise he will have waived the irregularity. It is a general rule in pleading that a positive step on the basis of some prior pleading is a waive of any irregularity in such pleading.

Steele v. Plomer, 2 Phil. 780; Fulton Bank v. Beach, 2 Paige 307; S. C., 6 Wend. 36; Seifried v. People's Bank, 1 Baxt. 200.

Not only may an answer be taken off the files for an irregularity in its form, but if on its face it is evidently evasive the complainant may, before he excepts to it for insufficiency move to have it taken off the files.

Glassington v. Thwaites, 2 Russ. 458, 462; Seaton v. Grant, L. R. 2 Ch. App. 459.

The court will also, sometimes, in case the pleadings, affidavits or other documents contain matter which on account of its character is desirable should not remain of record, although not scandalous because pertinent, permit them to be taken off the file upon the consent of all the parties to the suit.

Clifton v. Bental, 9 Beav. 105; Walton v. Broadbent, 3 Hare 334; Seaton v. Grant, L. R. 2 Ch. App. 459.

JOINDER OF SEVERAL DEFENCES.

All or any two of the several modes of defence may be joined. A defendant may demur to part of the bill, plead to another part, answer to a third part and disclaim as to a fourth part. Each separate defence, however, must relate to a separate and distinct part of the bill.

Clark v. Phelps, 6 Johns. Ch. 214; Livingston v. Story, 9 Pet. 632.

A defendant as we have seen cannot plead to that part of the bill to which he has demurred, nor answer any part to which he has demurred or pleaded, nor by answer claim what by disclaimer he has declared he has no right to; because a plea, or answer, will overrule a demurrer, and an answer a plea, the one defence being inconsistent with the other and the court preferring that which rests nearest upon the merits.

Bolton v. Gardner, 3 Paige 273; Spofford v. Manning, 6 Paige 383.

When a demurrer is to a part of the bill, and there is an answer or other defence to the remainder of the bill, it should be entitled: "The demurrer of A. B.

the above named defendant, to a part of the bill of complaint of the above named complainant, and the answer of said A. B. to the remainder of said bill." When there is a plea to a part of the bill accompanied by an answer to the remainder, the plea and answer should be entitled as above, except plea is inserted in place of demurrer.

Tomlinson v. Swinnerton, 1 Keen. 9, 13.

When the answer, however, is in *support* of the plea, the title is " Plea and answer."

These captions are not mere matters of form. If the answer by its commencement is apparently an answer to the whole bill, it will overrule a plea or demurrer to a part of the bill, although it does not answer that part covered by the demurrer or plea.

Leaycraft v. Dempsey, 4 Paige 124; Summers v. Murry, 2 Edw. Ch. 205.

If the answer contains a full and complete disclosure and there is no impertinent or scandalous matter in it to which the complainant desires to except, he must determine whether he will go to a hearing upon the bill and answer. If, assuming that all the material averments of fact contained in the answer are true, the case made by the bill has been admitted, he may notice the cause for hearing. In this case no allegation made in the bill, although put in under oath, will be considered as evidence in the cause, and all the material averments contained in the answer, although not put in under oath, are held to be true. In short, the complainant must rely wholly upon those allega-

tions in the bill which the defendant by his answer has admitted, and those admissions are to be taken with all the reservations and explanations contained in the answer. The allegations in the bill, admitted by the answer, must be sufficient, after being emasculated by the explanatory matter contained in the answer, to entitle the complainant to the relief prayed for, or he will fail in his suit. The case must be clear and strong, therefore, which will justify the complainant in going to a hearing on the bill and answer.

Contee v. Dawson, 2 Bland 264; Childs v. Horr, 1 Cole (Ia. 432; Rogers v. Mitchell, 41 N. H. 154; Pierce v. West, 1 Peters C. C. 351; Cummings v. Corey, 58 Mich. 494; Weigert v. Frank, 56 Mich. 200; Durfee v. McClurg, 6 Mich. 223.

There is an exception to the rule that the complainant can go to a hearing on the bill and answer when the admissions contained in the answer are sufficiently full and explicit. No decree can be taken on a bill confessed against an infant defendant, or on an answer of a guardian *ad litem* admitting the allegations contained in the blll, but the complainant must in either case sustain his bill by evidence.

Thayer v. Lane, Walk. Ch. 200; Chandler v. McKinney, 6 Mich. 216; Smith v. Smith, 13 Mich. 258.

Upon the hearing of a cause upon bill and answer no proof is introduced by either party, but if the answer refers to matter of record proved by the record itself, or to exhibits, the record and exhibits are regarded as a part of the answer and may be read in evidence.

Rowland v. Sturgis, 2 Hare 520; Chalk v. Haine, 7 Hare 393; Legard v. Sheffield, 2 Atk. 377.

REPLICATION.

If the complainant cannot go to a hearing upon the bill and answer he must join issue by filing a replication to the answer. According to the early system of equity pleading, if the defendant set up in his answer some new matter by way of defence or avoidance, to which new matter the complainant had a perfect defence, he set this up in a replication, and if he wanted a discovery from the defendant in reference to such new matter, he was required to set forth the evidence to which he desired the defendant's oath. Under the modern system of pleading, this purpose is accomplished by the complainant amending his bill and inserting such new matter, and requiring the defendant, if necessary, to file an amended answer.

Upon the replication being filed, the cause is at issue, and the next step is for the complainant and defendant to take such proof as is necessary to sustain the contention on the part of each.

But before any proofs are taken it is important that each party should determine how much of his case has been established by the pleadings; what facts have been admitted, and what have been denied.

Admissions are either

I. Upon the record, or,

II. By agreement between the parties.

I. ADMISSIONS UPON THE RECORD.

These may be,

1. Constructive; such statements of fact as the

parties are conclusively presumed to have admitted under the forms of pleading, and,

2. Actual; such statements of fact as are actually set out in the pleadings.

We have seen that if the defendant puts in a plea to the bill, he thereby admits the truth of all the matters well pleaded by the complainant and not traversed by the plea. In such a case the facts set forth in the bill are constructively admitted to be true, and the complainant is not required, upon filing a replication to the plea, to introduce any proof to sustain his bill, except as to those matters specifically denied by the plea.

When the bill charges a fact to be within the knowledge of the defendant, or which from the whole context of the bill can be fairly presumed to be within his knowledge, and the answer is silent as to that fact, it will be taken as admitted.

McAllister v. Clopten, 51 Miss. 257.

But when the fact is not charged as within the knowledge of the defendant and can not be presumed to be so, it is not admitted by the silence of the answer.

Hardy v. Heard, 15 Ark. 184; Moore v. Lockett, 2 Bibb. 67, 69; Neal v. Hagthorp, 3 Bland 551.

Any material matter, as a general rule, charged in the bill, and neither admitted nor denied, must be proved by the complainant.

Brown v. Pierce, 7 Wall. 205, 211; Smith v. St. Louis M. L. Co., 2 Tenn. Ch. 599, 602; Hardwick v. Bassett, 25 Mich. 149.

2 Bill Ch.

If answer upon oath has been waived, all admissions made by the defendant in his answer may be read in evidence against him, without making the denials contained in the answer evidence in his favor.

Smith v. Potter, 3 Wis. 432.

The facts positively alleged in the bill may be read in evidence by the defendant as admissions made by the complainant. The complainant as a matter of course cannot read his own bill as evidence in his favor, unless the defendant has, by his answer, admitted, directly or by implication, the truth of certain parts of the bill, in which case the complainant may read such portions of his bill *as the admissions of the defendant.*

McGowan v. Young, 2 Stewart 276.

Although by his replication the complainant denies the truth of the whole of the defendant's answer, he is not precluded from using any part of it as evidence in his favor, unless it be the answer of an infant. When the complainant reads a part of the defendant's answer as an admission in his favor, he must read all of the answer bearing on that subject and any other writings referred to; he must take the admission with all the limitations and explanations with which it is accompanied.

Bartlett v. Gillard, 3 Russ. 149; Beech v. Haynes, 1 Tenn. Ch. 569, 571; Lady Ormond v. Hutchinson, 13 Ves. 47, 53.

It is not necessary that the defendant should in his answer make a positive admission in order to have it

read in evidence against him, it will be sufficient if he alleges, that he believes, or is informed and believes, it to be true; unless it is accompanied by some statement which prevents its being considered as an admission.

Potter v. Potter, 1 Ves. Sen. 274; Hills v. McKinney, 3 Stew. Eq. 465; Jackson v. Oglander, 2 H. & M. 465.

When answer under oath has not been waived so much of the answer as is responsive to the discovery sought by the bill may be read in evidence by the defendant. And where the allegations in the bill have been positively denied in the answer the complainant will not be entitled to a decree, based upon such allegations, unless they are supported by two witnesses, or by one witness with corroborating circumstances, or from corroborating circumstances or documentary evidence alone.

Hart v. Ten Eyck, 2 Johns. Ch. 62, 92; Panton v. Tefft, 22 Ill. 367; Gould v. Gould, 3 Story 516, 540.

The right of the defendant to have his answer taken in evidence is co-extensive with his obligation to answer.

Blaisdell v. Bowers, 40 Vt. 126.

And the complainant is not permitted to impeach the character of the defendant for truth and veracity. He has made him his witness.

Vandergrift v. Herbert, 3 C. E. Green 466, 469; Chambers v. Warren, 13 Ill. 318, 321.

When, however, the answer contains allegations not responsive to anything contained in the bill, upon

which the defendant was interrogated, but in opposition to, or avoidance of the plaintiff's case, such allegations are not made evidence by the answer, but must be established by independent proof.

Clements v. Moore, 6 Wall. 299, 315; Seitz v. Mitchell, 94 U. S. 580; Roberts v. Stigleman, 78 Ill. 120; Hart v. Carpenter, 36 Mich. 402.

It is not always easy to determine whether a particular allegation in the defendant's answer is new matter, or is matter responsive to the bill. It has been said, that if the particular allegation can be omitted from the answer, and the complainant's interrogatories will still be fully answered, it is new matter, but if, when stricken out, the answer could be excepted to for insufficiency, that it is responsive.

Bellows v. Stone, 18 N. H. 465.

LECTURE XII.

II.—ADMISSIONS BY AGREEMENT.

These are admissions made by the parties to prevent delay and save expense. It is the practice in this state, and undoubtedly in other states also, to put such admissions in the form of a written stipulation. Such stipulation is entitled in the cause, and usually proceeds as follows:

In this cause it is hereby stipulated by and between said parties;

1st. That, &c.

2d. That, &c.

Finally, that the facts hereby and herein set forth shall be considered by the court upon the hearing of said cause as admissions made therein by said parties, and may be read as evidence upon the hearing of said cause.

The stipulation is signed by the solicitors for complainant and defendant and is filed with the other proof.

TAKING TESTIMONY.

Formerly all testimony in chancery was taken upon interrogatories before an examiner, and neither party to the suit was permitted to be present in person or by counsel. Nor was either party entitled to a copy of the interrogatories prepared by the other for his

witnesses. As we have seen, the bill did not set forth the *evidence* tending to establish the case made by the bill, but merely the facts which such evidence would tend to establish when introduced. Each party drew up the interrogatories for his own witnesses and the witnesses were secretly examined by the examiner and no part of the testimony was divulged to either side. Each party was, however, entitled to be furnished with a list of his opponent's witnesses, that he might examine them upon cross interrogatories if he desired, but since he neither knew what the direct interrogatories were nor how they had been answered, such cross-examination was not only unsatisfactory, but quite likely to do his cause more harm than good. Full directions were given as to how the examiners were to proceed. The witness was not permitted to see the interrogatories he was to answer; each one was read over to him and he was required to answer it in full before the next was read. After the testimony was taken it was filed in court and then published, *i. e.*, opened for inspection, and each side was furnished with copies, and thus after the cause was ready for hearing, the counsel for the first time learned what evidence had been introduced.

Daniel Ch. Pr. Chap. XX.

This system was cumbrous, unsatisfactory, often unfair and fell into merited disrepute. The rules for taking proofs were from time to time modified, until at the present time testimony is taken with the same publicity and with little more formality than proofs

are taken in a law court. In this State, under the statute, either party, by giving the other notice within ten days after a cause is at issue, may have all the witnesses examined in open court.

H. S. § 6647.

The Supreme Court are empowered by the statute to regulate the taking of testimony in chancery, and in pursuance of such power, they have adopted certain rules which provide that when a cause is at issue, if neither party has obtained the right of examination of witnesses in open court, either party may enter an order of course within thirty days after the expiration of the time for obtaining the right to examine witnesses in open court, to take proof within sixty days from service of notice of such order, and that thereafter either party may within the sixty days, upon giving the other party ten days' notice of the time, place and names of the witnesses he intends to examine, take the testimony of any of his witnesses.

Mich. Rule 47; Brown v. Brown, 22 Mich. 242.

Parties may stipulate to take proofs before a notary public, and this is frequently done when there is a notary who is a stenographer and the Circuit Court Commissioner is not. But in the absence of a stipulation the proofs are taken before a Circuit Court Commissioner. At the time and place designated the party appears with his witnesses and proceeds to examine them orally. If the opposite party is present and does not object, the testimony may be taken in a narrative form omitting the questions asked, but if

objection is made to that course, the Circuit Court Commissioner writes down each interrogatory at length, followed by the answer as given by the witness. Should the opposite attorney object to any question for any reason, for instance, that it is leading or irrelevant, etc., the commissioner writes down the objection, but does not pass upon it. After he has taken down the objection he writes out the answer of the witness in the language of the witness. If objection is made, the court regards such testimony as taken subject to the objection, which is considered and ruled upon at the hearing. Although the commissioner cannot pass upon objections made to testimony, it would seem that he may exercise some discretion in the first instance in regard to taking down scandalous matter, or testimony that the witness is privileged from giving.

Storrs v. Scougale, 48 Mich. 388; Rea v. Rea, 53 Mich. 40.

In nearly every instance, however, it is the better practice for the commissioner to take down all the testimony offered, together with the objections made to it, and leave the admissibility of the testimony to the Circuit and Supreme Court. The Supreme Court have held that it is not the proper practice, for the circuit court even, to *expunge* testimony that in its judgment is inadmissible, but to allow it to stand, so that, in case of an appeal to the Supreme Court, that court may be in a position to consider and pass upon its admissibility. The Supreme Court, sitting in chancery, is not a court of errors, but an appellate

court, and it hears the cause *de novo*, and must therefor pass upon all questions of the admissibility of testimony which was before the lower court.

Bilz v. Bilz, 37 Mich. 116; Brown v. Brown, 22 Mich. 242; Collins v. Jackson, 53 Mich. 40; Hewlet v. Shaw, 9 Mich. 346.

If any documents are introduced in evidence before the commissioner, he receives them and marks them as exhibits, numbering them consecutively. When notified of the entry of an order closing proofs, the commissioner files the testimony taken by him in the cause, and it is published.

If any of the witnesses in a cause reside out of the state, or more than thirty miles from the commissioner, the party, desiring to take the testimony of such witnesses, may apply to the judge or the register, for a commission to examine such witnesses.

Mich. Rules 48, 49, 50, 51, 52, 53.

The statute provides that the counsel of the respective parties may be present at such examination, and that witnesses may be examined and cross-examined orally, and that the testimony so taken shall be reduced to writing and subscribed by the witnesses, and filed in the court where the cause is pending.

H. S. §§ 6639-6646.

When a deed or other instrument in writing which is duly acknowledged or proved, in such manner as to authorize it to be read in evidence, is stated in the bill, such deed or instrument may be read upon the hearing of the cause, unless the defendant has in his answer denied the due execution of the deed, or the existence

of the instrument; but documents which are of themselves evidence, without further proof, shall not be read on the hearing, unless they have been made exhibits before the commission.

Mich. Rule 56; Bachelor v. Nelson, Walk. Ch. 449; Jerome v. Seymour, Har. Ch. 255; Swetland v. Swetland, 3 Mich. 482.

The method of taking testimony in the United States court is regulated by Rules 67, 68 and 69, which provide that the testimony of witnesses may be taken upon direct and cross interrogatories, or orally, before an examiner. When it is taken orally, the court may, on motion of either party, assign a time within which the complainant shall take his evidence, and the time thereafter within which the defendant shall take his. The rules prescribe that the testimony in a cause shall be taken within three months after the cause is at issue, unless further time is given by the court, or judge, upon cause shown.

When a witness is infirm or about to depart out of the country, or is the sole witness to a material fact, his testimony may be taken at any time after the cause is at issue *de bene esse*, upon leave granted.

U. S. Rule 70.

HEARING OF THE CAUSE.

When the proofs are closed and the cause is ready for hearing, it may be noticed for hearing by either party, and causes are entitled to be heard in this state in the order in which the replication to the answer was filed.

Mich. Rule 63.

Upon the hearing the complainant has the opening and closing. As a rule, the judge, before the hearing on the merits commences, has the counsel for the complainant state in his own language the purpose for which the bill was filed, and its principal allegations of fact, and he then requests the defendant to state the defence made in the answer. Having thus made himself familiar with the matters in issue, he next proceeds to ascertain what facts are admitted, and about which there is no controversy, and what facts are in dispute. If only a part of the facts in the case are in dispute, he confines the reading of the testimony and the comments of counsel to that part of the testimony bearing upon those questions.

In reading the testimony to the court, the complainant reads the direct testimony given by his own witnesses, and the defendant reads the cross-examination. When the defendant's testimony is reached, the defendant's counsel reads the direct and the complainant's the cross-examination. At the close of the hearing the court may decide the case, or hold it under advisement, and render his decision at some future day. Causes are frequently heard out of term, and at chambers by arrangement made between the court and counsel. In such a case the cause is formally submitted to the court in term, and the argument made afterwards before the court. In this manner it appears upon the record that all the proceedings were had in court, and all appearances of irregularity are avoided. The argument of a cause before the court at chambers

is indeed not an irregularity, but the submission of a cause to the court in vacation would be, and a decree rendered in vacation upon the final hearing of a cause would be a nullity.

If there is any good reason, on account of the nature of the testimony, a cause will be heard in private, and the public will be excluded. The court may direct that the cause shall be heard in private at the request of counsel, or on its own motion.

Matter of Lord Portsmouth Cooper, Rep. 106; Ogle v. Brondling, 2 Russ. & My. 688.

An objection to the bill based on want of proper parties may be made at the hearing, but if the defect can be cured by amendment and service be had upon the new parties, the court will, upon terms, allow the cause to stand over and the proper parties may be added.

Jones v. Jones, 3 Atk. 110; Palmer v. Rich, 12 Mich. 414.

The objection, however, must come from the defendant, as the complainant cannot postpone the cause without his consent, unless the complainant was ignorant of the persons whose claims will be affected by the decree.

Inness v. Jackson, 16 Ves. 356; Thomas v. Gaines, 35 Mich. 155-165.

If the objection of want of parties has been made by the defendant in his answer and the complainant has neglected to amend his bill in that particular, the

court may in its discretion refuse to allow the cause to stand over and dismiss the bill.

Van Epps v. Van Deusen, 4 Paige 64; Bank v. Seton, 1 Peters 299; Story v. Livingstone, 13 Peters 359; U. S. Rule 52.

When upon the hearing it is discovered that the proofs are defective in some formal matter, the court will, if a reasonable excuse is given for the omission, allow the cause to stand over for the purpose of supplying such defects.

1 Barbour Ch. Pr. 322-323; U. S. Rule 53.

DISMISSING THE BILL AT THE HEARING.

When the pleadings are defective, or when through some informality in the bill the court cannot give the complainant relief, or where from some other cause the bill is dismissed without the courts passing upon the merits, and it appears that the complainant may be entitled to some relief, it will be dismissed *without prejudice.*

Story Eq. Pl. §§456, 793; Wilson v. Egleston, 25 Mich. 257.

But if a bill is dismissed by the court upon the hearing absolutely, such dismissal may be pleaded in bar to a new bill filed for the same cause of action; and a bill cannot be dismissed without prejudice when a new bill must cover the same ground.

Crozier v. Acre, 7 Paige 137; Gale v. Gould, 40 Mich. 515.

A bill is sometimes dismissed and the complainant given leave to bring an action at law. The court may make an order retaining the bill for a certain period

with liberty to the complainant to proceed at law, conditioned, that if he fails to do so, that the bill be dismissed absolutely.

1 Barb Ch. Pr. 324, 325.

In this state the court may at the hearing upon pleadings and proofs call upon either party or any witness to testify before the court orally.

Rule 99; Hamilton v. Hamilton, 37 Mich. 603.

FEIGNED ISSUES.

It sometimes happens that the testimony is so conflicting and unsatisfactory, that the court or the parties may desire, that a particular question of fact be found by a jury. An issue made for that purpose is called a feigned issue.

3 Black. Cases 452.

The court approves the frame of the issue and it is tried substantially as a suit at law.

3 Barbour Ch. Pr. 484; Milk v. Moore, 39 Ill. 584–588; Russell v. Paine, 45 Ill. 350; Wood v. Wood, 2 Paige 109; Dunn v. Dunn, 11 Mich. 285; Brink v. Morton, 2 Cole (Ia.) 411; Hall v. Doran, 6 Cole (Ia.) 433.

LECTURE XIII.

DECREES.

A decree is a sentence of a court of chancery determining the rights of the parties to the suit.

Decrees are of two kinds, *Interlocutory and Final.*

An interlocutory decree is a decree made during the pendency of the cause to facilitate the taking of proofs, or to protect the rights of the parties, or to aid the court in arriving at a correct conclusion in regard to some disputed fact, but which is not a final determination of the rights of the parties in whole or in part.

A final decree is one that disposes of the whole or some part of the case on the merits and reserves no question for the further judgment of the court thereon.

Crosby v. Buchanan, 23 Wall. 420; Lewis v. Campau, 14 Mich. 458–460; Winthrop v. Muker, 109 U. S. 180; Bank v. Shedd, 121 U. S. 74.

It is sometimes exceedingly difficult to draw the distinction between an interlocutory and final decree. The distinction is, however, an important one, since the right to appeal from a decree is a statutory right and must be strictly followed, and the statute usually restricts the right of appeal to *final decrees.* It may be said that any decree which finally disposes of the

rights of the parties upon the merits of any *branch* of the controversy is final, but that if the merits are not passed upon and the order is made simply to take an additional step towards a final determination upon the merits, it is interlocutory, provided, the rights of the parties remain *in statu quo*, for any decree which divests a party of a pre-existing legal right is final.

Barry v. Briggs, 22 Mich. 201; Tawas, etc. R. R. v. Iosco Ct., 44 Mich. 479; Jennison Ch. Pr. Chap. 18; Bank v. Whitney, 121 U. S. 284; Railroad v. Simmons, 123 U. S. 52; Grant v. Insurance Co., 121 U. S. 105

SETTLING DECREES.

The party in whose favor the judgment of the court is made, makes a draft of such a decree as he deems he is entitled to under the decision. He serves upon the opposite solicitor a copy of this draft, with notice of the time and place, when he will apply to the court to have it settled. If the draft is satisfactory to the solicitor upon whom service is made, he usually indicates, by an indorsement on the draft, his consent to have a decree settled in that form. If it is not satisfactory, he proposes amendments and appears before the court, and the court settles the decree, after the parties are heard and signs it. The decree is then countersigned by the register and entered in the journal of the court at length.

The decree should in apt terms set forth clearly and methodically the judgment of the court. If the defendant is required to do or to refrain from doing some

act it should be distinctly set forth, and if the defendant is required to perform some act the time within which it is to be performed and the manner of performance, and the conditions, should be made exceedingly plain.

FORM OF DECREE.

The formal parts of a decree are: 1. Date and title. 2. Recitals. 3. Ordering part; and to this is sometimes added the declaratory part.

At first the decree on its face set forth the pleadings and the evidence, but usually at the present time the decree recites merely the substance of the pleadings and the facts upon which it is founded, and in the United States court not even that is done. Rule 86 provides that no part of the bill, answer or other pleadings or report of the master, or other prior proceedings, shall be recited in a decree.

U. S. Rule 86; Dexter v. Arnold, 5 Mason 303, 311; Bartlett v. Fifield, 45 N. H. 82, 83.

It is still the practice in some of the states, however, to set forth the evidence in substance in the decree.

Walker v. Carey, 53 Ill. 470; Moss v. McCall, 75 Ill. 190; Hilleary v. Thompson, 11 W. Va. 113; Allen v. Blunt, 1 Blatch. C. C. 480.

In the mandatory part of the decree great care should be taken to meet the case disclosed and secure the rights of each of the parties. The decree must be consistent with itself. But the court may without contradiction pass a separate, a reciprocal, a direct or an inverted decree to meet the nature of the case.

Lingon v. Henderson, 1 Bland 275; Hodges v. Milliken, 1 Bland 507; Owens v. Case, 1 Bland 404; Elliot v. Pell, 1 Paige 263.

When a mistake or clerical error has been made in a decree, it may be corrected by the court upon motion or petition, made after entry and before enrollment.

Bates v. Garrison, Har. Ch. 221; U. S. Rules 85; Dexter v. Arnold, 5 Mason 303; Whiting v. Bank, 13 Peters 6; Tilton v. Barnee, 17 Fed. Rep. 59, Coleman v. Neil, 11 Fed. Rep. 461.

The party making the application must show that he has been injured by the error or mistake however.

Russell v. Waite, Walk. Ch. 31; Insurance Co. v. Whittmore, 12 Mich. 427; York v. Ingham Ct. Judge, 57 Mich. 421; Hart v. Lindsay, Walk. 72.

At common law a decree did not become a final record of the court until it was enrolled. It must be enrolled before a deed can be executed on a sale under a decree and before an execution can issue to enforce performance of such a decree.

Minthorne v. Thomas, 2 Paige 102; Taylor v. Gladwin, 40 Mich. 233; Mickle v. Maxfield, 42 Mich. 304; Law v. Mills, 61 Mich. 35; Long v. Long, 59 Mich. 296.

The decree is enrolled in the following manner: The register of the court in which the decree is entered, attaches together the bill, pleading and such other papers as the general rules direct, together with the taxed bill of costs therein, and annexes thereto a fair engrossed copy of the decretal order, signed by the circuit judge and countersigned by the register who entered the same. The register then annexes to the papers so attached together his certificate, under the seal of the court, wherein he certifies according to

the fact, the time when the papers were attached together, for the purpose of enrollment and the names of the parties at whose instance the same was done.

Schwab v. Mabley, 47 Mich 512; Long v. Long, 59 Mich. 296; Loud v. Winchester, 52 Mich. 174; Low v. Mills, 61 Mich. 35; Mickle v. Maxfield, 42 Mich. 304.

After a decree has been duly enrolled it cannot be disturbed upon motion or petition. It can only be opened upon a bill of review filed upon leave granted, and the power of the court to grant leave is discretionary.

Maynard v. Pereault, 30 Mich. 160; Vaughn v. Black, 63 Mich. 215; Clark v. Circuit Judge, 40 Mich. 166.

As a general rule, all who are parties or privies to a decree are bound by it, and no one who is not a party, or is not represented by or in privity with a party to the suit, is bound.

Burk v. Sherman, 2 Doug. 176; Greiner v. Klein, 28 Mich. 12, 17; Brown v. Wynkoop, 2 Blackf. 230; Com. v. Cambridge, 4 Mass. 627; Mallow v. Hinde, 12 Wheat. 193; Richter v. Jerome, 123 U. S. 233; Atkinson v. Flanigan, Mich. Jan. 1888; German Seminary v. Saenger, Mich. Jan. 1888.

ENFORCEMENT OF DECREES.

It is one of the maxims of equitiy that it acts *in personam.* "The strict primary decree in this court," said Lord Chancellor Hardwicke, "is *in personam*, and although this court cannot issue execution *in rem*, *e. g.*, by elegit, still I can enforce the judgment of the court, which is *in personam* by process *in personam*, *e. g.*, by attachment of the person when the

person is within the jurisdiction, and also by sequestration, so far as there are goods and lands of the defendant within the jurisdiction of the court, until the defendant do comply with the order or judgment of the court, which is against the defendant personally, to do or cause to be done, or to abstain from doing some act."

Penn. v. Lord Baltimore, 1 Ves. 385.

Therefore, unless the power of the court has been enlarged by the statute, the performance of an order or decree of the court is enforced by what is termed a process of contempt. The process is based upon the theory that the defendant having been commanded to do, or to refrain from doing a particular act, his neglect to do, or not to do that particular act, is in contempt of the authority of the court, and for that contempt he has merited punishment. The law courts acts upon an entirely different theory. They do not regard the defendant, who fails to satisfy a judgment rendered against him, as in contempt of the court, but issue a process to satisfy the plaintiff's demand. That may be satisfied by seizure and sale of the defendant's property or the imprisonment of the body of the defendant, and when both remedies are given the plaintiff must elect which he will pursue.

Contempt of the court of equity is technically disregarding a command of the court evidenced and authenticated by its great seal, and consequently before a party can be said to have incurred such contempt, he must be personally served with the mandate

of the court under seal, and the mere service of a copy of the decree, or order of the court, without the writ, is not sufficient.

This writ is called a writ of execution, and it recites the order or decree, or that part of it, which the defendant is to obey. At first it was the practice to insert the entire decree, but afterwards, by order of the court, if the decree *was for the payment of money* the substance of that part directing the payment of money was inserted.

When the order or decree directs the defendant to do a particular act, which he neglects to do, the writ of execution commands him to do the act within a specified time, and if it is not done within the time limited, the party is then in contempt.

The statute has, however, very materially enlarged the powers of the court, and in this State the statute provides that courts of equity may enforce the performance of any decree or obedience thereto, by execution against the body of the party, against whom such decree shall have been made, or by execution against the goods and chattels, and in default thereof, the lands and tenements of such party.

H. S. § 6653; Mickle v. Maxfield, 42 Mich. 304.

Generally the writ of execution must be served upon the party himself in order to bring him into contempt.

This is done by handing him a copy and showing him the original under the seal of the court. But when personal service cannot be had upon a party owing to his own misconduct, substituted service will

be directed. A party will not be permitted to put the court at defiance.

Tyson v. Ward, 1 Dickens 166; Rider v. Kidder, 12 Ves. 202; DeManneville v. DeManneville, 12 Ves. 203.

The party having been duly served with a writ of execution, if he neglect to obey the mandate, and that fact is brought to the attention of the court by affidavit, a writ of attachment is issued, upon which the party is arrested and brought before the court, and unless he can purge himself of the contempt, i. e., offer a good excuse for not obeying the mandate, he is by order of the court directed to comply with the mandate instanter or stand committed to jail.

2 Danl. Ch. Pr. Sec. 7.

INTERLOCUTORY PROCEEDINGS.

The proceedings we have already noticed are the usual and regular proceedings had in every cause in chancery. There are certain interlocutory proceedings to which we will now call your attention, none of which may be had in any given cause, but some of which are usually taken at some stage in the progress of every cause, and which are of great practical importance.

An interlocutory application is a request made to the court for its aid and assistance in some matter arising in the cause, either to further the proceedings or to protect the rights of some of the parties to the suit. These applications are made either orally,

when they are called motions, or in writing, when they are designated petitions.

There is no inflexible and certain rule given by which you can determine whether a particular application shall be made by motion or petition. As a general rule, when the application is based upon a long or intricate statement of facts, it should be made by petition and not by motion. Otherwise the application may be made by motion.

Shipbrooke v. Hinchinbrook, 13 Ves. 387, 393; Shaft v. Phœnix Ins. Co., 67 N. Y. 544, 547; Bergan v. Jones, 4 Met. 371; Jones v. Roberts, 12 Sim. 189; Anon, 4 Madd. 229; Skinner v. Sweet, Coop. 55.

A motion may be made by or on behalf of any of the parties to the suit, who is not in contempt. If a party is in contempt, he cannot be heard until he purges himself of his contempt.

Johnson v. Pinney, 1 Paige 646; Rogers v. Paterson, 4 Paige 450; Lane v. Ellzeg, 4 H. & M. 504.

A MOTION IS EITHER OF COURSE OR SPECIAL.

A motion of course is one which will grant upon an *ex parte* application and without hearing the other side, under some standing rule or the known practice of the court. It requires no notice to be given the opposite party as no opposition will be allowed to it.

Eyles v. Ward, Mos. 255; Barbour Ch. Pr., 566.

Motions of course are understood to be confined to orders which are entered by the register, at the request of a party, without any application being made to the court.

Mich. Rule 24; U. S. Rule 5.

A special motion is one which is not granted by the court as a matter of course, but one which the court may, in its discretion, after cause shown, grant or refuse. They are made either *ex parte* or upon motion.

There is no clear and well defined rule under which special motions may be classified into those which may be made *ex parte* and those requiring notice. You must in a great measure rely upon the rules of the court which state usually whether the special motion requires notice or not. If the rules are silent, and the practice is uncertain, the safest course is to give notice.

Marshall v. Mellnish, 5 Beav. 496; Isnard v. Cazeaux, 1 Paige 39; Hart v. Small, 4 Paige 551; U. S. Rules 3, 4; Mich. Rule 61.

Ex parte motions are made for a variety of purposes—for instance:

For an order that an absent defendant appear; that complainant's bill be taken as confessed; to show cause why injunction should not issue; to enlarge the time for taking testimony; for time to answer for appointment of a guardian *ad litem*, etc.

Sometimes upon an *ex parte* motion an order is entered that a particular act is to be done unless the appointed party show cause to the contrary within a specified time. Such an order is called an order *nisi*. After the time limited for showing cause, or doing the act required, upon motion and proof by affidavit of non compliance, the order *nisi*, is made absolute.

Dan. Ch. Pr. 1594.

All *ex parte* motions must be supported by affidavit or other proof sufficient to make a case for the interference of the court.

When the motion is not of course and cannot be made *ex parte*, notice must be given in writing to the opposite party. This being simply a notice that an oral motion will be made to the court, the form of the notice becomes important. It must be entitled in the court and cause and directed to the solicitor of the opposite party and signed by the party giving the notice. In the body of the notice the particular order or direction of the court which will be asked for must be set out clearly and distinctly, and the party must be informed of the grounds upon which the application is made, and consequently the notice must be accompanied with copies of all affidavits and other proofs not on file in the cause, and previously known to the other solicitor, which will be read upon the hearing of such notion. The time and place of hearing must be also given. This part of the notice usually concludes with the words "or as soon thereafter as counsel can be heard."

Isnard v. Cazeaux, 1 Paige 39; Brown v. Ricketts, 2 Johns. Ch. 425; Jackson v. Stiles, 1 Cow. 134, 135 n.

The time and manner of service is fixed by the rules. After the notice has been served the party making the service should prepare an affidavit setting forth the time and manner of service to be used in case the opposite party does not appear to oppose the motion.

It is the practice of the court when served motions are to be made to hear *ex parte* motions and those which are not opposed first. When a motion is opposed it is the usual practice for the party making the motion, to first read the notice and the affidavits, if any, in its support, and then for the opposing party to read any opposing affidavits, after which the moving party opens and closes the argument. The decisions of the court may be rendered at the hearing or the motion may be taken under consideration and the verdict rendered at a subsequent sitting of the court.

The court will not upon motion make an order which will decide the principal point in the case, except upon consent of all the parties affected by it. For instance if the bill is filed to enforce the specific performance of a contract, and the only question in dispute is the title of the vender, the contract being admitted by the answer, the court will upon motion direct a reference to a master to enquire into the title, but the court will not upon motion before the hearing enquire into any *other* objection.

Like v. Beresford, 3 Bro. C. C. 366; Moss v. Mathews, 3 Ves. 279.

LECTURE XIV.

PETITIONS.

Petitions are entitled in the court and cause and addressed in the same manner as a bill, when they are made in a cause already pending.

The petition should briefly and clearly set forth the particulars of the case and conclude with praying the court to grant the order desired "or such other and further relief as may be agreeable to equity and good conscience." The petition must be signed and sworn to by the petitioner and also signed by the counsel.

Matter of Christie, 5 Paige 242.

When a person not a party to the original bill has an interest by way of title, lien or otherwise in the property which forms the subject-matter of the suit, and such interest is liable to be affected by the proceedings, he may by petition apply to the court for leave to intervene for the protection of his rights, and such leave will be granted when the cause exists.

When leave is granted the party must forthwith, or within such time as the court determines, file his petition in the cause setting forth his rights and praying for the relief sought, and give notice of the filing thereof to the other parties to the cause.

Freeman v. Howe, 24 How. 450; Stewart v. Durham, 115 U.S. 61; Gumbel v. Pitkin, 124 U. S. 131–143.

Petitions are noticed, and heard in the same manner as motions.

ORDERS.

Orders are either common, special or by consent.

A common order is one that the party is entitled as of course and is made without notice to the opposite party.

A special order is one made by the court upon special application, either *ex parte* or upon notice.

An order by consent is one made upon stipulation of the parties or their solicitors.

All common orders and orders by consent of the parties, may be entered in the common rule book in the register's office, at the peril of the party taking such order. The day on which the order is entered must be noted in the entry. All special orders made by the court must be entered in the record of the proceedings of the court. When an order is entered by consent, the consent must be in writing signed by the parties or their solicitors and filed in the cause.

Hammond v. Place, Har. Ch. 438; Crone v. Angell, 14 Mich. 339; Mich. Rules 24.

Orders for injunctions, and all other special orders, must be entered with the register before process issues.

Hoffman v. Treadwell, 5 Paige 82; Skinner v. Dayton, 2 Johns. Ch. 226.

It frequently happens that the entry of a common order is not made at the proper time. In such a case, if no great length of time has intervened, a motion of

cause may be made to the court to enter the order *nunc pro tunc*; but after a considerable length of time, there ought to be notice of the motion.

Williamson v. Henshaw, 1 Dick. 129.

Neither party can have any benefit from a decision of the court until the order thereon is drawn up and perfected. When the order granted is special in its provisions the party in whose favor it is granted should submit a copy to the adverse party that he may submit amendments thereto if he desired. The draft and the amendments are then given to the register that the order may be settled by him and entered. If the register is in doubt as to the decision of the court, he is, in such a case, to apply to the court to settle the order.

Whitney v. Belden, 4 Paige 140; Earl of Fingal v. Blake, 3 Molloy 50.

SERVICE OF ORDERS.

Not all orders need be served, and whether or not an order must be served depends usually upon the form of the order. Special orders obtained *ex parte*, usually provide that the act designated shall be performed by the opposite party within the time specified after service of the order. But where a special order is obtained upon notice the order usually provides that the act shall be performed within the time designated after entry of the order. The reason for this distinction is that in the first instance the opposite party has no personal knowledge of the order until

he is notified, and in the later case he has such notice, having had notice of the motion for the order.

But in all cases as we have seen, where it is intended to bring the party into contempt for not complying with the order, notice must be served upon him personally. The service in such case is made in the same manner as notice of a decree, by delivering to him a copy of the order and at the same time showing him a certified copy of the original order under the seal of the court.

Ex parte Gwynne, 12 Ves. 380; Cooper 282; Laton v. Seaman, 9 Paige 609; Young v. Goodson, 2 Russ. 255.

When the party has appeared by solicitor, and it is not desired to bring him into contempt, service of notice, when notice is necessary, upon the solicitor is sufficient.

Stafford v. Brown, 4 Paige, 360–362.

ENFORCING ORDERS.

It is sometimes provided by statute that orders for the payment of money may be enforced by means of an execution running against the property of the defendant. At common law orders ~~come~~, in general, enforced by process of contempt. Upon motion, and proof that an order had been personally served, for the payment of costs for instance, and that the order had not been obeyed, attachment issued and the defendant was committed to prison for contempt.

Dan. Chr. P. 1454.

MODIFYING AND DISCHARGING ORDERS.

It is a general rule that every order made in the progress of a cause, may for cause shown, be modified or rescinded at any time before the final disposition of the suit.

Ashe v. Moore, 2 Mer. 383; Fanning v. Dunham, 4 Johns. Ch. 35; Isnaid v. Cazeaux, 1 Paige 39.

An order will not be vacated, however, except to permit the party applying to secure rights that are meritorious. If he simply desires to delay a cause, or take advantage of some technical defence or objection, the court will allow the order to stand although the party has excused himself from all fault.

Champlin v. Mayor of N. Y., 3 Paige 573; Townsend v. Townsend, 2 Paige 413; Hunt v. Wallis, 6 Paige 371.

INJUNCTIONS.

It is very frequently necessary for a court of equity to restrain a party from doing some particular act in order to prevent irreparable injury to another, or to maintain the *statu quo* pending the determination of the legal rights of the parties to the subject-matter in litigation. This object is accomplished by the writ of injunction, a writ of the greatest importance and of very frequent use especially in this country during the past half century. We can do no more than merely to indicate the existence and purpose of the writ, and refer the the student to the exhaustive treaties on the subject by Dr. High.

A writ of injunction is a judicial process acting *in*

personam requiring the party to whom it is directed to do or to refrain from doing some act therein specifically described. It is used both for the enforcement of a right and the prevention of a wrong, but it must be an actual right or a positive wrong, and the withholding of the right or the doing of the wrong must work a positive injury to the person complaining, or the court will not interfere.

McDonogh v. Calloway, 7 Rob. La. 442; Goodrich v. Moore, 2 Minn. 49.

Injunctions are either *mandatory*, commanding something to be done, or *preventive*, forbidding the doing of something. A mandatory injunction is seldom issued and then only upon the final hearing.

Robinson v. Byram, 1 Bro. C. C. 588; Gale v. Abbott, 8 Jur. N. S. 987; Worthington v. Green, 1 Md. Ch. 97; Rogers v. Railroad, 5 C. E. Green, 379.

With reference to their duration injunctions are either interlocutory or perpetual. Interlocutory injunctions are issued at any time during the progress of the suit, usually at the filing of the bill, to continue until the coming in of the answer, or the hearing, or the further order of the court. A perpetual injunction is never granted except at the final hearing and is usually a part of the decree.

Chapman v. Harrison, 4 Bland 336.

The sole object of an interlocutory injunction is to preserve the present situation of the parties, and therefore it will go no further than is necessary to preserve all the rights in issue between them *in*

statu quo. They are divided into two classes, *common* and *special.*

A common injunction is one that issues to aid the court in granting the ultimate relief asked, which is something different from the injunction itself, while a special injunction is issued to prevent irreparable injury and the obtaining of which is the sole or principal object and purpose of the suit.

Purnell v. Daniel, 8 Ired. Eq. 9; Troy v. Norman, 2 Jones Eq. 318; Peterson v. Mathis, 3 Jones Eq. 31.

An injunction becomes operative from the time the party to whom it is directed has actual notice. It is not necessary that he should be actually served with the writ and therefore it may be served outside the jurisdiction of the court.

Ramsdall v. Craighill, 9 Ohio 197; Little v. Price, 1 Md. Ch. 182; Milne v. Van Buskerk, 9 Iowa 558; Osborne v. Tennant, 14 Ves. 136.

A perpetual injunction is one that is issued under a final decree as an interlocutory injunction which is made perpetual by the final decree. By its terms the defendant is forever inhibited from doing certain acts, or making certain specific claims therein set forth, which would be contrary to equity and good conscience. Such an injunction will issue whenever it is necessary to protect the rights of the complainant.

Bushnell v. Hartford, 4 Johns. Ch. 301; Caruthers v. Hartsfield, 3 Yerg. 356; Kenson v. Kenson, 1 Bibb. 184.

Injunctions in this state may be granted by a circuit court commissioner.

Mich. Rule 112; see also 17, 21, 23, 109.

Special injunctions are not granted in the United States Court except upon notice to the opposite party, and they continue in force until the next term of the court, or until the further order of the court.

U. S. Rule 55. Revised St. §§ 718, 719, 720; Parker v. Judges, 12 Wheaton 561.

WRIT OF NE EXEAT.

A writ of *ne exeat* is the process of the court issuing under its seal to prevent a person who is a party to a suit from leaving the jurisdiction of the court. It is resorted to for the purpose of compelling a defendant to give bail conditioned that he will do and perform the decree of the court.

Gilbert v. Colt, Hopk. 496; De Rivafinoli v. Consetti, 4 Paige, 264; Gleason v. Bisby, 1 Clarke, 551.

The statutes of the United States provide that when a suit in equity is commenced, and satisfactory proof is made to the circuit court, or to the circuit justice or judge, that the defendant designs quickly to depart from the United States; that there is due from him a sum certain or capable of reduction to a certainty; that complainant has no sufficient legal redress, and that irreparable injury or a denial of justice will be caused to complainant if the defendant so departs, such court or judge may order the issuance of a writ of *ne exeat*, upon which the marshal arrests the defendant and keeps him in custody, unless he gives security to abide the order and decree of the court.

Revised Statutes § 717; U. S. Rule 21.

The writ may be applied for at any stage of the

proceedings after, but not before, the filing of the bill of complaint.

Ex pr. Brumker, 3 P. Wms. 312: Dunham v. Jackson, 1 Paige 629.

The application for the writ may be made *ex parte.* The application is founded upon affidavit or petition, and, unlike the writ of injunction, it need not be prayed for in the bill. The writ may be allowed by the same officers who are authorized to allow writs of injunction, and the officer making the allowance directs in what amount the defendant shall give bail.

Elliott v. Sinclair, Jac. 545; Gleason v. Bisby, 1 Clarke 551; Brehm v. Wood, 1 Turner & Russ. 332; McNamara v. Dwyer, 7 Paige 239.

The writ commands the sheriff to have the defendant personally to come before him and give a bond in the penal sum endorsed thereon, that he will not go, or attempt to go, beyond the jurisdiction of the court —at common law beyond the four seas—and in default of his giving such bond that he commit him to prison.

Gibert v. Colt, 1 Hopk. 500; Rice v. Hale, 5 Cash. 233; Mich. Rule 17.

RECEIVERS.

A receiver is a suitable person appointed to take charge of property which is involved in the suit, when for any reason, the court regards the parties to the suit not to be the proper persons to have the custody or management of such property. The appointment of a receiver is discretionary with the court. When

appointed he is regarded as an officer acting under the orders of the court. The power of appointment is usually called into action either to prevent fraud or save property in litigation from material injury.

In re Receivers' Globe Ins. Co, 6 Paige 102; Baker v. Barkies, 42 Ill. 79; Vorhill v. Hynson, 26 Md. 83, 92; Mich. Rules, 104, 106, 107, 108; U. S. C. C. Rules 8, 9, 11.

When the application for a receiver is made during the pendency of the suit and before a decree, there must be a foundation laid for the application in the bill, but the bill need not contain a prayer for a receiver. The application is made upon motion, notice of which must be served upon the opposite party, unless he has absconded or has concealed himself to avoid service.

Dowling v. Hudson, 14 Beav. 423, 424; Pitcher v. Hilliar, 3 Dick. 580.

LECTURE XV.

PRODUCTION OF PAPERS.

It is the practice of the court of chancery to require the defendant to produce any papers in his possession relevant to the matters in question, which the complainant of right ought to have the privilege of examining. It is the complainant's privilege to apply for the production of such papers as a part of his general right of discovery.

Warrick v. Queen's College L. R. 3 Eq. 683; Att'y-Genl. v. Thompson, 8 Hare 106.

When the complainant has books, papers or other documents in his possession, material for the defendant's defence, the defendant was required at common law to file a cross bill by which means he obtained the same right for production of papers as the complainant had under his bill.

Kelly v. Eckford, 5 Paige 548; Denning v. Smith, 3 Johns Ch. 409.

When a bill is filed for the purpose of obtaining a partnership accounting, and the partnership books are in the hands of one of the partners, the court upon application will direct such books to be placed in the hands of an officer of the court for the purpose of allowing the other partner to inspect them.

Kelly v. Eckford, 5 Paige 548

To obtain an order for the production of papers or books, application is made to the court by special motion and the bill or affidavit made to sustain the motion that the production of the papers or books are necessary to enable the party making the application to prosecute or defend the suit.

ABATEMENT AND REVIVOR.

Abatement of a suit in equity is the effect produced by the happening of some event whereby the further progress of the cause is temporarily or permanently suspended.

Hoxie v. Carr, 1 Sumner 173.

The abatement may be due to some event whereby the interest of one of the parties becomes extinguished, for instance, when joint tenants as such are parties and one of them dies, in such a case the abatement is said to be as to a party; or, the abatement may be due to the transfer of the interest of one of the parties to a third person; for instance, when upon the death of one of the parties, his interest is vested in heirs or devisees, in such case there is an abatement as to the suit.

Leggett v. Dubois, 2 Paige 211, 212; Barbour Ch. Pr. 675.

In the first instance there is no abatement as to the surviving parties, and the court will on the motion of either of the parties, order the cause to proceed between such survivors. But in the other case there is no longer the proper persons before the court against or

by whom proceedings can be had and the suit must therefore be revived.

Leggett v. Dubois, 2 Paige 211, 213.

When there is an abatement of the suit by the death or bankruptcy, for instance, of the complainant, no further proceedings can be had, as a general rule, until this defect has been cured, and if any proceedings are had, they will be set aside as irregular.

Insurance Co. v. Slee, 2 Paige 365; Canhone v. Vincent, 8 Sim. 277.

The proceedings are merely suspended by the abatement and those already had in the cause are not annulled thereby. If a party has been imprisoned for contempt, abatement of the suit does not discharge him from custody, neither is a receiver discharged for that reason.

Dan. Ch. Pr. 225; 1 Hogan 174.

And the court will sometimes permit necessary proceedings to be had pending abatement. Thus orders will be made for the preservation of property, and proceedings had to punish a party for breach of an injunction.

Washington Ins. Co. v. Slee, 2 Paige 365, 368; Hawley v, Bennet, 4 Paige 163.

REVIVOR.

In many of the states the statutes provide that suits may be revived upon petition. These statutory proceedings are usually confined to cases where the suit abates by the death of a party, the statute substituting

a petition for a bill of revivor. When the abatement is one that can be remedied under the statute, the statutory proceedings are usually resorted to as being simpler and more expeditious, but a party is not prohibited from resorting to a bill of revivor even in those cases when the statute has given ample relief by petition.

The statute is necessarily confined to those cases in which there can be no legal controversy with reference to the right of a party to revive the suit in his favor or against whom it may be revived; in other words, to those cases where, at common law, an abatement could be remedied by a bill of revivor. It is laid down as the rule that a bill of revivor may be filed whenever by death of one of the parties his interest vests as a matter of law in some other person, so that the only question for the court to determine is the question whether or not such person is the one designated by the law.

Story Eq. Pl. §364; Freematee v. Markhous, 2 J. J. Marsh. Ky. 303; Boynton v. Boynton, 1 Foster 246.

But when the party against whom or in whose behalf the suit is sought to be revived, is not designated by the statute as the person who represents the original party to the bill, but his representative character depends upon some question of fact an original bill in the nature of a bill of revivor and supplement must be filed.

Douglass v. Sherman, 2 Paige 358, 360, 361; Monteith v. Taylor, 9 Ves. 615; Mendhom v. Robinson, 1 My. & K. 217.

The reason for the above rules, is, that in the later class of cases, the title depending upon a question of fact, it is necessary to put the question of title in issue that it may be litigated.

SUPPLEMENTAL BILLS.

When the bill becomes defective by some event occurring after it is filed and too late to be cured by amendment; or when by an event subsequent to the filing of the bill a new interest in the matter in litigation is claimed by one of the parties to the suit, or a new party claims, otherwise than by mere operation of law, the interest which belonged to some other party at the commencement of the suit, a supplemental bill is the proper remedy to cure the defect.

Jones v. Jones, 3 Atk. 110; Dormer v. Fortescue, 3 Atk. 124, 133; Humphreys v. Humphreys, 3 P. Wms. 349; Pelkington v. Moss, 2 Madd. 240, 466; Knight v. Mathews, 1 Madd. 566, 304; Usborn v. Baker, 2 Madd. 379; 539.

It is filed on leave, to supply some defect in the structure of the original bill, caused by the happening of some event after the filing of the original bill.

Kennedy v. Georgia St. Bank, 8 How. U. S. 586; Winn v. Albert, 2 Md. Ch. 42.

It is not proper to file a supplemental bill to put in issue new matters which can be added to the bill by way of amendment. Therefore if there has been no change in the parties and the bill is defective from the complainant having omitted to make certain allegations, though ignorance of fact, and no proofs have

been taken, the complainant should apply to the court for leave to amend, and if he has filed a replication to withdraw his replication.

Dias v. Merle, 4 Paige 259; Colclough v. Evans, 4 Sim. 76; Stafford v. Howlett, 1 Paige 200; Chandler v. Pettit, 1 Paige 168.

If proofs have been taken he must in that event ask leave to file a supplemental bill.

Dias v. Merle, 4 Paige 259.

Not all matters, however, that have arisen since the commencement of suit can be put in issue even by a supplemental bill. If the complainant had no cause of action when the bill was filed he cannot cure the defect by putting in issue matters which have since occurred. He will not, for instance, be permitted to support a bad title held by him at the time the bill was filed, by subsequently acquiring a good one and setting up such acquired title by a supplemental bill.

Tonkin v. Lithbridge, Coop. R. 43; Davidson v. Foley, 3 Bro. C. C. 598; Pritchard v. Draper, 1 Russ. & My. 191.

This rule does not, however, bar a complainant who has a good inchoate title, from showing by a supplemental bill that such inchoate title has because vested through some formal act.

Mutter v. Chanvoe, 5 Russ. 42; Sadler v. Lovett, 1 Molloy 162.

A supplemental bill cannot be filed without leave of the court first obtained. The motion for an order giving permission need not be noticed however, unless an injunction is prayed for in the supplemental bill.

Eager v. Price, 2 Paige 333; Lawrence v. Bolton, 3 Paige 294; Winn v. Albert, 2 Md. Ch. 42.

If an injunction is prayed for and the defendant has appeared, a copy of the proposed bill is served upon him with a notice of the motion, together with copies of the affidavits or other proofs upon which the motion is based.

Eager v. Price, 2 Paige 333; Winn v. Albert, 2 Md. Ch. 42.

CROSS BILL.

Formerly a defendant could not pray for any relief in his answer, except to be dismissed the court with his reasonable costs and charges, and therefore, if he sought any relief, he must do so by a bill of his own, filed in the same cause and designated a cross bill.

Morgan v. Tipton, 3 McLean 339; Cullom v. Erwin, 4 Ala. 452.

Under the practice in this state and in some other states the defendant can in his answer ask for affirmative relief thus in many instances doing away with the necessity of a cross bill. It is still however desirable, and in some cases, necessary. It frequently happens that a complete decree cannot be made under the original bill, due to the fact that the conflicting rights of the defendants are not put in issue, or that some of the defendants are entitled to affirmative relief, and that a cross bill or cross bills are necessary to completely bring the whole matter in dispute before the court. In such a case it becomes necessary for one or more of the defendants to file a bill against the complainant, and if they are necessary parties, against one or more of the defendants.

White v. Buloid, 2 Paige 164; Anglo-Egyptian Co. L. R. 1 Ch. Ap. 108; Mich. Rule 123.

A cross bill is regarded as a defence and the original and cross bills are considered together as constituting one suit.

Field v. Schieffelin, 7 Johns. Ch. 249–252; Cartwright v. Clark, 4 Metc. 104.

Formerly no person could be made a party to a cross bill who was not a party to the original bill, but now in many of the states new parties when necessary may be thus brought in.

Blodgett v. Hobart, 18 Vt. 414; Brandon Mfg. Co. v. Prime, 14 Blatch. 371; Kennedy v. Kennedy, 66 Ill. 190; Cobb v. Baxter, 1 Tenn. Ch. 405.

As to the proper practice in this state under rule 123 which permits the defendant to ask for affirmative relief in his answer see

McGuire v. Buck, Mich. April, 1888; Harkley v. Mack, 60 Mich. 591.

The proper time for filing a cross bill is at the time the answer is put in. If it is not then filed and no sufficient excuse is given for the delay, the proceedings in the original suit will not be stayed.

White v. Buloid, 2 Paige 164; Josey v. Rogers, 13 Ga. 473; Irving v. DeKay, 10 Paige 319.

The cross bill should be confined to the matters stated in the original bill and must not introduce new and distinct matters not embraced therein. If it should it would be an original bill as to such matters. It must not contradict the allegations made by the

defendant in his answer to the bill, and it is proper, if not necessary, that the answer should set out all the allegations contained in the bill.

Harkley v. Mack, 60 Mich. 591; Irving v. DeKay, 10 Paige 319, 322; Hudson v. Hudson, 3 Rand. 117.

The original bill must be answered before the complainant in the original bill will be compelled to answer the cross bill.

After both causes are ready for a hearing either upon the pleadings, or pleadings and proofs, either party may obtain an order *ex parte* to have both causes heard together.

White v. Buloid, 2 Paige 164; U. S. Rule 72; Mich. Rule 20.

LECTURE XVI.

BILLS OF INTERPLEADER.

When a person is in possession of a specific chattel, or a definite sum of money, which two or more persons claim adversely to each other, but in the same right, or privity of estate, he may exhibit a bill of interpleader against such adverse claimants and thus relieve himself from the liability incident to delivering the article, or the money to the wrong claimant, by compelling them to litigate their adverse claims between each other.

Child v. Mann, L. R. 3 Eq. 805–806, 808; Bedell v. Hoffman, 2 Paige 199; Green v. Mumford, 4 R. I. 313; Farley v. Blood, 30 N. H. 354; Horton v. Baptist Church &c., 34 Vt. 309.

To entitle a party to file a bill of interpleader he must be a mere stakeholder, having, himself, no interest in the property in controversy, so that when the court decrees an interpleader, he may step out of the case altogether.

Lincoln v. R. & B. R. R. Co., 24 Vt. 639; Angell v. Hadden, 15 Ves. 244; Bowditch v. Soltyk, 99 Mass. 136.

Strictly speaking the complainant does not ask any relief against either of the defendants, but simply the aid of the court in determining to whom the property of right belongs, that he may deliver it to such rightful person and be relieved against the claims of the other.

Bedell v. Hoffman, 2 Paige 199; Badeau v. Rogers, 2 Paige 209; Lazin v. Van Saun, 2 Green Ch. 325.

There must be privity of some sort between the parties, such as privity of estate, title, or contract, and the claims must be all of the same nature. If the adverse claimants assert rights under adverse titles, and have claims differing in their nature, the bill cannot be maintained. Thus when two assessing districts have assessed the same person for the same property in each district, claiming to act under the statute, the owner of the property may file a bill of interpleader against the two corporations, or when a tenant owes rent to his landlord, and two persons claim through the same title to be such landlord, the tenant may file a bill against both, but if in the latter case the claim of one was based upon a title paramount to the other, as when one claims under the original title, and the other under a tax title, the bill may not be maintained.

M. & H. R. R. Co. v. Clute, 4 Paige 384; Thompson v. Ebbitts, Hopk. 272; Stanley v. Sidney, 14 M. & W. 800; Story Eq. Pl. § 239.

The claims of the several defendants must not only be substantially the same in their nature, but this must appear in the bill. The bill must also show that the defendants claim an interest in the whole subject-matter of the suit and be so framed that the decree may embrace the whole of it.

Hoggart v. Cutts, 1 Cr. & P. 197, 205; Crawford v. Fisher, 1 Hare 436, 440.

If the matter in dispute is money in the hands of

the complainant he should offer in his bill to bring it into court, to enable the court to direct that to be done upon the application of either of the other parties.

Shaw v. Coster, 8 Paige 339.

As a general rule a sheriff, who has seized property under an execution which is claimed by a party other than the defendant named in the writ, cannot file a bill of interpleader making such adverse claimants parties. If, however, there are conflicting equitable claims, or claims due to some event happening after the levy, for instance the bankruptcy of the execution defendant, he may file a bill.

Tufton v. Hardinge, 6 Jur. N. S. 116; Child v. Mann, L. R. 3 Eq. 805, 807.

There are conflicting claims sometimes to funds in the sheriff's hands arising from the sale of property on several executions running against the same person and in favor of divers persons. In such a case it is held in Arkansas that the sheriff may file a bill of interpleader.

Lawson v. Jordan, 19 Ark. 297.

But as a general rule this cannot be done.

Shaw v. Coster, 8 Paige 339; Parker v. Barker, 42 N. H. 78; Nash v. Smith, 6 Conn. 421.

In theory the bill is filed solely for the benefit of the complainant to relieve him from vexatious litigation and liability to pay the same amount twice, and the court will not permit the bill to be filed if there is collusion between the complainant and one of the

parties. The complainant must therefore file with the bill an affidavit that there is no collusion between him and either of the parties; and if there are several complainants they must all join in the affidavit.

Atkinson v. Monks, 1 Cow. 691; Farley v. Blood, 30 N. H. 354, 361; Story Eq. Pl. §§ 291, 297; Shaw v. Coster, 8 Paige 339.

In the bill of interpleader the complainant sets forth fully the subject-matter of the controversy; that the property is in his hands; that he has no interest in it; that the defendants named claim the property and the nature of their claim, but not their title. This part of the bill must be drawn so as to show that the complainant has a right to compel the defendants to interplead. The complainant must also aver, that he is ignorant, or in doubt, as to which of the parties are entitled to the property. The bill prays that the defendants may interplead, so that the court may determine to whom the property belongs. It usually prays also, if the matter of controversy is a money demand, that the complainant may pay the money into court. If a suit at law has been commenced by either, or both the defendants, or threatened by either or both, the bill also prays, that the defendants may be enjoined from further proceedings against the complainant at law.

Union Bank v. Kerr, 2 Md. Ch. 460; French v. Robechard, 50 Vt. 43.

BILLS TO PERPETUATE TESTIMONY.

Any person, who would, under the allegations contained in his bill, become entitled, upon the happening of some future event, to an estate, or interest in any property, real or personal, the right to which cannot by him be legally investigated, by being brought to trial before the happening of such event, may maintain a bill to perpetuate the testimony material for establishing such estate, or interest.

Lord Dursley v. Fitzhardinge, 6 Ves. 251–259; Allen v. Allen, 15 Ves. 129–135.

The interest which the complainant has, must be a present interest and not a mere contingent interest. But if it is a present interest it is wholly immaterial how minute it may be, or how remote the possibility may be, of the happening of the event upon which it is to be enjoyed.

Lord Dursley v. Fitzhardinge, 6 Ves. 251–259; Allen v. Allen, 15 Ves. 129–135.

The bill must set forth the matter touching which the complainant desires to take testimony. It must show that he has an actual and not a contingent interest, and that the facts to which the proposed testimony relates cannot be investigated immediately in a court of law or equity, or that before the facts can be adjudicated upon, the evidence of such witness, is in danger of being lost by his death or departure from the state. In the latter case the bill must be accompanied with

affidavit setting forth the danger of the loss of such testimony.

Phillip v. Carew, 1 P. Wms. 116, 117.

When a suit at law can be commenced immediately, a suit must be actually commenced before a bill to perpetuate testimony will be entertained.

Angell v. Angell, 1 Sim. & Stu. 83, 93.

It would seem that the bill is demurrable unless it shows that the complainant's interest is actual, and not capable of being barred by the defendant; that the interest cannot be investigated immediately, and that the defendant has an interest to contest the complainant's claim.

Allen v. Allen, 15 Ves. 129, 135; Larkins v. Ayleworth, 1 Vern, 105; Dursley v. Fitzhardinge, 6 Ves. 262; Ellice v. Roupelle, 32 Beav. 308.

The defence to a bill to perpetuate testimony is by demurrer, plea or answer, as in other cases. The cause, however, is never brought to a hearing. After the cause is at issue a commission issues for the examination of witnesses.

Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.

At common law the court would not permit the testimony to be published except in support of a suit or action, and not then, unless the witness, whose testimony had been taken, was dead, or sick, or so aged, or infirm, that he could not be examined in the cause.

Morrison v. Arnold, 19 Ves. 669; Jackson v. Rice, 3 Wend. 180; Jackson v. Perkins, 2 Wend. 308.

To obtain the order of publication, a notice of the motion must be served, which must be supported by an affidavit, that the testimony is necessary to be made use of in the complainant's behalf, that the witnesses are dead or so sick, aged or infirm, that they cannot travel to give evidence in the cause, or that they are out of the state. Upon such a showing the order of publication will be made. If a portion only of the testimony taken is to be used the order will designate what testimony is to be published.

Bills to perpetuate testimony are seldom resorted to at the present time, the statute in many of the states having provided a cheaper and more expeditious method of accomplishing the same purpose.

LECTURE XVII.

BILL TO EXAMINE WITNESSES DE BENE ESSE.

This species of bills bears a close analogy to bills to perpetuate testimony. But the two differ widely, standing upon distinct considerations. A bill to perpetuate testimony cannot be maintained except in cases where no suit can then be commenced in which the desired testimony can be taken. Bills to take testimony *de bene esse* are on the other hand sustained only in aid of a suit already pending.

Story Eq. Pl. §250; Angell v. Angell, 1 S. & S. 83.

The object of the bill is to take the testimony of witnesses to be used in a pending action at law in case where delay may result in the loss of such testimony, and the bill may be filed by the plaintiff or defendant in such suit at law.

The danger of the loss of a witness's testimony may arise from the age of the witness or his state of health, or from the fact that he is the only witness by whom a given fact can be proved. In this later case the court, in view of the uncertainty of life, will admit the testimony of such a witness to be taken although he is neither sick, infirm or aged.

Shirley v. Earl of Fenns, 1 P. Wms, 97; Pearson v. Ward, 2 Dick. 648.

As a general rule a witness is not treated as being aged unless he is seventy years of age.

Fitzhugh v. Lee, Amb. 65

But if a witness is infirm, or in ill health to an extent to endanger life, or to prevent his attendance at the trial, the court will permit his testimony to be taken, no matter what his age may be.

Phillips v. Carew, 1 P. Wms. 117.

If a witness is going out of the jurisdiction of the court his testimony also may be taken. At common law this was the case, although the witness was going from one division of the kingdom to another, as from England to Scotland.

Botts v. Verelst, 2 Dick. 454.

In framing a bill to examine witnesses *de bene esse*, care must be taken to allege all the material facts upon which the right to maintain the bill can be maintained, that is, that the witness whose testimony you desire to take is aged, infirm, about to leave the jurisdiction of the court, or is the only witness by whom you can prove a material fact, as the case may be. The bill should be supported also by an affidavit showing the circumstances by which the evidence intended to be taken may be otherwise lost.

Angell v. Angell, 1 S. & S. 83, 91; Phillips v. Carew, 1 P Wms. 117; Story Eq. Pl. §257.

The affidavit must be positive as to the material facts, and not rest upon belief merely. Thus where a bill was filed to take the testimony of a witness

alleged to be the only witness, and the affidavit alleged that he was the only witness in the belief of the party, it was held insufficient, and that the affidavit should have stated positively that he was the only witness who knew the fact.

Rowe v. ——, 13 Ves. 260.

Testimony taken *de bene esse* is only valid in the cause in which it is taken, and against those who are parties to such cause. In other respects the rules applicable to bills to perpetuate testimony apply to these bills.

There are several other bills which we do not notice for the reason that their form depends largely upon local statutes, for instance bills for divorce, bills filed by judgment creditors against their debtors, bills for the partition of land, bills for the foreclosure of mortgages, etc., etc.

Having now gone over the various steps taken in the progress of a suit in equity we will close this short synopsis of equity pleadings and practice with Lord Redesdale analysis of the different kinds of bills. He says: "The several kinds of bills have been usually considered as capable of being arranged under the general heads: I. Original bills, which relate to some matters not before litigated in the court by the same parties standing in the same interests. II. Bills not original which are either an addition to, or a continuance of an original bill, or both. III. Bills which, though occasioned by or seeking the

benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of a former bill but in the nature of original bills. And though this arrangement is not perhaps the most perfect, yet, as it is nearly just, and has been very generally adopted in argument, and in the books of reports and of practice, it will be convenient to treat the different kinds of bills with reference to it.

I. A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the defendant to defend himself against a possible future injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills have, therefore, been again divided into bills praying relief, and bills not praying relief. An original bill praying relief may be: 1. A bill praying the order or decree of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. 2. A bill of interpleader, when 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 persons exhibiting the bill. 3. A bill praying the writ of certiorari to remove a cause from an inferior court of equity. An original bill not praying relief may be: 1. A bill to perpetuate the testimony of witnesses. 2. A bill for the discovery of facts resting within the knowledge

of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II. A suit imperfect in its frame, or becomes so by accident, before its end has been obtained, may, in many cases, be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to or continuance of the former bill, or both. A bill of this kind may be: 1. A supplemental bill, which is merely an additional to the original. 2. A bill of revivor, which is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. 3. A bill both of revivor and supplement which continues a suit upon an abatement and supplies defects arisen from some event subsequent to the institution of the suit.

III. Bills for the purpose of cross litigation of matters already depending before the court, of controverting, suspending, avoiding or carrying into execution a judgment of the court, or obtaining the benefit of a suit which the plaintiff is not entitled to add to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by, or seeking the benefit of former bills; and may be: 1. A cross-bill, exhibited by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first

bill. 2. A bill of review to examine and reverse a decree made upon a former bill and signed by the person holding the great seal, and enrolled, whereby it has become a record of the court. 3. A bill in the nature of a bill of review, brought by a person not bound by the former decree. 4. A bill to impeach a decree on the ground of fraud. 5. A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of matter arisen subsequent to it. 6. A bill to carry a decree made in a former suit into execution. 7. A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of the continuance of the original bill. 8. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective without abatement, in cases which do not admit of a supplemental bill to supply that defect.

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GENERAL EQUITY RULES

PRESCRIBED BY

THE SUPREME COURT OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1

The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

Ewing v. Blight, 1 Phila. 576.

2

The Clerk's office shall be open, and the Clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

3 McLean, 503.

4

All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether

special or of course, shall be entered by the clerk in an order book, to be kept in the clerk's office, on the day when they are made and directed; which book shall be open, at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court, may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

U. S. v. Parrott, 1 McAll. 457; McLean v. Lafayette Bank, 3 McLean 503; Newby v. Or. Cent. R. Co., 1 Saw. 63; Bronson v. Kensey, 3 McLean 180; Halderman v. Halderman, Hemp. 407; Wilkins v. Jordan, 3 Wash. 226; Bennett v. Hoefner, 17 Blatch. 341; Chicago, etc., Co., 1 Woolw. 63.

5

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

Poultney v. Lafayette, 12 Peters, 472.

6

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by the judge of the court, be made on a

rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

U. S. v. Parrott, 1 McAll. 477.

PROCESS.

7

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

5 Mass. 35; R. S. sec. 911; Herndon v. Ridgway, 17 How. 424; Toland v. Sprague, 12 Peters 300; Nazro v. Cragin, 3 Dill. 474; Ex parte Graham, 3 Wash. C. C. 456; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. Rep. 252; Crellin v. Ely, 13 Fed. Rep. 420; Johnson v. Waters, 111 U. S. 640.

8

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a

special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree.

R. S. secs. 985, 986; Toland v. Sprague, 12 Peters 300; Gwin v. Breedlove, 2 How. 29; Griffin v. Thompson, 2 How. 245; McFarland v. Gwin, 3 How. 720.

9

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Terrell v. Allison, 21 Wall. 289; Pratt v. Burr, 5 Biss. 36; Thompson v. Smith, 1 Dill. 458.

10

Every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SERVICE OF PROCESS.

11

No process of subpœna shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

12

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff; which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff. occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum. that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso. Where there is more than one defendant, a writ of subpœna may, at the election

of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

Treadwell v. Cleveland, 3 McLean 283; O'Hara v. MacConnell, 93 U. S. 150.

13

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

Ward v. Seabry, 4 Wash. 426; Ward v. Sebring, 4 Wash. 472; Sawyer v. Gill, 3 W. & M. 97; Hyslop v. Hoppock, 5 Ben. 533; Weiberg v. The St. Oloff, 2 Pet. Adm'y 428; Segee v. Thomas, 3 Blatch. 11: Robinson v. Cathcart, 2 Cr. C. C. 590; Doe ex dem. v. Johnston, 2 McLean 323; K'y Silv. M'g Co. v. Day, 2 Saw. 468; Hitner v. Suckley, 2 Wash. 465; Read v. Consequa, 4 Wash. 174; Eckert v. Bauert, 4 Wash. 370; Parsons v. Howard, 2 Woods 1; Reid v. Rochereau, 2 Woods 145; Dunn v. Clark, 8 Peters 1; Lowenstein v. Glidewell, 9 Blatch. 324; Pacific R. R. Co. v. Mo. R'y Co., 1 McCrary 647; Bronson v. Keokuk, 2 Woods 498; O'Hara v. McConnell, 3 Otto 151; Phœnix M. I. Co. v. Wulf, 9 Biss. 285; Jobbins v. Montague. 5 Ben. 429; Gracie v. Palmer, 8 Wheat. 299; Thayer v. Wales 5 Dill. 325; Young v. Montgomery, etc., Co., 2 Woods 607; Kibbe v. Benson, 17 Wall. 624; Settlemeier v. Sullivan, 97 U. S. 444.

14

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, toties quoties, against such defendant, if he shall require it, until due service is made.

15

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Jobbins v. Montague, 5 Ben. 428; U. S. v. Montgomery, 2 Dall. 335; Hyman v. Chales, 12 Fed. Rep. 855; Kennedy v. Brent, 6 Cranch 187; Wortman v. Coyningham, 1 Peters

C. C. 241; Life and F. Ins Co. v. Adams, 9 Peters 573; Harriman v. Rockaway B. P. Co., 5 Fed. Rep. 561; U. S. v. Moore, 2 Brock. 317.

16

Upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17

The appearance day of the defendant shall be the rule day, to which the subpœna is made returnable; provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book, on the day thereof, by the clerk.

Treadwell v. Cleveland, 3 McLean 283; Poultney v. Lafayette, 12 Peters 472; Nelson v. Moon, 3 McLean 319; Carrington v. Brent, 1 McLean 167; Gracie v. Palmer, 8 Wheat. 699; Goodyear v. Chaffee, 3 Blatch. 268; Marye v. Strauss, 5 Fed. Rep. 494; Knox v. Summers, 3 Cranch 496; Segee v. Thomas, 3 Blatch. 11; Jones v. Andrews, 10 Wall. 327; Dore v. Gibboney, 3 Hughes 382; Kentucky, etc., Co. v. Day, 2 Sawy. 468; Virginia, etc., Co. v. U. S., Taney 418; Shelton v. Tiffin, 6 How. 163; Osborne v. U. S. Bank, 9 Wheat. 739; Buerk v. Imhaeuser, 8 Fed. Rep. 457; Hale v. Continental Ins. Co., 12 Fed. Rep. 359; Graham v. Spencer, 14 Fed. Rep. 603; Patterson v. U. S., 2 Wheat. 222.

BILLS TAKEN PRO CONFESSO.

18

It shall be the duty of the defendant, unless the time shall be otherwise enlarged for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration

of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court, or a judge thereof, may direct, as to pleading to or fully answering the bill within a period to be fixed by the court, or judge, and undertaking to speed the cause.

Amended 7 Otto VIII; O'Hara v. McConnell, 93 U. S. 150; Halderman v. Halderman, Hemp. 407; Dean v. Mason, 20 How. 198; Walz v. Brookville National Bank, 11 Chi. Legal News 392; 8 Reporter 580.

19

When the bill is taken pro confesso, the court may proceed to a decree any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.

Amended 7 Otto VIII; Scott v. Blaine, Bald. 287; Allen v. Thomas, 1 Cr. C. C. 294; Stewart v. Smith, 2 Cr. C. C. 615; McMicken v. Perin, 18 How. 507; Kemball v. Stewart, 1 McLean 332; Piatt v. Oliver, 2 McLean 281, 283; Lincoln v. Tower, 2 McLean 487; Fellows v. Hall, 3 McLean 281; Cameron v. McRoberts, 3 Wheat. 591; Suydam v. Beals, 4 McLean 12; Read v. Consequa, 4 Wash. C. C. 175; Pendleton v. Evan's Ex'rs, 4 Wash. C. C. 336; Pendleton v. Evan's Ex'rs, 4 Wash. C. C. 336; Boudinot v. Symmes, Wall. C. C. 139; O'Hara v. McConnell, 3 Otto 150; Bennett v. Hoefner, 17 Blatch. 341; Blackburn v. Selma R. Co., 3 Fed. Rep. 689; Walz v. Brookville Nat'l Bank, 11 Chi. Legal News 392; 8 Reporter 580.

FRAME OF BILLS.

20

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of——, A. B., of——, and a citizen of the State of——, brings this, his bill, against C. D., of——, and a citizen of the State of ——, and E. F., of——, and a citizen of the State of——. And thereupon, your orator complains, and says that," etc.

Dodge v. Perkins, 4 Mason 435; Jackson v. Ashton, 8 Pet. 148; K'y Silv. M'g Co. v. Day, 2 Saw. 468; Barth v. McKeever, 4 Biss. 206; Str. Shark v. Lee Choi Chum, 1 Saw. 717; Harrison v. Nixon, 9 Peters 483, 505; Speigle v. Meredith, 4 Biss. 120; Merserole v. P. C. Union Co., 6 Blatch. 356; National Bank v. Baack, 8 Blatch. 137; Findlay v. U. S. Bank, 2 McLean 44; Vose v. Philbrook, 3 Story 336; Sterrick v. Pagsley, 1 Flippin 350; U. S. v. Pratt Coal Co., 18 Fed. Rep. 708.

21

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of the bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and shall also contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order pending the suit is required, it shall also be specially asked for.

Perry v. Corning, 7 Blatch. 195; Dunham v. Eat. & Ham. R. R. Co., 1 Bond 492; Georgia v. Braiseford, 2 Dall. 405; Taylor v. Merch. Fire Ins. Co., 9 How. 390; Spooner v. McConnell, 1 McLean 337; Smith v. Foxall, 2 Pet. 595; Union Bank of Georgetown v. Geary, 5 Pet. 99; Harrison v. Nixon, 9 Pet. 483; Boone v. Chiles, 10 Pet. 177; Walden v. Bodley, 14 Pet. 156; Hobson v. McArthur's Heirs, 16 Pet. 182; Washington R. R. v. Bradleys, 10 Wall. 299; Wilson v. Graham, 4 Wash. 53; Penhallow v. Doane, 3 Dall. 86; Moore v. Mitchell, 2 Woods 483; Lewis v. Shainwald, 7 Saw. 403; Poultney v. City of Lafayette, 3 How. 81; see also Gen. Eq. Rule 23.

22

If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the bill may pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.

Abbott v. Am. H'd Rub. Co., 4 Bl. C. C. 489; Bunce v. Gallagher, 5 Bl. C. C. 481; Barney v. Baltimore City, 6 Wall. 280; Hoe v. Wilson, 9 Wall. 501; Tobin v. Walkinshaw, 1 McAll. 26.

23

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants, under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

24

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Roach v. Hulings, 5 Cr. C. C. 637; Dwight v. Humphreys, 3 McLean 104; Stinson v. Hildrup, 8 Biss. 376.

25

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then if shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof, shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Nourse v. Allen, 4 Blatch. 376; Perry v. Corning, 7 Blatch. 195; Capen v. Flesher, 1 Bond 440; Gaines v. Chew, 2 How. 619; Oliver v. Piatt, 3 How. 333; McLean v. Lafayette Bank, 3 McLean 415; Gier v. Gregg, 4 McLean 202; Griswold v. Hill, 1 Paine 390; Langdon v. Goddard, 3 Story 13; Wood v. Mann, 1 Sum. 579; Chapman v. School District, Deady 108.

27

No order shall be made by any judge, for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, pro-

cure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

Oliver v. Piatt, 3 How. 333; Nelson v. Hill, 5 How. 127; Surget v. Byers, Hempst. 715; U. S. v. Sturges, 1 Paine 525; Chapman v. School District, Deady 108.

AMENDMENTS OF BILLS.

28

The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course), after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill, as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Capen v. Flesher, 1 Bond 440; Shields v. Barrow, 17 How. 130; Holmes v. Heirs of Trout, 1 McLean 1; Longworth v. Taylor, 1 McLean 514; Walden v. Bodley, 14 Pet. 156; Peirce v. West's Ex'r, 3 Wash. 354; Read v. Consequa, 4 Wash. 175; Goodyear v. Bourn, 3 Blatch. 266; Harrison v. Rowan, 4 Wash. 202; Fisher v. Rutherford, Bald. 188; Hilliard v. Brevoort, 4 McLean 25; Swatzel v. Arnold, Woolw. 383; Coghlan v. Stetson, 19 Fed. Rep. 727; Douglas v. Butler, 6 Fed. Rep. 228; Hardin v. Boyd, 113 U. S. 756.

29

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court or a judge thereof, may, in his discretion, direct. But after replication

filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Fisher v. Rutherford, Bald. 188; Goodyear v. Bourn, 3 Blatch. 266; Wharton's Ex'rs v. Lowrey, 2 Dall. 364; Snead v. McCoull, 12 How. 407; Shields v. Barrow, 17 How. 130; Hunt v. Rousemaniere, 2 Mason 342; Ross v. Carpenter, 6 McLean 382; Conolly v. Taylor, 2 Pet. 556; Jackson v. Ashton, 10 Pet. 480; Walden v. Bodley, 14 Pet. 156; Neale v. Neales, 9 Wall. 1; Wash. R. R. v. Bradleys, 10 Wall. 299; Pierce v. West's Ex'r, 3 Wash. 354; Duponti v. Mussy, 4 Wash. 128; Tufts v. Tufts, 3 W. & M. 457; Clifford v. Coleman, 13 Blatch. 210; The Tremolo Patent, 23 Wall. 518; Battle v. Mutual L. I. Co., 10 Blatch. 418; Lichtenauer v. Cheney, 3 McCrary 119; Brown v. White, 16 Fed. Rep. 900; National Bank v. Carpenter, 101 U. S. 567; Graffan v. Burgess, 117 U. S. 181; Clements v. Moore, 6 Wall. 310; Adam's Equity, p. 346, note 3.

30

If the plaintiff so obtaining any order to amend his bill, after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Marshall v. Vicksburg, 15 Wall. 146.

DEMURRERS AND PLEAS.

31

No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

Goodyear v. Toby, 6 Bl. C. C. 130; Newby v. Oregon Cent. R. Co., 1 Saw. 63; Ewing v. Blight, 3 Wall. Jr. 134;

Sims v. Lyle, 4 Wash. 301; National Bank v. Insurance Co , 104 U. S. 55, 76; Secor v. Singleton, 3 McCrary 230; Filer v. Levy, 17 Fed. Rep. 610.

32

The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination and the facts on which the charge is founded.

Atwill v. Ferrett, 2 Blatch. 39; Maxwell v. Kennedy, 8 How. 210; Rhode Island v. Massachusetts, 15 Pet. 233; Foster v. Swasey, 2 W. & M. 217; Pierpont v. Fowle, 2 W. & M. 23; Wisner v. Barnett, 4 Wash. 631; Gallagher's Ex'rs v. Roberts, 1 Wash. 320; Livingston v. Story, 9 Peters 632; Oliver v. Decatur, 4 Cranch C. C. 458; Heath v. Erie R. R. Co., 8 Blatch. 348; Brandon Co. v. Prime, 14 Blatch. 371; Perry v. Littlefield, 17 Blatch. 273; Crescent City Co. v. Butchers, etc., Co., 12 Fed. Rep. 225; Hayes v. Dayton, 18 Blatch. 420; Beard v. Bowler, 2 Bond 13; Wythe v. Palmer, 3 Saw. 412; Kirkpatrick v. White, 4 Wash. C. C. 595; Wheeler v. McCormick, 8 Blatch. 267; Lamb v. Starr, Deady 351; Noyes v. Williard, 1 Woods 187; Lewis v. Baird, 3 McLean 56; Burnley v. Jeffersonville, 3 McLean 336; Shelton v. Tiffin, 6 How. 163; House v. Mullen, 22 Wall. 42; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. Rep. 18.

33

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

Meyers v. Dorr, 13 Blatch. 22; Gallagher's Ex'rs v. Roberts, 1 Wash. 320; Rhode Island v. Massachusetts, 14 Peters 210; Mellus v. Thompson, 1 Cliff 125; Parton v. Prang, 3 Cliff 537; S. C. 2 Off. Pat. Gaz. 619; Gernon v. Boccaline, 2 Wash. C. C. 199.

34

If, upon the hearing, any demurrer or plea is overruled, the plantiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and

it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.

Poultney v. City of Lafayette, 3 How. 81; Sims v. Lyle, 4 Wash. C. C. 303; Wooster v. Blake, 7 Fed. Rep. 816; Halderman v. Halderman, Hemp. 407; Suydam v. Beals, 4 McLean 12; Fellows v. Hall, 3 McLean 487; Ormsby v. Union Pac. R'y Co., 4 Rep. Fed. 170; Newman v. Moody, 19 Fed. Rep. 858.

35

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

Brooks v. Byam, 2 Story 553; National Bank v. Carpenter, 101 U. S. 567; Hunt v. Rousemaniere, 2 Mason 342; Dwight v. Humphreys, 3 McLean 104; Ketchum v. Driggs, 6 McLean 14; Gaylor v. R. R. Co., 6 Biss. 286.

36

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.

Livingston v. Story, 9 Pet. 633; Kirkpatrick v. White, 4 Wash. 595.

37

No demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Lewis v. Baird, 3 McLean 56; Ferguson v. O'Hara, 1 Peters C. C. 493; Crescent City Co. v. Butchers, etc., Co., 12 Fed. Rep. 225; Hayes v. Dayton, 18 Blatch. 420.

38

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same

is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed, as of course, unless a judge of the court shall allow him further time for the purpose.

Poultney v. Lafayette, 3 How. 81; Parton v. Prang, 3 Cliff 537; S. C., 2 Off. Pat. Gaz. 619; Hughes v. Blake, 6 Wheat. 453; Leeds v. Marine Ins. Co., 2 Wheat. 380; Newby v. Oregon C. R. R. Co., 1 Saw. 63; National Bank v. Insurance Co., 104 U. S. 54.

ANSWERS.

39

The rule, that if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer, or discovery of his title, than he would be in any answer in support of such plea.

Hardeman v. Harris, 7 How. 726; Piatt v. Oliver, 1 McLean 295; Mech. Bank of Alexandria v. Lynn, 1 Pet. 376; Boone v. Chiles, 10 Pet. 179; Brooks v. Byam, 1 Story 296; Kittredge v. Pres. Claremont B'k, 3 Storey 590; Gaines v. Agnelly, 1 Woods 238; Samples v. The Bank, 1 Woods 523; Vose v. Reed, 1 Woods 647; Livingstone v. Story, 11 Peters 352; Wickliffe v. Owings, 17 How. 47; Wood v. Mann, 1 Sum. 578; Clark v. White, 12 Peters 178; Randall v. Phillips, 3 Mason 378; Bailey v. Wright, 2 Bond 181; Lenox v. Prout, 3 Wheat. 520; Union Bank v. Geary, 5 Peters 98; Higbe v. Hopkins, 1 Wash. C. C. 230; Carpenter v. Prov. W. I Co., 4 How. 185; Hughes v. Blake, 1 Mason 515; Langdon v. Goddard, 2 Story 267; Gould v. Gould, 3 Story 516; Greeley

v. Smith, 3 Story 659; Town v. Smith, 1 Wood & M. 115; Delano v. Winsor, 1 Cliff. 501; Pomeroy v. Manin, 2 Paine 476; Toby v. Leonard, 2 Cliff. 40; Gilman v. Libbey, 4 Cliff. 447; Hayward v. National Bank, 2 Cliff. 294; Gernon v. Boccaline, 2 Wash. C. C. 199; Walker v. Derby, 5 Biss. 134; Field v. Holland, 6 Cranch 8; Russell v. Clark, 7 Cranch 69; Clark's Ex'rs v. Van Reimsdyk, 9 Cranch 153; Leeds v. Marine Ins. Co., 2 Wheat. 380; Morris v. Nixon, 1 How. 119; Van Reimsdyk v. Kane, 1 Gall. 630; Osborne v. U. S. Bank, 9 Wheat. 738.

40

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered, that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

10 How. v.; Young v. Grundy, 3 Cranch 51; Treadwell v. Cleveland, 3 McLean 283; Langdon v. Goddard, 3 Story 13; Parsons v. Cumming, 1 Woods 461; Bailey v. Young, 12 Blatch. 200.

41

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form, or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories, except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath, with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

R. S. sec. 858; 13 Wall. xi.; Slessinger v. Buckingham, 8 Saw. 469; Patterson v. Gaines, 6 How. 550; Amory v. Lawrence, 3 Cliff. 524; Holbrook v. Black, 8 L. R. N. S. 89; Heath v. Erie R. R. Co., 8 Blatch. 348.

42

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall here after be used the words in the form, or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as, by the note hereunder written, they are respectively required to answer, that is to say:

"1. Whether," etc.

"2. Whether," etc.

Langdon v. Goddard, 3 Story 13.

44

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Mech. Bank of Alexandria v. Lynn, 1 Pet. 376.

45

No special replication to any answer shall be filed; but if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may, in his discretion, direct.

Taylor v. Benham, 5 How. 233; Wilson v. Stolly, 4 McLean 275; Colman v. Martin, 6 Blatch. 291; Duponti v. Massy, 4 Wash. C. C. 128; Clements v. Moore, 6 Wall. 299; Mason v. Hartford P. & F. R. Co., 10 Fed. Rep. 334.

46

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47

In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties, by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and, in such cases, the decree shall be without prejudice to the rights of the absent parties.

R. S. Sec. 737; Louisville R. R. Co. v. Letson, 2 How. 556; Shields v. Barrow, 17 How. 130; Shields v. Barrow, 17 How. 141; Herndon v. Ridgway, 17 How. 425; Coiron v. Millaudon, 19 How. 113; Taylor v. Cook, 2 McLean 516; Bargh v. Page, 4 McLean 11; Doremus v. Bennett, 4 McLean 224; Bank of Vicksburg v. Slocomb, 14 Pet. 60; Caldwell v. Taggart, 4 Peters 190; Morgan v. Morgan, 2 Wheat. 298; Williams v. Bankhead, 19 Wall. 263; Van Reimsdyk v. Kane, 1 Gall. 371; West v. Randall, 2 Mason 181; Elmendorf v. Taylor, 10 Wheat. 152: Finley v. Bank of U. S., 11 Wheat. 304; French v. Shoemaker, 14 Wall. 314; Fitch v. Creighton, 24 How. 159; Heath v. Erie Railway Co., 8 Blatch. 347; Abbott v. American H. R. Co., 4 Blatch. 491; Mallow v. Hinde, 12 Wheat. 193; Vattier v. Hinde, 7 Peters 252; McCoy v. Rhodes, 11 How. 131; Cameron v. McRoberts, 3 Wheat. 591; Harding v. Handy, 11 Wheat. 103; Gray v. Larrimore, 2 Abb. U. S. 542; Cole S. M. Co. v. Virginia & C. Co., 1 Saw. 470; Payne v. Hook, 7 Wall. 425; Mechanics' Bank v. Seaton, 1 Peters 299; Calhoun v. St. Louis, etc., Co., 14 Fed. Rep. 4; Wormley v. Wormley, 8 Wheat. 421; Carneal v. Banks, 10 Wheat. 181; Ward v. Arredondo, 1 Paine, 410; Harrison v. Urann, 1 Story 64; Joy v. Wirtz, 1 Wash. C. C. 517; Drake v. Goodridge, 6 Blatch. 151; Riddle v. Mandeville, 5 Cranch 322; Russell v. Clarke, 7 Cranch 64; Marshall v. Beverly, 5 Wheat. 313; Connecticut v. Pennsylvania, 5 Wheat. 424; Barney v. Baltimore, 6 Wall. 280; Bank v. Carrollton R. R., 11 Wall. 624; Traders Bank v. Campbell, 14 Wall. 87; Ribon v. R. R. Co., 16 Wall. 446; Young v. Cushing, 4 Biss. 456; Bunce v. Gallagher, 5 Blatch. 481; Florence S. M. Co. v. Singer S. M. Co., 8 Blatch. 113; Carson v. Robertson, Chase 475; Bank v. Smith, 6 Fed. Rep. 215; Dormitzer v. Ill. etc., B. Co., 6 Fed. Rep. 217; Milligan v. Milledge, 3 Cranch 220; Hoxie v. Carr, 1 Sum. 173; Hunt v. Wycliffe, 2 Peters 201; Dandridge v. Washington's Ex'rs, 2 Peters 370; Parsons v. Lyman, 4 Blatch. 432; Brown v. Pacific M. S. S. Co., 5 Blatch. 526; Harrison v. Brown, 4 Wash. C. C. 202; Connolly v. Tayler, 2 Peters 556; Mollan v. Torrance, 9 Wheat. 537; Coann v. Atlanta, etc., Co., 14 Fed. Rep. 4; Kerr v. Watts, 6 Wheat. 550; McArthur v. Scott, 113 U. S. 340.

48

Where the parties on either side are very numerous, and can not, without manifest convenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit

properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Mandeville v. Riggs, 2 Peters 482; Brown v. Pacific M. S. S. Co., 5 Blatch. 525; Campbell v. R. R. Co., 1 Woods 368; Wilmer v. Atlanta, etc. Co., 2 Woods 447; West v. Randall, 2 Mason 181; Calhoun v. St. Louis Ry. Co., 14 Fed. Rep. 4.

49

In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Chew v. Hyman, 10 Biss. 240.

50

In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party, where he desires to have the will established against him.

Ware v. Galveston City Co., 111 U. S. 170.

51

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

French v. Shoemaker, 14 Wall. 314.

52

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at

liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form, or to the effect following; that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objections shall then be allowed, be entitled, and of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Greenleaf v. Queen, 1 Peters 138; U. S. v. Gillespie, 6 Fed. Rep. 803; Segee v. Thomas, 7 Blatch. 11; Harrison v. Rowan, 4 Wash. C. C. 202.

53

If a defendant shall, at a hearing of the cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified, by name or description, the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

Segee v. Thomas, 3 Blatch. 11; Bank v. Seton, 1 Peters, 299; Story v; Livingstone, 13 Peters 959; Wallace v. Holmes, 9 Blatch. 65; Greenleaf v. Green, 1 Pet. 138.

NOMINAL PARTIES TO BILLS.

54

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill, but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Wormley v. Wormley, 8 Wheat. 422.

55

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party, by the court, in term, or by a judge thereof, in vacation, after a hearing, which may be *ex parte* if the adverse party does uot appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

R. S. sec. 718, 719, 720; Simms v. Guthrie, 9 Cranch 19; Dunn v. Clark, 8 Peters 1; McKinne v. Voorheis, 7 Cranch 279; Dial v. Reynolds, 3 Otto 34; Diggs v. Walcott, 4 Cranch 179; Haines v. Carpenter, 1 Otto 254; City Bank v. Skelton, 2 Blatch. 26; Whepley v. Erie Ry. Co., 2 Blatch. 271; Ewing v. Blight, 3 Wall. Jr. 139; Fanshawe v. Tracy, 4 Biss. 490; Fremont v. Merced Mf'g Co., 1 McAll. 268; Walworth v. Board of Supervisors, 5 Biss. 133; McCauley v. Kellogg, 2 Woods 13; Marsh v. Bennett, 5 McLean 117; Mowrey v. R. R. Co. 4 Biss. 78; Gray v. Chicago, etc Co., 1 Woolw. 63; Coleman v. Hudson R. R. Co., 5 Blatch. 57; Read v. Consequa, 4 Wash. C. C. 174; Farmer v. Calvert Lith. Co., 1 Flippin 228; Poor v. Carleton, 3 Sum. 70.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the

time of the service of the same process, the suit shall stand revived, as of course.

Glenn v. Capp, 11 Gill. & J. 1; Thorn v. Germand, 4 Johns. Ch. 363; Requa v. Holmes, 16 N. Y. 193; Wash. Ins. Co. v. Slee, 2 Paige 365; Minnesota Co. v. St. Paul Co., 2 Wall 609; Mayor, etc., of Springfield v. Edwards, 10 C. L. N. 51; Kennedy v. Georgia St. B'k, 8 How. 586; Fitzpatrick v. Domingo, 14 Fed. Rep. 216; Clarke v. Mathewson, 12 Peters 164; Clarke v. Matthews, 2 Sum. 262; Vattier v. Hinde, 7 Peters 252; Mason v. Hartford, P. & F. R. Co., 19 Fed. Rep. 53; Chester v. Life Ass'n of America, 4 Fed. Rep. 487; Barribeau v. Brant, 17 How. 43; Illinois Cent. R. R. Co. v. Turrill, 110 U. S. 301.

57

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court, on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Oliver's Ex'r v. Decatur, 4 Cr. C. C. 458; Slack v. Walcott, 3 Mason 508; Greenleaf v. Queen, 1 Pet. 138; Clarke v. Matthewson, 12 Pet. 164; Winter v. Ludlow, 3 Phila. 464; Baker v. Whiting, 1 Story 218; Jenkins v. Eldredge, 3 Story 300; Hoxie v. Carr, 1 Sum. 173; Kennedy v. Georgia St. B'k, 8 How. 610; Tappan v. Smith, 5 Biss. 73; Cohen v. Flesher, 1 Bond. 440; Caster v. Wood, 1 Bald. 289; Parkhurst v. Kinsman, 2 Blatch. 72; Snead v. McCoull, 12 How. 407; Mosgrove v. Kountze, 14 Fed. Rep. 315; Chester v. Life Ass'n of America, 4 Fed. Rep. 487.

58

It shall not be necessary, in any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any com-

missioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory.

Read v. Consequa, 4 Wash. C. C. 335; Herman v. Herman, 4 Wash. C. C. 555.

AMENDMENT TO ANSWERS.

60

After an answer is put in, it may be amended, as of course, in any matter of form or by filling up a blank, or correcting a date or reference to a document, or other small matter, and be re-sworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But, after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Caster v. Wood, 1 Bald. 289; Foote v. Silsby, 1 Blatch. 545; Calloway v. Dobson, 1 Brock 119; Wilson v. Turberville's Ex'r, 2 Cr. C. C. 27; Suydam v. Truesdale, 6 McLean 459; Smith v. Babcock, 3 Sum. 583; Rhode Island v. Massachusetts, 13 Peters 23; Walden v. Bradley, 14 Peters 156; India Rubber Co. v. Phelps, 8 Blatch. 85; Grier v. Gregg, 4 McLean 202.

EXCEPTIONS TO ANSWERS.

61

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Brent v. Venable, 3 Cr. C. C. 227; The Patriotic Bank v. Bank of Washington, 5 Cr. C. C 602; Brooks v. Byam, 1 Story 296; Hardeman v. Harris, 7 How. 726; Read v. Consequa, 4 Wash. C. C. 335; Bradford v. Geiss, 4 Wash. C. C. 513; Chapman v. School District, Deady 108; Griswold v. Hill, 1 Paine 390; Kitredge v. Race, 92 U. S. 116; Adams v. Bridgewater Iron Co., 6 Fed. Rep. 179; Allis v. Stowell, 5 Fed. Rep. 203.

62

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; *provided, however*, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Read v. Consequa, 4 Wash. 335; La Vega v. Lapsley, 1 Woods, 428; Penn v. Butler, Wall. C. C. 4.

64

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or at his election, he may have a writ of attachment to compel the defendant to make a a better answer to the matter of the exceptions; and the defend-

ant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer; and complying with such other terms as the court or judge may direct.

65

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto, on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit, or refuse, to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Coleman v. Martin, 6 Bl. C. C. 291; Robinson v. Satterlee, 3 Saw. 134; Clements v. Moore, 6 Wall. 299; Duponti v. Mussy, 4 Wash. 128; Jones v. Brittan, 1 Woods, 667; Bullinger v. Mackey, 14 Blatch. 355; Fisher v. Wilson, 16 Blatch. 220; Washington R. R. v. Bradleys, 10 Wall. 302; Fischer v. Hayes, 19 Blatch. 26; S. C. 6 Fed. Rep. 76; Vattier v. Hinde, 7 Pet. 252; Warren v. Van Brunt, 19 Wall. 646; Allis v. Store, 10 Biss. 57; S. C. 5 Fed. Rep. 203.

TESTIMONY, HOW TAKEN.

67

1. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally, by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-

interrogatories before the issuing of the commission; and, if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

2. Ordered, that the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can do by the said sixty-seventh rule.

3. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court; the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; *provided*, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition; but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solici-

tor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel, or solicitors, to the opposite counsel, or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the 30th section of Act of Congress, September 24th, 1789.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

4. Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th general rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply: and no further evidence shall be taken in the cause unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

17 How. vii.; 1 Black vi.; 9 Wall. vii.; R. S. § 865; Van Hook v. Pendleton, 2 Blatch. 85; Pierce v. Strickland, 2 Story 292; Blease v. Garlington, 92 U. S. 1; Sickles v. The Gloucester Co. 3 Wall. Jr. 193; Coleman v. Martin, 6 Blatch. 291; Bronson v. LaCross R. R. Co. 9 Am. Law R. 350; Bischoffscheim v. Baltzen, 10 Fed. Rep. 1; In re Clarke, 9 Blatch. 372; N. C. R. R. Co. v. Drew, 3 Woods 692; U. S. v. Parrott, 1 McAll. 447; Armstrong v. Brown, 1 Wash. C. C. 43; Menus v. Dupont, 3 Wash. C. C. 31; Willings v. Consequa, 1 Peters 301; Lonsdale v. Brown, 3 Wash. C. C. 404; Boudereau v. Montgomery, 4 Wash. C. C. 186; Rhodes V. Selin, 4 Wash. C. C. 715; Read v. Bertrand, 4 Wash. C. C. 558; Crocker v. Franklin Co., 1 Story 169; Ketland v. Bissett, 1 Wash. C. C. 144; Dodge v. Israel, 4 Wash. C. C. 323; Richardson v. Golden, 3 Wash. C. C. 109; Bell v.

Davidson, 3 Wash. C. C. 328; Gilpins v. Consequa, 3 Wash. C. C. 184; Gass v. Stinson, 3 Sum. 98; Frese v. Biedenfeld, 14 Blatch. 402; De Butts v. Bacon, 1 Cranch C. C. 569; Livingston v. Story, 9 Peters 632.

68

Testimony may also be taken in the cause after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission, or by a new deposition taken under the acts of Congress, if a court, or a judge thereof, shall, under all the circumstances, deem it reasonable.

R. S. secs. 868–875; Phettiplace v. Sayles, 4 Mason 312; Gass v. Stinson, 3 Sum. 98; Russell v. McLellan, 3 W. & M. 157; The Ruby, 5 Mason 451.

69

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or 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. Immediately upon the return of the commissions and depositions containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may, at any time, pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony.

9 Wall. vii.; Brown v. Hall, 6 Bl. C. C. 401; Patten v. Darling, 1 Cliff. 254; Mellus v. Howard, 2 Curt. 264; Ingle v. Jones, 9 Wall. 486; Wood v. Mann, 2 Sum. 316; Gilbert v. Van Arman, 1 Flippin 421; Coeman v. Martin, 6 Blatch. 291; De Butts v. Bacon, 1 Cranch C. C. 569; Gass v. Stinson, 3 Sum. 605; Fischer v. Hayes, 19 Blatch. 25; S. C., 6 Fed. Rep. 76; Wooster v. Clark, 9 Fed. Rep. 854; Bischoffscheim v. Baltzer, 10 Fed. Rep. 1; Thayer v. Swift, Walk. Ch. 384; Bachelor v. Nelson, Walk. Ch. 449; Sargeant v. National Bank, 7 Rep. 231.

TESTIMONY, DE BENE ESSE.

70

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

Eslava v. Mazange, 1 Wood 623; Richter v. Union Trust Co., 115 U. S. 209.

FORM OF LAST INTERROGATORY.

71

The last interrogatory in the written interrogatories to take testimony, now commonly in use, shall, in the future, be altered and stated in substance, thus: "Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

Rhoades v. Selin, 4 Wash. C. C. 715; Richardson v. Golden, 3 Wash. C. C. 109; Dodge v. Israel, 4 Wash. C. C. 323.

CROSS BILL.

72

Where a defendant in equity files a cross bill for discovery only, against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill at the hearing, in the same manner, and under the same restrictions as the answer, praying relief, may now be used and read.

Allen v. Allen, Hemp. 58; Shields v. Barrow, 17 How. 130; Cross v. De Valle, 1 Wall. 1; Bronson v. LaC. & M. R. R. Co., 2 Wall. 283; Rubber Co. v. Goodyear, 9 Wall. 837; Heath v. Erie R'y Co., 9 Blatch. 316; Forbes v. R. R. Co.,

2 Woods 323; Putnam v. New Albany, 4 Biss. 365; Weaver v. Alter, 3 Woods 152; Young v. Pott, 4 Wash. C. C. 521; Carnochan v. Christie, 11 Wheat. 446; Peay v. Schenck, 1 Woolw. 175; Brandon, etc., Mfg Co. v. Prime, 14 Blatch. 371; Moore v. Huntington, 17 Wall. 417; Loewenstein v. Glidewell, 5 Dill. 325; Washington Railroad v. Bradleys, 10 Wall. 299.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73

Every decree for an account of the personal estate of a testator, or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Kelsey v. Hobby, 16 Peters 269; Pendleton v. Evans Exrs., 4 Wash. C. C. 391; Allen v. Blunt, 1 Blatch. 480; St. Colombe v. U. S., 7 Peters 625; Field v. Holland, 6 Cranch 8; Lawrence v. Dana, 4 Cliff. 6; Jewett v. Cunard, 3 Wood & M. 277; Harding v. Handy, 11 Wheat. 103.

74

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance and for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor, of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference,

and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and make his report, and to certify to the court or judge the reasons for any delay.

76

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, was so brought in or used.

77

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents, applicable thereto; and also to examine, on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate, from the clerk's office, or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

Foote v. Silsby, 3 Blatch. 507; Story v. Livingston, 13 Peters 359; Harding v. Handy, 11 Wheat. 103; Wooster v. Gumbiruner, 20 Fed. Rep. 167; Hatch v. Indianapolis & S. R. Co., 9 Fed. Rep. 856.

78

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or exam-

iner requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which, being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

Erie Ry. Co. v. Heath, 8 Blatch. 413; R. R. Co. v. Drew, 3 Woods 692; In re Clarke, 9 Blatch. 372; Gass v. Stinson, 2 Sum. 605: Jenkins v. Eldridge, 3 Story 299; see also Gen. Eq. Rule 67.

79

All parties accounting before a master, shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Ransom v. Winn, 18 How. 295.

80

All affidavits, depositions and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order, and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in

any particular case. The compensation to be allowed to every master in chancery for his services, in any particular case, shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Van Hook v. Pendleton, 2 Blatch. 85; Acts of Congress, 1879, ch. 183, p. 415; Frese v. Biedenfeld, 14 Blatch. 402; Myers v. Dunbar, 12 Blatch. 380.

EXCEPTIONS TO MASTER'S REPORT.

83

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

Troy Iron and Nail Fact. v. Corning, 6 Bl. C. C. 328; Greene v. Bishop, 1 Cliff. 186; Brockett v. Brockett, 3 How. 691; Ward v. Peck, 18 How. 289; McMicken v. Perin, 18 How. 507; Story v. Livingston, 13 Pet 359; Dexter v. Arnold, 2 Sum. 108; Gordon v. Lewis, 2 Sum. 143; Canal Co. v. Gordon, 6 Wall. 561; Harding v. Handy, 11 Wheat. 103; Gaines v. New Orleans, 1 Woods 104; Stanton v. Al. & Chat. R. R. Co., 2 Woods 506; Mason v. Crosby, 3 W. & M. 258; St. Colombe v. U. S., 7 Peters 625; Foster v. Goddard, 1 Black 506; Chappedelaine v. Dechenaux, 4 Cranch 306; Turrill v. R. R. Co., 5 Biss. 345; Garretson v. Clark, 15 Blatch. 70; Oliver v. Platt, 3 How. 334; Cowdrey v. R. R. Co., 1 Woods 331; Fischer v. Hayes, 16 Fed. Rep. 469; Hatch v. Indianapolis & S. R. Co., 9 Fed. Rep. 856.

84

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose excep-

tions are overruled shall for every exception overruled pay costs to the other party, and for every exception allowed shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the circuit court.

Garretson v. Clark, 17 Blatch. 256.

DECREES.

85

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may at any time, before an actual enrollment thereof, be corrected by order of the court, or a judge thereof, upon petition, with the form or expense of a rehearing.

Dexter v. Arnold, 5 Mason 303; Whiting v. U. S. Bank, 13 Peters 6; Tilton v. Barrell, 17 Fed. Rep. 59; Coleman v. Neill, 11 Fed. Rep. 461.

86

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof nor the report of any master, nor any other prior proceedings, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered adjudged, and decreed as follows, viz." [Here insert the decree or order.]

Whiting v. U. S. Bank, 13 Peters 16; Putnam v. Day, 22 Wall. 60; Forgay v. Conrad, 6 How. 21; R. R. Co. v. Swasey, 23 Wall. 405.

87

GUARDIANS AND PROCHEIN AMIS.

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants, or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants, and other persons so incapable, may sue by their guardians, if any, or by their prochein ami, subject, however, to such orders as the court may direct for the protection of infants and other persons.

Bank of U. S. v. Ritchie, 8 Peters 128.

88

REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No re-hearing shall be granted after the term, at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Clark v. Threlkeld, 2 Cr. C. C. 408; Daniel v. Mitchell, 1 Story 198; Jenkins v. Eldredge, 3 Story 229; Emerson v. Davies, 1 W. & M. 21; Browder v. McArthur, 7 Wheat. 58; Hunter v. Town of Marlboro. 2 W. & M. 169; Bentley v. Phelps, 3 W. & M. 403; Tufts v. Tufts, 3 W. & M. 426; Roemer v. Simon, 91 U. S. 149; Baker v. Whiting, 1 Story 218; Giant Powd. Co. v. Cal. V P. Co., 6 Saw. 509; Scott v. Blaine, 1 Bald. 287; Scott v. Hore, 1 Hughes 163; American, etc., Co. v. Sheldon, 18 Blatch. 50; The Collins Co. v. Coes, 8 Fed. Rep. 519; Hicks v. Ferdinand, 20 Fed. Rep. 111; Hayes v. Dayton, 20 Fed. Rep. 690; Adair v. Thayer, 7 Fed. Rep 920; Coburn v. Shroeder, 11 Fed. Rep. 425; Newman v. Moody, 19 Fed. Rep. 858; Arnold v. Nye, 11 Mich. 456.

89

The circuit court (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not consistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

U. S. Bank v. White, 8 Pet. 262; Phila., etc., Co. v. Stimson, 14 Peters 448; Steam S. C. Co. v. Jones, 13 Fed. Rep. 581; Poultney v. Lafayette, 12 Peters 472; Russell v. McLellan, 3 Wood & M. 157; Jenkins v. Greenwald, 1 Bond 127.

90

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be

applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Van Hook v. Pendleton, 2 Bl. C. C. 85 Hubbard v. Turner, 2 McLean 519; Pomeroy v. Manin, 2 Paine 476; Vattier v. Hinde, 7 Pet. 253; Livingston v. Story, 9 Pet. 632; Rhode Island v. Massachusetts, 14 Pet. 210; Smith v. Burnham, 2 Sum. 612; Badger v. Badger, 1 Cliff. 237; Lewis v. Shainwald, 7 Saw. 403; Boyle v. Zacharie, 6 Peters 648; Emerson v. Davies, 1 Wood and M. 21; Lorillard v. Standard Oil Co., 18 Blatch. 199; Goodyear v. Prov. Rub. Co., 2 Cliff. 351; U. S. v. Parrott, 1 McAll. 447; Martindale v. Waas, 11 Fed. Rep. 551; U. S. Bank v. White, 8 Peters 262.

91

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

92

In suits in equity for the foreclosure of mortgage in the circuit court of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court, regulating the equity practice, where the decree is solely for the payment of money.

1 Wall., v.; 2 Jones on Mortgages 574; Moore v. Shaw, 15 Hun N. Y. 428; Boyce's Ex'rs v. Grundy, 9 Peters 286; Howe v. Lemon, 37 Mich. 164; White v. Zust, 28 N. J. Eq. 107; Lawrence v. Fellows, Walk. Ch. 468.

93

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

7 Otto, vii.; Leonard v. Ozark Land Co., 115 U. S. 465.

94

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.

14 Otto ix ; Leo v. U. P. R. R. Co., 17 Fed. Rep. 273; Dannmeyer v. Coleman, 11 Fed. Rep. 101.

RULES

OF THE

CIRCUIT COURTS OF THE UNITED STATES

FOR THE

DISTRICTS OF MICHIGAN,

IN EQUITY.

NOTE.—For authority of circuit courts to make rules and to regulate practice in cases not provided for by General Equity Rules, see General Equity Rule 89, and R. S., Sec. 918.

1

SERVICE OF COPIES.

If the defendant appears, the complainant shall serve him with a copy of the bill, if required, within twenty days after receiving notice of such appearance; and after such appearance, the party filing any pleading or proceeding in the cause, whether plaintiff or defendant, shall, at the time of filing the same, serve a copy thereof on the opposite party, or his attorney.

2

SECURITY FOR COSTS.

Upon the commencement in this court, or removal thereto, of any suit or proceeding in equity, there shall be paid to the clerk by the party so commencing or removing such suit or proceeding, advance fees to the sum of five dollars.

The clerk shall require of all non-resident plaintiffs of this district security for costs. The following form indorsed on the writ or declaration, or upon a separate paper entitled and filed in the cause, may substantially be pursued: I (A B) acknowledge myself security for all costs for which the plaintiff may become liable in this suit."

The surety shall be a resident of this district, unless the court for sufficient cause direct the acceptance of a non-resident as such surety.

The clerk may, in his discretion, in lieu of the written undertaking above set forth, accept as such security, a money deposit of fifty dollars; *provided*, that if at any time said deposit shall appear to the clerk inadequate or insufficient security, he shall require the plaintiff to either furnish the written security above provided or make a further money deposit.

In cases removed from a state court the party in whose behalf the case is removed, if a non-resident of the district, shall, on filing a copy of the record in such suit, give security for costs in like manner as is required of non-residents in cases commenced in this court. In default thereof it shall be competent for the opposite party, upon the usual notice, if defendant, to have the case dismissed, or if plaintiff, to have the same remanded.

If the plaintiff or defendant in any suit where security for costs has been given, as above provided, shall fail or neglect to pay any costs for which he is liable, for ten days after the final determination of the suit, or if marshal's or clerk's fees, for ten days after a demand for the same by such officer, the person to whom such costs are due may have judgment and execution against the surety for the amount so due, upon motion filed and ten days' notice thereof, in writing, to such surety.

3

ADMINISTRATION OF OATHS.

Jurats and affidavits to be used in this court may be verified before the clerk of any court of record, or before any notary public; *provided, however*, that where such clerk or notary is a non-resident of this district, his signature shall be attested by his official seal.

Gen. Eq. Rules, 59, 91.

4

FRAME OF BILLS AND ANSWERS.

Every bill of complaint shall contain, as concisely as may be, a narrative of the material facts, matters and circumstances on which the complainant relies, such narrative being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct matter or allegation, and shall pray specifically for the relief which the complainant may conceive himself entitled to, and also for general relief; and the prayer shall be subdivided into paragraphs

numbered consecutively, each praying separate relief, following, as nearly as may be, the form set forth by the English General Order No. 14, Daniel. Ch. Prac., page 319. Every answer shall contain not only the defendant's answer to the several paragraphs of the bill, but, thereafter, such statement of his case as he may deem it necessary or advisable to make; and such answer shall also be divided into paragraphs, numbered consecutively, each paragraph containing, as nearly as may be, a separate and distinct allegation; and such answer must be full and explicit and distinct to each separate paragraph in the bill, in the same order as numbered in the bill, before it enters upon any statement of the defendant's case; and the common commencing clauses, reserving exceptions, and containing protestations, and the common concluding clause, denying combination, and the general traverse, and the common repetitions, "This defendant, further answering, saith," and the like, shall be omitted.

Gen. Eq. Rules, 20, 21, 22, 23, 24, 26, 39, 41, 42, 43, 44, 59, 93.

5

FORECLOSURE BILLS.

In a bill for foreclosure or satisfaction of a mortgage, it shall not be necessary or allowable to set out at length the rights and interests of the several defendants who are purchasers of, or who have liens on, the equity of redemption in the mortgaged premises, subsequent to the registry or recording of the complainant's mortgage, and who claim no right in opposition thereto; but it shall be sufficient for the complainant, after setting out his own right and interest in the premises, to state generally that such defendants have, or claim, some interest in the premises, as subsequent purchasers or incumbrancers, or otherwise; and if any such defendants are, by the misstatements of the complainant in his bill, or otherwise, unnecessarily compelled to put in an answer to protect their rights, the costs occasioned thereby may, in the discretion of the court, be charged on the complainant personally; and if such defendants unnecessarily put in answer to such bill, the extra costs occasioned by such answer may be charged on the defendants personally, in the discretion of the court.

6

CREDITORS' BILLS.

When a creditor by judgment, or decree, files a bill in this court against his debtor to obtain satisfaction out of the equitable interests, things in action, or other property of the latter, after the return of an execution unsatisfied, he shall state in such bill the true sum actually and equitably due on such judgment or decree, over and above all just claims of defendant by way of set-off, or otherwise. The bill shall likewise contain an allegation that the same is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor, against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of complainant's own debt.

7

VERIFICATION OF CREDITORS' BILL.

Every such creditor's bill shall be verified by the oath of the complainant, or of his agent or attorney: or the material allegations in the bill as to the recovery of the judgment or decree, the return of execution unsatisfied, the amount justly due thereon, and that the bill is not exhibited by collusion with the defendant, but for the sole purpose of compelling payment and satisfaction of the complainant's own debt, shall be established by affidavit. The charging part of the bill shall not be considered as sworn to unless it is expressly so stated in the jurat.

Gen. Eq. Rule 95.

8

RECEIVERS IN CREDITORS' SUITS.

Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of the debtor where it is necessary or proper for him to do so, and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents or profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not

exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' notice of the time and place of such sale.

De Visser v. Blackstone, 6 Bl. C. C. 235.

9

DUTIES OF RECEIVERS.

Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed, unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust. The receiver shall give security sufficient to cover the whole property and effects of the debtor which may come in his hands by virtue of his office; and he shall hold such property and effects for the benefit of all creditors who have commenced, or shall commence, similar suits during the continuance of his trust, to be disposed of according to their legal or equitable priorities. He shall not pay over the funds in his hands to the parties, or to any other person, without being specially authorized to do so by an order or decree by the court; nor shall he be discharged from his trust without a special order, to be obtained upon a written consent by all the parties interested in the property in his hands, or upon due notice of the application.

10

INJUNCTION UPON CREDITORS' BILLS.

No injunction issued upon any such creditor's bill shall be construed to prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the support of himself or of his family, or to defray the expenses of the suit, or to prevent him from complying with any order of this court, made in any other cause, to assign and deliver his property and effects to a

receiver; or to restrain him from making the necessary assignment to obtain his discharge under the insolvent laws, unless an express provision to that effect is contained in the injunction.

11

ORDER FOR RECEIVERS.

An injunction may be allowed and a receiver appointed in any stage of the cause, either on stipulation or on motion. The court may appoint such receiver, or may make an order referring it to a master to appoint a receiver with the usual powers, and to take from him the requisite security. The order shall also direct the defendant to assign, transfer, convey, and deliver over to the receiver, on oath, under the direction of the master, all his property, equitable interests, things in action, and effects, and all notes, bonds, mortgages, deeds, books of accounts, contracts, papers, evidences, and securities relating to the same; and that he appear before the master from time to time, and produce such books and papers, and submit to such examination, on oath, as the master shall direct, in relation to any matter which he might be legally required to disclose. The complainant shall also be at liberty to examine witnesses before the master as to the property of the defendant, or as to any other matter charged in the bill and not admitted by the defendant.

12

DUTIES OF MASTERS AND EXAMINERS.

That such masters and examiners in chancery as may be or have been appointed by this court, shall perform all duties which, according to law and the practice of courts of chancery, appertain to the office, in all causes depending on the equity side of this court; and they shall be entitled to such fees and charges for their services as are prescribed by the statutes of Michigan, or which may be allowed by this court. And a master or marshal making sale under an order or decree shall be entitled to commission on the proceeds thereof as follows: On the first $500, two per cent.; on the next $500, one and one-half per cent.; on the next $4,000, one per cent., and on the excess over $5,000, one-half of one per cent., not exceeding in all $250. And in case the master shall be required to make sale under any order or decree, or examine witnesses at a place distant from his residence, he shall be allowed his necessary and reasonable expenses

incurred attending such sale or examining such witnesses, and a reasonable remuneration for his time, to be fixed by the court, for going to, remaining at, and returning from such place.

13

SERVICE ON NON-RESIDENT SOLICITORS.

In all cases where opposing solicitors reside in different towns, cities or villages, service of notices or other papers may be made by depositing them in the postoffice directed to the solicitor, or party on whom service is to be made, at his place of residence, to be ascertained according to the best information of the person making the service.

14

WAIVER OF OATH.

The complainant may in his bill waive the necessity of defendant's answer being put in on oath, in pursuance of section 6621 of Howell's Annotated Statutes of this State, and in such case the answer shall have no greater force as evidence than the bill.

Baker v. Biddle, Bald. 407; Chace v. Holmes, 2 Gray 433; Armstrong v. Scott, 3 Greene 433; Patterson v. Gaines, 6 How. 550; Clements v. Moore, 6 Wall. 314; Bronson v. Green, Walk. Ch. 486.

15

FINAL RECORD AND ENROLLMENT.

A record of every suit finally determined in equity shall be made in the manner provided by section 750 of the Revised Statutes.

Upon the written request of the solicitor for either party, duly filed, the clerk shall attach together the bill, pleadings and other papers in the cause, with the final decree, and annex thereto his certificate under the seal of the court, of the date and at whose request the same was done, and file the same in his office.

R. S., sec. 750; How. Mich. Stat., secs. 6648–6649; Martindale v. Waas, 11 Fed. Rep. 551; Steam Stone Cutter Co. v. Jones, 13 Fed. Rep. 567.

16

DECREES PRO CONFESSO.

When the defendant having been served with process, as provided by the 15th Gen. Eq. rule, does not appear as required by the 17th Gen. Eq. rule, a decree pro confesso under the 18th Gen. Eq. rule may be entered against him.

17

NOTICES OF MOTIONS.

Like notice shall be given of the argument of special motions, as is required by the rules of this court, in cases of law, and such notice shall be addressed and served in the manner prescribed in these rules.

Law Rules, 2, 7.

18

NOTICES OF HEARING.

A notice of hearing of every case of issue upon pleadings and proofs shall be given at least ten days before the first day of the term, and a note of issue of every such case shall at the same time be filed with the clerk; *provided*, that where the time for taking proofs in any case shall expire after the first day of the term, or within ten days before said first day, such case may be noticed for hearing during the term; and after the lapse of ten days from the giving of such notice, on filing due proof of service of notice, such case shall be placed by the clerk on the chancery docket for the term, at the foot of the docket, and shall stand for hearing at any time before said docket shall have been finally called and disposed of. Issues of law may be called up at any time upon five days' notice.

19

PRINTING RECORDS.

Any judge holding the circuit court may, upon the application of either party, or upon his own motion, enter an order in any case in equity standing for final hearing in said court upon pleadings and proofs, requiring the pleadings and proofs in such case, or the material portion thereof, to be printed, and thereupon each party shall cause to be printed all the pleadings of, and proofs taken by, such party in such cause, or the material portion thereof, and shall deliver three printed copies of such pleadings and proofs to the opposite party at least eight days before the hearing of such cause, and three copies to the clerk on the hearing for the use of the court.

The order provided for by this rule may be entered as of course by the clerk upon filing the written consent of the solicitors for all parties thereto.

A party recovering costs shall be entitled to tax against the

opposite party his actual disbursements for all printing required to be done by him under this rule.

20

GENERAL RULE FOR THE HEARING AND ARGUMENT OF CASES.

Preparatory to the argument of a case other than in jury trials, counsel for the respective parties are required to furnish to the court, printed, or plainly written, and in the order following:

1. The legal questions of the case.

2. The nature of the case, briefly stated.

3. The relevant and material facts, in numbered paragraphs, together with the points made, and the authorities cited in support of them arranged under the respective points.

4. Abstracts of pleadings and proofs, so far as material and relevant, preserving the numbering of the paragraphs of the pleadings, and folioing the proofs.

It will greatly facilitate the argument of the legal propositions of a case if counsel, before citing authorities, will first state legal propositions insisted upon; then give the authority; next state the point decided in the cited case, and then the facts upon which the ruling is based. Finally read only the language of the court in deciding the point; when more is desired the court will indicate it.

Abstracts of the material testimony generally give all that is necessary to an understanding of the case upon the facts. The original testimony can be read from when essential to a proper understanding of it, or where the accuracy of the abstract is questioned.

21

VERIFICATION OF BILLS.

That bills in equity may be verified by the agent or solicitor for the complainant:

1. When the party is at the time absent from the district.

2. When the facts are within the personal knowledge of the agent or solicitor.

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STATE OF MICHIGAN.

RULES OF THE CIRCUIT COURTS,

IN CHANCERY.

AGENTS, THEIR APPOINTMENT AND LIST.

RULE 1. Every solicitor shall have an agent at the county seat in each county of this state where a circuit court is established, except in the county where such solicitor keeps his office. The register, deputy register and practicing solicitors, or any other person specially authorized by the court, may be such agents; but the agent must have an office or a regular and known place of business within two miles of the register's office, in the city or town for which he is appointed agent. The appointment of an agent shall be in writing, signed by the solicitor, and specifying his place of residence. It shall be filed with the register at the place for which the appointment is made, who shall keep in his office a list of such agents, with the names and residence of the solicitors appointing them.

SERVICE ON AGENT, OR BY MAIL—NOTICE OF FILING PAPERS—NOTICE NOT NECESSARY WHEN DEFENDANT HAS NOT APPEARED.

RULE 2. When the solicitors for adverse parties do not reside in the same city, village or township, service of papers contemplated by these rules may be made on an agent; but if there be no such agent, such service must be made by mail, postpaid. Notice of the filing of all pleadings shall be given to the adverse party, except when otherwise provided by these rules, within the time limited for filing the same. But no service of notice in the ordinary proceedings in a cause shall be necessary to be made on a defendant who has not appeared therein.—*As amended October 30, 1874.*

5 Mich. 215; 33 Mich. 298; 11 Mich. 344: 12 Mich. 427; 22 Mich. 212; 26 Mich. 390; 38 Mich. 132. See H. S. §§ 6636–6638.

DOUBLE TIME WHEN SERVICE ON AGENT—HOW PAPERS SERVED ON SOLICITORS AND AGENTS.

RULE 3. When the service is on an agent, or by putting in the postoffice for want of an agent, it must be double the time of service which would be requisite if the service was on the solicitor in person. And if the solicitor resides more than one hundred miles from the agent or office where the service is made, the time of such service shall in no case be less than fifteen days. Notices and other papers may, in absence of a solicitor or agent from his office, be served by leaving the same with his clerk or law partner in such office, or with a person having charge thereof; and if no person is found in the office, by leaving the same, between the hours of six in the morning and nine in the evening, in a suitable and conspicuous place in such office; or if the office be not open so as to admit of service therein, then by leaving the same at the residence of the solicitor or agent, with some person of suitable age and discretion.

5 Mich. 215.

ADDRESS OF BILLS AND PETITIONS—CAPTION OF DECREES AND ORDERS.

RULE 4. All bills and petitions hereafter to be filed in any of the circuit courts, shall be addressed: "To the Circuit Court for the County of ———, in Chancery;" and the caption of decrees shall be as follows, viz.: "State of Michigan, The Circuit Court for the County of ———, in chancery. At a session of said Court, held at ———, on the ——— day of ———, in the year one thousand eight hundred and ———.

"Present—Hon. ——— ———,

Circuit Judge.

The caption of orders made by circuit court commissioners shall be as follows:

"State of Michigan, ——— Judicial Circuit, in Chancery. Suit pending in the Circuit Court for the County of ———, in Chancery; at ——, on the ——— day of ———, A. D. 18—.

"It is ordered," etc.

51 Mich. 623; National Bank v. Byles, 67 Mich.—(Oct. 20, 87), 45 Mich. 394.

MOTIONS TO BE MADE ON DAY FOR WHICH NOTICED—CONTINUANCE OF MOTIONS.

RULE 5. In all cases, motions shall be made and petitions

presented on the day for which they are noticed, if the party has an opportunity to be heard on that day, unless the court (or circuit court commissioner, in a matter pending before him) shall otherwise direct. And if there is not sufficient time to finish the business noticed for any day, it may be continued from day to day until it is completed; or it may be adjourned to some subsequent day. And motions made for a day in term, and which can not be heard on the day for which they are noticed, shall stand continued from day to day without any special continuance.

Walk. Ch. 309; Har. Ch. 19; Har. Ch. 258; 19 Mich. 157; 47 Mich. 177. See H. S. §§6609-6610-6627.

SECURITY FOR COSTS BY NON-RESIDENT — RESIDENTS MAY BE REQUIRED TO GIVE.

RULE 6. In all cases where the complainant or complainants are not residents of this state, before process shall issue, a bond in the penal sum of one hundred dollars shall be filed with the register, to be approved of by him, conditioned to pay all such costs as shall be decreed against the complainant in such case; and the court or a circuit court commissioner may, upon motion, upon sufficient cause shown, require a new bond to be filed, in the same or an additional amount; and may also require security where complainants are residents of this state, if the justice of the case demand it.

BY WHOM BILLS MAY BE VERIFIED.

RULE 7. Sworn bills may be verified by the oath of the complainant, or in case of his absence from the state, or other sufficient cause shown, by the oath of his agent, attorney or solicitor.

Walk. Ch. 5.

MANNER OF VERIFYING BILLS, ETC.

RULE 8. In bills, answers and petitions which are to be verified by the oath of the party, the several matters stated, charged, averred, admitted, or denied, shall be stated positively, or upon information and belief only, according to the fact. The oath administered to the party shall be, in substance, that he has read the bill, answer or petition, or has heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his

information or belief, and as to those matters he believes it to be true; and the substance of the oath shall be stated in the jurat.

See H. S. § 6621; Walk. Ch. 309; Walk. Ch. 439; Har. Ch. 243; 23 Mich. 332; 31 Mich. 290; 20 Mich. 34; 26 Mich. 437; 20 Mich. 34; Hr. Ch. 301; 12 Mich. 297; 55 Mich. 190; 61 Mich. 9; 53 Mich. 228; 45 Mich. 543; 46 Mich. 489; 56 Mich. 3.

RETURN DAY OF PROCESS—FURTHER PROCESS.

RULE 9. All process, unless otherwise directed, shall be made returnable on a day certain (except Sunday) either in vacation or in term, not less than ten days from the issuing thereof; and if process is not executed before the return day, new process may be taken out, of course, as often as may be necessary, or an *alias* or *pluries* may be issued.

See H. S. §§ 6629, 6632, 6636; 3 Mich. 280; 16 Mich. 9; 27 Mich. 454; 32 Mich. 89; 32 Mich. 307.

SUBPŒNA—HOW SERVED.

RULE 10. The names of all the defendants in a cause shall be inserted in the subpœna. It may be served by delivering a copy of the writ, subscribed by the complainant, his solicitor, or the officer or person serving the same, and inscribed "copy," and showing the original, under seal of the court, at the time of such delivery to the defendant. The service may be on or before the return day mentioned in the subpœna.

See H. S. §§ 6634, 6636, 6638, 6659; Har. Ch. 19, 254; Walk. Ch. 309, 339; 14 Mich. 514; 35 Mich. 115; 39 Mich. 563; Shendon v. Cameron, Mich. (April 28, 1887); 56 Mich. 185; 45 Mich. 418; 47 Mich. 604; 61 Mich. 35.

PROCEEDINGS ON RETURN OF SUBPŒNA SERVED—APPEARANCE AND ANSWER BY DEFENDANT.

RULE 11. Upon the return of the subpœna served, as directed in the preceding rule, the defendant shall cause his appearance to be entered in twenty days from the return day of said writ, and if he does not require a copy of the bill as hereinafter provided, he shall plead, answer or demur within the same time, or in default thereof his appearance may be entered by the register, and the bill of complaint taken as confessed. If a copy of the bill is required, he shall answer in twenty days from the service of such copy, or the bill may be taken as confessed. Copies of every pleading by a defendant shall be served within the time limited for filing the same.

See H. S. §§ 6629, 6636, 6638, 6689; Har. Ch. 241, 426; Walk. Ch. 19, 45; 9 Mich. 234; 27 Mich. 52; 12 Mich. 314; 14 Mich. 514; 29 Mich. 72; 27 Mich. 52; 33 Mich. 268; 25 Mich. 149; 29 Mich. 289; 33 Mich. 305; 38 Mich 596; 39 Mich. 628; 43 Mich. 208; 43 Mich. 548; 57 Mich. 268; 45 Mich. 394; 44 Mich. 202; 56 Mich. 295; 58 Mich. 482; 62 Mich. 480; 63 Mich. 382; 50 Mich. 16; 61 Mich. 4; 52 Mich. 489; 55 Mich. 280; 51 Mich. 446; 45 Mich. 453; 45 Mich. 394; 59 Mich. 296; 58 Mich. 494; Lafferty v. Bank, 70 Mich. (May 11, 1888); Hatch v. St. Joseph, 68 Mich. (Jan. 19, 1888).

ATTACHMENT AGAINST DEFENDANT NOT ANSWERING.

RULE 12. When the subpœna has been personally served, and the defendant shall fail to appear and plead, answer or demur, within the time limited for the same, the complainant may, upon filing an affidavit that a discovery as to the matters charged in the bill is necessary, and service thereof with notice, move the court for an attachment against such defendant or defendants.

26 Mich. 102.

PROCEEDINGS ON SUCH ATTACHMENT.

RULE 13. If the defendant appears personally, or is brought into court by the sheriff, on the return of an attachment for not answering, he shall enter his appearance and put in his answer, and pay the costs incurred by his contempt *instanter*, or within such time as the court shall appoint, or be committed until he complies.

See H. S. § 6623.

ORDER THAT COMPLAINANT GIVE COPY OF BILL—BILL TO BE DISMISSED IF COPY NOT SERVED.

RULE 14. When the defendant has appeared, he may have an order, of course, that the complainant deliver a copy of the bill to the defendant or his solicitor in fifteen days, and if such a copy is not delivered within fifteen days after the service of notice of such order, or within such further time as may be allowed for that purpose, the defendant, on filing an affidavit of the service of such notice and that no copy of the bill has been served, may have a decree dismissing the suit, with costs, for want of prosecution.

Har. Ch. 256; 58 Mich. 393.

COMPLAINANT MAY PROCEED EX PARTE ON BILL TAKEN AS CONFESSED, UNLESS DEFENDANT HAS APPEARED.

RULE 15. When a bill has been taken *pro confesso* against a

defendant, unless he may have entered his appearance, it shall not be necessary in any further proceeding in a cause for the complainant to serve such defendant with any of the notices contemplated by any of the rules of practice of this court for any object or purpose whatever, but he may proceed *ex parte*.

See H. S. §§ 6636, 6638; Walk. Ch. 45; 16 Mich. 223; Walk. Ch. 200; 6 Mich. 217; 13 Mich. 258; 38 Mich. 395; 5 Mich. 215; 11 Mich. 344; 12 Mich. 427; 15 Mich. 253; 38 Mich. 662.

PROCEEDINGS AGAINST ABSENT OR CONCEALED DEFENDANTS.

RULE 16. The order to take the bill as confessed against an absent or concealed defendant, and for a reference under the provisions of chapter one hundred and fifteen of the Compiled Laws (*Ch. 176, Comp. L. 1871*), may be entered of course, on filing the proof of publication or notice, and an affidavit that the defendant has not appeared. But the order requiring the defendant to appear, and designating the paper in which it shall be published, or a direction to the commissioner to receive the testimony of the complainant as evidence on the reference, can only be obtained by a special application.

See H. S. §§ 6670, 6686, 7500; 1 Mich. 480; Walk. Ch. 305; 10 Mich. 117; 14 Mich. 514; 13 Mich. 533; 30 Mich. 63, 105; 10 Mich. 260; 14 Mich. 532; 32 Mich. 307; 29 Mich. 72; 32 Mich. 307; 40 Mich. 264; 53 Mich. 629; 60 Mich. 318; 45 Mich. 358; 64 Mich. 53; 59 Mich. 296; 50 Mich. 40; 45 Mich. 44; 54 Mich. 236; 45 Mich. 218; 25 Mich. 149; 36 Mich. 402; 2 Mich. 161.

EXCEPTIONS TO ANSWER NOT TO PREVENT DISSOLUTION OF INJUNCTION, ETC.

RULE 17. Exceptions to an answer shall not prevent the dissolution of an injunction or the discharge of a *ne exeat;* but upon every application for such dissolution or discharge, made upon answer before exceptions are filed, or before the validity of exceptions filed has been determined, the sufficiency of the answer in all points material to the allowance of such application shall be considered in the decision thereof.

WAIVER OF OATH TO ANSWER—COMPLAINANT NOT TO EXCEPT FOR INSUFFICIENCY IN SUCH CASE—FACTS STATED IN ANSWER ADMITTED IF NOT REPLIED TO.

RULE 18. If the complainant waives the necessity of the answer being made on oath of the defendant, it must be distinctly stated

in the bill. When the answer is put in without oath, it may be excepted to for scandal and impertinence; but the complainant shall not be at liberty to except thereto for insufficiency; but all material allegations in the bill, which are not answered and admitted, may be proved by him in the same manner as if they were distinctly put in issue by the answer; and if no replication is filed, the matters of defence set up in the defendant's answer will, on the hearing, be considered as admitted by the complainant, although the answer is not on oath.

See H. S. §§ 6618, 6621; Walk. Ch. 439; 39 Mich. 85; Walk. Ch. 267; 15 Mich. 316; 12 Mich. 297; 40 Mich. 52; 9 Mich. 536; 15 Mich. 316; 40 Mich. 52; Walk. Ch. 90; 2 Mich. 144, 213; 42 Mich. 181; 5 Mich. 171; 13 Mich. 552; 6 Mich. 223; 42 Mich. 477; 11 Mich. 9; 12 Mich. 314; 36 Mich. 173; 27 Mich. 349; 42 Mich. 304; 49 Mich. 399; 56 Mich. 301; 56 Mich. 200; 48 Mich. 375; 58 Mich. 494.

ANSWERS, ETC., BEFORE WHOM MAY BE SWORN TO.

RULE 19. The plea or answer of the defendant may be sworn to before any officer authorized by the laws of this state to administer oaths or take affidavits. It may also be sworn to before any judge of any court of record in the United States; but if sworn to before such judge in any other state or territory in the United States, his certificate shall be accompanied by the certificate of the clerk or deputy clerk of such court, under the seal thereof, showing the official character of such judge, and the genuineness of his signature. Such plea or answer may be sworn to in any foreign country before any minister or other diplomatic agent or consul of the United States, or any notary public; but the certificate of such notary shall be made under his notarial seal.

See H. S. §7448.

DEFENDANT MUST ANSWER ORIGINAL BILL BEFORE ENTITLED TO ANSWER TO CROSS-BILL.

RULE 20. When a cross-bill is filed, the complainants therein who are defendants in the original bill shall put in and perfect their answer to the original bill before they shall be entitled to an order to compel an answer to the cross-bill, unless the court shall otherwise specially direct.

Walk. Ch. 170; 2 Mich. 472; 10 Mich. 40, 291; 12 Mich. 94; 36 Mich. 388; 43 Mich. 208; 14 Mich. 361.

AMENDMENTS TO BILL, WHEN OF COURSE—NOT OF COURSE ON INJUNCTION BILL—REGISTER NOT TO PERMIT AMENDMENTS UNLESS AUTHORIZED—HOW AMENDMENTS MADE AND SERVED.

RULE 21. If the bill has not been sworn to, the complainant may amend it, at any time before the plea, answer or demurrer is put in, of course and without costs. He may also amend of course after answer, at any time before he replies thereto, until the time for replying expires, and without costs if a new or further answer is not thereby rendered necessary; but if such amendment requires a new or a further answer, then it shall be on payment of costs to be taxed. He may also amend sworn bills, except injunction bills, in the same manner, if the amendments are merely in addition to and not inconsistent with what is contained in the original bill; such amendments being verified by oath, as the bill is required to be verified. But no amendment of an injunction bill shall be allowed without a special order of the court, and upon due notice to the adverse party, if he has appeared in the suit. Amendments of course may be made without entering any rule or order for that purpose; but the register shall not permit any amendments to be made unless the same appear to be duly authorized. And in every case of an amendment of course, the complainant's solicitor shall either file a new engrossment of the bill with the register where the original bill is filed, or furnish him with an engrossed copy of the amendments, containing the proper references to the folios and line in the original bill on file, where such amendments are to be inserted or made. But no amendment shall be considered as made until the same is served upon the adverse party, if he has appeared in the cause.

Har. Ch. 438; Walk. Ch. 398; Walk. Ch. 486; 20 Mich. 34; 10 Mich. 486; 18 Mich. 298; 19 Mich. 516; 36 Mich. 77; 1 Doug. 504; 9 Mich. 246; 12 Mich. 414; 13 Mich. 367; 36 Mich. 77; 43 Mich. 129; Walk. Ch. 485; 14 Mich. 160; 15 Mich. 104; 18 Mich. 298; 20 Mich. 34; 26 Mich. 437; 29 Mich. 366; 41 Mich. 608; 43 Mich. 433; 45 Mich. 29; 45 Mich. 504; 48 Mich. 536; 48 Mich. 201; 52 Mich. 429; 63 Mich. 238; 62 Mich. 598; 52 Mich. 637.

AMENDMENTS AFTER DEMURRER.

RULE 22. If the defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the complainant may amend of course, on pay-

ment of costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer; and in all cases of demurrer for causes not within the former part of this rule, the complainant's right to amend, and the terms on which amendments may be permitted, shall be in the discretion of the court.

Walk. Ch. 398; 34 Mich. 10; 35 Mich. 155; 43 Mich. 220.

AMENDMENTS AFTER INSUFFICIENT ANSWER—AMENDMENTS ON PLEA OR DEMURRER OVERRULED.

RULE 23. Where the answer is excepted to as insufficient and the defendant submits to answer further, or the answer on reference if found insufficient, the complainant may amend the bill of course, and without costs, at any time within ten days after the defendant submits to answer any of the exceptions, or after confirmation of the commissioner's report, if the defendant does not submit to answer any of the exceptions; and the defendant shall answer the amendment and exceptions together. If a plea or demurrer to the bill be overruled, the complainant may, within ten days thereafter, amend his bill of course, and without costs; and in all cases where the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant shall have the same time to answer, after such amendment, as he originally had. But no amendments, of course, of injunction bills are to be allowed under this or the preceding rule, nor any amendments which are inconsistent with the original sworn bill.

34 Mich. 51; 41 Mich. 719.

COMMON AND SPECIAL ORDERS—HOW ORDERS TO BE ENTERED.

RULE 24. Orders to which a party, by the rules and practice of the court, is entitled of course without showing special cause, shall be denominated common orders; and orders made on special application to the court, or circuit court commissioner, shall be denominated special orders. All common orders and orders by consent of the parties, such consent being in writing and signed by such parties or their solicitors and filed, may be entered with the register in the common rule book kept in his office, at the instance of the party or his solicitor, at the peril of the party taking such order; and the day on which the order is made shall be noted in the entry thereof, and

all special orders made by the special direction of the court, or circuit court commissioner, shall be entered in the record of the proceedings of the court, as heretofore has been usual.

Har. Ch. 438; 14 Mich. 340.

EITHER PARTY MAY NOTICE PLEA OR DEMURRER FOR ARGUMENT —ISSUE ON PLEA AFTER ALLOWANCE.

RULE 25. When the defendant pleads or demurs to a bill, the complainant shall have twenty days to file a replication to his plea, or amend his bill; and if he does not take issue on the plea or amend the bill within that time, either party may notice the plea or demurrer for argument, at the next or any subsequent term. If the plea is allowed, the complainant may, within ten days after notice of such allowance, take issue on the plea, upon payment of the costs of hearing thereon.

Walk. Ch. 485; Har. Ch. 265, 311, 219, 395; Walk. Ch. 117, 317, 355, 457; Har. Ch. 240; 2 Doug. 191; Walk. Ch. 416; 11 Mich. 56; 16 Mich. 162; 28 Mich. 359; Walk. Ch. 454; 24 Mich. 241; Har. Ch. 227, 247; 15 Mich. 104, 511; 25 Mich. 175; Walk. Ch. 28, 394, 54, 327; 1 Mich. 34; 21 Mich. 263; Har. Ch. 227; 21 Mich. 524; 32 Mich. 42; 34 Mich. 342; 43 Mich. 220; 43 Mich. 269; 43 Mich. 548; 60 Mich. 470.

BILL MAY BE TAKEN AS CONFESSED, IF FRIVOLOUS PLEA OR DEMURRER IS PUT IN—ANSWER AFTER PLEA OR DEMURRER OVERRULED.

RULE 26. If a plea or demurrer is overruled as frivolous, or a plea upon issue thereon is found to be untrue, the complainant may, unless the court otherwise direct, have an order to take the bill as confessed, or he may compel the defendant to answer the bill at his election. In all other cases, if the plea or demurrer be overruled, neither a further plea nor demurrer shall be received; and the defendant shall answer the bill and pay the costs of the hearing, within twenty days after notice of the order overruling the plea or demurrer, or such other time as may be prescribed by the court in such order. If he fails to put in his answer and pay the costs within the time prescribed, the bill may be taken as confessed, and the matter thereof decreed accordingly; or the complainant may have an attachment to compel an answer.

WHEN COMPLAINANT MAY EXCEPT TO ANSWER—WHEN ANSWER DEEMED SUFFICIENT—DEFENDANT MAY SUBMIT TO ANSWER EXCEPTIONS.

RULE 27. When the answer is to the whole bill, the complainant shall have twenty days, after notice that such answer is put in, to except to the same, or if the answer is to part of the bill only, he shall have twenty days after the plea or demurrer to the residue of the bill has been allowed or overruled, to except to such answer; at the expiration of which time, if no exceptions are taken, and no order for further time has been granted, the answer shall be deemed sufficient. If the complainant excepts to the answer for insufficiency, the defendant may, within eight days after service of a copy of the exceptions, give written notice of his submission to answer any or all of such exceptions; and he shall be liable for the costs of the exceptions which he submits to answer.

Walk. Ch. 307.

COMPLAINANT TO REFER EXCEPTIONS IN TEN DAYS.

RULE 28. When exceptions to an answer for insufficiency are not submitted to within the time prescribed by the preceding rule, the complainant, at any time within ten days thereafter, may have an order of course to refer the exceptions not submitted to by the defendant to the circuit court commissioner. If the exceptions not submitted to are not referred, and notice of such reference given within the time specified, they shall be considered as abandoned, and the answer as to such exceptions shall be deemed sufficient.

REFERENCE OF SECOND OR THIRD ANSWER, FOR INSUFFICIENCY.

RULE 29. If a complainant refers a second or third answer for insufficiency on the old exceptions, the particular exceptions to which he requires a further answer shall be stated on the order of reference. And if he does not refer such second or third answer for insufficiency within ten days after the same is put in, such answer shall be deemed sufficient.

EXCEPTIONS FOR SCANDAL OR IMPERTINENCE.

RULE 30. Exceptions to any pleading or other matter pending before the court for scandal and impertinence, shall be taken in the same manner as exceptions to an answer for insufficiency;

and may be submitted to in like manner, and within the same time. If they are not submitted to, the party excepting shall refer them in the same manner, or they shall be considered as abandoned; and if such exceptions are to an answer, the answer thenceforth shall be deemed sufficient.

WHEN COMMISSIONER'S REPORT ON EXCEPTIONS TO BE OBTAINED.

RULE 31. Whenever an answer or other pleading or proceeding is referred for insufficiency, scandal or impertinence, the exceptions shall be considered as abandoned, if the party obtaining the reference shall not procure and file the commissioner's report within fifteen days from the date of the order of reference, unless the commissioner shall, within that time, certify that the party obtaining such reference has not been guilty of an unreasonable delay, and that further time, to be specified in the certificate, is necessary to enable the commissioner to make a satisfactory report; in which case the exceptions shall be considered as abandoned, if the report be not obtained within the further time so stated. And if the exceptions were to an answer, it shall henceforth be deemed sufficient.

COMMISSIONER TO FIX TIME FOR PUTTING IN FURTHER ANSWER.

RULE 32. If on a reference of exceptions to an answer, or the reference of a second answer on the old exceptions, the commissioner shall find the answer insufficient, he shall fix a time for putting in a further answer and specify the same in his report.

WHEN REPORT ON EXCEPTIONS TO BECOME ABSOLUTE—EXCEPTIONS TO REPORT.

RULE 33. The commissioner's report on exceptions shall be delivered to the party obtaining the reference, who shall forthwith file the same in the proper office; and if he does not except to the report within eight days thereafter, it shall become absolute as against him. But the adverse party shall have eight days after service of notice of filing the report to except to the same; and if he does not except within that time, it shall become absolute as against him, without any order for that purpose. If none of the exceptions to an answer are submitted to by the defendant or allowed by the commissioner, the answer shall be deemed

sufficient from the time such report becomes absolute as against the complainant.

ORDER TO EXPUNGE IMPERTINENT MATTER—REPORT DISALLOWING EXCEPTIONS FOR SCANDAL, ETC., TO BE FINAL.

RULE 34. If the commissioner reports that anything contained in any pleading or proceeding is scandalous or impertinent, the party excepting, on filing proof that the report has become absolute against the adverse party, may have an order of course that the commissioner making the report expunge the scandalous or impertinent matter; and that the adverse party pay the costs of the exceptions and the proceedings thereon, within twenty days after the service of a copy of such order and of the taxed bill on him or his solicitor. When the adverse party submits to the exceptions, the same order may be obtained on filing the notice of submission. If the commissioner disallows an exception for scandal and impertinence, his report shall be final, and no exceptions to the report in that respect shall be allowed; but it shall not preclude the party, upon the hearing of the cause, or upon the taxation of the general costs in the suit, from insisting that the matter excepted to was in fact impertinent.

ORDER FOR FURTHER ANSWER.

RULE 35. On exceptions to answer for insufficiency, if all the exceptions are submitted to by the defendant, or a part are submitted to and the rest abandoned, or are disallowed on reference, the complainant may have an order of course, that the defendant put in a further answer, and serve a copy thereof, within twenty days after notice of the order, and pay the costs of the exceptions.

Har. Ch. 228, 332; 12 Mich. 314.

ORDER FOR FURTHER ANSWER, AFTER REFERENCE.

RULE 36. If, on a reference of exceptions, or the reference of a second answer upon the old exceptions, the answer is found insufficient, and the commissioner's report has become absolute against the defendant, the complainant may have a similar order of course, to put in a further answer, and pay the costs, within the time specified in the commissioner's report.

Walk. Ch. 307.

BILL OF COSTS TO BE SERVED BEFORE EXPIRATION OF TIME TO ANSWER—TIME TO ANSWER, AFTER AMENDMENTS TO ANSWER.

RULE 37. In the cases specified in the two preceding rules, the defendant shall be entitled to a copy of the taxed bill of costs at least ten days before the time for putting in the further answer expires, or he may put in such answer without paying the costs. But the complainant may afterwards proceed by execution or attachment to compel payment thereof, if they are not paid within twenty days after service of a copy of the taxed bill on the defendant or his solicitor. And if the complainant has amended his bill, so as to require an answer to the amendments as well as the exceptions, the defendant shall have the same time to answer the amendments and exceptions together as he originally had to answer the bill; and the order to answer shall be varied accordingly.

ORDER PRO CONFESSO, OR FOR ATTACHMENT, OR NEGLECT TO ANSWER.

RULE 38. If the defendant does not put in a further answer and pay the costs within the time prescribed, or within such further time as may be allowed by the court for that purpose, the complainant, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or may move for an attachment against the defendant.

HEARING OF EXCEPTIONS TO COMMISSIONER'S REPORT ON EXCEPTIONS—COSTS ON HEARING.

RULE 39. The argument of exceptions to a commissioner's report on exceptions shall be heard as a special motion. Either party may notice the same for hearing, and the party excepting to the report shall furnish the necessary papers for the court; and if he neglect to do so, the report may be confirmed. But if both parties have excepted to the report, each shall furnish copies of his own exceptions, and the party obtaining the reference shall furnish such other papers as may be necessary. The costs of the hearing on exceptions to a report upon exceptions shall be in the discretion of the court; but neither party shall be entitled to costs as against the other, unless he succeeds as to the major part of the exceptions to the report. And where the party succeeding as to the major part does not succeed as to all the exceptions to the report, his costs of the hearing, to be

allowed against the adverse party shall not be taxed at a sum exceeding ten dollars.

COSTS ON EXCEPTIONS.

RULE 40. When exceptions are taken to an answer for insufficiency, or to any pleading or proceeding for scandal or impertinence, the party excepting shall be entitled to the costs of the exceptions which are submitted to, and those which are finally allowed after reference to a commissioner; but neither party shall be entitled to costs upon the reference of exceptions, unless he finally succeeds as to all the exceptions which are referred. The costs on exceptions shall not be taxed until all exceptions are submitted to, abandoned, allowed, or finally disposed of; and then the whole costs to which the exceptant is entitled shall be included in one bill, and the adverse party may off-set any costs to which he is entitled.

FOR WHAT CAUSE DEMURRER OR PLEA NOT TO BE OVERRULED.

RULE 41. 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.

FOR WHAT CAUSE DEMURRER OR PLEA NOT TO BE OVERRULED.

RULE 42. No demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

WHEN DEFENDANT MAY DECLINE ANSWERING PART OF BILL.

RULE 43. A defendant shall be at liberty, by answer, to decline answering any part of the bill from answering which he might have protected himself by demurrer, and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Walk. Ch. 520.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

RULE 44. It shall not be necessary, on any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case require it.

See H. S. §§ 6654, 6668; Walk. Ch. 6; 29 Mich. 72; Har. Ch. 332, 438; 10 Mich. 117; 13 Mich. 463; 11 Mich. 56; 31 Mich. 36; 14 Mich. 124; 16 Mich. 162; 32 Mich. 515; 40 Mich. 317; 46 Mich. 511; 49 Mich. 595; German American Sem. v. Sawyer, 66 Mich. (June 9, 1887); 53 Mich. 629.

WHEN CAUSE DEEMED AT ISSUE—WHEN TO STAND ON BILL AND ANSWER—NOTICE OF HEARING.

RULE 45. Every cause shall be deemed at issue on filing a general replication to the answer, and no special replication shall be filed but by leave on cause shown. If the complainant does not reply to the defendant's answer within twenty days after it is deemed to be sufficient, he shall be precluded from replying, and the cause shall stand for hearing on bill and answer, unless further time for replying be granted by the court, upon cause shown, and either party may notice it for hearing as soon as it is in readiness for hearing against the other defendants, if any there are.

See H. S. § 6645; Walk. Ch. 389, 454; 37 Mich. 248; 56 Mich. 3.

DISMISSING BILL FOR WANT OF PROSECUTION.

RULE 46. In any suit against several defendants, if the complainant does not use due diligence in prosecuting such suit, any of said defendants may apply to dismiss the bill for want of prosecution, and on such application further time shall not be allowed to complainant, unless on good cause shown for the delay.

Walk. Ch. 356, 359; Har. Ch. 265; 24 Mich. 241.

ORDER TO TAKE PROOFS—WHEN PROOFS TO BE TAKEN, AND WHEN CLOSED—IF NO ORDER ENTERED, CASE TO STAND ON PLEADINGS—FEIGNED ISSUES—EXAMINATION OF WITNESSES IN OPEN COURT.

RULE 47. When a cause is at issue, if neither party has obtained the right of an examination of witnesses in open court, either party desirous of taking testimony, may at any time within thirty days after the expiration of the time of obtaining the right to such examination in open court, enter an order of course, and give notice thereof to the opposite party, for the taking of testimony within sixty days from the service of notice of such order, and either party under such order may, at any time within the said sixty days take the testimony of his witnesses, upon giving

ten days' notice to the opposite party of the names and places of abode of the witnesses to be examined, and of the time and place of such examination, and the person before whom the same will be taken. At the end of the said sixty days, either party, on filing an affidavit of the service or receipt of such notice, may enter an order of course that the proofs be closed. If neither party shall obtain an order for taking testimony as aforesaid, or for an examination of witnesses in open court, the cause shall stand for hearing on pleadings, and may be noticed by either party. In cases where feigned issues have been in use, the issue shall be made hereafter by presenting the questions to be tried in a simple form upon the facts. The issue, unless agreed upon, shall be framed by the circuit judge, and in all cases shall be approved by him.

See H. S. §§ 6647, 6648; Walk. Ch. 48; Har. Ch. 31; Walk. Ch. 453, 48; 39 Mich. 122; Walk. Ch. 120, 384; 36 Mich. 77; Walk. Ch. 45; 16 Mich. 223; Walk. Ch. 200; 6 Mich. 217; 13 Mich. 258; Walk. Ch. 449; 2 Mich. 381; 6 Mich. 133; 8 Mich. 395; 9 Mich. 213; 10 Mich. 453; 11 Mich. 284, 529; 13 Mich. 367; 16 Mich. 283; 24 Mich. 18; 28 Mich. 427; 29 Mich. 289; 30 Mich. 282; 33 Mich. 101, 121; 8 Mich. 74; 26 Mich. 443; 27 Mich. 214; 33 Mich. 347, 500; 9 Mich. 346; 11 Mich. 284; 22 Mich. 212; 22 Mich. 242; 27 Mich. 4; 32 Mich. 193; 29 Mich. 289; 54 Mich. 624; 54 Mich. 621; 49 Mich. 29; 55 Mich. 136; 52 Mich. 552; Goodrich v. Goodrich, Mich. (June 23, 1887); 46 Mich. 489; 56 Mich. 3; 53 Mich. 40; 48 Mich. 388; 46 Mich. 68.

WHEN COMMISSION MAY BE ISSUED TO TAKE TESTIMONY.

RULE 48. If the party wishes to examine witnesses residing out of the state, or more than thirty miles from the residence of a circuit court commissioner, or when all the circuit court commissioners are interested, living within that distance, as counsel or otherwise, either party may, at any time after issue is joined and before proofs are closed, as prescribed in the preceding rule, or when the case is at default, present a petition to the register where the suit is pending, stating the names and residences of the witnesses and of the person or persons proposed as commissioners, and praying that a commission may be issued to take the examination of such witnesses; and ten days' notice of the application shall be given to the adverse party if he has appeared. If the adverse party does not appear and join in the commission,

or object to the persons named as commissioners, a commission shall be issued agreeably to the prayer of the petition.

See H. S. §6639.

ADVERSE PARTY MAY JOIN IN COMMISSION—WHEN ONE COMMISSIONER MAY ACT ALONE.

RULE 49. If the adverse party wishes to join the commission, he must, at the time of presenting the petition, furnish the names and residence of the witnesses on his part, and they shall be inserted in the commission. If he is not satisfied with the commissioners named in the petition, he may name commissioners on his part; and the register to whom the petition is presented, after hearing the allegations of the parties, shall designate a suitable person or persons to execute the commission, and issue the same accordingly; but any of the commissioners named in the commission may execute the same, in case the others neglect or refuse to join in the execution thereof, or they are, from any cause, prevented.

WITNESSES TO BE EXAMINED ON INTERROGATORIES—SETTLEMENT THEREOF.

RULE 50. Witnesses to be examined out of the state shall be examined on written direct and cross-interrogatories, to be allowed by a circuit court commissioner and annexed to the commission. Copies of interrogatories proposed shall be served, with notice of an application for the allowance thereof, at least five days before the time fixed for such application, and at the time and place of the settlement of such interrogatories, the adverse party shall propose his cross-interrogatories, unless further time is allowed him for that purpose by the officer settling the same.

PETITION FOR SPECIAL COMMISSION.

RULE 51. If it shall be necessary to have a commission to take the examination of witnesses in any case not provided in the preceding rules, the party may present a petition to the circuit judge, or circuit court commissioner acting as an injunction master, for that purpose, setting out the facts which entitle him to a special commission, and the usual notice of the application shall be given to the adverse party.

COMMISSION, HOW EXECUTED AND RETURNED.

RULE 52. To every commission for the examination of witnesses out of the state, a copy of this rule shall be annexed, as instructions to the commissioner on the execution of the commission:

1st. Any one of the commissioners may execute the commission.

2d. The witness, before he is examined, must take an oath or affirmation, to be administered by the commissioner, that the answers to be given by him to the interrogatories annexed to the commission shall be the truth, the whole truth, and nothing but the truth.

3d. The examination of the witnesses must be reduced to writing by the commissioner, or by some one in his presence and under his direction, and must be signed by the witness, and certified by the commissioner as follows:

"Examination taken, reduced to writing, and sworn to (or affirmed) this, ——— day of ———, A. D. ———, before me, A. B., Commissioner."

4th. Exhibits must be annexed to the deposition of the witness, and be signed by him and the commissioner.

5th. The commissioner must subscribe each sheet of the deposition, annex the deposition and exhibits to the commission, and endorse his return on the back of the commission:

"The execution of this commission appears in certain schedules hereunto annexed. A. B. Commissioner."

6th. The commissioner must enclose the commission, interrogatories, depositions and exhibits, in a packet, and bind it with tape, and set his seal at the several meetings or crossings of the tape, and direct it "To the Register of the Circuit Court for the County of ———, in Chancery, at ———, State of Michigan."

7th. He must then deposit the commission in the postoffice, unless there are written directions on the commission to return the same in another way.

OPENING AND FILING COMMISSION.

RULE 53. The register, on the commission being returned, shall open it, and endorse thereon the time and manner of receiving it, and then file it.

HOW DEPOSITIONS SUPPRESSED FOR IRREGULARITY—NOTICE TO BE GIVEN OF FILING.

Rule 54. No deposition will be suppressed on the hearing of a cause for irregularity or informality in the taking of the same, but the question must be brought before the court on a special motion for that purpose, before the cause is brought to

a hearing. Upon receiving any deposition taken within or without this state, on commission or otherwise, the register shall notify the solicitor of the party on whose behalf it was taken, and such solicitor shall notify the opposite solicitor, and such motion shall be made within ten days after the solicitor making the same shall have been so notified.

Har. Ch. 31; 19 Mich. 157; 42 Mich. 477.

HOW PARTY MAY BE EXAMINED AS A WITNESS—OBJECTION TO TESTIMONY ON HEARING.

RULE 55. When a party wishes to examine a defendant as a witness against a co-defendant, or against the complainant, he may, at any time within twenty days after he has received or served a notice of the rule to produce witnesses, on filing an affidavit that such defendant is a material witness, and is not interested in a matter to which he is to be examined, have an order of course for the examination of such defendant as a witness, as to any matter in which he is not interested, subject to all just exceptions. And such defendant shall thereupon be examined to such matters, in the same manner as other witnesses; but the adverse party, at the hearing, may object to the competency of his testimony.

PROVING DOCUMENTS AT HEARING—WHEN DEEDS, ETC., MAY BE READ AT HEARING WITHOUT PROOF.

RULE 56. Documents which are of themselves evidence without further proof shall not be read on the hearing, unless they have been made exhibits before the commissioner; and no deed or other writing shall be proved at the hearing; except on an order previously obtained after due notice to the adverse party. But where any deed or other instrument in writing which is duly acknowledged or proved in such manner as to authorize it to be read in evidence, is stated in the bill, or where any judgment or other matter of record is set out or distinctly stated in the bill, such deed or instrument, or an authenticated copy of the record, may in all cases be read upon the hearing of the cause, unless the defendant in his answer denies the due execution of said deed or instrument, or the existence of such record, either positively or according to his belief.

Walk. Ch. 449; Har. Ch. 225; 3 Mich. 482; 14 Mich. 514; 42 Mich. 304.

COMPELLING ATTENDANCE OF WITNESSES BEFORE COMMISSIONERS.

RULE 57. Process of subpœna to compel the attendance of witnesses before a commissioner shall issue of course, and the time and place of attendance shall be specified in the writ; and such witnesses may be punished if they fail to attend and submit to an examination. But no witness shall be compelled to appear before a commissioner more than forty miles from his place of residence, unless by special order of the court.

See H. S. §§6632, 7257, 7483, 7484.

COMMISSIONER TO RETURN AND FILE DEPOSITIONS.

RULE 58. Within ten days after notice of the order to close the proofs, the commissioner, on being applied to for that purpose by either party, shall cause the depositions and exhibits taken or produced before him to be returned and filed with the register. No copy of any deposition or exhibit shall be read on the hearing, unless the original has been returned and filed in the proper office.—*As amended April 27, 1871.*

ORDERS TO ENLARGE TIME TO PRODUCE WITNESSES.

RULE 59. An order to enlarge the time for the examination of witnesses may be granted, on sufficient cause shown, without notice to the adverse party; but an *ex parte* order shall not be granted after the time for the examination of witnesses has actually expired, nor shall a second order be granted to the same party, except on the usual notice of the application to the adverse party, and upon such terms as the court may prescribe.

Walk. Ch. 384.

NOTICE OF HEARING.

RULE 60. After the proofs are closed, either party may notice the cause for hearing at the next or some subsequent term. It shall not be necessary in any case to obtain an order to set a cause down for hearing; but when a cause is in readiness for hearing, on plea or demurrer, bill and answer, pleadings and proofs, exceptions to a commissioner's report, or on the equity reserved, either party may notice the same for hearing, and have the cause entered on the calendar of causes for the term.

37 Mich. 166; Har. Ch. 265; 47 Mich. 513, 515; Zable v. Harshman, 68 Mich. (July 12, 1888); Turner v. Hart, 71 Mich. (July 11, 1888); 50 Mich. 252; Davenport v. Att. Gen.

70 Mich. (May 11, 1888); Goodrich v. Goodrich, Mich. (June 23, 1887).

TIME ON NOTICES, ETC.—COPIES OF PAPERS ON MOTIONS TO BE SERVED.

RULE 61. All notices of hearing, or of special motions, or of the presenting of petitions, when required, shall be notices of at least eight days, if the solicitor of the adverse party resides over one hundred miles from the place where the court is to be held; if over fifty and not exceeding one hundred, six days' notice shall be given; and in all other cases at least four days. And a copy of the petition, affidavit or certificate on which any special application is founded, shall be served on the adverse party the same length of time previous to making the application to the court.

Har. Ch. 255.

CASE, AND ABBREVIATION OF PLEADINGS.

RULE 62. When a cause is submitted or heard on bill, answer and replication, or on the pleadings and proofs, if the parties do not agree upon a case to be signed by them, containing, with all requisite brevity, a statement of the pleadings and proofs, the complainant shall furnish the court with a case, stating the time of filing the bill, and of the answer and other pleadings respectively, the names of the original parties in full, the change of parties, if any has taken place pending the suit, and a very brief history of the proceedings in the cause; and containing an abbreviation of the pleadings, not exceeding one-sixth of the number of folios contained in the original pleadings respectively.

HOW CALENDAR TO BE MADE UP.

RULE 63. In making up the calendar, causes to be heard on bills taken as confessed shall have a preference, and shall be entered according to priority, from the date of the order to take the bill as confessed. Pleas and demurrers shall constitute the second class of causes, and have priority from the time when the plea or demurrer was filed. Causes to be heard on bill and answer shall occupy the third place on the calendar, and have priority from the time when the answer was put in. Those which are to be heard on the pleadings, or on pleadings and proofs, shall form the fourth class, and have pri-

ority from the time when the replication was filed. Causes to be heard on exceptions, or upon the equity reserved in a decretal order, shall be placed in the class to which they belonged before the decretal order or reference, and according to their priority as it then existed; and causes for rehearing shall be arranged in the same manner. But the court, in the hearing of the calendar causes, may, in its discretion, give a preference to any particular cause, or description of causes, over others in the calendar. And mortgage cases of the fourth class shall be entitled to a preference over any other causes of the same class, unless the defendant, before the cause is heard, shall file with the register an affidavit that he has a good and meritorious defence, and that his answer was not put in for the purpose of delay; the filing of which affidavit he shall have noted on the calendar.

See H. S. §6628; 38 Mich. 662.

CAUSE TO BE NOTICED FOR FIRST DAY OF TERM—NOTICE TO REGISTER.

RULE 64. Causes shall be noticed for hearing for the first day of the term. The notice to the register, specifying the class to which the cause belongs, and the time from which it is entitled to priority, shall be delivered to the register, who is to make the calendar, four days previous to the commencement of the term. But if the cause is not in readiness for hearing in time to notice it for the first day in term, it may be noticed for a subsequent day in term and placed at the foot of the calendar; and, if the bill has been taken as confessed, may be heard out of its regular order.

29 Mich. 228; 37 Mich. 166; 38 Mich. 662.

PAPERS TO BE FURNISHED ON HEARING—ON A REHEARING.

RULE 65. When a cause is heard or submitted on plea or demurrer, or on bill and answer (except in mortgage or partition causes where the complainant's rights are not contested), the court shall be furnished with copies of the pleadings, and an abbreviation thereof not exceeding one-sixth of the number of folios contained in the originals. If it is heard on bill, answer and replication, or on pleadings and proofs, in addition to the case required by the sixty-second rule, the court shall be furnished with copies of the pleadings, and of the depositions, if

any, and with short abstracts of the exhibits. On a rehearing, a copy of the decree or order reheard shall be furnished, and copies of the pleadings, abstracts, case, depositions, etc., on which the same was founded. Upon exceptions to a commissioner's report, copies of the order of reference, report and exceptions, and of such part of the evidence before the commissioner, and of the pleadings, as are material for the decision of the exceptions, shall be furnished. And in all cases the necessary papers shall be delivered to the court when the hearing of the cause shall commence.

BY WHOM PAPERS TO BE FURNISHED—POINTS TO BE DELIVERED.

RULE 66. If the cause is heard or submitted on plea or demurrer, or on exceptions to a commissioner's report, or on a rehearing, the necessary papers shall be furnished by the party pleading, demurring or excepting, or who obtained the rehearing. In all other cases the papers shall be furnished by the complainant, except that on an original hearing upon pleadings and proofs, each party shall furnish copies of the testimony and abstracts of the exhibits on his part only. And each party shall deliver to the court and to the adverse party a copy of the points on which he relies; and may also deliver to the court and to the adverse party a draft of the minutes of the decree to which he conceives himself entitled.

PAPERS TO BE LEGIBLY WRITTEN—HOW ENTITLED.

RULE 67. All bills, answers and other proceedings, and copies thereof, shall be fairly and legibly written, and if not so written, the register shall not file such as may be offered to him for that purpose; and in the entitling and endorsement of papers by either party the complainant's name shall be placed first.

Const. Art. 18, sec. 6; See H. S. § 7251.

DEFAULT AT THE HEARING.

RULE 68. If the cause is noticed for hearing on the part of defendant, and the complainant does not appear to argue on his part, or does not furnish the necessary papers, agreeably to the preceding rule, the bill may be dismissed with costs. If noticed on the part of the complainant, and the defendant does not appear at the hearing and furnish the necessary papers on his part, the complainant may have such decree as he is entitled to

by the defendant's default, according to the usual course and practice of the court.

Walk. Ch. 31, 72; 28 Mich. 359; 30 Mich. 160; 25 Mich. 149; 43 Mich. 367.

MANNER OF SUBMITTING CAUSES.

RULE 69. All submissions shall be in writing, signed by the necessary parties or their solicitors, and shall be delivered to the register with the necessary copies and papers. On special motions and petitions, as well as in calendar causes, he shall mark the papers and note them in his minutes, as on a hearing; and he shall not enter the submission until all the necessary copies and papers are furnished, as required by the rules of the court.

PROCEEDINGS ON ORDER OF REFERENCE—SUMMONS AND ITS SERVICE.

RULE 70. When a matter is referred to a commissioner, to examine and report thereon, on bringing the decree or order into his office he shall assign a day and place for hearing the parties, and give to the party bringing in such decree or order a summons for the adverse party to attend at the day and place so appointed. The summons shall be served on the adverse party or his solicitor such time, previous to the day appointed for hearing, as the commissioner may deem reasonable and direct, taking into consideration the nature of the matter to be examined, and the residence of the parties. But the time of service, unless otherwise ordered by the court, shall not be less than two days, when the solicitor of the adverse party resides in the city or town where the hearing is to take place; and not less than four days when he resides elsewhere, not exceeding fifty miles from the place of hearing; not less than six days, if over fifty and not exceeding one hundred miles; and not less than eight days when he resides more than one hundred miles from the place of hearing.

Walk. Ch. 357, 391, 423, 453; Har. Ch. 436.

PARTY ENTITLED TO PROSECUTE ORDER OF REFERENCE TO PROCEED IN THIRTY DAYS.

RULE 71. If the party who is entitled to prosecute such decree or order of reference does not procure and serve such summons within thirty days after the decree or order is entered, any other party or person interested in the matter of reference shall be at liberty to apply to the court, by motion or petition, to ex-

pedite the prosecution of the decree or order; and after the proceedings have been commenced, by the service of a summons to attend before the commissioner, if the party entitled to prosecute such decree or order does not proceed with due diligence, the commissioner shall be at liberty, upon the application of any other person interested, either as a party to the suit, or as coming in to prove his debt, or establish a claim under the decree or order, to commit to him the prosecution of the reference.

PROCEEDINGS IN COMMISSIONER'S OFFICE.

RULE 72. At the time and place appointed in the summons for hearing the parties, the commissioner shall proceed to regulate, as far as may be, the manner of its execution; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary notices, and to point out which of the several proceedings may properly be going on *pari passu;* and as to what particular matters interrogatories for the examination of the parties appear to be necessary; and whether the matters requiring evidence shall be proved by affidavit, or by the examination of witnesses; and if the commissioner shall think it expedient so to do, he may then, or upon any subsequent attendance, and from time to time, as circumstances may require, fix the time within or at which any proceedings before him shall be had; and he may proceed *de die in diem,* or by adjournment from time to time, as he may think proper.

EXAMINATION OF BOOKS, ETC., BEFORE COMMISSIONER.

RULE 73. Where, by any decree, or order of the court, books, papers or writings are directed to be produced before the commissioner for the purpose of such decree or order, it shall be in the discretion of the commissioner to determine what books, papers or writings are to be produced, and when and for how long they are to be left in his office; or, in case he should deem it necessary that they should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he may deem expedient.

WHEN COMMISSIONER MAY PROCEED EX PARTE.

RULE 74. Where some, or one, but not all of the parties, do attend the commissioner at the time and place appointed, the commissioner shall be at liberty to proceed *ex parte,* if he thinks

it expedient so to do, considering the nature of the case; and if he has proceeded *ex parte*, such proceeding shall not in any manner be reviewed by him, unless, upon special application to him for that purpose by the party who was absent, the commissioner shall be satisfied such party was not guilty of willful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; and such costs to be certified by the commissioner at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review; and every summons to attend before a commissioner shall be considered peremptory.

HOW COMMISSIONER TO TAKE TESTIMONY.

RULE 75. The commissioner shall be at liberty to examine any witness or party, or any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require; the examination or evidence being taken down at the time by the commissioner, or by his clerk in his presence, and preserved, in order that the same may be used by the court, if necessary.

See H. S. §§ 6643, 6644; Walk. Ch. 48; Har. Ch. 31; 37 Mich. 116; 40 Mich. 493; 43 Mich. 171.

PROCEEDINGS OF COMMISSIONER ON EXCEPTIONS—EXCEPTIONS TO REPORT THEREON.

RULE 76. If a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the commissioner, on the ground that it is scandalous or impertinent, or that any examination of a party before him is insufficient, such party shall be at liberty to file exceptions thereto with the commissioner; and the commissioner shall have authority to expunge any such matter which he shall find to be scandalous or impertinent. And where the matter is excepted to as scandalous or impertinent, if the commissioner disallows the exceptions, his decision thereon shall be final as to the exceptions which are disallowed; but this shall not preclude the party from insisting upon the impertinence at the hearing of the cause, or upon any subsequent proceeding founded on the commissioner's report upon the reference, or upon the taxation of the general costs of the cause, or of the reference. And in deciding

on the sufficiency or insufficiency of the examination of a party, or of an answer to a bill, the commissioner shall always take into consideration the relevancy or materiality of the statement or question referred to in the exception. On exceptions to the commissioner's report, or to his certificate of the sufficiency or insufficiency of the examination, the parties shall be confined to the objections taken before the commissioner.

HOW ACCOUNTS TAKEN BEFORE COMMISSIONER.

RULE 77. All parties accounting before a commissioner shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the commissioner may direct. On any reference to take or state an account, the commissioner shall be at liberty to allow interest as shall be just and equitable, without any special direction for that purpose, unless a contrary direction is contained in the order of reference. And every charge, discharge, or state of facts, brought in before a commissioner, shall be verified by oath as true, either positively or upon information and belief.

18 Mich. 12; 43 Mich. 613; 56 Mich. 632; 46 Mich. 587; Low v. Hill, 66 Mich. (Oct. 20, 1887); Killefer v. Lone, 70 Mich. (June 8, 1888).

COMMISSIONER MAY MAKE SEPARATE REPORTS.

RULE 78. In all matters referred to a commissioner, he shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as he shall deem expedient; the costs of such separate reports to be in the discretion of the court. And where the commissioner shall make a separate report of debts or legacies, he shall be at liberty to make such certificate as he thinks fit, with respect to the state of assets; and any person interested shall thereupon be at liberty to apply to the court as he shall be advised.

ORDER TO CONFIRM REPORT.

RULE 79. After the report is filed, either party may have an order of course to confirm the same, unless cause to the contrary thereof be shown in eight days after notice of its being filed; and if no exceptions are filed and served within that time, the order shall become absolute of course, without further order; or either

party may file exceptions, and have an order of course to confirm the report, so far as the same is not excepted to, and with the like effect.

Walk Ch. 19, 23, 45; 12 Mich. 314; Walk. Ch. 23; 14 Mich. 532; 17 Mich. 386; 18 Mich. 255; 20 Mich. 212; 23 Mich. 412; 40 Mich. 1; 32 Mich. 307; 33 Mich. 298.

ENROLLMENT OF DECREE—FROM WHAT OFFICE PROCESS TO ISSUE THEREON—SALE.

RULE 80. No process shall be issued, or other proceedings had on any final decree, until the same is duly enrolled. And such process, unless otherwise specially directed by the court, shall be sealed and issued by the register, who shall not suffer any process to pass his seal, if it does not appear to be duly warranted. If a commissioner is directed to sell real estate under such decree, he may give the requisite notice of sale previous to enrollment; but, to protect the title of the purchaser, the party for whose benefit the sale is made shall cause the decree to be enrolled, and produce a certificate thereof, before any conveyance shall be executed by the commissioner. And where any previous decree or decretal order disposes of any part of the merits of the cause, or is necessary to explain the final decree, it shall either be recited therein or enrolled therewith, as a part of the final decree in the cause.

H. S. §§ 6597, 6648, 6649, 6653, 6707, 6708, 6737, 6739, 7255, 7256, 7639, 7643; Walk. Ch. 6, 72, 494; 18 Mich. 255; 13 Mich. 463; 15 Mich. 253; 19 Mich. 142; 36 Mich. 77; 43 Mich. 283; 36 Mich. 297; 36 Mich. 64; 43 Mich. 192; 42 Mich. 131; 15 Mich. 253; 33 Mich. 268; 32 Mich. 13; 33 Mich. 63; 33 Mich. 298; 33 Mich. 337–500; 35 Mich 189; 39 Mich. 313; 40 Mich. 232; 42 Mich 304; 39 Mich. 55; 47 Mich. 512; 61 Mich. 35; 59 Mich. 296; 52 Mich. 174; 63 Mich. 704; Atkinson v. Flannigan, 70 Mich. (June 15, 1888); German Seminary v. Sawyer, 66 Mich. (June 9, 1887); 123 U. S. 233; 62 Mich. 614; 44 Mich. 240; 42 Mich. 272; 54 Mich. 323; 48 Mich. 375; Brick v. Brick, 65 Mich. (Feb. 15, 1887); 45 Mich. 1; 48 Mich. 618; 58 Mich. 77; 46 Mich. 489; 56 Mich. 3; 58 Mich. 429; Edgar v. Burck, 65 Mich. (April 14, 1887); 43 Mich. 367; 55 Mich. 276; 53 Mich. 543; 56 Mich. 291; 55 Mich. 40; 61 Mich. 35; 59 Mich. 295; 46 Mich. 511; 57 Mich. 421.

MANNER OF APPLYING FOR REHEARING.

RULE 81. A petition for a rehearing shall state the special matter or cause on which such rehearing is applied for, and

the particular points in which the decree or order is alleged to be erroneous, but it shall not be necessary to state the proceedings anterior to such decree or order sought to be reversed; and the facts, if they do not appear from the records of the court, shall be verified by affidavit of the party, or of some other person. It shall also be accompanied by the certificate of two counsel, that they have examined the case, and that in their opinion the decree or order is erroneous in the particulars mentioned in the petition. And a copy of the petition, with the usual notice of presenting the same, shall be served on the adverse party, but the rehearing shall not be considered as a matter of course in any case.

Har. Ch. 221; Walk. Ch. 359-446; 38 Mich. 662; 15 Mich. 519; 25 Mich. 16; 26 Mich. 484; 38 Mich. 443; 24 Mich. 387.

ORDER TO STAY PROCEEDINGS, AND SERVICE THEREOF.

RULE 82. Where a party is entitled to an order to stay proceedings, or for temporary relief until he has time to give regular notice of a motion, or of presenting a petition for a rehearing, or for any other purpose, he may make an *ex parte* application to the court, or judge, or commissioner, acting as injunction master, for an order that the adverse party show cause why the motion or the prayer of the petition should not be granted, or to stay proceedings, or for other temporary relief in the meantime. And the adverse party shall be served with a copy of the order, and of the petition, affidavit or certificate on which it is founded, the same length of time before the day for showing cause as is required in the ordinary case of special motions, unless the court, or judge, or commissioner, shall specially direct a shorter notice to be given.

DEPOSIT ON REHEARING.

RULE 83. If a rehearing is granted, the petitioner shall lose the benefit thereof, unless he shall, within ten days thereafter, deposit with the register fifty dollars, to answer the costs and damages of the adverse party, if the decree or order shall not be materially varied.

AGREEMENTS BETWEEN PARTIES TO BE IN WRITING.

RULE 84. No private agreement or consent between the parties, in respect to the proceedings in the cause, shall be

alleged or suggested by either of them against the other, unless the same shall have been reduced to the form of an order by consent, and entered in the book of common orders; or unless the evidence thereof shall be in writing, subscribed by the party against whom it is alleged or suggested, or by his solicitor or counsel.

Walk. Ch. 23-389; Har. Ch. 438; 20 Mich. 195.

TIME ON RULES AND ORDERS.

RULE 85. All rules to take effect *nisi*, etc., unless otherwise specially directed, shall be rules of eight days; and the time on all rules, orders, notices and proceedings, where a time is given or stated, shall, unless otherwise expressly provided, be deemed and taken to be one day inclusive and one day exclusive, but if the time expires on Sunday, the whole of the succeeding day shall be included.

EXTENDING TIME AND SETTING ASIDE DEFAULTS.

RULE 86. The court, or commissioner acting as injunction master, upon special cause shown, may extend the time for putting in or serving any pleading or exceptions, or for any other proceeding which is required by the rules of the court to be done within a limited time; and the court may set aside any order or decree, obtained by default or otherwise, upon such terms as may be deemed just and proper.

Walk. Ch. 31, 72, 384; Har. Ch. 241, 426, 265; 14 Mich. 514.

ACCOUNT OF MONEY DEPOSITED, HOW KEPT.

RULE 87. The accounts of the register with the banks in which the moneys are directed to be deposited, shall be kept in such a manner that in the cash books of the banks, and in the bank books of the register, it shall appear in what particular suit, or on what account, the several items of money credited or charged were deposited or paid out.

See H. S. §§6598, 6606; 34 Mich. 99.

FORM OF ORDERS FOR PAYMENT OF MONEYS OUT OF COURT.

RULE 88. Orders upon the banks for the payment of moneys out of court shall be made payable to the order of the person entitled thereto, or of his solicitor or his attorney, duly authorized, and shall specify in what particular suit, or on what account

the money is to be paid out, and the time when the decree or order authorizing such payment was made.

42 Mich. 249.

TAXING COSTS—RETAXATION.

RULE 89. The circuit court commissioners and registers of each circuit court shall have power to tax costs, and where costs have been taxed, upon hearing of the parties, an application for a retaxation may be made directly to the court.

See H. S. §§8962, 8963, 8996, 9003, 9032, 9045; Walk. Ch. 340, 72; 16 Mich. 506; Walk. Ch. 153.

BILL OF COSTS TO SPECIFY ITEMS—AFFIDAVIT TO BE ANNEXED —NOTICE OF TAXATION—WHAT ALLOWED.

RULE 90. In a bill of costs offered for taxation, by or on behalf of any solicitor, or of any party who prosecutes and defends by a solicitor, or by or on behalf of any officer of this court who prosecutes and defends in person, the several items of disbursements and of the fees of officers of the court, shall be particularly specified therein, and not charged in gross, or they shall be disallowed on taxation; and when witnesses' fees are charged, the names of the witnesses shall be specified, and the number of days' travel and attendance of each. The affidavit of the solicitor, or the officer who prosecutes or defends in person, shall also be annexed to the bill before it is taxed, stating, according to the best of his knowledge and belief, that the several disbursements charged in the bill have been actually and necessarily incurred or paid; and before any officer or party shall be entitled to demand payment thereof, such costs or fees shall be taxed by a taxing officer of this court; but no officer whatever shall tax his own costs or fees; and the same notice of taxation shall be given to the party to be charged therewith, if such party has appeared in the cause or proceedings, as is required by the rules of this court. The following costs shall be allowed to the prevailing parties, viz.: In all cases determined by final decree on pleadings and proofs, thirty dollars. In all cases determined by final decree on bill and answer, plea or demurrer, twenty dollars. In all cases where decree is taken on the bill taken as confessed, fifteen dollars. Upon all special motions, such sum, not exceeding ten dollars, as the court shall deem just. When a bill is dismissed for default at the hearing, or for want

of prosecution, or voluntarily by the complainant, the defendant shall be entitled to the same costs as if the cause had been heard, and where the bill is dismissed upon payment of the claim, or performance of the relief sought, before decree, the complainant shall be entitled to the same costs as if the case had been heard. If such payment or performance is made before plea, demurrer or answer, the costs shall be as on bill taken *pro confesso*; if after any pleading is put in and before proofs, they shall be as on a hearing upon pleadings; and if proofs are taken, the costs shall be as on a hearing upon pleadings and proofs. In divorce cases the costs shall be under the direction of the court. Where there are several defendants entitled to costs, the costs granted by this rule shall be apportioned among them as the court may deem proper.—*As amended October 23, 1858.*

See H. S. §§ 9001, 9002; Walk. Ch. 45, 72, 153; 41 Mich. 730; 35 Mich. 237; 1 Doug. 41; 10 Mich. 454; 12 Mich. 61, 117, 540; 13 Mich. 258; 14 Mich. 160; 16 Mich. 506; 24 Mich. 39; 31 Mich. 207; 25 Mich. 127; 29 Mich. 305; 35 Mich. 96.

HOW RIGHTS OF SUBSEQUENT PURCHASERS, ETC., SET OUT IN BILL.

RULE 91. In a bill for foreclosure or satisfaction of a mortgage, it shall not be necessary to set out at large the rights and interests of the several defendants who are purchasers of, or who have liens on, the equity of redemption in the mortgaged premises, subsequent to the registry or recording of complainant's mortgage, and who claim no right in opposition thereto; but it shall be sufficient for the complainant, after setting out his own right and interest in the premises, to state generally that such defendants have or claim some interest in the premises, as subsequent purchasers or encumbrancers, or otherwise.

Walk. Ch. 43; 36 Mich. 364; 40 Mich. 307; Har. Ch. 423, 443, 449; Walk. Ch. 465; 6 Mich. 70; Walk. Ch. 64; 39 Mich. 42; 34 Mich. 10; 35 Mich. 115; 1 Mich. 179; 3 Mich. 448; 8 Mich. 115; 13 Mich. 409; 14 Mich. 361; 10 Mich. 453; 15 Mich. 489; 34 Mich. 221; 35 Mich. 97; 24 Mich. 39; 28 Mich. 125; 26 Mich. 128; 27 Mich. 308; 32 Mich. 438; 33 Mich. 354; 34 Mich. 10; 35 Mich. 99; 38 Mich. 387, 513, 667; 43 Mich. 299; 33 Mich. 505; 40 Mich. 506; 41 Mich. 719; 35 Mich. 134; 40 Mich. 371; 42 Mich. 304; 43 Mich. 468; 34 Mich. 362; 34 Mich. 221; 34 Mich. 300; 35 Mich. 115; 42 Mich. 107, 304; 35 Mich. 464; 36 Mich. 77, 173; 39 Mich. 689; 40 Mich. 530; See H. S—; 40 Mich. 264; 40 Mich

380; 41 Mich. 274; 3 Mich. 211; 9 Mich. 9; 12 Mich. 270; 13 Mich. 303; 24 Mich. 305, 479; 26 Mich 500; 30 Mich. 149; 35 Mich. 134, 229, 284; 40 Mich. 339, 610, 668; 41 Mich. 371, 719; 42 Mich. 115, 482; 37 Mich. 473.

REFERENCE TO COMPUTE AMOUNT DUE ON MORTGAGE, ETC.—AFFIDAVIT OF REGULARITY.

RULE 92. If a bill to foreclose a mortgage is taken as confessed, or the right of the complainant, as stated in his bill, is admitted by the answer, he may have an order of course, referring it to a commissioner to compute the amount due to the complainant, and to such of the defendants as are prior incumbrancers of the mortgaged premises; and if the defendant is an infant, and has put in a general answer by his guardian, or any of the defendants are absentees, the complainant may have a similar order of course, referring it to a commissioner to take proofs of the facts and circumstances stated in the complainant's bill, and to compute the amount due on the mortgage, preparatory to the hearing of the cause. But every such cause shall be regularly brought to hearing at term after the coming in of the commissioner's report, before a final decree is entered therein; and if the bill has been taken as confessed, the complainant shall show to the court, at the hearing, by affidavit or otherwise, that the proceedings to take the bill as confessed have been regular, according to the rules and practice of the court. He shall also show whether the bill has been taken as confessed against all of the defendants upon service of subpœna, or after an appearance, or whether some of them have been proceeded against as absentees. From and after January 1, 1879, sales shall not be ordered on less than six full weeks or forty-two days notice, and publication shall not commence until the time fixed by decree for payment has expired, nor within a year after commencement of suit.—*As amended October 18, 1878.*

See H. S. §§ 1137, 6674, 6677, 6711, 6713; Walk. Ch. 6; 29 Mich. 72; 16 Mich. 162; 36 Mich. 297; 43 Mich. 208; 33 Mich. 410; 36 Mich. 160; Walk. Ch. 15, 45; 12 Mich. 314; Walk. Ch. 23, 478; 9 Mich. 28; 13 Mich. 552; 34 Mich. 300; 42 Mich. 304; 11 Mich. 304; 15 Mich. 253; 21 Mich. 524; 36 Mich. 297; 12 Mich. 215; 36 Mich. 77; 40 Mich. 1; 37 Mich. 473; 34 Mich. 302; 34 Mich. 503; 37 Mich. 148; 39 Mich. 304; 40 Mich. 517; 41 Mich. 264; 15 Mich. 253; 12 Mich. 314; 33 Mich. 505; 40 Mich. 506; 40 Mich. 447; 19 Mich. 142; 36 Mich. 285; 43 Mich. 200; 37 Mich. 81, 164; 35 Mich. 115;

42 Mich. 107, 304; 42 Mich. 154; 33 Mich. 298; 34 Mich. 13; 34 Mich. 302; 29 Mich. 57, 153; 37 Mich. 596; 29 Mich. 72; 30 Mich. 331; 31 Mich. 263; 32 Mich. 63; 32 Mich. 225; 32 Mich. 515; 33 Mich. 354; 34 Mich. 10; 35 Mich. 97; 35 Mich. 233; 33 Mich. 298; 43 Mich. 322; 38 Mich. 30, 92; 39 Mich. 777; 40 Mich. 693; 41 Mich. 202, 625; 42 Mich. 34; 39 Mich. 150; 13 Mich. 23; 27 Mich. 203; 27 Mich. 289; 31 Mich. 440; 37 Mich. 47; 37 Mich. 539; 40 Mich. 581; 42 Mich. 389; 38 Mich. 430; 41 Mich. 198; Walk. Ch. 185, 459; 15 Mich. 253; 19 Mich. 142; 21 Mich. 524; 23 Mich. 312; 35 Mich. 134; 36 Mich. 77; 38 Mich. 387 430; 41 Mich. 198; 34 Mich. 477; 43 Mich. 129; 43 Mich. 515; 43 Mich. 208; 40 Mich. 447; 38 Mich. 662; 41 Mich. 40; 43 Mich. 349; 43 Mich. 549, 473.

HOW SURPLUS ON FORECLOSURE SALE DISPOSED OF.

RULE 93. On the coming in and confirmation of the commissioner's report of the sale of mortgaged premises, if it shall appear there is any surplus money remaining in court after satisfying the amount due the complainant, any defendant, upon filing an affidavit that such surplus has been paid into court, and that he is entitled to the same, or some part thereof, may have an order of course, referring it to a commissioner to ascertain and report the amount due to such defendants, or to any other person, and which is a lien upon surplus moneys; and to ascertain the priorities of the several liens thereon; to the end that on coming in and confirmation of the report, such further order and decree may be made for the distribution of surplus moneys as may be just; and every defendant who has appeared in the cause, and every person who has left a written notice of his claim to such surplus moneys with the register or assistant register, where the same are deposited, shall be entitled to notice to attend the commissioner on such reference. And any person making a claim to such surplus moneys, and who shall fail to establish his claim on the hearing before the commissioner, may be charged with such costs as the other parties have been subjected to by reason of such claim; and the parties succeeding on such reference may be allowed such costs as by the court may be deemed reasonable; but no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation or paid out of such surplus.

See H. S. §§ 6709-6710, 10 Mich. 268; 21 Mich. 211; 19 Mich. 244; 12 Mich. 398; 21 Mich. 211; 33 Mich. 63; 33

Mich. 268-337; 35 Mich. 57; 36 Mich. 281; 41 Mich. 689; 36 Mich. 287; 36 Mich. 285; 40 Mich. 264; 42 Mich. 131; 43 Mich. 192; 17 Mich. 386; 18 Mich. 255; 13 Mich. 258.

SECURITY BY GUARDIAN AD LITEM, ETC.

RULE 94. No guardian *ad litem* for an infant defendant, or next friend of an infant complainant, unless he has given security to the infant according to law, shall as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian, out of the fund, or received by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of the sale of real property belonging to such infant sold under a decree or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.

Walk. Ch. 314; 42 Mich. 69.

BILLS FOR DIVORCE.

RULE 95. All bills for the purpose of obtaining divorce, whether the husband or wife is complainant, shall be duly verified by oath, in the usual manner of verifying bills, where, by the course and practice of the court, an oath is required. In a bill for a divorce on the ground of adultery, the complainant must also positively aver that the adultery charged in the bill was committed without the consent, connivance, privity or procurement of the complainant; and that the complainant has not voluntarily cohabited with the defendant since the discovery of such adultery. And in all such bills, and in all bills for divorce upon any ground, the complainant shall also positively aver that the act done or cause charged in the bill for which divorce is sought, was committed without the consent, connivance, privity or procurement of the complainant, and that such bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties thereto, or between the complainant and any other person.

Const. Art. 4, sec. 26; Comp. L. 1871, ch. 170; Walk. Ch. 53; Har. Ch. 19; Walk. Ch. 421; 6 Mich. 285; 14 Mich. 462; 18 Mich. 458; 21 Mich. 414; 26 Mich. 417; 30 Mich. 163; 15 Mich. 184; 12 Mich. 456; 16 Mich. 162; 17 Mich. 205, 211; 22 Mich. 242; 24 Mich. 180; 22 Mich. 299; 26 Mich. 417; 30

Mich. 163; 35 Mich. 138; 37 Mich. 603; 40 Mich. 232, 495; 39 Mich. 67, 719; 40 Mich. 63; 35 Mich. 138; 39 Mich. 221; 39 Mich. 661; 40 Mich. 232; 35 Mich. 138; 40 Mich. 527, 528, 232; 42 Mich. 53; 43 Mich. 287; 40 Mich. 493; 40 Mich. 633; 3 Mich. 67; 20 Mich. 34; 26 Mich. 437: 13 Mich. 452; 17 Mich. 205; 33 Mich. 201; 18 Mich. 420; 35 Mich. 461; 17 Mich. 205, 211; 20 Mich. 34; 24 Mich. 482; 26 Mich. 417; 40 Mich. 493; 34 Mich 519; 16 Mich, 140; 35 Mich. 210; 11 Mich. 284; 20 Mich. 222; 24 Mich. 482; 31 Mich. 194, 298; 26 Mich. 437; 17 Mich. 211; 36 Mich. 386; 25 Mich. 247; 24 Mich. 180; 22 Mich. 242.

REFERENCE TO TAKE PROOFS IN DIVORCE CASES.

RULE 96. If any such bill is taken as confessed, or the facts charged therein are admitted by the answer, the complainant may, upon due proof by affidavit of the regularity of the proceedings to take the bill as confessed, or upon the bill and answer, have an order of course entered for a reference to a commissioner, to take proof of all the material facts charged in the bill, and to report such proof to the court, with his opinion thereon. And on such reference it shall be the duty of the commissioner, in addition to any questions put by the parties, to make such full inquiries of the persons sworn as shall be necessary to arrive at all the material facts of the case.

Walk. Ch. 532; 28 Mich. 344; 31 Mich. 298; 17 Mich. 211; 31 Mich. 298; 29 Mich. 305; 24 Mich. 482; 20 Mich. 34; 24 Mich. 482; 26 Mich. 417; 33 Mich. 101.

DEFENCE OF ADULTRY, ETC., IN DIVORCE CASES.

RULE 97. The defendant in the answer may set up the adultery of the complainant, or any other matter which would be a bar to a divorce, separation, or the annulling of the marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

5 Mich. 395; 6 Mich. 285.

DECREE FOR DIVORCE, ETC., NOT TO BE ENTERED BY CONSENT OR DEFAULT.

RULE 98. No sentence or decree of nullity, declaring void a marriage contract, or decree for a divorce, or for a separate or limited divorce, shall be made of course, by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such case shall

be heard after the trial of the issue, or upon the coming in of the commissioner's report, at a stated term of the court.

Walk. Ch. 48, 309; 16 Mich. 79; 13 Mich. 452; 18 Mich. 335; 12 Mich. 456; 24 Mich. 176; 36 Mich. 37; 37 Mich. 59; 10 Mich. 425; 39 Mich. 64.

PARTIES TO CAUSES, AND WITNESSES, MAY BE EXAMINED BY COURT ORALLY.

RULE 99. In all chancery cases whatever, whether for divorce or otherwise, which are at issue on pleadings and proofs, the court may call upon the parties thereto, or any of them, or any witnesses thereto, to testify orally in open court; and in all cases of divorce, whether at issue or standing on the bill taken as confessed, the court may in like manner call upon the complainant, or any witness thereto, so to testify; and may make all necessary orders to secure the attendance of such party or witness, and may suspend the hearing of the cause from time to time, as often as may be necessary to secure such attendance; or in case of the neglect or refusal of the complainant to attend and testify, may dismiss the bill in the same manner as though said complainant had made default at the hearing.

37 Mich. 603.

PAYMENT OF INTERLOCUTORY COSTS—HOW COMPELLED.

RULE 100. When a party is ordered to pay the costs of any interlocutory proceedings, and no time of payment is specified in the order, he shall pay them within twenty days after the filing of the taxed bill and affidavit, and service of a copy of the order and of such taxed bill; or if a gross sum is specified in the order, within twenty days of service of a certified copy of the order. And if he neglects or refuses to pay such costs within the time prescribed as aforesaid, or specified in the order, the adverse party, on an affidavit of the personal service of such copies, and a demand of payment, and that such costs have not been paid, may have an execution therefor, or move for an attachment against the delinquent.

Har. Ch. 19; 35 Mich. 138; 22 Mich. 299; See H. S. §§6235, 6653, 7257.

BILL OF REVIEW.

RULE 101. On filing a bill of review, or other bill in the nature of a bill of review, the complainant shall make the like

deposit, or give security to the adverse party in the same amount which is or would be required on an appeal from an order or decree complained of; and no such bill shall be filed, either upon the discovery of new matters, or otherwise, without special leave of the court first obtained, nor unless the same is brought within the time allowed for bringing an appeal, except upon newly discovered facts or evidence, unless upon reasons satisfactory to the court.

18 Mich. 490; 23 Mich. 537; 25 Mich. 527; 30 Mich. 160; 35 Mich. 115; 40 Mich. 166; 39 Mich. 64; 35 Mich. 115; 39 Mich. 98; 40 Mich. 307; 42 Mich. 107; 42 Mich 304; 52 Mich. 489; 45 Mich. 394; 63 Mich. 215; 48 Mich. 375.

CREDITOR'S BILL—WHAT TO STATE.

RULE 102. Where a creditor, by judgment or decree, files a bill in this court against his debtor to obtain satisfaction out of the equitable interests, things in action, or other property of the latter, after the return of an execution unsatisfied, he shall state in such bill, either positively or according to his belief, the true sum actually and equitably due on such judgment or decree, over and above all just claims of the defendant, by way of offset or otherwise. He shall also state that he knows, or has reason to believe, the defendant has equitable interests, things in action, or other property, exceeding one hundred dollars in value, exclusive of all prior claims thereon, which the complainant has been unable to discover and reach by execution on such judgment or decree. The bill shall likewise contain an allegation that the same is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors; but for the sole purpose of compelling payment and satisfaction of the complainant's own debt.

• Walk. Ch. 1, 28, 62, 143, 317, 353, 495; Har. Ch. 162, 169, 227, 430, 435; 38 Mich. 578; 43 Mich. 269; Har. Ch. 227; Walk. Ch. 28, 495; Har. Ch. 430; 1 Mich. 213, 321; 26 Mich. 383, 500; 33 Mich. 268; 7 Mich. 334; 9 Mich. 358, 485; 30 Mich. 63; 40 Mich. 636, 24; 43 Mich. 309; Har. Ch. 169; Walk. Ch. 62; 1 Mich. 213, 321; 9 Mich. 358, 485; 17 Mich. 128; 30 Mich. 63; 3 Mich. 201; Walk. Ch. 1, 495, 28, 143, 317; Har. Ch. 169, 430, 435; 1 Mich. 446; Har. Ch. 162; Walk. Ch. 353, 5, 115, 391, 465, 495; Har. Ch. 227, 443, 449; 1 Doug. 351; 1 Mich. 118, 512, 446; 6 Mich. 441; 31 Mich. 76; 33 Mich. 257; 27 Mich. 76; 41 Mich. 503; 29 Mich. 526; 32

Mich. 88; 51 Mich. 148; 55 Mich. 39; 52 Mich. 8; 45 Mich. 554; 63 Mich. 250; German American Seminary v. Sawyer, 66 Mich. (June, 1887); 55 Mich. 387; 40 Mich. 689, 399; 9 Mich. 358, 485.

CREDITOR'S BILL TO BE VERIFIED—AMENDMENT OF.

RULE 103. Every such creditor's bill shall be verified by the oath of the complainant, or in case of his absence from the state, or other sufficient cause shown, by the oath of his agent or attorney. Such bills may be amended of course, in the same manner as bills not sworn to, if the amendments are merely in addition to and not inconsistent with what is contained in the original bill. But all such amendments shall be verified by oath, in the same manner as the bill is required to be verified.

Walk. Ch. 5.

CREDITORS MAY PROCEED EX PARTE WHEN DEFENDANT IN DEFAULT.

RULE 104. In suit by judgment creditor's bill, in case the defendant has been duly served with process, and he is in default for want of answer, the complainant shall be entitled to the like orders and proceedings in regard to receivers as he would be in case he should take the bill as confessed by the defendant.

See H. S. §§6624, 6625.

DEBTOR MAY CONSENT THAT BILL BE TAKEN AS CONFESSED—ORDER THEREON—COPY OF RULE TO BE SERVED WHEN ANSWER REQUIRED.

RULE 105. The debtor against whom a creditor's bill is filed shall not be subject to the expense of putting in an answer thereto in the usual manner, if he shall cause his appearance to be entered within twenty days after the return day of the subpœna, and shall, within the time allowed for an answer, deliver to the complainant or his solicitor a written consent that an order may be entered taking the bill as confessed, and for the appointment of a receiver, and for a reference to take the examination of the defendant, in conformity to this rule. Upon presenting such written consent to the court, the complainant may have a special order, founded thereon, directing the bill to be taken as confessed against the debtor, and referring it to such commissioner as the court may designate in such order, to appoint a receiver with the usual powers, and to take from him the requisite secu-

rity. The order shall also direct the defendant to assign, transfer and deliver over to the receiver on oath, under the direction of the commissioner, all his property, equitable interests, and in action, and effects; and that he appear before the commissioner, from time to time, and produce such books and papers, and submit to such examination as the commissioner shall direct, in relation to any matter which he might have been legally required to disclose if he had answered the bill in the usual manner. The expense of taking down such examination by the commissioner shall be paid by the complainant in the first instance, and may be taxed and allowed to the latter as a part of his necessary costs in the suit. The complainant shall also be at liberty to examine witnesses before the commissioner, as to the property of the defendant, or as to any other matter charged in the bill and not admitted by the defendant on such examination. And the complainant shall cause a written or printed copy of this rule to be served on the defendant at the time of the service of the subpœna, with a notice to the defendant that an entry of his appearance and answer on oath is required; or such defendant shall not be answerable to the complainant for the costs of the proceedings to compel an appearance and answer.

Walk. Ch. 353, 391, 465.

RECEIVERS IN CREDITOR'S SUITS, AND THEIR POWERS.

RULE 106. Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall, unless restricted by the special order of the court or circuit court commissioner, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of the debtor, where it is necessary or proper for him to do so, and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time as may be necessary, for terms not exceeding one year. And it shall be his duty, without unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court.

He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' notice of the time and place of such sale.

RECEIVER FOR SEVERAL SUITS—SECURITY TO BE GIVEN—HOW TO PAY OVER MONEYS.

RULE 107. Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed, unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust. The receiver shall give security sufficient to cover the whole property and effects of the debtor, which may come in his hands by virtue of his office; and he shall hold such property and effects for the benefit of all creditors who have commenced, or shall commence, similar suits, during the continuance of his trust, to be disposed of according to their legal or equitable priorities. He shall not pay over the funds in his hands to the parties, or to any other person, without being especially authorized to do so by an order or decree of the court; nor shall he be discharged from his trust without a special order, to be obtained upon a written consent of all the parties interested in the property in his hands, or upon notice of the application.

RECEIVER FOR SUBSEQUENT SUITS. RECEIVER'S ACCOUNTS.

RULE 108. When another suit is commenced after the appointment of a receiver, the same person may be appointed receiver of such subsequent suit, and shall give such further security as the court shall direct. He shall keep a separate account of any property or effects of the debtor, which may have been acquired since the commencement of the first suit, or which may be assigned to such receiver under the appointment in the last cause.

EFFECT OF INJUNCTION UPON CREDITOR'S BILLS.

RULE 109. No injunction issued upon any such creditor's bill shall be construed to prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the sup-

port of himself, or of his family, or to defray the expenses of the suit, or to prevent him from complying with any order of this court, made in any other cause, to assign and deliver his property and effects to a receiver; or to restrain him from making the necessary assignment to obtain his discharge under the insolvent laws, unless an express provision to that effect is contained in the injunction.

ORDERS ON TWO OR MORE SPECIAL MOTIONS AT SAME TIME: HOW ENTERED.

RULE 110. When two or more special motions or applications in the same suit are decided at the same time, or on the same day, or several directions are given by the court in relation to the suit, the whole shall be entered together as one order, unless the court shall otherwise direct. And when a party is entitled to enter two or more orders of course in a suit at the same time, or on the same day, they shall be entered together as one order.

POWERS OF CIRCUIT COURT COMMISSIONERS.

RULE 111. Under the "Act to provide for the discharge of the duties heretofore performed by Injunction Masters," approved June 27th, 1851 (*S. L. 1851, p. 277*), the circuit court commissioners designated in pursuance thereof shall have the same power in chancery cases within their respective counties as may be properly exercised by a circuit judge at chambers, subject to such restrictions and regulations as the supreme court may prescribe.

Const. Art. 6, sec. 16; Walk, Ch. 453, 459; 17 Mich. 411.

RULE 112. The general powers conferred by said act are hereby restricted in the following particulars:

1. No such circuit court commissioner shall be empowered to vacate any order or decree of the circuit court, or any order made by a circuit judge.

2. Nor shall he grant any injunction to stay proceedings at law, unless reasonable notice of the time and place of hearing the application therefor shall have been previously given to the adverse party.

3. Nor shall he grant any injunction without such notice in any case unless the judge of the circuit court in which the application is made shall be absent from the county at the time of such ap-

plication or is disqualified from granting an injunction in the cause, nor unless in the opinion of such commissioner the peculiar exigencies of the case require it for manifest reasons to be shown by the affidavit of the facts and circumstances.

4. Nor shall he grant any injunction restraining the execution or performance of any public improvement, nor to compel a defendant to refrain from doing any act where the injunction will necessarily produce great and irreparable injury to the defendant, if the claim of the complainant is not sustained. Nor shall he grant any injunction in any case where no special provision is made by law as to security; except where the injunction prayed for is against a judgment debtor who is made defendant in a creditor's bill, unless the officer granting the same shall take from the complainant or his agent a bond to the party enjoined, in such sum as shall be deemed sufficient and in not less than five hundred dollars, with sufficient surety or sureties to be approved of by the officer allowing the injunction, conditioned to pay the party enjoined such damages as he may sustain by reason of the injunction if the court shall eventually decide that the complainant was not equitably entitled to such injunction, such damages to be ascertained by a reference to a circuit court commissioner, or by the court having jurisdiction of the cause in which the injunction issued, as such court shall direct.

Such officer allowing the injunction shall, before the register shall issue the writ, file such bond with such register in chancery, who shall carefully preserve the same for the benefit of the obligee therein named. (Ordered to take effect June 1st, 1886). *As amended April 7, 1886.*

17 Mich. 411.

PRACTICE BEFORE COMMISSIONERS.

RULE 113. The rules and practice of the circuit courts in chancery shall govern the proceedings before such circuit court commissioners, as far as they may be applicable.

COMMISSIONER'S REGISTER OF PROCEEDINGS.

RULE 114. It shall be the duty of every such circuit court commissioner to procure and keep in his office a register, which shall be delivered over to his successor in office, in which he shall enter the title of each cause or proceeding in which he shall

make any order, and a complete memorandum of his doings therein. And every commissioner shall file with the register of the court all orders made by him, together with all papers on which the same are based, immediately upon the making of such order.

APPEAL FROM ORDER OF COMMISSIONER.

RULE 115. Any person conceiving himself aggrieved by any order made by any such circuit court commissioner, in any suit in chancery, may appeal therefrom to the circuit court of the county in which such suit is pending: *Provided* (1) That such appeal shall be claimed and entered within fifteen days from the time of making such order; and (2) That the appellant shall, within that time, execute a bond to the appellee in such penal sum, not less than one hundred dollars, as the commissioner shall prescribe, with sufficient security, to be approved by the commissioner, conditioned to pay, satisfy and perform the order which by the circuit court may be made in the premises, and to pay all costs in case the order appealed from shall be affirmed. But no such appeal shall operate as a stay of proceedings, unless a special order to that effect shall be made by the circuit judge or by such circuit court commissioner, on proper cause shown.

BOND ON APPEAL.

RULE 116. The appeal bond mentioned in the preceding rule shall be filed with the circuit court commissioner approving the same, and shall be returned with the appeal papers.

PROCEEDINGS TO PERFECT APPEAL.

RULE 117. It shall be the duty of the appellant under these rules to file with the circuit court commissioner, within the time above limited for claiming and entering his appeal, his reasons for such appeal. Whereupon it shall be the duty of such commissioner, within twenty days thereafter, to transmit to the clerk of the circuit court said bond and all papers upon which the motion or proceeding may have been founded, or which may have been used on such motion or proceeding, unless already so filed, certified by him, or in case the original pleadings or files shall have been used, he shall certify such fact to the court, with a description of the original papers so used.

FEES OF COMMISSIONERS.

RULE 118. Such circuit court commissioners shall be entitled to the following fees for their services, to be paid by the party requiring such services, on the performance of the same, viz:

For entering any cause on the register required to be kept by such commissioner, fifty cents.

For hearing a motion for injunction, when opposed, three dollars; when heard *ex parte*, one dollar.

For attending at the time and place assigned for the hearing of any special motion, and adjourning the same upon request or on reasonable cause, one dollar.

For attending and hearing every argument, upon any special motion, when contested, three dollars; if not contested, one dollar.

For certifying papers, when an appeal is claimed from the circuit court commissioner, to the circuit court, two dollars.

For approving and filing appeal bond, fifty cents.

For granting stay of proceedings when an appeal is taken, fifty cents.

For allowing a commission to take testimony in a cause, fifty cents. For settling and allowing interrogatories under a commission, one dollar.

For appointing a receiver, when the question is contested, three dollars and fifty cents; when *ex parte*, one dollar and fifty cents.

If any commissioner shall perform any other duties than those enumerated in the above fee bill, he shall be entitled to such fees therefor as shall be allowed him by the circuit judge.

GENERAL PRACTICE OF COURT.

RULE 119. In cases where no provision is made by the statute, or by these rules, the proceedings of this court shall be according to the customary practice, as it has heretofore existed in cases not provided for by statute or the written rules of the court.

WHEN RULES TO TAKE EFFECT.

RULE 120. These rules shall take effect from and after the fifteenth day of June, 1858.

PROOFS IN PARTITION SUITS.

RULE 121. In all cases where a suit is brought for a partition of lands, if any defendant is an infant and has answered generally, the complainant may at any time thereafter, before hearing, enter an order of course for a reference to take proofs of all material facts of the case, and of the title of the complainant; and, on such reference, he shall exhibit before the commissioner proof of his title and of all other material facts, and a complete abstract of all the conveyances and incumbrances; all of which proofs and abstracts shall be reported to the court. And no decree shall, in such or any other case, be rendered against an infant, in partition, until the court if fully satisfied concerning the facts and circumstances of the case; and the court may at any time order such reference, or further references, as justice may require for the complete information of the court. And the proofs shall in all cases be returned to the court for its action thereon.—*Adopted July 17, 1863.*

Har. Ch. 247; 19 Mich. 116; 12 Mich. 540; 25 Mich. 53; 30 Mich. 38; 28 Mich. 12; 28 Mich. 521; 25 Mich. 381; 29 Mich. 122; Walk. Ch. 200; 21 Mich. 524; 8 Mich. 263; 21 Mich. 438; 22 Mich. 77; 25 Mich. 175; 28 Mich. 163; 43 Mich. 171.

FORM OF SUBPŒNA—UNDERWRITING—PRINTED FORM.

RULE 122. To remove the danger of mistake among defendants ignorant of the meaning of the command of a subpœna, it shall be necessary, after the first day of January, 1880, and permitted and recommended until then, that the body of the subpœna, instead of requiring personal appearance under a pecuniary penalty, shall contain a notice of the filing of the bill, and of the time when appearance may be entered on penalty of default; and there shall be underwritten a notice designating against what defendants a personal decree is asked.

Such subpœna shall be in substantial compliance with the form hereto appended.

Printed forms must be clearly and legibly printed on durable paper, and such subpœna and underwriting must be on a page of full letter size, and the heading and place of endorsement deep enough not to be obscured by enrollment.—*Adopted April 22, 1879.*

FORM OF SUBPŒNA.

STATE OF MICHIGAN—THE CIRCUIT COURT FOR THE COUNTY OF.... ..., *In Chancery.* } *To-wit:*

In the name of The People of the State of Michigan:

To.....

[SEAL.] *Greeting:*

You are hereby notified that a bill of complaint has been filed against you in the Circuit Court for the County of ....., in Chancery, by ...., as complainants.., and that if you desire to defend the same you are required to have your appearance entered with the Register of said court, at his office in the ....., of ....., in person or by solicitor, within twenty days after the ..... day of ....., in the year 18...., which is the return day of this writ. Hereof fail not, under the penalty of having said bill taken as confessed against you.

Witness the Honorable... .....Circuit Judge, at..... this.... ...day of.....,in the year of our Lord one thousand eight hundred and.....

....., *Register.*

....., *Solicitor for Complainant.*

Underwriting: A personal decree is sought against the defendants... ....., and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

....., *Solicitor for Complainant.*

63 Mich. 215.

RULE 123. In any case in equity where a defendant shall claim from the complainant any relief which, according to the established course and practice of courts of chancery, might be had by cross bill, such defendant shall be at liberty by his answer to present the facts upon which his equity rests, and to claim by such answer the benefit of a cross-bill, and the court shall have power to give relief upon such answer to the same extent that it might have given it had a cross-bill been filed. But if the cause be such that, if a cross-bill had been filed, the practice of the court would have required it to be sworn to, the answer claiming such relief shall be under oath, notwithstanding an oath thereto may be waived by the bill.—*Adopted March 6, 1884.*

60 Mich. 591; McGuire v. Burk, 69 Mich. (April 24, 1888); 54 Mich. 634; 48 Mich. 539.

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