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.)