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.