

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.