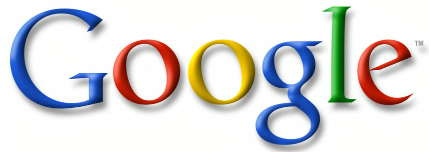

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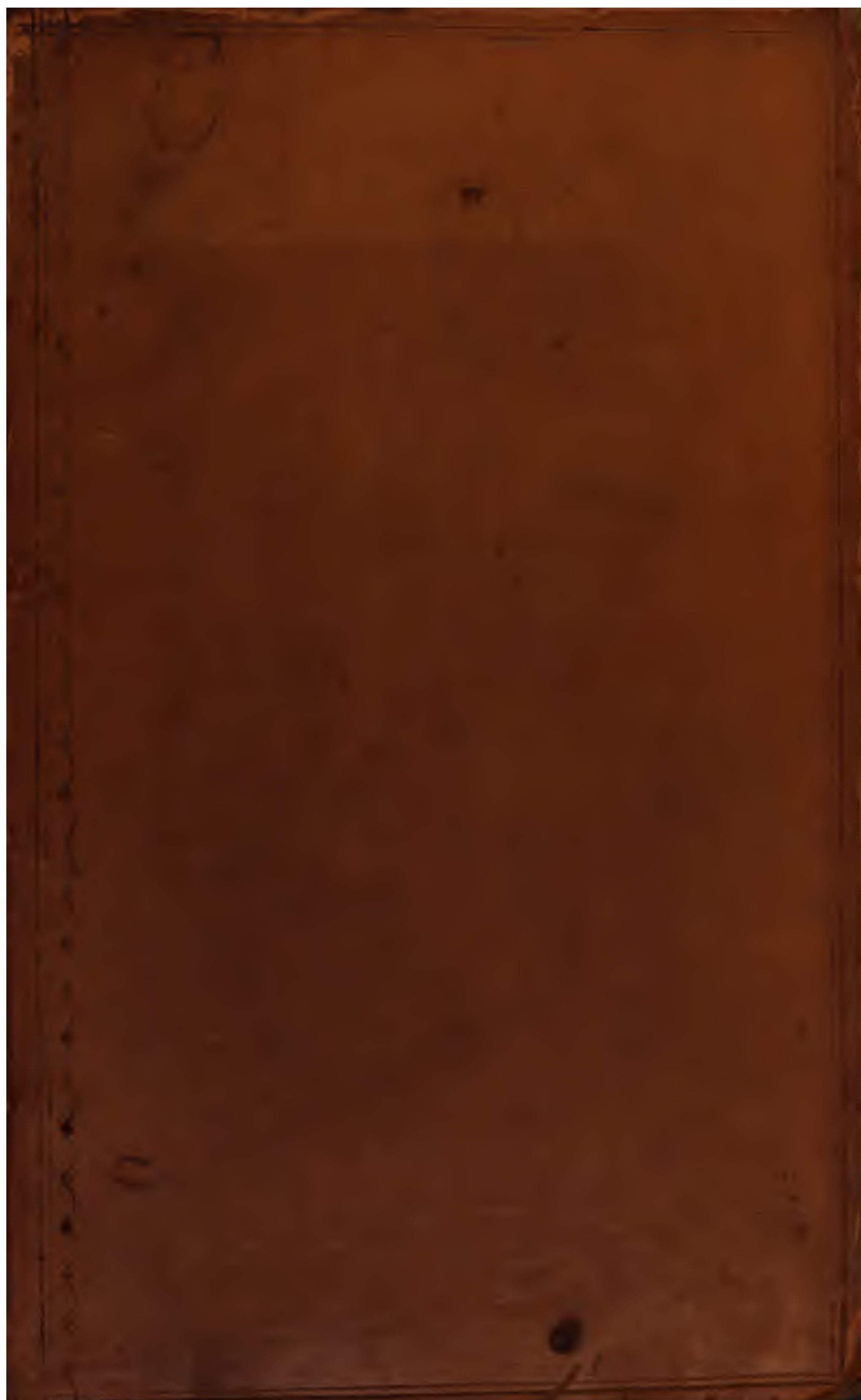

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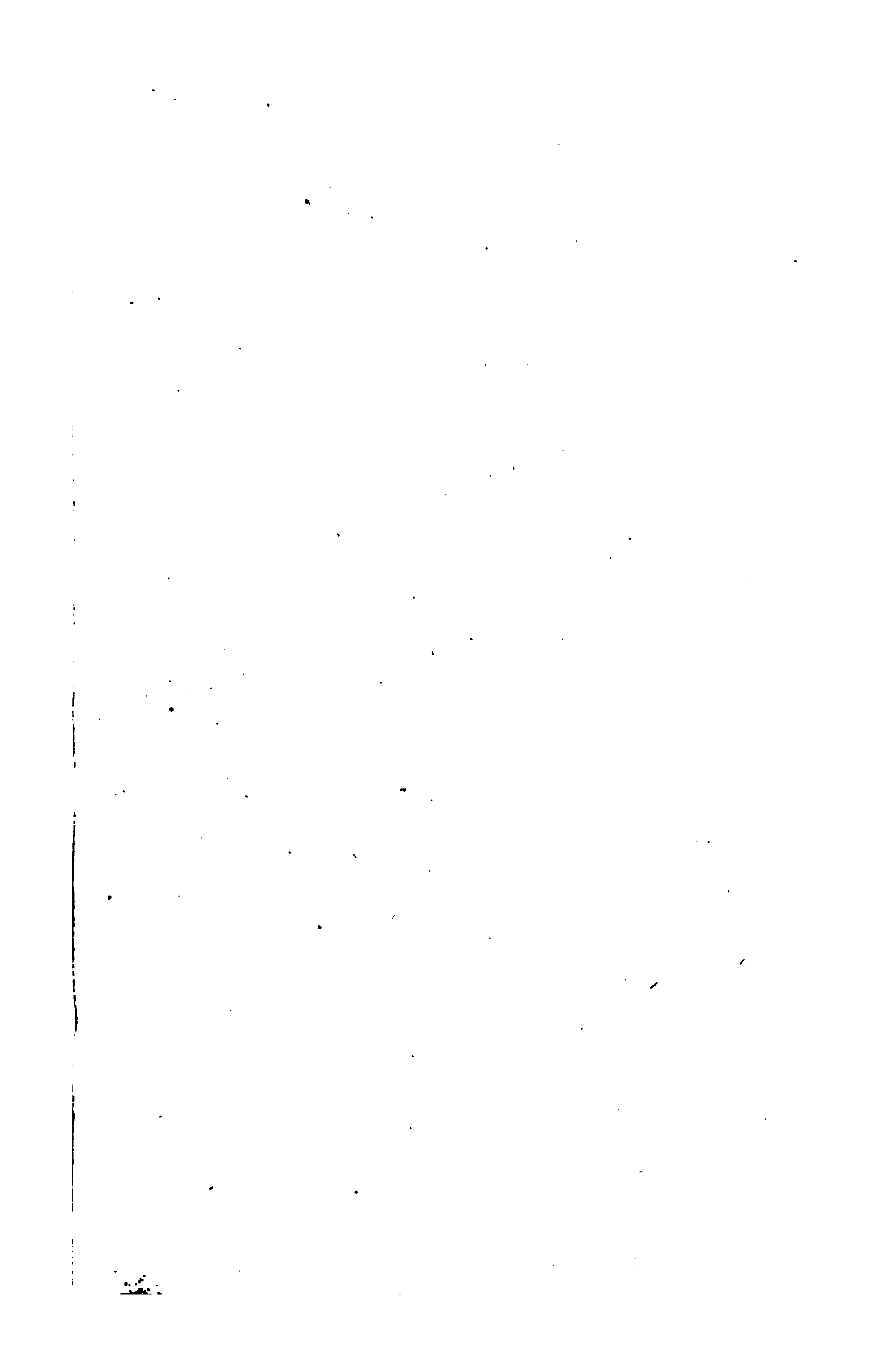

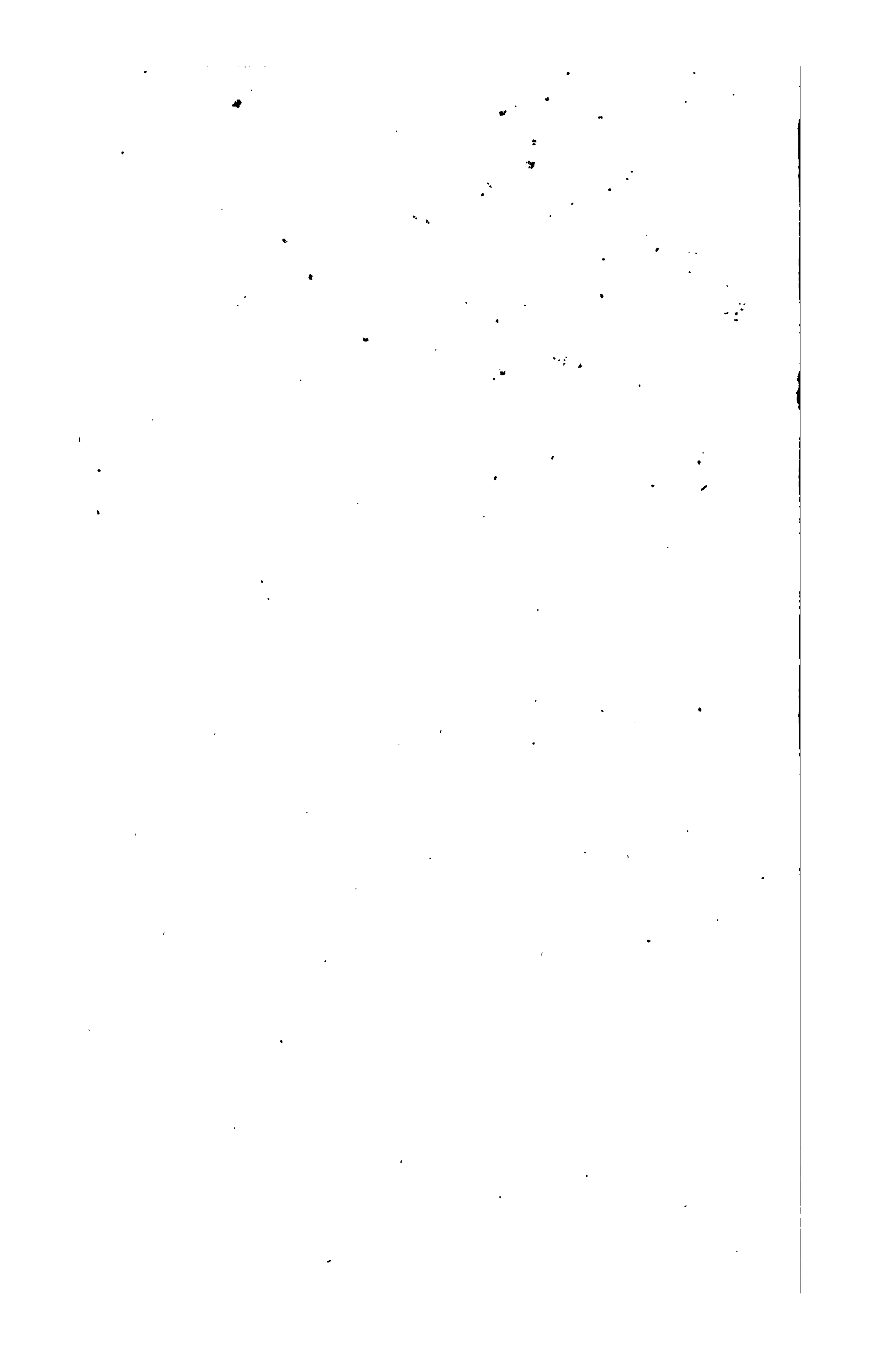

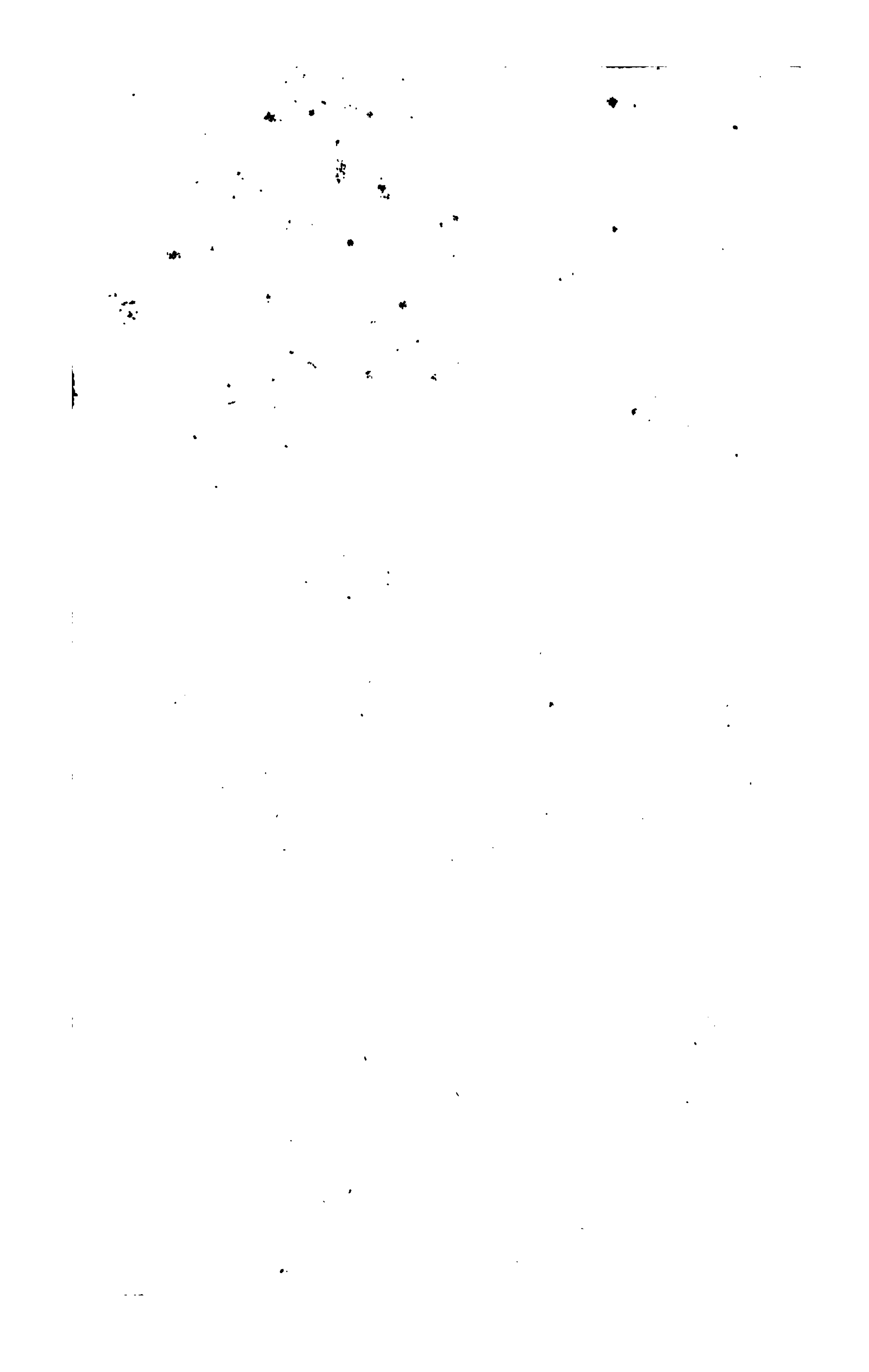

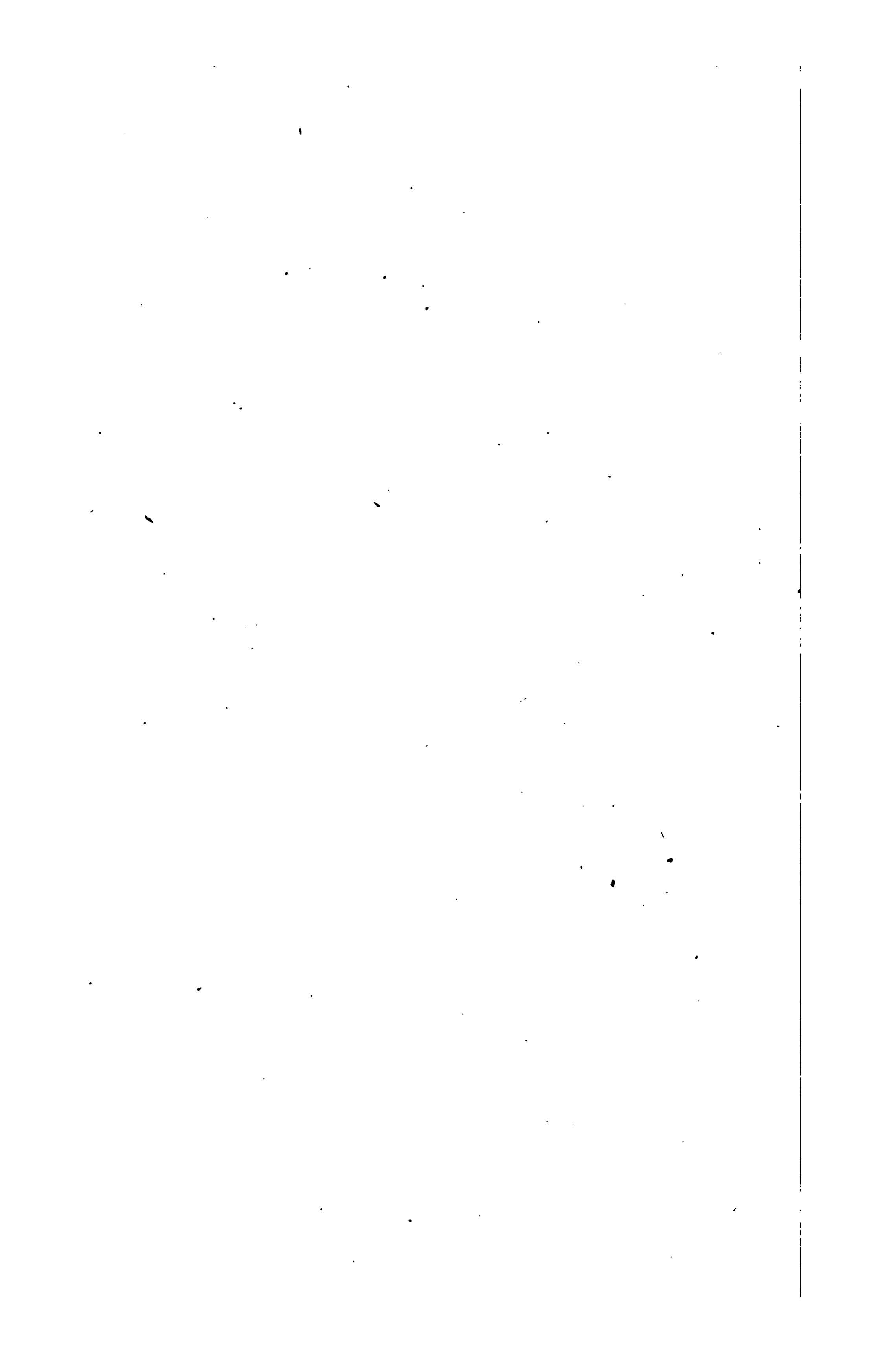

AN

# HISTORICAL TREATISE

OF

# *A SUIT in EQUITY.*

# AN HISTORICAL TREATISE OF A SUIT in EQUITY:

IN WHICH IS ATTEMPTED

A Scientific DEDUCTION of the PROCEEDINGS ufed on the EQUITY SIDES of the COURTS

OF

CHANCERY AND EXCHEQUER,

FROM THE

COMMENCEMENT OF THE SUIT

TO THE

DECREE AND APPEAL;

WITH

Occafional REMARKS on their IMPORT and EFFICACY;

AND

An INTRODUCTORY DISCOURSE on the Rife and Progrefs of the EQUITABLE JURISDICTION of thofe Courts.

---

By *CHARLES BARTON*,

OF THE INNER TEMPLE, BARRISTER AT LAW.

---

*Quæ nofti, fine arrogantia poftulanti imperties; quæ nefcis, fine occultatione ignorantiæ tibi poftula impartiri.* SEN.

---

*LONDON:*

PRINTED FOR W. CLARKE AND SON, PORTUGAL STREET, LINCOLN'S-INN.

1796.

TO THE

STUDENTS OF THE HONORABLE

SOCIETY

OF THE

INNER TEMPLE,

THE FOLLOWING TREATISE

IS INSCRIBED

AS A TESTIMONY

OF THE RECOLLECTION

ENTERTAINED BY THE AUTHOR

OF THE PLEASURE

DERIVED FROM THEIR FELLOWSHIP

DURING THE TERM

OF HIS NOVICIATE.

# ADVERTISEMENT.

THE principal defign of the following SKETCH, is to furnifh the Student with fuch a knowledge of the Proceedings in our Courts of Equity, as may enable him to underftand them fcientifically, and prepare them with accuracy. It is fubmitted to the judgment of the Profeffion with, it is hoped, a becoming diffidence, but without apprehenfion; for however confcious the Author may be of his own deficiency, he is equally fenfible of their liberality: every allowance, he is perfuaded, will be made for the Errors of a firft Attempt, and fome, perhaps, for the unavoidable inaccuracies of a firft Impreffion.

CARY STREET, LINCOLN'S INN.
*Hilary Term*, 1796.

*The Reader is requested to attend to the following*

# ERRATA.

| | | |
|---|---|---|
| Page | 5 line 7 | for "then," *read*, when. |
| | 9 2 | for "were," *read*, was. |
| | 33 | n. (1) *add*, see p. 119, n. (1). |
| | 48 | n. (1) for "Joseph Maddington," *read*, C. D. |
| | 60 | for "see Appendix," *read*, see *ante* p. 37. |
| | 63 | n. (1) for "Knight," *read*, Arch. |
| | 96 | l. 12 for "in," *read*, on. |
| | 139 | n. (2) l. 5. *dele* "in." |
| | 176 | n. (1) for "Interrogatories," *read*, Depositions. |

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# INTRODUCTION.

*Of the Hiſtory and Jurisdiction of the Courts of* CHANCERY *and* EXCHEQUER.

NOTWITHSTANDING the difficulties which are ſuppoſed to impede the ſucceſs of any attempt to determine the origin of our Courts of Equity, I am inclined to believe that no greater portion of induſtry is required for this purpoſe, than has frequently been applied with ſucceſs in elucidating ſubjects of equal antiquity and obſcurity. But in an introductory diſcourſe of this nature, ſo minute an inveſtigation would be improper. My intention at preſent is merely to furniſh the reader with ſome previous acquaintance with the na-

ture of thofe Courts, to the *proceedings* of which his attention is afterwards requefted; and for this purpofe a very fhort account of their ancient and prefent ftate will, I imagine, be thought amply fufficient.

First, of the Court of Chancery.—I fhould probably be thought inordinately fond of antiquity, were I to endeavour to fhew that the equitable jurifdiction of this Court derived its fource from the *Wittenagemote*, or grand council of the Anglo-Saxon government. It is true there is no *direct* authority for this opinion; but it feems to be founded on fair and probable grounds of deduction [a]. We are informed by the records

[a] In the few obfervations which the reader is here prefented with, relative to the origin and ancient jurifdiction of our Courts of Equity, he would not readily forgive me were I to perplex him with references to the *various* authorities from which they are extracted. It may be proper, however, to fay in general, that thofe upon which I have principally relied, are *Glanville*, *Spelman*, *Coke*, and *Madox*: though I have occafionally found it neceffary to refort to the ancient records, from whence thofe treatifes were compiled:

cords of that period, that thofe auguft affemblies, when met to deliberate on the affairs of the nation, undertook alfo the decifion of all fuch caufes between fubject and fubject, as they conceived to be of too great importance, or too much difficulty, for the determination of the ordinary tribunals. When the abolition of trials by ordeal and perfonal combat afterwards gave rife to fuch frequent appeals to the Court, as to interfere with the more immediate and important objects of its meeting, a certain number of its members appear to have been delegated for the particular purpofe of difcharging this inferior duty. This delegation, from the place in which it ufually affembled, was denominated the *Aula Regis* [a]. The

piled: And in digefting the materials which I met with in thefe feveral authorities, I have derived no fmall affiftance from the ingenious work of Profeffor *Millar* on the *Englifh Government.*

[a] It is worthy of remark, as an example of the invariability of human nature, and of fimilar caufes being univerfally productive of fimilar effects, that a like inftitution was formed, and by like degrees, in many other European kingdoms—Thus the *Aulic* council arofe out of the diet of the German Empire, and the *Cour de Roy* out of the ancient parliament of France. See *Millar*, 328.

 weight

weight and authority of the monarch, who at firſt preſided there in perſon, enabled him to decide each caſe according to its intrinſic merit, without any regard to the technical forms of proceeding which had prevailed in the ordinary Courts of Juſtice; but afterwards, when his encreaſing avocations in the affairs of government, rendered it inconvenient for him to attend to theſe ſubordinate concerns, and the buſineſs of the Court devolved on the *Grand Juſticier*; the authority of this tribunal became more reſtrained: The juſticier, to avoid the imputation of partiality or inconſiſtency, found himſelf obliged to regulate his proceedings in a great meaſure by the rules and precedents which had been eſtabliſhed in the Courts of Common Law; when, therefore, an adherence to this maxim had compelled him, in conſequence of former precedents, to give a judgment which was evidently inequitable or oppreſſive, the party aggrieved was naturally inſtigated to ſeek redreſs by an appeal to the king himſelf, who, as the fountain of juſtice, was enabled to adminiſter ſuch relief as the na-

ture

ture of the cafe might require. At the early period we now allude to, when the rules of law were few and fimple, and the objects of difpute, comparatively, neither numerous nor important, applications for this purpofe were, probably, feldom neceffary: but on the acceffion of *William* I. then the Aula Regis became the king's ordinary Court Baron, and by the extenfion of the feudal tenures, drew to itfelf the greater part of the judicial bufinefs of the nation, interpofitions of this fort, occafioned by the more various inftances of imperfection in the rules of the Common Law, which the multiplication of fuits before the jufticier naturally gave rife to, became fo frequent, as to be deemed burthenfome to the monarch [a]; they were therefore left, by degrees, to the decifion of the *Chancellor*, who being the king's fecretary, and alfo regiftrar of the decrees of the Aula Regis, was fuppofed to be more particularly converfant with the nature of judicial inveftigations [b]. When, from the increafe of civility

[a] See *Mil.* 330.

[b] A fimilar jurifdiction appears to have been acquired by the fame officer, in many other nations of Europe; as a reafon

ity and refinement in the nation, the rigour of the Common Law became more ſenſibly felt, and conſequent applications to the Chancellor daily more frequent and importunate, the neceſſity of this extraordinary juriſdiction became apparent, and it was at length ſuffered to riſe from an *occaſional* to an eſtabliſhed and *permanent* authority. But the reader perceives, that notwithſtanding the frequent reſort to this tribunal, it does not as yet appear to have exerciſed an *original* but only an *appellate* juriſdiction, founded on the oppreſſive deciſions, occaſioned by the limited authority, of the inferior Courts [a]. But as the principles of natural juſtice, as well as of civil polity, required that an *immediate* and *direct* appeal, without the intervention of any inferior Court, ſhould be allowed to that tribunal which was alone calculated

reaſon for which it may be obſerved, that when the nobility, by the prevalence of the feudal laws in Europe, became vaſſals to the crown, and held their fiefs by charter from the king, the power of granting thoſe deeds became the ſource of great influence, and cauſed the Chancellor, to whom as ſecretary to the king it belonged, to be conſidered as one of the principal officers of ſtate.

[a] See 3 *Reeves's Hiſt.* 189.

culated to afford relief, we find that so early as the reign of *Edward* I. the Chancellor began to exercise an original and independent jurisdiction, as a Court of *Equity*, in contradistinction to a Court of *Law*. Fortunately for the growth of this new jurisdiction, it received a considerable accession of authority by an act passed in the 13th year of that king's reign: by this statute the Chancellor was impowered to frame new writs adapted to the particular circumstances of any new cases which might arise. These writs, agreeably to the intentions of the legislature, were at first directed to such of the Courts of Common Law as were thought best calculated to try the merits of the question in controversy: cases, however, soon arose, which neither of those Courts, by their ordinary modes of proceedure, appeared competent to investigate: when this, therefore, happened, the Chancellor (not averse, perhaps, professor Millar[a] remarks, to the extension of his own power) ventured to summon the parties before himself, and determine their differences of his

[a] *View. Eng. Gov.* 475.

own proper authority.—Having aſſumed a cognizance over one ſort of caſes, it was eaſily extended to others; and biſhop *Waltham*, Chancellor to *Richard* II. under colour of the before-mentioned ſtatute, and to avoid the effects of the ſtatute of Mortmain upon ſuperſtitious uſes, is ſaid to have deviſed the modern writ of *ſubpœna*, returnable in Chancery [a]. This proceſs was afterwards, by fictitious ſuggeſtions, extended to ſuch a variety of caſes properly cognizable by the Courts of Common Law only, that in the two ſubſequent reigns we find innumerable petitions preſented to the Commons againſt the growing juriſdiction of this newly erected tribunal: ſome trifling regulations were made, but nothing effectual was done to remedy the grievances complained of till the 15*th Henry VI.* when it was provided that no writ of *ſubpœna*

[a] See *Rol. Parl.* 3 *Hen.* V. But this writ (notwithſtanding the ſuggeſtion of the Commons) ſeems rather to have been *adopted* by Waltham for this particular purpoſe, than *invented* by him; for it is evident, from an act paſſed in the preceding reign, that it was by no means an unuſual proceſs. See 42 *Eliz.* cap. 3.

ſhould

ſhould from thenceforth be granted, till ſurety were found to ſatisfy the party grieved for his damages and expences, in caſe the complainant did not ſubſtantiate the allegations of his bill; and by an act paſſed in the 31ſt year of the ſame reign, it is alſo declared that "no matter determinable by the law of this realm, ſhall be determined in any other form than after the courſe of the ſame law in the king's Courts having determination of the ſame law." But theſe ſtatutes, though they curbed the exceſs, indirectly eſtabliſhed the legitimacy of the Court; and we in conſequence find, that in *Edward the Fourth's* time, the proceſs by bill and ſubpœna was become its daily practice[a].

"This however did not extend very far, for in the ancient treatiſe, entitled *Diverſite des Courtes*, ſuppoſed to have been written very early in the ſixteenth century, we have a cata-

[a] 3 *Blac. Com.* 53. The following extract, with which I ſhall cloſe the ſhort hiſtory I have given of the Court of Chancery, is taken entirely from the elegant work I have here referred to.

logue

logue of the matters of confcience then cognizable by *fubpæna* in Chancery, which fall within a very narrow compafs [a]. No regular judicial fyftem at that time prevailed in the Court, but the fuitor, when he thought himfelf aggrieved, found a defultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an ecclefiaftic, or fometimes (though rarely) a ftatefman, no lawyer having fat in the Court of Chancery from the times of the chief juftices Thorpe and Knyvet [b], fucceffively Chancellors

[a] Though the fubjects acknowledged at this early period to be cognizable by *fubpæna* muft indifputably have been exceedingly few, when compared with the prefent extenfive jurifdiction of our Courts of Equity, yet the authority which the learned judge here refers to appears to be too imperfect a treatife to be relied upon as any conclufive evidence of their ancient limits.

[b] Sir Edward Coke obferves, feemingly with fome exultation, that "in perufing the Rolls of Parliament in the times of thefe Lord Chancellors, we find no complaint at all of any proceeding before them; but foon after, when a Chancellor was no profeffor of the law, we find a grievous complaint by the whole body of the realm; and a petition that the moft wife and able men within the realm might be chofen Chancellors, and that he feek and redrefs the enormities of the Chancery." 4 *Inft.* 79.

cellors to King Edward III. in 1372 and 1373, to the promotion of Sir Thomas More, by King Henry VIII. in 1530; after which the great ſeal was indiſcriminately committed to the cuſtody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the diſpoſition of the Prince required, till Serjeant Puckering was made Lord Keeper in 1592; from which time to the preſent the Court of Chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the ſeal was entruſted to Dr. Williams, then Dean of Weſtminſter, but afterwards Biſhop of Lincoln, who had been chaplain to Lord Elleſmere when Chancellor. Lord Bacon, who ſucceeded Lord Elleſmere, reduced the practice of the Court into a more regular ſyſtem; but did not ſit long enough to effect any conſiderable revolution in the ſcience itſelf; and few of his decrees which have reached us are of any great conſequence to poſterity. His ſucceſſors, in the reign of Charles I. did little to improve upon his plan; and even after

the Reſtoration; the ſeal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years, and afterwards to the Earl of Shafteſbury, who, though a lawyer by education, had never practiſed at all. Sir Heneage Finch, who ſucceeded in 1673, and became afterwards Earl of Nottingham, was a perſon of the greateſt abilities, and moſt uncorrupted integrity, a thorough maſter and zealous defender of the laws and conſtitution of his country, and endowed with a pervading genius that enabled him to diſcover and purſue the true ſpirit of juſtice, notwithſtanding the embarraſſments raiſed by the narrow and technical notions which then prevailed in the Courts of Law, and the imperfect ideas of redreſs which had poſſeſſed the Courts of Equity. The reaſon and neceſſities of mankind ariſing from the great change in property, by the extenſion of trade, and the abolition of military tenures, co-operated in eſtabliſhing his plan, and enabled him in the courſe of nine years to build a ſyſtem of juriſprudence and juriſdiction upon

upon wide and rational foundations, which have alſo been extended and improved by many great men, who have ſince preſided in Chancery; and from that time to this the power and buſineſs of that Court have increaſed to an amazing degree," till, we may venture to aſſert, it is at length governed by one of the moſt perfect ſyſtems of equitable juriſprudence now exiſting in Europe.

Having finiſhed, in reſpect to the Court of CHANCERY, the ſhort ſketch we propoſed to give of the origin and hiſtory of our Courts of Equity, we ſhall now preſent the reader with a ſimilar (though ſtill more conciſe [a])

[a] The Court of Exchequer being of inferior notoriety, as a Court of Equity, and at the ſame time perfectly ſimilar in its nature, to the Court of Chancery, we think it unneceſſary, for the purpoſe of elucidating the following treatiſe, to recur again to the ſame principles and reaſoning we had recourſe to in the preceding pages; particularly as we believe ourſelves authorized in affirming, that (with ſuch incidental variations as ariſe from that Court having been inſtituted for the *ſole* purpoſe of determining caſes of a *fiſcal* nature, whilſt this was equally open to all caſes of a different deſcription) the obſervations we there made are equally applicable here.

review

review of the Court of EXCHEQUER. This Court appears to have been a branch of the same *Aula Regis* which we have before spoken of, though it is difficult, for want of authentic records, to ascertain the exact period of its existence as a separate tribunal of Equity[a], it probably originated, and advanced in authority, from that great *Fountain of Courts* in the same manner as we have already imagined the Court of Chancery to have gained an independent jurisdiction; cases relating to the King's *revenue* being, as, from analogy, we are justified in supposing, referred to the *Treasurer* of the household[b], (as most conversant with matters of a *fiscal* nature) in like manner, as we have seen, that those of a general nature were to the *Chancellor*, it would *consequently*, as receiving its authority expressly from the King's *prerogative*, exercise an *Equitable* jurisdiction, which *Sir Edward Coke* (who has employed much labour in investigating it's origin and other incidents) affirms that it in fact did,

[a] See *Mad.* ch. iv. [b] See 4 *Inst.* ch. xiii.

and

and has done "time out of mind [a]." The Court of Exchequer seems to have shewn the same inordinate desire of extending its authority as was manifested by the Court of Chancery, when first allowed to exercise an original jurisdiction; and the same jealousy on that account was manifested by the Commons, who therefore prayed "that some remedy might forthwith be had for those who were summoned into this Court by *false suggestions* [b]." But the advantages accruing to the public by the establishment of different tribunals of justice being gradually perceived as well by the legislature as the people, the irregularity complained of appears soon afterwards to have been either forgotten or connived at; and the Court of Exchequer is now permitted to avail itself of these suggestions undisturbed, and (except in a very few instances, for particular reasons) allowed to exercise a concurrent jurisdiction with the Court of Chancery in all matters properly

[a] 4 *Inst.* 119. [b] 47 *Edw.* III. ch. 34.

cognizable

cognizable in a Court of Equity [a].—What those matters are it now only remains for us to inquire.—Accurately to describe the Jurisdiction of our Courts of Equity, Sir *John Mitford* observes to be a task so difficult, that "those who have attempted it have generally failed.[b]" Great respect is undoubtedly due to the opinion of one whose extent of erudition in this branch of our jurisprudence is so generally (and so justly) acknowledged; and it is, probably, a fortunate circumstance for the author of the present sketch, that he is not called upon by the nature of his treatise to enter minutely into a subject which that learned gentleman appears to have considered with so much reluctance; specifically to enumerate every object of juridical investigation which, in the words of Grotius, "*lex non exacté definit sed arbitrio boni viri permittit*," (and which are properly

[a] It is still however usual in practice, (and till lately was thought necessary) in order to give the Court jurisdiction over matters not relating to the king's revenue, to alledge in the proceedings that the party aggrieved is indebted to the crown, and by reason of the injury complained of is rendered incapable of discharging his obligation.

[b] *Plead. Chan.* 5.

properly the fubject of an equitable jurifdiction) were indeed not only difficult, but abfolutely impracticable. It is neverthelefs prefumed, that by a proper attention to the nature and conftitution of our Courts of Equity, and the mode of difpenfing juftice which there prevails, the reader will find but little difficulty to determine in any *given* cafe (and this feems to be the real purpofe of fuch an inquiry) whether it be more properly cognizable in a Court of Equity or a Court of Law :—The original inftitution of our Courts of Equity, as independent jurifdictions, was, we have feen, to fupply the defects of the Common Law. This principle is ftill adverted to in the practice of thofe Courts, and affords a copious fource of their prefent authority : It extends to all thofe cafes in which the Courts of Law can afford either no redrefs at all, or not that particular redrefs which equity, or natural juftice, requires. Therefore, where a perfon had been difcharged under an infolvent bill, by which his perfon was protected from arreft, and his property happened to be of fuch a nature as not to be fubject to the



controul

practice of that law) compelled by the oath of the *defendant* himſelf, a diſcovery of the facts with which he was charged [a]. Hence ariſes another fertile branch of the juriſdiction of Courts of Equity, extending to every caſe where the facts required to ſupport it reſt ſolely in the breaſt of the defendant.

From this ſource of juriſdiction it ſeems to have ariſen that matters of *account*, *fraud*, *accident*,

Court of *Exchequer* would, when exerciſing its *equitable* juriſdiction, adopt the ſame *mean* of juſtice as that Court to which it bore ſo great an analogy, and to which it was in ſome reſpects ſubordinate.

[a] The imperfect notions of juſtice entertained by our anceſtors when juſt emerging from barbariſm, (a period of ſociety at which prejudice ſeems to be at its height, and alternately hurries men into both the extremes of abſolute inſenſibility and faſtidious refinement) led them to imagine that it was in every caſe hard to oblige a man to furniſh evidence againſt himſelf: this mode of examination was therefore wholly rejected by the Common Law. But the purer ideas of equity which prevailed in the later period of the inſtitution of our Courts of Equity, gave riſe to a mode of reaſoning far more conſonant with juſtice; viz. that if the party were innocent of the charges alledged againſt him, he could not be hurt by an examination; but if, on the other hand, he were guilty, it was irreconcileable to every true principle of juſtice that he ſhould be ſcreened from the laws by ſuch refined notions of delicacy.

*accident*, and *miſtake*, are ſaid in the books[a] to be the peculiar objects of our Courts of Equity, a full inveſtigation of thoſe ſubjects frequently requiring a diſcloſure from the party himſelf; but it ſhould be remarked, that where this is not the caſe, and effectual relief can be granted by a Court of Law, they are ſo far from being the peculiar objects of our Courts of Equity, that thoſe Courts will generally refuſe their aſſiſtance[b]; and for want of attending to this diſtinction, it has been incautiouſly ſaid by a moſt able and ingenious writer, that the "Court of Chancery claims an *excluſive* juriſdiction in *all* matters of *truſt* and *confidence*[c]:" Whereas various ſpecies of truſts, as "depoſits and all manner of bailments; and more eſpecially the implied contract ſo highly beneficial and uſeful,

[a] 1 *Roll. Abr.* 374—4 *Inſt.* 84.

[b] See 1 *Vez.* 392, 521.—2 *Atk.* 61—1 *Term. Rep.* 310, 708, 710—3 *ib.* 151—3 *Blac. Com.* 431. And in one caſe of *fraud*, that of obtaining a will by impoſition, the Courts of Equity will not interfere, though *diſcovery* be ſought. See 3 *Brow. Par. Ca.* 358.

[c] See *Fonb. Eq.* 10.

of having undertaken to account for money received to another's uſe[a]," are peculiarly cognizable in a Court of Law.

Upon the whole, therefore, the reader perceives that Courts of Equity being *extraordinary* tribunals, eſtabliſhed for the purpoſe of ſupplying the defects which the increaſe of commerce and ſocial connections gradually diſcovered or created in the *ordinary* Courts of Law, he has only to conſider whether the particular caſe which may happen to be the ſubject of his contemplation can or cannot be fully inveſtigated, and receive a complete and effectual deciſion in the *ordinary* Courts of Law: if it can, to them he muſt reſort; and in the contrary event only is he juſtified in appealing to the *extraordinary* tribunals of Equity, which aſſume a juriſdiction we have ſeen in thoſe caſes only which are "not within the bounds or beyond the powers of *other* juriſdictions[b]."

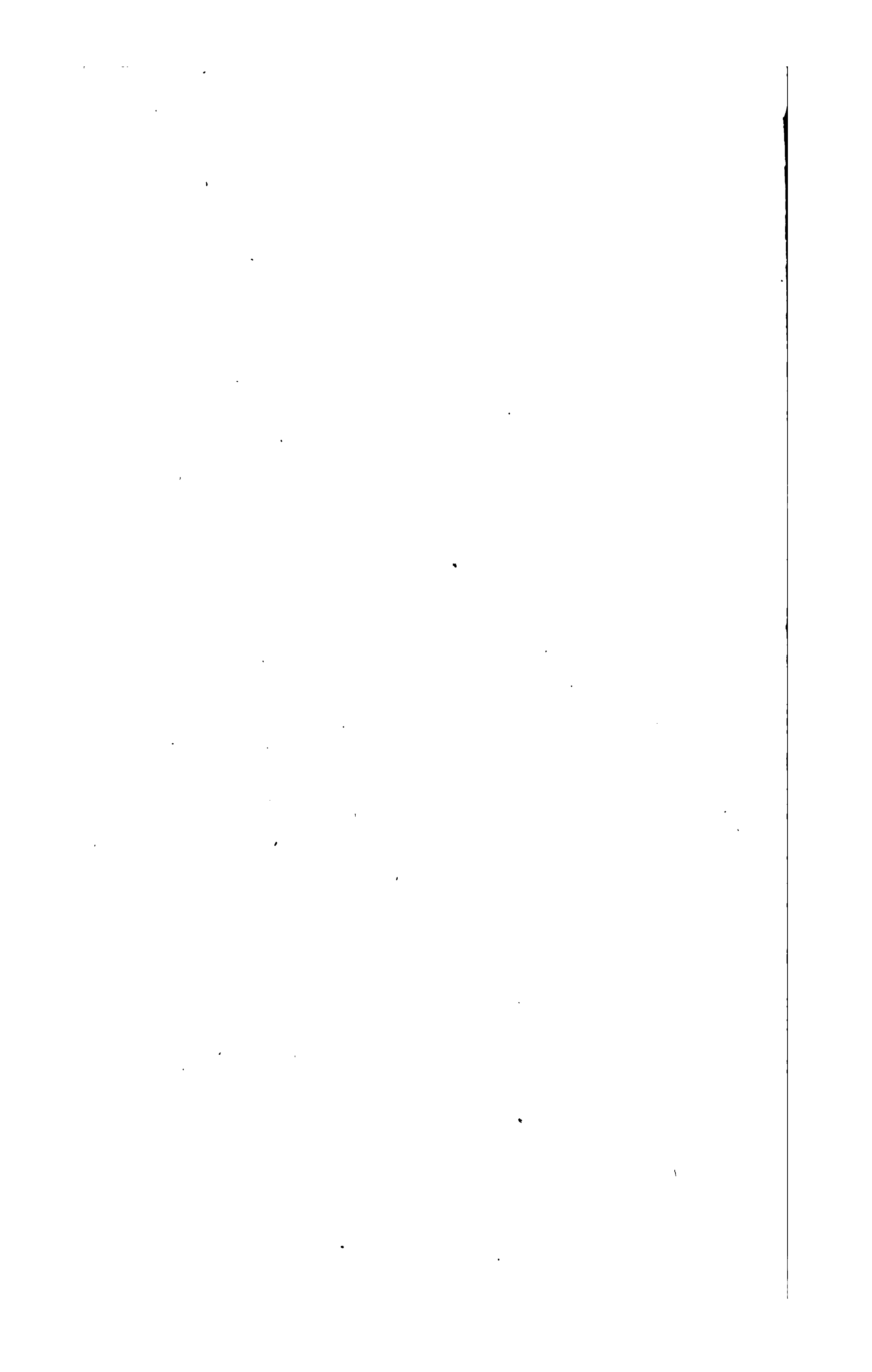
[a] 3 *Blac. Com.* 431. and all the later *Reports.*

[b] *Mit. Plead.* 5. 111. and *Parry* v. *Owen*, 3 *Atk.* 740—but ſee alſo latter part of note (d) p. 18.

Having

Having completed the *general* idea which I propoſed to give of the leading objects of juriſdiction cognizable in our Courts of Equity [a], I now arrive at the proceſs by which they are to be attained.

[a] I have omitted to notice the excluſive juriſdiction which the Court of *Chancery* exerciſes in a variety of inſtances over *ideots*, *lunatics*, *minors*, and *cha rities*. This juriſdiction having devolved on that Court not as a *Court of Equity*, but as adminiſtering, by the mouth of the *Chancellor*, the prerogative and official duties of the Crown. The ſummary juriſdiction given to the Chancellor concerning *bankrupts* is expreſsly conferred on him by the various *ſtatutes* relating to thoſe unfortunate men; and in reſpect of cauſes affecting the king's *revenue*, theſe are determined in the Court of *Exchequer*, as a Court originally eſtabliſhed for that particular purpoſe, and not properly as a Court of *equitable* juriſdiction. The ſame may be obſerved of certain objects of juriſdiction given to this Court by particular Acts of Parliament, and ſome *incidental* and *collateral* branches of juriſdiction in both Courts.



# AN HISTORICAL TREATISE OF A *SUIT in EQUITY.*

## OF INSTITUTING A SUIT IN EQUITY.

THE method of inftituting a Suit in our Courts of Equity, is by preferring a BILL, on the part of a Subject, or an INFORMATION, on the part of the Crown (1), to the Equitable Jurifdiction of thofe Courts, ftating the

(1) The difference between a *Bill* and an *Information*, is little more than in form; the Bill running in the ftile of a petition from the party himfelf, whilft the Information is offered as a narrative of facts related by an officer of the Crown; whatever, therefore, in the enfuing Treatife is faid of the one, will, unlefs otherwife expreffed, be equally applicable to the other.

the circumſtances of the injury complained of, and praying ſuch relief as the nature of the caſe may happen to require. A *Bill*, or *Information*, in Equity, therefore, anſwers to a *Declaration* at Common Law, and to the *Libellus Articulatus*, or *Libel*, of the Civil Law [a].

Bills will of courſe vary in their form (as they alſo do in their denomination) according to the objects for which they are exhibited; thoſe moſt uſually preferred, and which are defined by Sir *J. Mitford* [b] to be "Original Bills, praying the decree of the Court, touching ſome right claimed by the perſon exhibiting the Bill, in oppoſition to rights claimed by the perſon againſt whom the Bill is exhibited," are conſtituted of *nine* diſtinct parts:

1. The *Direction* or *Addreſs* of the Bill, which, if exhibited in the Court of Chancery, is to the Lord *Chancellor*, or other perſon holding the cuſtody of the Great Seal; and if in the Court

[a] See *Gib.* Cod. T. xliv. c. 1.

[b] *Plead. Chan.* 36.

of

of *Exchequer*, to the Treaſurer, Chancellor, and Barons of that Court.

2. The *Introduction*; containing the names and deſcriptions of the perſons exhibiting the Bill.

3. The *Premiſes*, or, as more uſually ſtiled, the *Stating Part* of the Bill, which contains the circumſtances of the Complainant's caſe.

4. The *Confederating Part*, alledging that the Defendants combine and confederate together, in order to defraud the Plaintiff of his rights.

5. The *Charging Part*, in which the Complainant alledges the Defendant to have proffered certain excuſes for delaying compliance with his demands, and *charges* matter to ſhew the inſufficiency of thoſe excuſes.

6. The *Clauſe of Juriſdiction*, which, in order to induce the Court to take cognizance of the Suit,

Suit, avers, that the Plaintiff can have no relief but in a Court of Equity.

7. The *Interrogating Part*, queſtioning the Defendant as to the truth of the ſeveral charges in the Bill.

8. The *Prayer of Relief*, framed agreeably to the nature of the Plaintiff's caſe.

9. The *Prayer of Proceſs*, which prays the writ of *Subpœna* againſt the Defendant, requiring him to appear in Court, and anſwer the matters alledged againſt him.

That the reader may the better comprehend the particular purport and uſe of theſe ſeveral parts, I ſhall ſubjoin the whole form of an Original Bill in *Chancery*, and accompany it with occaſional remarks.

An

## *An Original* BILL *in* CHANCERY.

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*To the Right Honourable* EDWARD LORD THURLOW, *Baron Thurlow of Aſhfield, in the County of Suffolk, Lord High Chancellor of Great Britain* (1).

1. The Addreſs of the Bill.

HUMBLY *complaining, ſheweth unto your Lordſhip* (2), *your Orator,* James Willis *(Son of* John Willis, *of* Babbington, *in the County of*

2. Introduction.

(1) If the Bill be exhibited in the Court of *Exchequer,* the ſtile of addreſs is " To the Right Hon. *William Pitt,* Chancellor, and Under Treaſurer of His Majeſty's Court of Exchequer, at Weſtminſter; the Right Hon. Sir *Archibald Macdonald,* Knt. Lord Chief Baron of the ſame Court; and to the reſt of the Barons there." Though Bills in the Court of Exchequer are ſtill addreſſed to the *Treaſurer* and *Chancellor,* thoſe officers have long ſince withdrawn their attendance from the adminiſtration of juſtice; they appear, however, to have conſtantly ſat with the Barons upon Suits in Equity, during the reigns of *James* I. and *Charles* I. After the Reſtoration it was leſs frequent, but not unuſual; and Sir *Robert Walpole* ſat as Chancellor upon the ſecond argument of a Plea. *Trollop* v. *Trollop,* 21 June, 1732. See *Abbot's Prac. Grt. Seſs. Wales* xxiv.

(2) In the Court of *Exchequer* the ſtile is " Your Honors."

Eſſex,

Effex, *Efq.)* (1) *an Infant, under the age of 21 years; to wit, of the age of 6 years, or thereabouts, by his faid Father and next friend, and* Samuel

(1) It is material that the defcription and place of abode of the Plaintiff fhould be fet forth in the Bill, that the Defendants may know where to apply to him, fhould they be difpofed to accede to his demands, or fhould it be neceffary to refort to him for the payment of cofts, in compliance with any order or procefs of the Court, which may iffue againft him during the progrefs of the Suit.

If the Bill be exhibited in the Court of *Exchequer*, " Debtor and Accountant to his Majefty, as by the records of this Hon. Court, and otherwife, it doth and may appear," is inferted after the Complainant's place of abode; the ufe of this fuggeftion is to give the Court cognizance of the Suit; to underftand which, the reader muft recollect, that the Court of Exchequer was originally conftituted for the fole purpofe of recovering the king's revenue; and that by the Common Law, every man was permitted to fue another in that Court in which he himfelf was bound to attend. By this allegation, therefore, (the truth of which the benignity of the Court never fuffers to be queftioned) the Plaintiff becomes entitled to inftitute his Suit. Upon thefe fictions of law, Sir *William Blackftone* obferves, that though they may at firft ftartle the Student, he will, on further confideration, find them to be highly beneficial and ufeful. In the prefent cafe, it gives the Suitor the choice of more than one tribunal, and frequently, as in the Court of King's Bench where a fimilar fiction prevails, prevents the circuity and delay of juftice, by allowing that Suit to be originally, and in the firft

Samuel Dickenfon, *of, &c.* (1) THAT (2) Thomas Atkins, *of* Taunton, *in the County of* Somerfet, *Efq. being feized and poffeffed of a very confiderable real and perfonal Eftate, did, on or about the fourth day of March, in the year of our Lord* 1742, *duly make and publifh his laft Will and Teftament in writing; and thereby,*

3. Premifes.

firft inftance, commenced in one Court, which, after a determination in another, might ultimately be brought before it on a writ of Error. See 3 *Com.* 45.

(1) The parties to a Bill muft comprize every perfon who is at all interefted in the event of the Suit, that the Court may be able to fettle the rights of all parties, and make a complete and definitive decree upon the matters in queftion. See *Prec. Chan.* 83. 2 *Atk.* 510.

(2) The Plaintiff's cafe muft here be ftated explicitly and fully, but yet with as much concifenefs as is confiftent with perfect intelligibility. If it be extended to an unneceffary length, by the introduction of circumftances, either totally irrelevant, or not material to the merits of the queftion; or by the recital of deeds, &c. in *hæc verba*, when the fubftance would have been fufficient, the Court, upon application, will order the fuperfluous matter to be expunged, as occafioning unneceffary expence to the parties, in taking copies of the proceedings. If, on the other hand, it be too briefly ftated, to be clearly intelligible, or if circumftances material to be ftated, are omitted, the Bill may be demurred to, as infufficient to give the Court fuch complete poffeffion of the merits of the cafe, as would enable it to do effectual juftice to the parties.

*amongft*

*amongst other things, devised and bequeathed as follows* (here are recited such parts of the Will as constitute the bequest, which was of £.800). AND *That the said Testator departed this life, on or about the 20th day of* December, 1748; *and upon, or soon after, the death of the said Testator, to wit, on or about the* 8th *day of* January, 1750, *the said* Edward Willis *and* William Willis (1), *duly proved the said Will in the Prerogative Court of the Archbishop of* Canterbury, *and took upon themselves the burthen and execution thereof; and accordingly possessed themselves of all the said Testator's real and personal Estate, goods, chattels, and effects, to the amount of £.*1500 *and upwards.* AND *your Orator further sheweth unto your Lordship, that he hath by his said Father and next friend, at various times, since his said Legacy of £.*800 *became due and payable, applied to the said* Edward Willis *and* William Willis *requesting them to pay the same, for the benefit of your Orator; and your Orator well hoped*

(1) Executors of the Will.

*that*

*that they would have complied with ſuch requeſt, as in conſcience and equity they ought to have done.* BUT NOW SO IT IS, MAY IT PLEASE YOUR LORDSHIP, *that the ſaid* Edward Willis *and* William Willis, *combining and confederating together* (1), *to and with divers other perſons as yet unknown to your Orator, (but*

4. Confederacy.

(1) This charge of confederacy, though univerſally inſerted as well in ancient as modern Bills, ſeems to be entirely nugatory: It is ſaid to have ariſen from an idea that without ſuch a charge, parties could not be added to a Bill by amendment, *Mit. Plead.* 40. but it is difficult to imagine whence ſuch an idea could have originated, as it appears to have been ever without foundation. See *Prax. Alm. Cur. Can.* 546. In ſome caſes, Sir *J. Mitford* thinks, it may have been inſerted, with a view to give the Court juriſdiction. It becomes me to bow to that gentleman's more extenſive practical knowledge; but I confeſs myſelf unable to apprehend what ſpecies of caſes it can be to which he alludes. All caſes of confederacy and combination, conſidered ſimply as ſuch, appear to be equally cognizable in a Court of Law; and it is extremely evident that a mere allegation of confederacy or combination in a Bill, without other equitable matter to ſupport it, could never authorize a Court of Equity to exerciſe its *extraordinary* juriſdiction.

And in the caſe of a Peer, (which further rebuts the idea of its being requiſite to give juriſdiction) the charge of combination is omitted; either, Sir *J. Mitford* obſerves, "out of reſpect to the peerage, or, perhaps, from an apprehenſion that ſuch a charge might be conſtrued into a breach of privilege."

D *whoſe*

*whose names, when discovered, your Orator prays may be inserted herein, as Defendants and parties to this your Orator's Suit, with proper and sufficient words to charge them with the premises) in order to oppress and injure your Orator, do absolutely refuse to pay, or secure for your Orator's benefit, the Legacy of £.800 aforesaid, or any part thereof; for reason whereof, the said Confederates sometimes alledge and pretend* (1) *that the Testator made no such Will, nor any other Will, to the effect aforesaid: and at other times they admit such Will to have been*

(1) If the Plaintiff can foresee the matter which the Defendant will set up to protect himself against the charges of the Bill, it is usual to introduce such matter by this mode of allegation, which affords himself an opportunity of rebutting its effects, by charging facts of an opposite tendency.

It is sometimes also used for the purpose of discovering the nature of the Defendant's case; or to put in issue some matter which the Plaintiff does not chuse to admit; for which latter purpose these fictitious pretences of the Defendant, with the contrary averments of the Plaintiff, are held to be sufficient. See *Gregory* v. *Molesworth.* 3 *Atk.* 626. Also *Mit. Plead.* 42. But it is, in general, discretionary in the Plaintiff's counsel either to alledge these pretences, or to interrogate the Defendant *specially* as to the facts they assume.

*made*

*made by the ſaid Teſtator, and that they proved the ſame, and poſſeſſed themſelves of his real and perſonal Eſtate; but then they pretend, that the ſame was very ſmall and inconſiderable, and by no means ſufficient to pay and ſatisfy the ſaid Teſtator's debts, legacies, and funeral expences: and that they have applied and diſpoſed of the ſame towards ſatisfaction thereof; and, at the ſame time, the ſaid Confederates refuſe to diſcover and ſet forth what ſuch real and perſonal Eſtate really was, or the particulars whereof the ſame conſiſted, or the value thereof; or how much thereof they have ſo applied, and to whom, and for what, or how the ſame has been diſpoſed of particularly.* WHEREAS *your Orator chargeth* (1) *the truth to be, that the ſaid Teſtator died poſſeſſed of ſuch real and perſonal Eſtate, to the full*

5. Charging Part.

(1) See *ante* p. 34. n. (1). Such facts as are within the Plaintiff's knowledge, and are eſſential for the purpoſe of eſtabliſhing his claim, ſhould be diſtinctly and poſitively charged; but thoſe which are ſuppoſed to be within the Defendant's knowledge, being part of the diſcovery prayed by the Bill, it is ſufficient to ſtate in general terms. See 1 *Vez.* 56. 1 *Vern.* 180. 2 *Atk.* 393. 1 *F. Vez.* 449. This obſervation is alſo applicable to the preceding part of the Bill, diſtinguiſhed by the denomination of the *Premiſes.*

*value aforesaid; and that the same was much more than sufficient to pay all the just debts, legacies, and funeral expences of the said Testator: and that the said Confederates, or one of them, have possessed and converted the same to their own uses, without making any satisfaction to your Orator for his said Legacy: All which actings, pretences, and doings of the said Confederates, are contrary to equity and good conscience, and tend to the manifest injury and oppression of your Orator.*

6. Jurisdicial Clause.

IN TENDER CONSIDERATION *whereof, and for that your Orator is remediless in the Premises, by the strict rules of the Common Law, and relievable only in a Court of Equity* (1), *where matters of*

(1) This averment that the Plaintiff is relievable only in Equity, was originally intended, it is presumed, for the purpose of giving the Court jurisdiction of the cause; but as in truth no assertion of this kind will of itself induce the Court to take cognizance of a case which does not come properly within it's customary and established jurisdiction, it seems equally nugatory with the clause of Confederacy, which we formerly observed upon. Courts of Equity, it may be recollected, like Courts of Law, are guided in respect to the range of their jurisdiction, by fixed and invariable bounds, founded on the principles and original constitution of those Courts in some cases, and immemorial usage in others; but from

*of this nature are properly cognizable ;* To THE END, THEREFORE, *that the ſaid Confederates may, reſpectively, full, true, direct, and perfect anſwer make upon their reſpective corporal Oaths* (1), *according to the beſt of their reſpective knowledge, information, and belief, to all and ſingular the charges and matters aforeſaid ; as fully, in every reſpect, as if the ſame were here again repeated, and they thereunto particularly interrogated ; and more eſpecially, that they may reſpectively ſet forth and diſcover* (2), *according to*

7. Interrogatory Part.

from which, in neither caſe, they are juſtified in departing. In order, therefore, to entitle the Plaintiff to the aſſiſtance of a Court of Equity, it is ſtrictly neceſſary that he make out ſuch a caſe, by his Bill, as does in fact authorize the Court to take cognizance of the Suit.

(1) In the caſe of a *Peer*, or Lord of Parliament, " upon his perſonal honor ;" and if an aggregate Corporation be Defendant, " under the common ſeal of the ſaid Corporation."

(2) One of the principal objects of a Suit in Equity, being to obtain from the Defendant a confeſſion of the facts neceſſary to ſupport the Plaintiff's caſe, the Bill requires a full and perfect anſwer to " all the charges and matters therein contained." And here (with praying proceſs) the Bill anciently cloſed ; (*M S S. Prec. Temp. Car. I.*) this general requiſition being found ſufficient, it is ſuppoſed, to procure the diſcovery ſought for. But the ingenuity of modern times having diſcovered the poſſibility of anſwering the *terms*

*to the beſt of their knowledge, whether the ſaid Teſtator,* Thomas Atkins, *duly made and executed ſuch laſt Will and Teſtament, in writing, of ſuch date, and of ſuch purport and effect, aforeſaid; and thereby bequeathed, to your Orator, ſuch Legacy of £.800, as aforeſaid; or any other, and what laſt Will and Teſtament, of any other, and what date, and to any other, and what purport and effect particularly; and that they may produce the ſame, or the probate thereof, to this Honourable Court as often as there ſhall be occaſion; and whether by ſuch Will, or any other, and what Will, the ſaid Teſtator appointed any, and what other Executors by name; and when the ſaid Teſtator died, and whether he revoked or altered the ſaid Will before his death, and when, and before whom, and in what manner;*

*terms* without replying to the *ſubſtance* of a queſtion, it is now become neceſſary to prefer ſpecific Interrogatories reſpecting each particular fact material to be anſwered; and the better to guard againſt evaſion, it is alſo uſual to direct thoſe queſtions, not only to the ſubſtantive fact itſelf, but to every circumſtance which by poſſibility might have accompanied it: but, it is to be obſerved, that as the reaſon of introducing theſe Interrogatories was for the purpoſe of obtaining a full and ſufficient anſwer to the charges of the Bill, no other are proper to be inſerted than ſuch as expreſsly refer to ſome previous matter contained in the Bill.

*and*

*and whether the ſaid Confederates, or one, and which of them, proved the ſaid Will, and when, and in what Court; and that they may reſpectively ſet forth, whether your Orator, by his ſaid Father and next friend, hath not ſeveral times, ſince his ſaid Legacy became due and was payable, applied to them to have the ſame paid, or ſecured for his benefit, or to that purpoſe and effect, or how otherwiſe; and whether the ſaid Confederates, or one, and which of them, refuſed, or neglected, to comply with ſuch requeſts, and for what reaſons reſpectively, and whether ſuch refuſal was grounded upon the pretences herein before charged, or any, and which of them, or any other, and what pretences particularly.* And *that the ſaid Confederates may admit aſſets of the ſaid Teſtator come to their hands, ſufficient to ſatisfy your Orator's ſaid Legacy, and ſubject to the payment thereof: And that, &c. &c.* (requiring a full ſtatement of Effects come to their hands, and the diſpoſal thereof, &c. that Plaintiff may be enabled to ſhew he has a right to the payment of his Legacy, in caſe it ſhould be controverted).

 AND

8. Prayer of Relief.

AND, *that they may be compelled by a decree of this Honourable Court to pay your Orator's ſaid Legacy of* £.800. *And that the ſame may be placed out at Intereſt, for your Orator's benefit, until your Orator attains his age of* 21 *years; and that the ſaid* £.800 *may then be paid him; and that in the mean time the intereſt thereof may be paid to your Orator's ſaid Father*, John Willis, *towards the maintenance and education of your Orator* (1). AND *that your Orator may have ſuch further and other relief in the Premiſes as the nature of his caſe ſhall re-quire,*

(1) This prayer for the particular relief to which the Plaintiff thinks himſelf entitled, though always inſerted, ſeems, in general, to be unneceſſary; for "though you pray general relief only by your Bill, you may at the Bar pray ſuch particular relief as is agreeable to the caſe made by your Bill." *P. Hardwicke Chanc. Grimes* v. *French*. 2 *Atk.* 141. See alſo *Cook* v. *Martyn*, ibid. 3. where his Lordſhip, in confirmation of the ſame doctrine, facetiouſly remarks that Mr. *Robins*, a very eminent counſel, uſed to ſay that general relief was the beſt prayer next to the *Lord's Prayer*. It is to be obſerved, however, that whether particular, or general relief, be prayed, ſuch relief only will be granted as is warranted by the *caſe made out by the Bill.* 2 *Atk.* 141. 3 *ib.* 131. Except only in the caſe of *infants*, or *charities*, where the Court will give ſuch directions as may be neceſſary, without ſtrictly attending to this circumſtance. See 1 *Atk.* 6. & 355.

*quire, and as to your Lordſhip ſhall ſeem meet* (1): MAY IT PLEASE YOUR LORDSHIP *to grant unto your Orator his Majeſty's moſt gracious Writ, or Writs, of* Subpœna (2), *to be directed*

9. Prayer of Proceſs.

(1) Beſides the *particular* relief before prayed, it is uſual to add this further prayer of *general* relief, the uſe of which (if it have any) is, that if the Plaintiff ſhould happen to have miſtaken the relief which he has a right to, the Court may neverthelefs afford him that to which he is entitled. 2 *Mod.* 91. *Mit. Plead.* 38. *Sed vid. Cook* v. *Martyn*, 3. where a Bill is ſtated to have been ordered for amendment, becauſe "*general* relief was prayed in one part of it, and *particular* relief in another;" but *quere* the accuracy of the reporter. There is, however, nothing irregular in a Bill being framed with two different aſpects, that if one fail the other may anſwer the purpoſe for which the Bill was preferred. *Bennet* v. *Vade.* 2 *Atk.* 325. This, therefore, is frequently done where the Plaintiff is doubtful in reſpect to the relief that the Court may think him intitled to.

(2) If the Plaintiff's caſe require that a ſpecial order of Court ſhould be obtained, as an *injunction* to ſtay proceedings at law, or for the preſervation of property in diſpute during the pending of the Suit, the prayer for ſuch order is uſually inſerted immediately before this for the *ſubpœna.* It varies, of courſe, according to the purpoſe it is intended to anſwer; if it be to ſtay an action at law, it may be thus: "*May it pleaſe your Lordſhip to grant unto your Orator, not only his Majeſty's moſt gracious Writ of Injunction, iſſuing out of, and under the ſeal of this Hon. Court, to reſtrain the ſaid* A. B. *from proceeding at Law againſt your Orator, touching*

*directed to the said* Edward Willis *and* William Willis, *and the rest of the Confederates, when discovered, thereby commanding them, and every of them, at a certain day, and under a certain pain, therein to be specified, personally to be and appear before your Lordship, in this Honourable Court; and then and there to answer*

*ing the matters aforesaid; but also his Majesty's most gracious Writ of Subpœna, as above.*

On this part of the Bill it may be further remarked, that if the Defendant be a Peer, or Lord of Parliament, before the prayer of *Subpœna* a *Letter Missive* is prayed, as

*May it please, &c. to grant unto your Orator your Lordship's Letter Missive, to be directed to the said Defendant, the Earl of, &c. desiring him to appear and answer your Orator's said Bill, or, in default thereof, his Majesty's most gracious writ of* Subpœna, &c.

Also, if an officer of the crown be made Defendant in his official capacity, instead of process, the Bill prays that he may answer the said Bill, *on being attended with a copy thereof.*

Or if the Plaintiff be apprehensive that the Defendant may avoid his demands by quitting the kingdom, he may pray for the writ of *ne exeat Regno.* The form of a writ of Injunction will be given hereafter; that of *ne exeat Regno* is as follows:

GEORGE *the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To our Sheriff of Middlesex, greeting: Whereas it is represented to us in our Court of Chancery, on the part of* Wade Williams *Complainant, against* Alexander Mills *Defendant, (amongst other things)*

*swer all and singular the Premises aforesaid,* (1) *and to stand to perform and abide such order, direction, and decree therein, as to your Lordship shall seem meet: And your Orator shall ever pray.*

A. MANNING (2),

*things) that he the said Defendant is greatly indebted to the said Complainant, and designs quickly to go into parts beyond the seas (as by Oath made on that behalf appears) which tends to the great prejudice and damage of the said Complainant; Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said* Alexander Mills *personally to come before you, and give sufficient Bail, or security, in the sum of £.500, that the said* Alexander Mills *will not go, or attempt to go, into parts beyond the seas, without leave of our said Court; and in case the said* Alexander Mills *shall refuse to give such Bail, or security, then you are to commit him, the said* Alexander Mills, *to our next prison, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof, to us, in our said Court of Chancery, distinctly and plainly, under your seal, together with this Writ. Witness ourself at* Westminster, *the day of in the 30th year of our reign.*

See Observations on the granting of this Writ, by *Talb. Chan.* 3 *P. Wms.* 312; and the modern practice of entering into surety. 2 *Har. Prac.* 204.

(1) The following words are omitted in Bills for *discovery*, and Bills to *perpetuate the testimony of Witnesses*, as see *post*.

(2) Every Bill (by order of Court) is required to be signed by Counsel, that no impertinent or improper matter may be presented

In perufing the form we have here given of a Bill in Equity, the ftudent may probably be lead to join in the common remark, that "every Bill contains the fame ftory three times told;" But Sir *John Mitford* judicioufly obferves, upon this infiduous charge, that though in the hurry of bufinefs it may be difficult to avoid giving fome room for fuch a reproach, by too indifcriminate a ufe of the feveral parts of a Bill, on every occafion, yet, if the Bill be prepared with due attention, its feveral parts will be found to be "perfectly diftinct, and to have their feparate and neceffary operation [a]."

The Bill of which we have given the form in the preceding pages, is framed for the pur-

prefented to the Court. Anciently, it is faid, the Court itfelf perufed the Bill, before it was filed, to fee whether the Petition were orderly and proper, but on account of the increafe and multiplicity of bufinefs, afterwards left it to the honour of the Bar. See *For. Rom.* 91. In the *Exchequer*, however, the fignature of one of the Barons is ftill requifite, before procefs can iffue.

[a] *Plead. Chan.* 46.

pofe

poſe of obtaining a decree of the Court, reſpecting ſome right demanded by the Plaintiff, and controverted by the Defendant[a]; and though other Bills are perfectly ſimilar to this in their *general* form, yet they muſt inevitably, as being exhibited under different circumſtances and for different purpoſes, vary from each other in certain particulars, it will be proper to preſent the reader with the *diſtinguiſhing parts* of ſuch other original Bills as have moſt generally obtained in practice; and, at the ſame time, endeavour to explain to him the particular circumſtances under which it will be proper that each ſhould be exhibited: Thus

### *A Bill of* INTERPLEADER

Is an original Bill, preferred in caſes where two perſons claim of a third the ſame debt, or the ſame duty[b]; as if rent be claimed of a Tenant by two ſeveral perſons, and he be ignorant

[a] See *ante*. p. 26.

[b] See 2 *F. Vez.* 310.

norant to which it is actually payable, he is entitled to protect himself against their separate claims, by exhibiting against them a Bill of *Interpleader* (1); by which, after setting forth the circumstances of his case, he prays that they may be compelled to state their respective rights to the Court. The form of this Bill differs from that we have already given, only in the *Prayer*, which requires,

THAT *the said Defendants may set forth to which of them the said rent doth of right belong, or is payable, and may interplead, and settle and adjust their said demands between themselves, your Orator being willing to pay*

(1) See 1 *Eq. Ca. Abr.* 80.—2 *ibid.* 173—*Bunb.* 303.—2 *F. Vez.* 310. But it should be observed, that in cases of *bailment*, which is when property has been bailed to a third person by the joint consent of both the other parties, a Court of *Equity* has no jurisdiction, as in those cases interpleader may be compelled in a Court of *Law*: Both Courts, however, act upon the same principle, with this difference only in its application, that whilst Courts of Law are confined to the single case of *Bailment*, those of Equity extend to all other cases to which in conscience and justice it ought to be applied.

*the*

*the ſaid rent to either of them to whom the ſame ſhall appear of right to be due, being indemnified by the decree of this Honourable Court; and that your Orator may be at liberty to bring the ſaid ſum into this Honourable Court, which your Orator doth hereby offer, and is ready to do* (1), *for the benefit of ſuch of the ſaid parties which ſhall appear to be entitled thereto; and*

(1) It is eſſential in a Bill of this ſort that the Plaintiff offer to bring the money in queſtion into Court; perſons might otherwiſe be induced to inſtitute a ſuit with a view only of retaining the longer in their hands the property they may have unjuſtly got poſſeſſion of. For a ſimilar reaſon, it is alſo required that the Plaintiff annex to his Bill an affidavit, that there is no colluſion between him and either of the other parties. *For. Rom.* 48—*Prac. Reg.* 39.—In *Errington* v. *Executors of Knip* et al. *Bunbury* 303. The reporter ſuggeſts a *quere*, whether an affidavit be neceſſary where private perſons only are Defendants (the *Attorney General* being in that caſe a Defendant): It is not eaſy to imagine by what mode of reaſoning ſuch a doubt could have been ſuggeſted. The *principle* of the rule is, ſurely, as applicable to perſons of a *private* as to thoſe of a *public* capacity; and it could hardly occur to the unprejudiced eye of a Court of Equity that His Majeſty's Attorney General ſhould be more liable to the ſeductions of fraud and colluſion than perſons of a leſs elevated ſtation.

*that*

*that your Orator may have ſuch further and other relief in the premiſes as to your Lordſhip ſhall ſeem meet, and his caſe may require,* MAY IT PLEASE YOUR LORDSHIP *to grant unto your Orator his Majeſty's moſt gracious writ of* Subpœna (1), *&c.* (as *ante*, p. 41.) *and to ſtand*

(1) If the parties have actually commenced an action at law againſt the Plaintiff, he may, previous to prayer of *Subpœna*, proceed to aſk an *Injunction*, as ſee *ante* p. 41. n. (2). The form of this writ (which we ſhall probably not have an opportunity of introducing afterwards) muſt of courſe be ſuited to the object it has to effect; as to ſtay waſte, to quit poſſeſſion, &c. (ſee *Hind. Chan. Prac.* 583, and ſeq.) That for the purpoſe of ſtaying proceedings at law, is as follows:

GEORGE *the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and ſo forth, To* ~~Joſeph Maddington~~ C. D. *His Counſellors, Attornies, Solicitors, and Agents, and every of them greeting. Whereas it has been repreſented unto us in our Court of Chancery, on the part of* A. B. *Complainant, that he has lately exhibited his Bill of Complaint into our ſaid Court of Chancery againſt you the ſaid* C. D. *Defendant, to be relieved touching the matters therein contained; and that you the ſaid Defendant, being ſerved with a writ iſſuing out of our ſaid Court, commanding you to appear and anſwer the ſaid Bill, have not obeyed the ſame, but are in contempt to an attachment for not appearing to and anſwering the ſaid Bill, and yet in the mean time you unjuſtly, as is alledged, proſecute the ſaid Complainant at law, touching the*

*ſtand to perform and abide ſuch order, direction, and decree therein, as to your Lordſhip ſhall ſeem meet, and your Orator will ever pray, &c.*

If

*the matters in the ſaid Bill complained of: We, therefore, in conſideration of the premiſes, do ſtrictly enjoin and command you the ſaid* C. D. *and all and every the perſons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods, and chattels, to our uſe, that you, and every of you, do abſolutely deſiſt from all further proceedings at law againſt the ſaid Complainant, touching any of the matters in the ſaid Bill complained of, until you the ſaid Defendant ſhall have fully anſwered the ſaid Bill, cleared your contempt, and our ſaid Court ſhall make other order to the contrary: But nevertheleſs, the ſaid Defendant is at liberty to call for a plea and to proceed to trial thereon; and for want of a plea, to enter up judgment; but execution is hereby ſtayed. Witneſs ourſelf at Weſtminſter this day of in the year of our reign.*

It ſhould be obſerved, that there is this difference between the effects of an injunction proceeding from the Court of Chancery, and the ſame writ iſſuing from the Court of Exchequer: That an injunction from the Court of *Chancery* will ſtay proceedings only before declaration delivered; the Defendant may, therefore, if he has delivered declaration, ſtill go on to judgment; though the *execution* will be ſtayed: Whereas, an injunction from the Court of *Exchequer* ſtops all further proceedings, in whatever ſtage the cauſe may be.

In *Chancery*, if the Defendant againſt whom an injunction is prayed be abroad, an affidavit of the truth of the Plain-

If a ſuit be inſtituted in an inferior Court of Equity, the authority of which is inſufficient to make an effectual decree upon the ſubject in queſtion, the defendant to ſuch ſuit may apply to the ſuperior Courts of *Chancery* or *Exchequer*, to have the cauſe removed thither [a]. The method of doing which is by exhibiting, in either of thoſe Courts

## *A Bill of* CERTIORARI.

This Bill firſt begins to differ materially from the form we ſet out with, in the clauſe of *juriſdiction*, where, after having ſtated the proceedings had in the inferior Court, and its inability to render juſtice between the parties, it proceeds:

tiff's allegations muſt accompany the Bill. 3 *Brow. Chan. Ca.* 12, 24; as alſo in ſome other ſpecial caſes, *ib.* 463. In the *Exchequer* this ſeems to be required in all caſes of injunction, whether the Defendant be abroad or not. See *Bunb.* 35.—2 *Brow.* 11.—1 *Fow. Prac.* 256.

[a] See 1 *Chan. Ca.* 31.—1 *Chan. Rep.* 68.—2 *ib.* 109.—1 *Vern.* 178.

IN

IN TENDER CONSIDERATION *whereof, and for as much as for want of jurisdiction in the said Lord Mayor and his brethren the Aldermen of the City of* London *over your Orator's witnesses, your Orator is remediless there; and it being agreeable to the rules and practice of this Honourable Court, upon such necessities and defects of jurisdiction in inferior Courts, for this High and Honourable Court to remove the records and proceedings thereof into this Honourable Court, and to proceed in this Court upon the same, and all other matters and things incident thereto,* MAY IT PLEASE YOUR LORDSHIP *to grant unto your Orator a writ of* Certiorari (1), *to be directed to the said Lord*

(1) The form of this writ is as follows:

GEORGE *the* Third, *by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c. To the Mayor and Aldermen of* London *greeting: We, willing for certain causes to be certified of and upon a certain Petition or Bill of Complaint before you against* Abraham Pettit *and* Charles Giles, *Gent. at the suit of* Samuel Newland, *Esq. lately exhibited and now depending, command you that the Petition or Bill aforesaid, with all things touching the same, by whatsoever other names the parties aforesaid, or any or either of them, are or is set down before us in our* Chancery, *truly, fully,*

*Lord Mayor of the City of London, and his brethren, the Aldermen of the said City, thereby commanding them, upon the receipt of the said writ, to certify and remove the records of the said cause, &c. and all proceedings thereupon, into this Honourable Court,* AND *that your Orator may be relieved in all and singular the premises according to equity and good conscience, and that the said defendants may stand to observe and perform such order and decree therein as to your Lordship shall seem meet; and your Orator shall ever pray* (1) *&c.*

Another

*fully, and exactly, as in your custody they now remain under your seals, distinctly and openly to send immediately, and this writ, that further thereof we may cause to be done that which, of right, ought to be done. Witness ourself at* Westminster, *the day of in the 30th year of our reign.*

Sewell Winter.

Indorsed, "By the Lord High Chancellor of Great Britain."

*Th.* C.

"In the matter of *Abraham Pettit*, and another."

(1) This Bill, the reader perceives, prays no writ of *Subpoena*, for the *Plaintiff* in the Bill of *Certiorari* being the *Defendant* in the *original* suit below, his only object is to stay the proceedings there; leaving it to the original Plaintiff

Another ſpecies of original Bill by which a ſuit may be inſtituted in our Courts of Equity is,

## *A Bill to* PERPETUATE THE TESTIMONY OF WITNESSES (1).

This Bill is uſed in caſes where there is reaſon to fear that the evidence neceſſary to ſupport facts which at a future period will probably become the ſubject of controverſy, may

Plaintiff to proceed or not, after removal, as he may judge proper.

That applications for the removal of cauſes from inferior Courts may not be made for the ſole purpoſe of delaying juſtice, it is required of the Plaintiff, on exhibiting his Bill, to enter into a bond to the two ſenior Maſters in *Chancery*, or Remembrancer in the Court of *Exchequer*, in the penalty of 100 *l.* to be void only in the event of the Plaintiff's proving the ſuggeſtions of his Bill within a limited time after the return of the writ. See *Prac. Reg.* 41.

(1) To avoid objection to a Bill framed for this purpoſe, it ſeems proper to annex an affidavit of the circumſtances by which the evidence intended to be perpetuated is in danger of being loſt, as being a practice adopted in other caſes of Bills which have a tendency to change the juriſdiction of a ſubject from a Court of Law to a Court of Equity. *Mit.* *Plead.*

The most frequent use of this Bill is to assist the jurisdiction of Courts of Common Law, which have no power to compel the production of deeds, &c. or any discovery from the Defendant himself [a].

A Bill of this nature, after setting forth the matter concerning which a discovery is sought, the interest of the several parties in the subject, and the Plaintiff's right to the discovery wanted, prays,

THAT *the said Defendant may produce the said settlement, or set forth the same in* hæc verba *in his the said Defendant's answer to this your Orator's Bill of Complaint*, MAY IT PLEASE YOUR LORDSHIP *to grant* Subpœna (1), *&c.*

These

[a] See 1 *Vez.* 205.—2 *ibid.* 451.—1 *Atk.* 288.—1 *Brow.* 469.

(1) See *ante* p. 55. n. (1); and also 2 *Brow. Chan. Ca.* 281, 319.—4 *ibid.* 480.—Agreeably to the principle of the rule adverted to in a former page, (53, n. 1.) that an affidavit is required to accompany a Bill whenever it seeks to remove the cognizance of a suit from a Court of Law, this Bill requires the affixture of an affidavit, only where it prays, (together

These are the *principal* species of *original* Bills exhibited in our Courts of Equity (1); are still, however, some others, which it might be improper entirely to omit: As, if a person be entitled to property, of a personal nature, after another's death, and has reason to apprehend it may be destroyed by the present possessor, he may exhibit a Bill in a Court of Equity to oblige the Defendant to guarantee it's safety by sureties: A Bill for which purpose is denominated *A Bill* QUIA TIMET[a].

Or, where a person has a right which may be controverted by a variety of others at

gether with the discovery) such relief as the Plaintiff would be entitled to at law, if the deeds, &c. were in his possession. See 3 *Atk.* 132, where this is said to be the constant distinction. See also *Prec. Chan.* 332. The purport of this affidavit must be, that they are not in the custody or power of the Plaintiff, and that he knows not where they are, unless they are in the hands of the Defendant.

(1) Other species of Bills not used for the purpose of *instituting* a suit, but which may arise incidentally in its *progress*, will be noticed hereafter.

[a] See 1 *Chan. Ca.* 70, 223.—1 *Vern.* 190.—*Anb.* 273.—1 *Brow. Ch. Ca.* 103.

4 different

different times, and by different actions; as in disputes between the tenants of two several manors respecting a right of commonage, &c. he may apply to a Court of Equity by a Bill which is called *A Bill of* PEACE; and the Court, to prevent a multiplicity of suits, will direct an issue to determine the right; for "there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the Plaintiff and Defendant," per *Hardwicke* Chancellor[a].

We began our enquiries with a suit instituted on the behalf of a *subject*, which, we have seen, is commenced by BILL, exhibited in the name of the party Complainant; but if the same suit be instituted on behalf of the *Crown*, or of those whose rights are entrusted to its protection, it is commenced by INFORMATION, exhibited in the name of the *King's Attorney* or *Solicitor General*, as his Majesty's representative. This, as we have be-

[a] 1 *Atk.* 282; see also *ib.* 284, and 1 *Vern.* 22, 266, 308.—

fore

fore obferved [a], differs from a *Bill* little otherwife than in its name; as will appear by the fkeleton we fhall here give.

To the Right Honourable, &c.

INFORMING, *fheweth unto your Lordfhip* Sir Alexander Scott, *Knt. His Majefty's Attorney General* (1). *That, &c. and his Majefty's faid Attorney General* (2) *further fheweth, &c. But*

[a] *Ante* p. 25. n. (1).

(1) If the matters in litigation do not concern the immediate rights of the Crown itfelf, but only thofe which are entrufted to its care, the officers depend on the relation of the parties at whofe inftance the fuit is commenced, in which cafe "at and by the relation of *Gabriel Shaddock*, rector of the parifh of Shefford, in the County of Warwick, and of *William Mills* and *John Pye*, Churchwardens of the fame parifh, on behalf of themfelves and the reft of the parifhioners and inhabitants of the faid parifh," *(or as the cafe may be)* is inferted here. Sometimes indeed, though the fubject of the fuit do include the immediate rights of the Crown, a nominal relator is, out of tendernefs to the Defendant, inferted in the information to fuftain the cofts (the King paying no cofts), fhould the fuit have been improperly commenced; and this practice is univerfally recommended by the Courts. See *Prec. Chan.* 13.—1 *Vern.* 277, 370.—*Mit. Plead.* 23. n. (e.)

(2) "By the relation aforefaid," if there be a relator named in the Bill.

*now*

*now so it is, &c. In consideration* (1) *whereof, &c. To the end therefore, &c.* precisely as in the Bill we originally gave*.

The Bill or Information being duly prepared, signed by Council, and fairly engrossed upon parchment, it is deposited in the office of the SIX CLERKS, if exhibited in Chancery, or if in the EXCHEQUER, amongst the records of that Court, there to remain in *perpetuam rei memoriam*; and this is termed *filing* a Bill in Equity. The next step in the progress of the suit is the Defendant's *appearance*.

(1) It is observable, that in all the forms of *Informations* to be met with in the books, the epithet TENDER, annexed to CONSIDERATION in *Bills*, is invariably omitted.

* As see APPENDIX.

OF

## Of Appearance to a Suit in Equity.

UPON the Complainant's Bill being filed in the manner we have just mentioned, the writ of *Subpœna* (1) issues out of the *Law* side of the Court, requiring the Defendant (as prayed in the Bill) to appear and answer the charges

(1) This writ answers to the *Citatio certis de causis* in the Civil Law (see *Gib. Cod.* T. xliv. c. 2.). It was first applied to the purpose of compelling an appearance to a Suit in Equity in the reign of Richard II. when *Bishop Waltham*, then Chancellor, appears to have adopted it in pursuance of *stat. West.* ii. c. 24. which (to prevent the multiplicity of petitions to Parliament for the formation of writs adapted to such new cases as were daily arising) enacted that "*quotiescunque de cætero evenerit in Cancellaria, quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure, & simili indigente remedio, non reperitur, concordent clerici de Cancellaria in brevi faciendo.*" This Writ was always vehemently opposed by the Courts of Common Law; and having sometimes, it seems, been issued upon groundless allegations, it was enacted by 15 *Hen.* VI. c. 4. at the instigation of the Commons, that no Writ of Subpœna should be granted in future till surety had been found to answer to the party aggrieved for his damages and expences, in case the Plaintiff failed to make good the charges in his Bill. This security, however, has long fallen into disuse, (a matter there is frequently reason to lament) and is now required only in cases where the

charges alledged againſt him. The form of this writ, in *Chancery*, is as follows:

*Subpœna to* APPEAR *and* ANSWER *in* CHANCERY.

GEORGE *the Third, by the Grace of* GOD, *of* Great Britain, France, *and* Ireland, *King* (1), *Defender*

the Plaintiff either reſides abroad, or is likely ſoon to quit the kingdom.

A cuſtom formerly prevailed (though contrary to the more ancient practice) of iſſuing the *Subpœna* before the Bill had been filed: this gave riſe to the ſtatute of 3 and 4 *Ann*, c. 16. by which it is provided, that "no *Subpœna*, or any other proceſs for appearance, do iſſue out of any Court of Equity till after the Bill be filed with the proper officer in the reſpective Courts of Equity, (except only in caſes of injunctions to ſtay waſte or proceedings at law, in which caſes, therefore, it may ſtill be done) and a certificate thereof granted by the proper officer;" and as a ſtill further check on this practice, it remains an order of the Court of *Chancery*, that "all Bills *there* filed ſhall be dated on the day they are brought into the Six Clerks Office." It is to be obſerved, however, that neither the *ſtatute* nor *order* have entirely put a ſtop to this mode of proceeding, though it is always done at the riſk of coſts.

(1) As theſe ſeveral titles were ſucceſſively introduced into our legal proceedings at the times when each was reſpectively aſſumed by the Sovereign, the two firſt in right of

*der of the Faith, and so forth* (1), *To* Edward Willis *and* William Willis (2) *greeting, for certain causes offered before us in our Chancery, we command, and strictly enjoin, you, that laying all other matters aside, and notwithstanding any excuse, you and each of you personally be and*

of conqueft, and the laft at the gracious requeft of his Holineſs *Leo.* X, it is preſumed that an addition will now again take place by the introduction of " *Corſica.*"

(1) *Viz.* Duke of *Brunſwick* and *Lunenburg,* and Knight Treaſurer and Elector of the Holy Roman Empire.

(2) Three Defendants only (of which a man and his wife together are deemed *one*) are in *Chancery* allowed to be inſerted in the ſame Subpœna; the reaſons for which, as given by *Gilbert* (*For. Rom.* 39,) are, that " the Plaintiff may not put in an abundance of Defendants, in order to terrify and vex them, and that miſtakes may not be made in tranſcribing a multitude of names in the label"—Reaſons which, though adopted by ſubſequent writers, the reader may probably think ſomewhat trivial. It is in truth difficult to account for all the *minutiæ* of this ſort which pervade our legal proceedings; few of them, probably, are ſanctioned by any other reaſon than this, that as ſome rule muſt neceſſarily be purſued, it was in moſt caſes thought better to adopt that which happend to prevail at the time, than eſtabliſh a new one. In the preſent inſtance, the *revenue* might poſſibly have been adverted to.

*appear*

*appear before us* (1), *in our ſaid Chancery, on the* *day of* *next*, (or immediately on the receipt of this Writ) (2) *whereſoever it ſhall then be* (3), *to anſwer concerning thoſe*

(1) The reader will recollect that equitable cauſes were originally determined by the *King* in Council.

(2) The return of a *Subpœna* may be either ordinary or extraordinary: The *ordinary* return is always on ſome day certain in *Term* (that is to ſay, one of the common return days). The *vacations* having, at the original conſtitution of the Terms, been appropriated, thoſe of *Hilary*, *Eaſter*, and *Michaelmas*. for the duties of devotion, preparatory to the feſtivals of *Lent*, *Whitſuntide*, and *Chriſtmas*, and that of *Trinity* for the purpoſe of collecting in the produce of the earth; but the *extraordinary* return, which is ſo called becauſe it can be had only by application to the Court, grounded on an affidavit of the Defendant's reſiding within ten miles from *London*, may be on any day in *vacation*, perſons reſiding within that diſtance of the Court being able, it was ſuppoſed, to leave and return to their avocations without any material inconvenience: And in thoſe circumſtances, if expedition be required, it may (agreeably to the rules of the *Canon Law*) be made returnable *immediately*, which always ſuppoſes great urgency; but no *Subpœna* can be made returnable immediately in *Term*, becauſe every day being then a day of appearance, no ſuch extraordinary expedition can be neceſſary. See *Gil.* 28, 38. in Author *Gail.* and *Spelm. Gloſſ.* c. 14. Alſo *Har. Prac.* 196. *Hind.* 78.

(3) The Court of Chancery, like the Courts of Common Law, having originally been ambulatory, and followed the perſon of the King.

*things*

*things which ſhall be then and there objected to you, and to do further, and receive, what our ſaid Court ſhall have conſidered in this behalf, and this you may in no wiſe omit* under the penalty (1) *of one hundred pounds, and have there this Writ. Witneſs ourſelf at* Weſtminſter, *the day of in the 33d year of our reign.*

COURTENAY.

Indorſed "*By the Court, to anſwer at the ſuit of* James Willis *et al.*"

And upon the label (2)—"*To* Edward Willis, *to appear in Chancery, returnable the day of at the ſuit of* James Willis *et al.*" (3)

An

(1) At the time this Writ was framed, all judicial proceſs ran in the Latin tongue. This part of the Writ having been then expreſſed by the words *Sub* and *pœna*, gave riſe to its preſent name of *Subpœna*.

(2) The label, the reader perceives, is an abſtract, as it were, of the Subpœna, as it relates to each Defendant: it is written upon a ſlip of parchment, and annexed to the Writ.

(3) Where there are more Plaintiffs than one, it is uſual to indorſe the Writ in this manner; which is held to be



ſufficient

An Exchequer Subpœna differs ſomewhat from this, and is as follows:

*Subpœna to* APPEAR *and* ANSWER *in the* EXCHEQUER.

*George the Third, &c. To* Edward Willis *and* William Willis (1), *greeting, we command and ſtrictly enjoin you, that all excuſes apart you appear before the Barons of our Exchequer at* Weſtminſter, *on the day of (or immediately after the return of this our Writ)* (2) *to*

ſufficient notice to the Defendant, as an appearance to one of the Plaintiffs will be an appearance to the reſt.

(1) In the *Chancery Subpœna*, we have ſeen, *ante* p. 63, n. 2. that the number of Defendants permitted to be inſerted in one Writ is confined to three; in this of the Exchequer four are allowed.

(2) The range of the Court of Chancery within which the *Subpœna* is allowed to be returnable *immediately* in the Vacations, we have ſaid is ten miles; in the Exchequer it was formerly fifteen: the reaſon of this difference *Gilbert* aſſigns to be, that as the Chancery was ambulatory with the King, and the Court of Exchequer fixed at the receipt at London, the Court that was ſtationary, took a larger range than that which was ambulatory; ſee *For. Rom.* 43. But the practice ſeems to have been ſince perverted, as the circuit of *Subpœnas* returnable immediately in the *Exchequer* is now only five miles,

*to anſwer us concerning certain articles then and there on our behalf to be objected againſt you, and this in no wiſe omit, under the penalty of one hundred pounds, which we ſhall cauſe to be levied upon your goods and chattels, lands and tenements, to our uſe, if you neglect this our preſent command. Witneſs the Right Hon. Sir* Archibald Macdonald, *Knight, at* Weſtminſter, *the day of in the year of our reign.*

ELIOT.

By the Barons,

Indorſed "*At the Suit of* James Willis *by Bill.*"

FOWLER.

Label—"To *Edward Willis*, returnable in the Court of Exchequer at *Weſtminſter*,

miles, and the ſame muſt iſſue either within the *Term*, or a limited term after it; for in this Court a *Subpoena* returnable immediately cannot iſſue in a *Vacation*, except from the laſt day of any Term, until the end of the Sittings after ſuch Term; in which caſe, by order of Court made 1721, the Clerks are empowered to iſſue proceſs of *Subpoena* returnable *immediate* upon Bills againſt perſons reſiding in, or within *five* miles of London, a proper affidavit having been previouſly filed of ſuch reſidence. See *Fow. Prac.* 135.

 on

on the day of next, (*or* immediately after the receipt hereof) at the fuit of *James Willis*. By Bill.

King's Remembrancer's Office,

F.

But if the Defendant be a Peer, or Peerefs, of the realm, or a Lord of Parliament, inftead of the Writ of *Subpœna* in the firft inftance, a *letter* under the fignature of the Court, is tranfmitted to him, acquainting him of the exhibition of the Plaintiff's Bill (1); of which an office copy is at the fame time delivered to him. This letter is ftiled a *Letter*

(1) The practice of fending Letters Miffive to Peers previous to the procefs of Subpœna, is faid to have been firft introduced about the 16th year of *Elizabeth*: Lord *Bacon*, Chancellor, appears to have been the firft who adopted this polite method of acquainting his order with the proceedings which had been inftituted againft them; and it has continued ever fince. See *Seld.* 1543.—*For. Rom.* 65.—*Prac. Reg.* 341. It is obfervable, that a fimilar practice prevailed in the Roman Law, where, if the Defendant was *perfona illuftris, vel clariffima*, he was cited in *writing* as being more refpectful than the ufual mode of citation, *obtorto collo*. See *For. Rom.* 23. Alfo *Hor. Sat. lib.* 1. *S.* 9. *l.* 75.

*Miffive*,

*Missive*, and, in *Chancery*, is conceived in these terms:

### *A* Letter Missive *in* Chancery.

*My Lord,*

It *appears by a Petition, a copy of which is herewith sent you, that* James Willis *an Infant, has exhibited his Bill in the High Court of Chancery against your Lordship, and desires your appearance thereto on the day of next: Wherefore I do, at his request, (according to the manner used to persons of your quality) desire your Lordship to take knowledge thereof, and to give orders to those you employ in such matters for your appearance to the said Bill accordingly.*

*I am,*

*Your Lordship's humble Servant,*

Thurlow, C.

To the Right Hon. *Henry*
Earl of Cadogan.

In the *Exchequer* the customary form is as follows:

 *A* Letter

*A* LETTER MISSIVE *in the* EXCHEQUER,

*To the Right Honourable* Henry *Earl of Cadogan.*

*May it please your Lordship,*

AFTER *our hearty commendations to your Lordship; Whereas there is an English* (1) *Bill exhibited in his Majesty's Court of Exchequer at* Westminster *against your Lordship, by* James Willis *an Infant: We have therefore thought fit to give your Lordship notice thereof rather by these our Letters, than by awarding His Majesty's ordinary process against you; wherefore these are to pray your Lordship to give order for the entering of your appearance on the day of next, and the putting in your answer according to the usual course with all convenient speed; of the which nothing doubting but that your Lordship will have the care and*

(1) A Bill in Equity is stiled an *English* Bill, in contradistinction to Bills and other proceedings in Courts of Law, which were formerly in the *Latin* or *Norman French* tongues. See *post*.

*regard*

*regard which thereunto appertaineth, we bid your Lordship heartily farewell.*

*Your Lordship's very loving friends,*

ARCH. MACDONALD,

A. THOMPSON.

Weftminfter, *the firft day of* July, 1794.

It is to be obferved, however, that thefe *Letters Miffive* are no *procefs* of the Court (1), but mere *complimentary* notices, which the Defendant may attend to or not at his pleafure. If he appear, it is well, but if not, a *Subpœna* muft be iffued againft him, as in common cafes (2).

The *Subpœna* having been properly ferved

(1) But though a Letter Miffive is no *procefs*, it is held to give priority of fuit to the Plaintiff who procures it. See *Bunb.* 124.

(2) The reafon of its being neceffary to iffue a *Subpœna*, in cafe of inattention to the Letter Miffive, is, that all fubfequent proceedings to compel an appearance, are fo many proceffes of *contempt*, founded on a difregard of the *Seal of the Court:* They cannot, therefore, be awarded on difobedience to a Letter Miffive only, which, being a mere *ex gratia* notice, can induce no fuch contempt.

on the Defendant (1), he is bound to appear (2) and anſwer the charges alledged againſt

(1) The method preſcribed by the practice of the Courts for the ſervice of the *Subpœna*, is by leaving the *body* of the Writ, if there be but *one* Defendant, either with the party himſelf, or at his uſual place of reſidence; but if there be *more than one* Defendant, the *label* only of the Writ is given to thoſe who are firſt ſerved, and the body reſerved for the laſt Defendant; the reaſon of this is, that the body of the Writ may be ſhewn to the ſeveral other Defendants to whom the *labels* are given, as they are not obliged to pay obedience to the *label*, unleſs the Writ itſelf, under the Seal of the Court, be at the ſame time ſhewn them. If the Defendant be a member of Parliament, it is the practice to accompany the *Subpoena* with a copy of the Bill, which muſt be ſigned by one of the Six Clerks of the Court.

N. B. Service on the wife is, in theſe caſes, held to be ſufficient notice to the huſband, they being deemed in law but one perſon. *Barlow* v. *Baker*, *Cary* 776.—*Pilgrime* v. *Read*, *ibid.* 111. In *For. Rom.* 41. there is a *quære*, whether ſuch ſervice, though good in the *Exchequer*, be ſufficient in *Chancery*. But there ſeems to be no room for ſuch a doubt; the practice of both Courts is in this reſpect the ſame, and the authorities here referred to are both in *Chancery*.

(2) Anciently the mode of Appearance (agreeably to the word itſelf) was by the Defendant's actual attendance in Court, where, in ſome caſes, he was to appoint a *reſponſalis*, or attorney, in open Court before the juſtices; and in thoſe caſes no attorney could be received but who was ſo appointed:

againſt him by the Plaintiff's Bill, within the time limited by the courſe of the Court (1); or

appointed: in other caſes the attorney was appointed by writ, or letters patent under the great ſeal, commanding the juſtices to admit the perſon therein named to act as the party's attorney in ſuch particular cauſe: as, "*Rex Vicecomiti Salutem: Scias quod N. poſuit coram me R. loco ſuo ad lucrandum vel perdendum pro eo in placito &c. quod eſt inter eum et T. de una carucata terre in villa, &c. et ideo tibi præcipio quod prædictum R. loco ipſius N. in placito illo recipias ad lucrandum vel perdendum pro eo, &c.* and if ſuch writ or letters could not be obtained, the party was obliged to appear perſonally in Court, *de die in diem*, till his Suit was determined; but, by *ſtat. Weſt.* 2. (13 *Ed.* I. *c.* 10.) *general* attornies, appointed for the purpoſe of conducting any Suit or other matter *indefinitely*, appear to have been allowed of; and, in the 20th year of the ſame king, the chief juſtice and his fellow juſtices, were eſpecially required to appoint from every County, *attornatos & apprenticios qui curiam ſequantur, et ſe de negotiis in eadem curia intromittant, et alii non.* See *Glan. lib.* 12. c. 1. 3. 2 *Inſt.* 378. *Gil. C. P.* 32. 1 *Reev. Hiſt.* 169. 2 *ib.* 284. The *preſent* eaſy and convenient method of conducting Suits by attorney, gradually obtained by the indulgence of ſucceſſive legiſlatures, founded on the perpetual advancement of ſcience and trade, and the conſequent refinement in manners.

(1) This, in *Chancery*, is now *four* days after the return of the *Subpœna*, if the Defendant reſide within 20 miles of London, and *eight* days if above that diſtance; and that whether it be returnable *immediately* or otherwiſe. See 1 *Har. Prac.* 220. But, in the *Exchequer*, if the Subpœna be returnable

or compulsory processes will be awarded against him for contempt, in neglecting the requisition of the *Subpœna*. The first of these processes is an *Attachment*, which is in the na-

returnable *immediately*, the Defendant must appear on the *next* day after the return; upon the *second* day after process returnable on a *day certain*; and on the *fourth* day after every *common* process. See 1 *Fow. Prac.* 214. In the Civil Law, after service of the Citation, the Defendant was allowed so much time, in which to appear, as "*ad locum citatum commodé venire posset.*" Which was reckoned by days journeys of 20 miles each; and from hence the first rule in Chancery was, that if the Defendant resided within 20 miles of Town, he was to appear in *four* days after service of the *Subpœna*, (three days being allowed him to prepare himself for his journey) and these answered to the *dies perendini* of the Roman law, and the *quatuor dies post* of our own Common Law; but if he lived within 10 miles of the Court, when the Citation, as with us, was *immediate*, he was to appear within *two* days, that being considered by the Civil Law and Chancery as an *immediate* citation, which was shortened by one half; but, in the *Exchequer*, two days only were allowed in the first case, and when the return was *immediate*, the Defendant's appearance was required on the very *next day* after process. See *For. Rom.* 29 and 30. The reason of more expedition being required in the Exchequer than in Chancery, appears to have been that as the Court of Exchequer was originally instituted for the sole purpose of recovering dues belonging to the Crown, the high prerogative of those times expected a more prompt obedience than was required in common cases.

ture

ture of a *Capias* at Common Law (1); and is directed to the Sheriff, commanding him to *attach*, or take up the person of the Defendant, and bring him into Court (2).

The form of this Writ, in *Chancery*, is as follows:

(1) The *Attachment* answers to the *apprehensio realis* of the Roman law, which followed the *primum & secundum decretum* upon a citation from a *plebeian*, and immediately after the citation itself from the *Prince*. The *Subpœna* being with us the citation from the prince, the Defendant is immediately *contumax*, on disobedience; the Attachment, therefore, or *apprehensio realis*, follows. It differs from the *Capias* at Common Law in this, that upon a *cepi corpus*, returned on a *Capias*, the Sheriff is obliged actually to produce the body of the Defendant in Court, or he is liable to be amerced under *Stat. West.* 2. c. 39. but in an Attachment it is sufficient if he detain the Defendant in custody till compliance. The words of the Attachment being only "*quod habeas ejus corpus ad respondendum*, and not as in the *Capias*, "*quod habeas corpus ejus* coram nobis *ad respondendum*. The reason of which might be, that as the purpose of the Attachment was merely to punish the Defendant for his contempt, its end was thought to be sufficiently answered by his imprisonment. See *For. Rom.* 82. This difference in the original *wording* of the two Writs seems to have been overlooked in the modern translation.

(2) See *post p.* 79. n. (1).

An

### *An* ATTACHMENT *in* CHANCERY.

GEORGE *the Third, by the grace of God, of* Great Britain, France, *and* Ireland, *King, Defender of the Faith, and so forth.*

*To the Sheriff of* Wiltshire (1), *greeting: we command you to attach* Edward Willis, *so as to have him before us, in our Court of Chancery, wheresoever the said Court shall then be, there to answer to us* (2); *as well touching a contempt, which he, as it is alledged, hath committed against us, as also such other matters as shall be then laid to his charge* (3); *and further to abide such order as our said Court shall make in his behalf; and hereof fail not, and bring this Writ with you. Witness ourselves at* West-

(1) In directing the Attachment, regard is to be had to the particular jurisdiction of privileged places, as the *Cinque Ports, Counties Palatine,* &c. The reader may find various forms of this Writ, as adapted to different parts of the kingdom, in 2 *Burt. Pleas Exch.* 18.

(2) See *ante* p. 75. n. (1).

(3) Because, though the process of Attachment issues for contempt, in not appearing to the *Subpœna,* yet, when the Defendant is once apprehended, he must answer to the Bill, as well as clear his contempt.

minster,

minster, *the* *day of* (1), *in the 30th year of our reign.*

ARDEN,
WINTER.

Indorsed, "*By the Court, at the Suit of* James Willis, *for want of appearance, (or answer).*

Label—*To the Sheriff of* Wiltshire. *An Attachment against* Edward Willis *for not appearing at the Suit of* James Willis, *returnable in, &c.* (2).

In the *Exchequer* it is thus:

*An* ATTACHMENT *in the* EXCHEQUER.

GEORGE *the Third, &c. To the Sheriff of* Wilts; *greeting: we command you that you omit not, by reason of any liberty, but enter the same, and at-*

(1 & 2) By the course of the Court there are to be 15 days between the *teste* and *return* of the Attachment (as also of every other process of contempt) and these 15 days are to be *inclusive* of the day of return, and *exclusive* of the day of the *teste*. But if the Defendant reside within 10 miles of London, it may, on motion to the Chancellor, or petition to the Master of the Rolls, be made returnable *immediately*.

*tach*

*tach* Edward Willis (1), *by his body, wheresoever you shall find him in your Bailiwick; and him safely and securely keep, so that you may have him before the Barons of our Exchequer, at* Westminster, *on the day of* (2) *next, to answer us concerning divers trespasses, contempts, and offences, by him lately done and committed; and that you then have there this Writ. Witness the Right Hon. Sir* Archibald Macdonald, *Knt. at* Westminster, *the day of* (3), *in the 31st. year of our reign. By affidavit* (4), *and by the Barons.*

ELIOT.

Indorsed "*at the Suit of* James Willis, *for want of appearance.*"

(1) By order of Court no more than four Defendants are to be inserted in one Writ.

(2 & 3) This Attachment must be tested and made returnable in *Term*. In all processes of contempt, in the Exchequer, it is requisite, by rule of Court, that there should be in *London* and *Middlesex* and other places within 15 *miles* of the Court, six days between the *teste* and return of the writ; and in all other Counties, within 60 miles of London, 15 days, unless an *immediate* return be obtained by express application to the Court. See 1 *Fow. Prac.* 147.

(4) *Viz.* Affidavit of the service of *Subpœna*.

Upon

Upon thefe writs the fheriff returns either *cepi corpus*, I have taken the Defendant, or *non eft inventus*, he is not to be found. If the Defendant be apprehended (1), he is detained in cuftody till he enter his appearance, and put in his Anfwer to the Complainant's Bill; or, on refufal, an *habeas corpus* is awarded, commanding the Sheriff to bring him into Court, or a *Meffenger* of the Court is difpatched for the purpofe (2). But in the *Exchequer* " there is

(1) It is to be obferved, that though the Attachment *iffues* againft all perfons indifcriminately, yet it is not *executed* upon the perfons of Peers, and Lords or Members of Parliament, thofe perfons being, for reafons of policy, privileged from every fpecies of arreft; and the ufe of the attachment iffuing, is only for the purpofe of grounding the fubfequent procefs of *fequeftration*, as we fhall fee hereafter. The fame may likewife be obferved in refpect of Infants, upon whom the Attachment, though fealed and entered as in common cafes, is never ferved; but an order of Court, founded on the attachment, is made to bring the infant into Court, where a guardian is appointed to defend his Suit.

(2) The Sheriff, having gone to the extent of his authority when he has taken the Defendant, he cannot remove him out of the County, without a fpecial mandate for that purpofe. See 2 *Atk.* 507. 2 *Peer Wil.* 301. 2 *Brow. Chan. Ca.* 181. The practice of moving for a meffenger was formerly confined

is a rule given of four days to bring in the body, that the Defendant may do it at his own charge if he pleafes, by an *habeas corpus* purchafed by himfelf; and if he do not remove himfelf within thofe four days, then a meffenger will be awarded upon motion; and this is by a particular prerogative of the Court of Exchequer, that the Plaintiff, who is the king's debtor, may not be delayed[a]."

But if the Sheriff return *non est inventus*, an additional procefs is awarded againft the Defendant, an *Attachment with Proclamation*, which, befides the ordinary form of Attachment, directs the Sheriff to caufe public proclamations to be made throughout the County to fummon the Defendant, on his allegiance, perfonally to appear and anfwer the charges brought againft him[b].

confined to the cities of *London* and *Briftol*, on account of the amerciaments in thofe places belonging to their refpective Corporations; but a meffenger is now fent indifferently to all parts alike. See 1 *Vern.* 154. *ibid.* 344. 2 *Atk.* 507.

[a] See *For. Rom.* 71.

[b] See 3 *Blac. Com.* 444.

The

The form of this Writ in *Chancery* is as follows:

## *An* ATTACHMENT *with* PROCLAMATIONS *in* CHANCERY.

GEORGE *the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. To the Sheriff of* Berkſhire, *greeting: We command you, on our behalf, to cauſe public proclamation to be made in all places within your Bailiwick, as well within liberties as without, whereſoever you ſhall think it moſt convenient, that* Edward Willis *do upon his allegiance on the day of perſonally appear before us, in our Court of Chancery, whereſoever it ſhall then be; and nevertheleſs, in the mean time, if you can find the ſaid* Edward Willis, *attach him ſo as to have him before us, in our ſaid Court, at the time before mentioned, there to anſwer to us, as well touching a contempt, &c.* (as in the ſingle Attachment.)

In the *Exchequer* the form is nearly the fame.

### *An* ATTACHMENT *with* PROCLAMATIONS *in the* EXCHEQUER.

GEORGE, *&c. To the Sheriff of* Berkfhire, *greeting: We command you, that you omit not by reafon of any liberty, but enter the fame, and make public proclamation in fuch places in your Bailiwick as you fhall think moft convenient, that* Edward Willis *do, on pain of his allegiance which he oweth to us, perfonally appear before the Barons of our Exchequer, at* Weftminfter, *on the day of next; And, in the mean time, omit not by reafon of any liberty, but that you enter the fame and attach, &c.* (as in the fingle Attachment.)

Should this Writ alfo be returned *non eft inventus*, and the Defendant ftill remain in contempt, a *Commiffion of Rebellion* is awarded againft him for not obeying the king's proclamations, according to his allegiance.

This

This commission is usually directed to four commissioners [a] therein named, who are jointly and severally commanded to attach the Defendant, wherever he may be found within the kingdom of Great Britain, "as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required (1)."

The form of this Writ is nearly the same in both Courts, and is as follows:

*A* COMMISSION *of* REBELLION *in both* COURTS.

GEORGE *the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of*

[a] See 3 *Blac. Com.* 444.

(1) The reason given by *Gilbert* for this process being directed to Commissioners under the great seal, and not, like the Writ of Attachment, to the Sheriff, is "That the Defendant is a rebel and contemner of the laws, and to be dealt with as such; and as the Sheriff cannot be supposed capable of executing all the processes directed to him in person, it may be inconvenient to trust so great a power with the Deputies of his appointment; and therefore the Court appoints its own commissioners, who are entrusted to do every thing very carefully, and are answerable to the Court for their miscarriages." *For. Rom.* 77.

*the Faith, &c. To* Bamber Tyler, William Fowler, John Miller, *and* Thomas Porter, *greeting: Whereas, by public proclamations made on our behalf by the Sheriff of* Middlesex, *in divers places of that County, by virtue of our Writ to him directed,* Edward Willis *hath been commanded upon his allegiance to appear before us in our Court of Chancery, at a certain day, now past; yet he hath manifestly contemned our said command; therefore we command you jointly and severally to attach, or cause the said* Edward Willis *to be attached, wheresoever he shall be found, within our kingdom of Great Britain, as a rebel and contemner of our laws, so as to have him, or cause him to be, before us in our said Court, on, &c. wheresoever it shall then be; to answer to us, as well touching the said contempt, as also such matters as shall be then and there objected against him: and further to perform and abide such order as our said Court shall make in that behalf: And hereof fail not. We also hereby strictly command all and singular Mayors, Sheriffs, Bailiffs, Constables, and other our officers and loyal servants and subjects,*

*whom-*

*whomſoever, as well within liberties as without, that they, by all proper means, diligently aid and aſſiſt you, and every one of you, in all things in the execution of the premiſes. In teſtimony whereof we have cauſed theſe our letters to be made patent. Witneſs ourſelf at* Weſtminſter, *the day of in the 34th year of our reign.*

ARDEN,
WINTER.

A SERJEANT AT ARMS.

Upon a ſimilar return of "*non eſt inventus,*" upon the Commiſſion of Rebellion, the Court diſpatches a *Serjeant at Arms* (1) in ſearch of the Defendant: This is ordered on

(1) The Serjeant at Arms is an officer of the Court of Chancery, granted for life, by patent from the king. His office is to attend upon the perſon holding the cuſtody of the great ſeal, and to execute the orders of the Court againſt theſe who in any reſpect contemn its juriſdiction. *Prac. Reg.* 332. A ſimilar officer, likewiſe, and under the ſame name, attends upon the Equity ſide of the Exchequer. 1 *Fow. Prac.* 164.

motion to the Court, grounded on the return of the Commiſſion of Rebellion (1).

If the Defendant is taken upon any of theſe proceſſes, he is committed to the *Fleet* or other priſon, till he enter his appearance according to the forms of the Court; and alſo clears his contempt, by payment of the coſts incurred by his contumacious behaviour. But

(1) The preceding proceſſes of Attachment and Commiſſion of Rebellion, are iſſued as of courſe, without any application for the purpoſe to the Court; becauſe the office from which thoſe writs proceed is that in which the appearance of the Defendant is entered and recorded. The inefficacy of one proceſs, therefore, to bring in the Defendant, is a ſufficient ſanction for them to iſſue the other. But the Serjeant at Arms, being a ſpecial meſſenger of the Court, cannot be diſpatched without its expreſs authority; and it muſt appear to the Court, "that the common miniſters of juſtice were not able to take the party, before they have recourſe to this extraordinary method;" for which reaſon, on moving for a Serjeant at Arms, the Commiſſion of Rebellion is always produced, and ſhewn to the Court. See *For. Rom.* 79—81. And the reaſon of this proceſs being obtained upon motion, is, "that there is nothing to iſſue under the great ſeal; ſo that ſince there is no proceſs under the ſeal to make it a record of the Court, there muſt be an act of the Court to ſend the Serjeant at Arms."

if he likewise elude the search of the Serjeant at Arms; a *Sequestration* issues (1). This, like the Commission of Rebellion, is awarded on motion, grounded on the return of the Serjeant at Arms; and is directed to certain commissioners therein named, authorizing and commanding them to possess themselves of all his personal Estate whatsoever, and the rents and profits of his real Estates, until satisfaction be made of the Plaintiff's demands, and the Court shall further order.

The form of this Writ in *Chancery* is as follows:

(1) The Writ of Sequestration, though the most efficacious process of the Courts of Equity, was not introduced till the reign of *Elizabeth*, when Sir *Nic. Bacon*, then Lord Keeper, after violent struggles with the Courts of Common Law, established its use to enforce the execution of the *decrees* of the Court; and it was not till long afterwards, that it was used as a *mesne* process of the Court. See 1 *Ch. Ca.* 91.—2 *ib.* 44.—1 *Ver.* 58, 421.

This Writ, though the *last* process against common persons, is the *first* against Peers, Lords of Parliament, (and their servants) and members of the House of Commons. See *ante* p. 79, n. (1)

*A* SEQUESTRATION *in* CHANCERY,

GEORGE *the Third, &c. To* Samuel Leghorne, Peter Wilkins, Isaac Jones, *&c. Whereas* James Willis, *Complainant, exhibited his Bill of Complaint to our Court of Chancery against* Edward Willis *and* William Willis, *Defendants: And whereas the said* Edward Willis, *being duly served with a Writ issuing out of our said Court, commanding him under the penalty therein mentioned, to appear to and answer the said Bill, has refused so to do, and thereupon all process of contempt has issued against him unto a Serjeant at Arms: And whereas the said* Edward Willis *hath of late absconded, and so concealed himself, that the Serjeant at Arms hath not been able to find him, as by the certificate of the said Serjeant at Arms appears: Know ye, therefore, that we, in consideration of your prudence and fidelity, have given, and by these presents do give, to you, any three, or two of you, full power and authority to enter upon all the messuages, lands, tenements, and*

*and real Eſtate whatſoever, of the ſaid* Edward Willis, *and to take, collect, receive, and ſequeſter into your hands, not only all the rents and profits of the ſaid meſſuages, lands, tenements, and real Eſtate, but alſo all his goods, chattels, and perſonal Eſtate whatſoever: and therefore we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to, and enter upon, all the meſſuages, lands, tenements, and real Eſtate of the ſaid* Edward Willis; *and that you do collect, take, and get into your hands, not only the rents and profits of all his real Eſtates, but alſo all his goods, chattels, and perſonal Eſtate; and keep the ſame under ſequeſtration, in your hands, until the ſaid* Edward Willis *ſhall fully anſwer the Complainant's Bill, clear his contempts, and our ſaid Court make other order to the contrary* (1).

(1) A Sequeſtration binds from the very time of awarding the Commiſſion, and not from the time of executing it only; otherwiſe the inferior officer would have *ligandi & non ligandi poteſtatem. Per Nottingham, Ch.* 1 *Ver.* 58.

*Witneſs*

*Witness ourself at* Westminster, *the*      *day of*      *in the 33d year of our reign.*

ARDEN.

WINTER.

In the *Exchequer*, the Sequestration differs but little from that in *Chancery*, and is thus:

*A* SEQUESTRATION *in the* EXCHEQUER.

GEORGE *the Third*, *&c.* *To* Samuel Leghorne, Peter Wilkins, *and* Isaac Jones. *Whereas* James Willis *has lately exhibited his English Bill of Complaint before the Chancellor and Barons of our Court of Exchequer, at* Westminster, *against* Edward Willis *and* William Willis, *Defendants; And whereas the said* Edward Willis, *having been duly served with process of Subpœna, issued out of and under the seal of our said Court, to appear to, and answer the said Bill, hath hitherto refused to appear thereto, and stands in contempt of our said Court, all process of contempt having issued out of our said Court against the said* Edward Willis;

Willis; *And, moreover, our Serjeant at Arms, attending our ſaid Court, hath made diligent ſearch after the ſaid* Edward Willis, *but hath not been able to find him, as by the certificate of our ſaid Serjeant at Arms manifeſtly appears: Know ye, therefore, that we, truſting to your fidelity, induſtry, and circumſpection, have appointed you our Commiſſioners; and, by theſe preſents, do give unto you, or any two or more of you, full power and authority to enter upon and poſſeſs, all and ſingular the meſſuages, lands, tenements, and hereditaments, of him the ſaid* Edward Willis, *and of taking and ſequeſtering the ſame; and alſo all his perſonal Eſtate, of what kind ſoever, into the hands of you, or any two or more of you; and therefore we command you, or any two or more of you, that at ſuch time and place, or times and places, which you, or any two or more of you, ſhall appoint for that purpoſe, you do aſſemble, go to, and enter upon all and ſingular the ſaid meſſuages, lands, tenements, hereditaments, and premiſes, of him the ſaid* Edward Willis; *and, from time to time, take and ſequeſter the ſame, and the rents and profits*

*profits thereof; and also all his personal Estate, of what kind soever, into the hands of you, or of any two or more of you, until the said* Edward Willis *shall have appeared to the said Bill, and our said Court shall have made further order therein* (1). *In witness whereof, we have caused these our letters to be made patent. Witness, &c. at* Westminster, *the day of in the year of our reign.*

*By order of Court, made the same day, and by the Barons.*

ELIOT.

The Sequestration is personally served on the tenants by two of the Commissioners, which is considered as a seizing and sequestering under the authority of the Writ. An order is then procured for the tenants to attorn to the Commissioners, who are amenable to the Court for the rents and profits. This order is also personally served. Should the execution of

(1) See the difference between commissioners acting under a Sequestration for want of appearance, and that for want of an answer. *Bunb.* 272.

the

the Writ be forcibly obſtructed, a Writ of *Aſſiſtance* may be ſued out, directed to the Sheriff of the County, &c. commanding him to aſſiſt the ſaid Commiſſioners in ſuch execution.

The reader perceives that the ſeveral proceſſes we have been enumerating, as iſſuing againſt a Defendant to compel his appearance to the Plaintiff's Bill, would be ineffectual againſt an aggregate *Corporation*; which being "inviſible, and exiſting only in intendment and conſideration of law[a]," cannot be ſerved with any perſonal proceſs. The method, therefore, of inforcing appearance from a Corporation, is by a *Diſtringas*, awarded againſt their lands and tenements, and directed to the Sheriff of the county, or place where ſuch corporate body is reſident.

A Diſtringas for this purpoſe, in *Chancery*, runs thus:

[a] 10 *Rep.* 32.

A Dis-

## *A* DISTRINGAS *in* CHANCERY.

GEORGE *the Third, &c. To the Sheriff of the City of* London, *greeting: We command you to make a diftrefs on the lands and tenements, goods and chattels, of the Mayor, Commonality, and Citizens of our faid City of* London, *within your Bailiwick; fo as neither the faid Mayor, Commonality, and Citizens, nor any other perfon or perfons for him, may lay his or their hands thereon, until our Court of Chancery fhall make other order to the contrary; and, in the mean time, you are to anfwer to us for the faid goods and chattels, and the faid rents and profits, of the faid lands, fo that the faid Mayor, Commonality, and Citizens, may be compelled to appear before us in our faid Court of* Chancery, *wherefoever it fhall then be, there to anfwer to us, as well touching a contempt, &c.* (as in the Attachment). *Witnefs, &c.*

ARDEN.

WINTER.

In the *Exchequer* it is as follows:

*A* DIS-

## *A* DISTRINGAS *in the* EXCHEQUER.

*George, &c. To the Sheriff of the City of* London *greeting: We command you that you omit not, by reafon of any liberty, but enter the fame, and diftrain the Mayor, Commonality, and Citizens of our faid City of London, by all their lands and chattels in your Bailiwick, fo that they, or any others, by their orders, lay hands on them, until you are otherwife commanded by us concerning the fame, and that you anfwer to us the iffues of the faid lands, and have their bodies before the Barons of our* Exchequer *at* Weftminfter, *on the day of next, to appear to and anfwer a certain Englifh Bill lately exhibited againft them before the Chancellor and Barons of our faid* Exchequer, *by* James Willis, *Plaintiff, and that you then have there this Writ. Witnefs, &c. at* Weftminfter, *the day of in the year of our reign.*

ELIOT.

Indorfed, "*At the Suit of* James Willis *by Bill.*"

FOWLER.

After

After which, if the corporation continue in contempt, there issues an *alias* and a *pluries* Distringas (these differ from the first Distringas only by the addition of "as we have formerly commanded you" in the *alias*, and "as we have many times before commanded you" in the *pluries*), and lastly, the sequestration is awarded against their lands, &c. as in other cases; with this difference only, that when the sequestration is once awarded against a corporation, it cannot, as against private persons, be stayed on entering their appearance*.

After order is obtained for a sequestration against the Defendant, the Complainant's Bill is taken *pro confesso*, and a decree made accordingly (1); and the sequestrators, proceed under

* *Prec. Chan.* 129.—2 *Vern.* 395.

(1) As all the processes of contempt which we have been adducing, and which at length entitle the Plaintiff to a decree *pro confesso*, are founded on the Defendant's disobedience to the *Subpoena*, by absconding to avoid that Writ, he might formerly have eluded justice; to remedy which it was provided by 5 *Geo.* II. c. 25. That where the Defendant

der the controul and authority of the Court, actually to sequester the estates of the Defendant agreeably to the tenor of the Writ, in order to make satisfaction to the Plaintiff for the injuries complained of in his Bill. This Writ of Sequestration, therefore, as Sir *William Blackstone* remarks[*], since it never issues till after the Plaintiff has obtained a decree on confession, seems rather intended to enforce the performance of the decree of the Court, than to be in the nature of process to bring in the Defendant; and it is the only remedy by the constitution of our Courts of Equity that a Plaintiff has, in case the Defendant absolutely refuse to appear; for unless he come in and

Defendant cannot be found to be served with process of *Subpoena*, and absconds, as is believed, to avoid being served therewith, a day shall be appointed him by the Court to appear to the Plaintiff's Bill, which, being inserted in the London Gazette, read at the parish church where the Defendant last resided, and fixed up at the Royal Exchange, if the Defendant do not appear on the day appointed, the Bill shall be taken *pro confesso*.—A law something similar to this composed one of the twelve Tables of the Roman Code. See 2 *Hooke's Hist.* 316.

[*] 3 *Com.* 444.



contest

conteſt the Suit, the Court has no authority to inveſtigate the merits of the ſubject, "nor can there be any proof againſt an abſent perſon." The benefit of the Sequeſtration therefore, which anſwers to the *primum decretum* of the Roman Law, and to the *quantum damificatus*, or damages of the Common Law, is the only ſatisfaction the Plaintiff can attain (1).

If, however, the Defendant, either voluntarily, or upon return of either of the preceding proceſſes, appear to the Complainant's Bill, he is then within a like definite time

(1) To obviate the injuſtice which muſt frequently ariſe to the Plaintiff from the Defendant's obſtinately refuſing to come to iſſue with the Plaintiff reſpecting the matters in diſpute, the Roman Law entertained a *fictitious* conteſtatio litis, which they called a *quaſi* conteſtatio. This they ſuppoſed to take place immediately after the proclamation or *primum decretum*; upon which, if the Defendant neglected to appear, they allowed the Plaintiff to proceed to his proof, which if he eſtabliſhed, the *ſecundum decretum* adjudged him the thing demanded. See *For. Rom.* 321.—*Gibs. Cod.* T. xliv. c. 2, 4.

limited

limited by the practice of the Court (1), to give

(1) This in *both* Courts is eight days, exclusive of the day of appearance; but if the Defendant cannot complete his defence within that time, the Court, upon application, will grant him such further time as may be requisite: and by the indiscriminate indulgence of the Court he is now in all cases entitled, as of course, to the allowance of three applications; the first for six weeks, the second for a month, and the third for three weeks, if he reside beyond the range of the Court (which in Chancery is now twenty, though formerly but ten miles, and in the Exchequer fifteen); and if he reside within those distances, the time allowed him on each application is a month for the first, three weeks for the second, and a fortnight for the third: but if he require still further time, the Court will require to be satisfied of the necessity of such unusual indulgence, and generally obliges him to enter an Appearance with the Register in six days, "thereby consenting that the Serjeant at Arms attending the Court shall go against him as in a Commission of Rebellion returned *non est inventus*, in case he do not put in his defence within the time limited by the order." See *For. Rom.* 83.—*Hinde* 144.

By the ancient Civil Law, where the libel was preferred to the Judge, a copy was delivered to the *Reus*, or Defendant, who was to make his defence in ten days; if he suffered this time to elapse, the *edictum primum* issued against him, and after ten days more, the *edictum secundum*; after a further period of ten days, the *edictum peremptorium*; and lastly, if he still held out for the space of ten days longer, judgment was given against him on default; and these were called the *dilationes*, or times to answer;

give in upon oath the matter he has to offer in his defence. Of this we are now to enquire.

ſwer: But after the eſtabliſhment of provincial judges, the *dilationes* were aboliſhed, and the *Actor* or Plaintiff, upon citing the *Reus*, was required to enter into ſurety to end his Suit in two months, and at the ſame time to deliver a copy of his libel to the Reus, who ſuperſcribed an acknowledgment of its receipt; after which, he was allowed twenty days to deliberate whether he would yield to the Actor's demands, or conteſt the Suit: and at the expiration of theſe twenty days, if no defence came in, he was preſumed to acquieſce in the Plaintiff's claims, and judgment was given accordingly—*Nov.* 53. c. 3.—*Code, lib.* 3. *Tit.* 9.

But at the inſtitution of our Court of Chancery, the time allowed by the Civil Law being thought too long, and that by the Canon Law (where it was appointed at the diſcretion of the Judge) too uncertain, the Subpœna or citation was at firſt made returnable on a day certain in Term, which (the whole Term being conſidered as but one day in law) gave him the whole of that Term to deliberate; at the expiration of which he was to put in his defence: but this being found inconvenient and partial, on account of the different lengths of the ſeveral Terms, and the different periods of the Term at which the Subpœna might be ſerved, they at length came to the general rule we have mentioned in the beginning of our note. See *For. Rom.* 89.

Of

## Of Defence to a Suit in Equity.

THE Defendant, having appeared to the Plaintiff's Bill, proceeds to defend himself against its allegations. This he may do, according to the nature of his case, by *Disclaimer*, by *Demurrer*, by *Plea*, by *Answer*; or, lastly, by *Bill* exhibited against the Plaintiff. As,

If the Defendant have no interest in the subject concerning which the Bill is exhibited, (which is not unfrequently the case in respect to one or other of the various Defendants who from an over-abundance of caution are sometimes made parties to a Suit[a]) he may avoid the Plaintiff's Bill by

### *A* Disclaimer.

The technical form of this species of defence is usually as follows:

[a] See *Richardson* v. *Hubbert.* 1 *Anstr.* 65.

*The Disclaimer of* Samuel Dickenson, *one of the Defendants to the Bill of Complaint of* James Willis, *an Infant, by* John Willis, *his Father and next friend, Complainant.*

THIS *Defendant saving and reserving to himself now, and at all times hereafter, all manner of advantage and benefit, of exception and otherwise, that can or may be had and taken, to the many untruths, uncertainties, insufficiencies, and imperfections in the said Complainant's said Bill of Complaint contained* (1), *for answer thereunto, or unto so much and such part thereof as is material for this Defendant to make answer unto, he answereth and saith,* THAT *he this Defendant doth fully and absolutely disclaim* (2) *all, and all*

(1) See *post*, p. 115. n. (1).

(2) The form we have here given is of a *Disclaimer* only, because that alone is the Defence we are at present considering; but it is rightly observed by Sir *J. Mitford*, (*Plead. Chan.* 253. and see 1 *Anstr.* 78.) that a *Disclaimer* can hardly be put in alone, for though the Defendant may have been made a party by mere mistake, having never had an interest in the subject of the Suit, yet as the contrary likewise may be the case,

*all manner of right, title, interest, and claim whatsoever in and to the Legacy of £.* 800 *in the Complainant's said Bill of Complaint mentioned, and all other the estate and effects of the said* Thomas Atkyns, *deceased, in the said Bill of Complaint named, and in and to every part*

and he may formerly have had an interest which he has since parted with, the Plaintiff may require the *Disclaimer* to be accompanied by an *Answer*, as to whether that be the case or not; and this is rendered still more necessary by the modern form of Bills in Equity, which requires a full and particular answer of the Defendant, not only as to whether the facts be as charged in the Bill, but how otherwise, and in what particulars they vary therefrom; and, consequently, there is no Disclaimer alone to be met with in any of the books of practice. The form we have given above therefore should, generally speaking, be introduced by an averment

THAT *the said Defendant doth not know that he this Defendant, to his knowledge or belief, ever had, or did claim, or pretend to have or claim, nor doth he now claim, or pretend to have, any right, title, or interest of, in, or to the said Legacy of £.* 800, *or other the estates and effects of the said* Thomas Atkins, *deceased, in the said Complainant's Bill set forth, or any part thereof, either by gift, grant, assignment, or otherwise howsoever, or of, in, or to any other the matters and things in the said Complainant's said Bill charged and set forth; nor did this Defendant ever, nor now doth, intermeddle or concern himself therein or thereabout, or in or about any part thereof, in any manner howsoever:* AND *this Defendant doth disclaim, &c.*

 *thereof;*

*thereof;* And *this Defendant doth deny all and all manner of unlawful combination and confederacy unjustly charged against him in and by the said Complainant's said Bill of Complaint, without that any other matter 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 unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this Defendant is ready to aver, maintain, and prove, as this Honourable Court shall award, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained* (1).

If there appear on the face of the Complainant's Bill (2) any defects or objections which may be offered in bar of the Plaintiff's

(1) See *post*, p. 121. n. (1).

(2) It is essential, in order to support the species of Defence we are going to speak of, that the objection be apparent upon inspection of the Bill itself; for if it be founded on matter *dehors* the Bill, it must be offered by way of *Plea*; as see *post*, p. 109. and 1 *Vez.* 426.

Suit;

Suit; as if the Bill be ſo framed as to be inſufficient to ground a definitive decree upon [a]; the Plaintiff appear by his own ſtatement to have no intereſt in the ſubject of the Suit [b]; the Bill require a diſcovery which would ſubject the Defendant to a penalty or forfeiture (1), or if any other objectionable matter appear on the *face of the Bill* (2), ſuch objections may be offered to the Court by *Demurrer*.

*A* DE-

[a] *Rep. Temp. Finch* 82. 1 *F. Vez.* 449.

[b] 2 *Atk.* 210. 2 *Anſtr.* 478.

(1) *Brownſword* v. *Edwards*, 2 *Vez.* 243, *Oliver* v. *Haywood*, *et al.* 1 *Anſtr.* 82, *City of London* v. *Ainſley*, *ib.* 158. But in theſe caſes he may, without demurring (or pleading) to the Bill, inſiſt upon the ſame matter on exceptions. See *poſt*, and 3 *Brow. Ch. Ca.* 38.

(2) The principal of theſe caſes are collected and referred to, *Mit. Plead.* 97 *et ſeq.* and 148 *et ſeq.*—See alſo 2 *Brow. Ch. Ca.* 319.—4 *ib.* 11. 480.—2 *F. Vez.* 97. 459.—2 *Anſtr.* 543. A want of juriſdiction is generally held to be good cauſe of Demurrer, and is ſo ſtated to be by Sir *J. Mitford*, (*Plead. Chan.* 102.) and ſee 1 *F. Vez.* 372.—But in *Roberdeau* v. *Rous et Ux.* 1 *Atk.* 543. it was ſaid by *Hardw.* Chan. that the Defendant "ſhould not have demurred for want of juriſdiction, for a Demurrer is always in bar, and goes to the *merits* of the caſe, and therefore it is informal and improper in that reſpect, for he ſhould have pleaded to the juriſdiction." Demurrers, however, are now univerſally allowed

*A* DEMURRER,

For the reaſons therein given, demands the judgment of the Court, whether the Defendant can be compelled to anſwer the Plaintiff's Bill (1), and is uſually in the following form:

*The joint and ſeveral Demurrer of* Edward Willis *and* William Willis, *two of the*

allowed to lie to the juriſdiction of the Court, and ſeemingly with good reaſon; for it can ſeldom happen (nor perhaps ever, if the caſe be accurately and explicitly ſtated) that it will not appear *upon the face of the Bill*, whether the caſe be within the juriſdiction of the Court.

But it is to be obſerved, that the ſame cauſes of Demurrer will not always extend to *every ſpecies* of original Bill: thus, for inſtance, no Demurrer will hold to a Bill of *Diſcovery* for want of Parties, nor, in general, for want of Equity, as the Plaintiff in neither caſe ſeeks a decree of the Court. See *Mit. Plead.* 163. See *Daubigny et al.* v. *Davallix et al.* 2 *Anſtr.* 462.

(1) It is here to be obſerved, that in order to diſcountenance the too prevalent practice of offering pleas in bar, merely to gain time, the Courts will not receive a Demurrer, (unleſs upon ſpecial grounds) after Attachment with Proclamation has iſſued againſt the Defendant for want of his appearance or anſwer. *For. Rom.* 92.—3 *Brow. Ch. Ca.* 372.

*Defen-*

*Defendants to the Bill of Complaint of* James Willis, *an Infant, by his Father and next friend, Complainant.*

THESE *Defendants by Protestation not confessing or acknowledging all or any of the matters in and by the said Bill set forth and complained of to be true in manner and form as the same are therein and thereby set forth and alledged* (1), *severally say they are advised that there is no matter or thing in the Complainant's said Bill of Complaint contained, good and sufficient in law to call these Defendants to account in this Honourable Court for the same; but that there is good cause of Demurrer thereunto, and they do demur thereunto accordingly, and for causes of Demurrer say*

(1) As it is imagined that a Defendant would in no case endeavour to evade the Plaintiff's Bill by Demurrer, when he could venture *bona fide* to deny the truth of its allegations upon oath, it is become an established rule of judgment in Courts of Equity, that every thing to which the Demurrer extends is true; See 1 *Vez.* 426.—1 *F. Vez.* 78. 289. 1 *Anstr.* 1. Hence arose the practice of introducing the Demurrer by a protestation against the truth of any of the facts alledged by the Bill; but it has no weight with the Court, and is entirely useless. See *post*, p. 115, n. (1).

*say, that the Complainant's said Bill of Complaint, in case the same were true, which these Defendants do in no wise admit, contains not any matter of Equity whereon this Court can ground any decree, or give the Complainant any relief or assistance as against them these Defendants* (1): *Wherefore, and for divers other errors and defects in the Complainant's said Bill of Complaint contained, and appearing on the face thereof, these Defendants do, as aforesaid, demur in law thereunto, and humbly crave the judgment of this Honourable Court, whether they are compellable or ought to make any answer thereunto otherwise than as aforesaid; And these Defendants humbly pray to*

(1) It is required, by order of Court, that the Demurrer express the grounds upon which it is founded; and in doing this, it must be positive, explicit, and certain, leaving nothing to supposition or inference. See *Edsell* v. *Buchannan*, 2 *F. Vez.* 83.—*Bowman* v. *Lygon*, 1 *Anstr.* 4, *Mynd* v. *Francis*, *ibid* 7.

If the Demurrer does not go to the whole Bill, it must express to what particular parts it is meant to extend; the Court cannot else determine upon the validity of the Demurrer without reading the whole Bill.—*Per Hard. Chan.* 2 *Vez.* 451. See also *Ward, et al.* v. *D. of Northumberland, et al.* 2 *Anstr.* 469.

be

*be hence dismissed with their costs and charges in this behalf most wrongfully sustained.*

A. STAINSBY (1).

But if the defects in the Plaintiff's case are of such a nature as that, though sufficient to bar the Plaintiff's Suit, they cannot, or in fact do not, appear upon a *mere* inspection of the Bill, such matter must be offered in the shape of

## *A* PLEA.

This is defined to be a *special answer*, shewing or relying upon one or more things as a cause why the Suit should be either dismissed, delayed, or barred (2); it does not, like a Demurrer, rest upon facts charged in the

(1) Every species of Defence to a Bill in Equity, is required to be signed by Counsel, as evidence of its propriety and sufficiency; but as a Demurrer alledges no facts, but rests on matters apparent in the Bill, it is not, like an Answer, put in upon the oath of the Defendant.

(2) *Prac. Reg.* 273. and see *Mit. Plead.* 177, *et seq.* and 222, *et seq.*—where the principal cases allowed to be offered by way of *Plea* are cited and referred to. See also *Bowser* v. *Walley*, 1 *Anstr.* 101, *Cooke* v. *Tombs*, 2 *ib.* 420, *Daubigny* v. *Davallon*, *ib.* 462. *Routh* v. *Peach*, *ib.* 519.

the Plaintiff's Bill, but alledges other facts to which the Plaintiff may reply [a]. The form of a Plea may be thus:

*The joint and several Plea of* Edward Willis *and* William Willis, *two of the Defendants to the Bill of Complaint of* James Willis, *an Infant, by* John Willis, *his Father and next friend, Complainant,*

*The said Defendants, by Protestation* (1), *not confessing or acknowledging all or any of the matters and things in the Complainant's said Bill of Complaint contained to be true in such manner and form as the same are therein declared and set forth, do plead thereunto; and for cause of Plea say* (2), *that heretofore, and before*

[a] See *Bicknell* v. *Gough*, 3 *Atk.* 558.

(1) As the truth of the matters alledged by the Complainant's Bill are understood to be admitted by the Defendant so far as they are not controverted by the Plea, the same protestation is prefixed to this species of defence, as we have before seen in respect to a Demurrer; see *ante* p. 107. n. (1).

(2) A Plea, like a Demurrer, and for a similar reason, if it do not go to the whole Bill, must express particularly to what

*fore the said Complainant exhibited his present Bill of Complaint in this Honourable Court;*

what parts it extends; see *Salkeld* v. *Science*, 2 *Vez.* 107. And every fact and circumstance essential to render it a complete equitable bar, must be clearly, distinctly, and positively averred, that the Plaintiff may be enabled to take issue upon its validity, 3 *Atk.* 70.—1 *F. Vez.* 393. The Plea must also be such as to reduce the matter pleaded to a single point, and not consist of a variety of circumstances; for the use of a Plea is to save time and expence: but if two or more facts might be admitted into a Plea, it would in fact occasion that very expence and delay which the policy of admitting Pleas was intended to prevent. See *Chapman* v. *Turner*, 1 *Atk.* 54. and *Whitbread* v. *Brockhurst*, 1 *Brow. Ch. Ca.* 417.—Also 2 *ib.* 559.—4 *ib.* 253.—2 *F. Vez.* 86.—And see *Blacket* v. *Langlands*, 1 *Anstr.* 14. *Pope* v. *Bish*, *ibid* 60. *Freeland* v. *Jones*, 2 *ibid* 407.

Though the Plea be irregular in its shape, yet if it be good in substance, the Court will permit it to be amended; but that this indulgence may not be used for the purpose of delay, it will be granted only upon condition that the party agree to amend by a very short day, and that he explain, as well "how the slip happened," as the nature of the amendment; *Newman* v. *Wallis*, 2 *Brow. Ch. Ca.* 147.—2 *F. Vez.* 85. See also *Pope* v. *Bish.* 1 *Anstr.* 60. and *Freeland* v. *Jones*, *ib.* 407. And, for the same purpose of preventing delay, neither Plea nor Demurrer will be received after Attachment with Proclamation has issued against the Defendant; and so too, a Plea must be set down for argument within eight days after it is filed, or it will be presumed to be abandoned. 3 *Brow. Ch. Ca.* 372.

*to wit, on the 9th day of* February, *which was in the year* 1752, *the said now Complainant, together with* John Willis *his Father, in the said Bill named, did exhibit their Bill of Complaint in this Honourable Court against these Defendants for the same matters, and to the same effect, and for the like relief and purpose as the said now Complainant doth by his present Bill demand and set forth; to which said first Bill of Complaint these Defendants did put in their 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 Honourable Court, and the matters thereof undetermined, and therefore these Defendants do plead the said former Bill, Answer, and Proceedings, in bar to the said Complainant's present Bill, and humbly pray the judgment of this Honourable Court, whether it behoves them to make any further or other answer thereunto than as aforesaid, and pray to be hence dismissed, with their reasonable costs and charges*

*charges in this behalf most wrongfully sustained.*

A. STAINSBY (1).

If, again, there be nothing in the Plaintiff's Bill to which the Defendant can or chuses to *demur*; and he has no exterior matter which it would be proper to offer by way of *Plea*; or if his Plea or Demurrer be overruled; he may proceed to controvert the Plaintiff's claims by *Answer* (2).

*An* ANSWER

" Generally controverts the facts stated in the Bill, or some of them, and states other facts,

(1) Pleas must be signed by Counsel; see *ante*, p. 109, n. (1) They are put in upon the oath of the party, or not, according to the nature of the matter alledged. See *Prac. Reg.* 274.

(2) Courts of Equity are apt, and with reason, to look with a suspicious eye upon Defendants who, by availing themselves of every cause of Demurrer or Plea, shew an unwillingness fairly to meet the Plaintiff's case: it is seldom, therefore, adviseable to have recourse to these modes of Defence, unless to prevent the expence of an examination of witnesses, or to avoid a discovery, which might be detrimental

facts, to ſhew the rights of the Defendant in the ſubject of the Suit; but ſometimes it admits the truth of the caſe made by the Bill, and either with or without ſtating additional facts, ſubmits the queſtions ariſing

mental to the Defendant's juſt and rightful intereſts. And upon this principle of diſcountenancing theſe dilatory Pleas, and encouraging an open and manly defence, have proceeded many of thoſe caſes which we have had occaſion to refer to in the preceding notes. And ſee 3 *Brow. Ch. Ca.* 38.

But, independent of theſe conſiderations, it is ſometimes prudent to forego the benefit of thoſe Defences, and ſubmit to anſwer the Complainant's Bill; by which means the Defendant has frequently an opportunity of preſſing upon the Court by his Anſwer facts and circumſtances in rebuttal of the Plaintiff's claims, which could not, conſiſtently with the eſtabliſhed mode of *pleading*, be offered together with ſuch Defences; ſee *Mit. Plead.* 246.—2 *P. Wms.* 145. And where a Diſcovery is ſought, which, if complied with, might ſubject the Defendant to diſabilities or forfeitures, it may in ſome caſes be more convenient to inſiſt by Anſwer on his non-liability to make the diſcovery, than to plead or demur to it in the firſt inſtance; ſee *Williams* v. *Farrington*, 3 *Brow. Ch. Ca.* 38, and 2 *Peer Wms.* 145.—3 *ib.* 238. —But it is to be obſerved, that if the penalty which the Defendant might be ſubjected to by a Diſcovery, be of ſuch a nature, as that it can be and is waved by the Plaintiff, the Diſcovery muſt be made, for the reaſon upon which the indulgence proceeds no longer then exiſts.

upon

upon the cafe thus made to the judgment of the Court [a]."

The form of an *Anfwer* (as referring to the preceding Bill [b]) may be thus:

*The joint and feveral Anfwers of* Edward Willis *and* William Willis, *two of the Defendants to the Bill of Complaint of* James Willis, *an Infant, by* John Willis, *his Father and next friend, Complainant.*

*Thefe Defendants now, and at all times hereafter, faving and referving to themfelves all manner of benefit and advantage of exception to the many errors and infufficiencies in the Complainant's faid Bill of Complaint contained* (1), *for Anfwer*

[a] *Mit. Plead.* 15.

[b] *Ante*, p. 29.

(1) This prelude to an Anfwer, Sir *J. Mitford* thinks, was originally intended to prevent a conclufion that the Defendant, having fubmitted to anfwer the Bill, admitted every thing which by his Anfwer he did not exprefsly controvert; and efpecially fuch matters as he might have objected to by Demurrer or Plea. *Plead. Chan.* 249. And though it appears at prefent to be entirely ufelefs, and difficult as it in general is, to account, in a fatisfactory manner, for the many

 common

*swer thereunto, or unto so much, and such parts thereof, as these Defendants are advised is material for them to make Answer unto: They answer and say* (1), *they admit that* Thomas Atkins,

common place phrases which obtain in our legal proceedings, framed, we are to presume, when the principles upon which the Courts had been instituted were but little adverted to, or understood; yet the reason suggested seems, in the present instance, to be founded on great probability; as we find that it was never introduced in the case of an Infant, who on account of the imbecillity of his judgment, was, and still is, entitled to the benefit of every exception without expresly claiming it.—A similar form, it is to be observed, preceded the Answer of the Civil Law; "*Sub protestatione de nimia generalitate, ineptitudine, obscuritate, nullitate, et indebita specificatione dicti libelli.*" *Clarke* 35. *For. Rom.* 90.

(1) The Defendant here proceeds to reply to the several charges alledged against him in the Bill, and at the same time introduces such facts and circumstances as may tend to controvert, or to qualify and meliorate them. To all such facts, as it is material for the Defendant to answer, he must speak directly and pointedly, and without equivocation or evasion; confessing, denying, or avoiding not only the letter, but the substance of each charge. It is not enough, therefore, to deny *generally* "all matters charged in the Bill," but it is requisite that each specific Charge should receive a specific Answer: thus where a Defendant was charged with having received particular sums of money,

Atkins, *in the Complainant's Bill named, did duly make and execute ſuch laſt Will and Teſtament in writing, of ſuch date, and to ſuch purport and effect as in the Complainant's ſaid Bill mentioned and ſet forth; and did thereby bequeath to the Complainant,* James Willis, *ſuch Legacy of £.800, in the words for that purpoſe mentioned in the ſaid Bill, or words to a like purport or effect. And theſe Defendants, further anſwering, ſay, they admit that the ſaid Teſtator,* Thomas Atkins, *did by ſuch Will appoint theſe Defendants,* Edward Willis *and* William Willis, *Executors thereof; and that the ſaid Teſtator died on, or about, the 20th day of De-*

money, ſpecified in the Bill, it was held to be inſufficient for the Defendant to refer by his Anſwer to a ſchedule containing, as he averred, a full account of all ſums of monies received by him; for per *Thurlow Chancellor*, the Defendant is bound to "anſwer *ſpecifically* to the *ſpecific* charges in the Bill." *Hepburn* v. *Durand.* 1 *Brow. Ch. Ca.* 503. But though the Anſwer muſt be full and explicit, it muſt at the ſame time be conciſe and pertinent. See *Hilton* v. *Barrow.* 1 *F. Vez.* 284. Alſo *ante*, p. 31. n. (*z*) where the obſervations made on the rules to be obſerved in the form of *Bills*, will *mutatis mutandis* equally apply to the ſubject of the preſent note. As to Supplemental Anſwers—ſee *Amb.* 292.—2 *Anſtr.* 443. —*ib.* 490.

 *cember,*

*cember*, 1748, *without revoking or altering the ſaid Will. And theſe Defendants, further anſwering, ſay, that they admit that they, theſe Defendants, ſometime afterwards, to wit, about the month of January*, 1750, *duly proved the ſaid Will in the Prerogative Court of the Archbiſhop of Canterbury; and took upon themſelves the burthen of the execution thereof, and theſe Defendants are ready to produce the ſaid probate as this Honourable Court ſhall direct. And theſe Defendants, further anſwering, admit, that the ſaid Complainant*, James Willis, *by his ſaid Father and next friend, did ſeveral times, ſince the ſaid Legacy of* £.800 *became payable, apply to them, theſe Defendants, to have the ſame paid or ſecured for the benefit of the ſaid Complainant, which theſe Defendants declined, by reaſon that the ſaid Complainant was, and ſtill is, an Infant, under the age of* 21 *years. Wherefore theſe Defendants could not, as they are adviſed, be ſafe in making ſuch payment, or in ſecuring the ſaid Legacy in any manner for the benefit of the ſaid Complainant, but by the order and direction, and under the*

*the ſanction of this Honourable Court. And theſe Defendants, further anſwering, ſay, that by virtue of the ſaid Will, of the ſaid Teſtator, they poſſeſſed themſelves of the real and perſonal Eſtate, goods, chattels, and effects of the ſaid Teſtator, to a conſiderable amount; and do admit that aſſets of the ſaid Teſtator are come to their hands ſufficient to ſatisfy the Complainant's ſaid Legacy, and which aſſets they admit to be ſubject to the payment thereof, and are willing and deſirous, and do hereby offer to pay the ſame as this Honourable Court ſhall direct, being indemnified therein; and theſe Defendants deny all unlawful combination and confederacy in the ſaid Bill charged* (1), *without that that any other matter*

(1) Since note (t) p. 33, was printed off, I have had occaſion to peruſe a Bill, drawn by a very eminent Draftſman, in which the charge of Confederacy has been purpoſely omitted. When the allegation is not made in the Bill, it can ſcarcely be neceſſary to ſay that it need not be denied by the Anſwer; but I cannot omit this opportunity to remark, that as every ſpecies of unneceſſary prolixity tends to multiply the expence of obtaining juſtice, without anſwering any uſeful purpoſe, it were much to be wiſhed that theſe ſuperfluous clauſes were univerſally expunged from our legal proceedings.

*matter or thing material or neceſſary for theſe Defendants to make Anſwer unto, and not herein, or hereby, well and ſufficiently anſwered unto, confeſſed, or avoided, traverſed or denied, is true to the knowledge or belief of theſe Defendants* (1). *All which matters and things theſe Defendants are ready to aver, maintain, and prove, as this Honourable Court ſhall direct; and humbly pray to be hence diſmiſſed with their*

ceedings. Such a practice would be perfectly conſiſtent with the enlightened and ſcientific knowledge of the preſent age, and, in the Author's opinion, do great credit to the diſintereſtedneſs of a liberal profeſſion.

(1) This ſentence, though ſo aukwardly expreſſed as to be utterly unintelligible if conſtrued with grammatical accuracy, is intended to import a general traverſe of every thing in the Plaintiff's Bill not particularly anſwered. "It ſeems to have obtained formerly, and in ancient times, when the Defendant uſed only to ſet forth his caſe in the Anſwer, without anſwering every clauſe in the Bill." (*per Macclesfield, Chancellor.* 2 *Peere Wms.* 87.) and where the Bill is otherwiſe ſufficiently anſwered, is now held to be unneceſſary. And in the caſe of Infants, whoſe Anſwer cannot be excepted to for inſufficiency, it is likewiſe omitted: as is alſo the previous charge of Confederacy, Infants being, for want of diſcretion, incapable of an act of Confederacy.

*reaſonable*

*reasonable costs and charges, in that behalf most wrongfully sustained* (1).

G. MADDOCKS (2).

There is still another species of Defence which it is sometimes necessary for a Defen-

(1) This Petition for the expences, which the Defendant has sustained by the Plaintiff's Bill, is the only Prayer which can be introduced into an Answer; and it must be observed with regret that it is the only indemnity which the Defendant can obtain for the unjust and aggravating calumnies which are not unfrequently made the subject of a Bill in Equity. The simple expedient of requiring an Oath of the Plaintiff, as to his *belief* in the truth of his allegations, it is presumed, would effectually put a stop to the practice of converting *Bills* into vehicles of defamation, without superinducing any possible inconvenience.

(2) "An Answer must be signed by counsel, unless taken by commissioners in the country, under the authority of a Commission issued for that purpose; in which case the signature by counsel is not required." *Mit. Plead.* 250. See also *post*, p. 123. By the ancient practice of the Courts of Equity, the Defendant was examined upon the allegations of the Bill, in *Chancery*, by one of the Masters, and in the Exchequer by a Baron of the Court. But this has long since devolved on the Gentlemen at the Bar in London, and *Commissioners* in the Country; and it is to be hoped without any cause of regret, either on the part of the Court or it's Suitors.

dant

dant to refort to, in conjunction with one or other or all of thofe we have already mentioned; as where the Defendant is unable to make a complete Defence to the Plaintiff's Bill, without the poffeffion of fome facts which reft in the knowledge of the Plaintiff himfelf, or fome of the Co-Defendants to the Suit, it may become expedient, for the purpofe of procuring fuch difcovery, to exhibit a CROSS BILL againft the Plaintiff or fuch Co-Defendant (1). This Bill differs from an original Bill no otherwife than as arifing from matter already in litigation, it is not neceffary to alledge any ground of Equity to fupport the jurifdiction of the Court.

Thefe feveral Defences if the Defendant live within the range of the Court, i.e. within 20 miles in Chancery and 15 in the Exchequer, are required to be figned by counfel; and, in ge-

(1) "The Crofs Bill is a *Defence*, and always confidered fo." *Per Hard. Ch. Kemp* v. *Mackrell.* 3 *Atk.* 812.

neral

neral (1), put in upon the Oath of the party, before a Mafter in Chancery, or a Baron in the Exchequer; after which they are depofited in the office of the SIX CLERKS of the refpective Courts.

But if the Defendant refide beyond the range of the Court, a *Dedimus Poteftatem* iffues (2) to Commiffioners, appointed for the purpofe of taking his Anfwer at the place of his refidence; in which cafe the Anfwer, or other Defence, need not be figned by counfel,

(1) The Crofs Bill is, of courfe, excepted, and fee preceding notes. An exception is alfo to be noted in refpect to the Attorney General, who acting by inftruction only, and being, perfonally, a ftranger to the real merits of the cafe, is not required to make Oath of the truth of his Defenfive Allegations.

(2) This is applied for by *motion* to the Court, and if the Defendant regularly appeared to the Plaintiff's Suit, and be not in contempt, it is granted as of courfe; but if the Defendant be in contempt to an "Attachment with Proclamation," the *Dedimus* will not be iffued till he has either offered fatisfactory reafons for his default, or an affidavit be produced of his inability to travel: for as the Dedimus is grantable only by the courtefy of the Court, it is with reafon withheld whenever the Defendant has fhewn himfelf unworthy of fuch an indulgence.

as the Commissioners are held to be answerable for the propriety of its contents (1).

The form of this Commission in *Chancery* is as follows:

*A* DEDIMUS POTESTATEM *in* CHANCERY *to take a Defendant's* PLEA, ANSWER, *or* DEMURRER (2).

(1) The responsibility of the Commissioners for the propriety of the Defendant's Answer, is grounded on the ancient practice of inserting the tenor of the Plaintiff's Bill in the *Dedimus*, when the Commissioners examined the Defendant *viva voce* upon the several interrogatories it contained; but, "by degrees, the inserting the tenor of the Bill in the Commission was done in so loose a manner in the office, that it became a mere ballad, and was of no real use to the parties, or assistance to the Commissioners in framing the Answer; but was a fruitless and unnecessary expence." *Batley* v. *Pearson.* 3 *Atk.* 439. It was therefore abolished by 4 and 5 *Anne*, c. 16.

(2) A *Dedimus* empowering the Commissioners to take a *Demurrer*, as well as a Plea or Answer from the Defendant, is called a *special Dedimus*; but as this is more usually applied for than the ordinary *Dedimus*, for taking a Plea or Answer only, I have preferred inserting the former kind; distinguishing, however, by inverted commas, such passages as are omitted in the latter.

GEORGE

GEORGE *the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To* Andrew Simson, Giles Mahew, William Fife, *and* Peter Sandes (1), *greeting: whereas* James Willis *has lately exhibited his Bill of Complaint before us, in our Court of Chancery, against* Edward Willis *and* William Willis, *Defendants; and whereas we have, by our Writ, lately commanded the said Defendant,* Edward Willis, *to appear before us in our said Chancery, at a certain day now past, to answer the said Bill; Know ye that we have given unto you, or any three or two of you, full power and authority, "in pursuance of the special order of our said Court," to take the Answer of the said Defendant,* Edward Willis,

(1) Any number of Commissioners may be inserted in the *Dedimus*; there are seldom, however, more than four; two nominated on behalf of each party. The order of naming them in the Commission is usually to put the Defendant's Commissioners first, and afterwards the Plaintiff's. One Commissioner on each side is sufficient to take the Answer, and if neither of the Plaintiff's Commissioners attend, it may be taken by those for the Defendant.

*on*

*on his corporal Oath* (1) *upon the Holy Evangelists* (2) *; " or his Plea upon his corporal Oath," to be administered by you, or any three or two of you; " or his Plea or Demurrer without Oath," to be respectively made to the said Bill; and therefore we command you, or any three or two of you, that at such day and place as you shall think fit, you go to the said Defendant, if he cannot conveniently come to you, and take his several Answer, Plea, or Demurrer respectively, as aforesaid, to the said Bill, the same being plainly and distinctly written upon parchment; and when you shall have so done, you are to send the same closed up under the seals of you, any three or two of you, unto us in our said Court of Chancery, without de-*

(1) Or if the Defendant be a Peer or Peeress, "upon his personal Honour." If a Quaker, "upon his solemn Oath or Affirmation," to be made before you, according to the form and tenor of the statute in that case made and provided. If a Corporation, "under the common seal of the said Corporation," &c.

(2) If the Defendant be a Jew, instead of "Holy Evangelists," the words, "upon the Sacred Pentateuch or Five Books of Moses," are inserted.

*lay,*

*lay* (1), *wheresoever it shall then be, together with this Writ. Witness ourself at* Westminster, *the day of in the 36th year of our reign.*

ARDEN,

Indorsed "*By the Court.*" WINTER (2).

In the *Exchequer* the form of the *Dedimus* is thus:

GEORGE *the Third, &c. To our beloved* Andrew Simpson, Giles Mahew, William Fife, *and* Peter Sandes, *greeting: Know ye*

(1) Strictly the return of the *Dedimus* should be regulated by that of the *Subpœna*; as if the *Subpœna* be made returnable on the first day of a Term, the Dedimus should return on the last day of the same Term; and if the Subpœna return on the last day of any Term the Dedimus should be returnable on the first of the ensuing Term: it is most usual, however, to make it returnable "without delay," which by the practice of the Courts is understood to mean the *first* return of the ensuing Term, if it issue during a *Term*, and the last return if it issue in the *Vacation*. It is nevertheless frequently made to suit the convenience of the Parties, and varied according to the distance of their residence from London.

(2) The Master of the Rolls, and Defendant's Six-Clerk.

*that*

*that we have assigned you, and do hereby give to you, or any two or more of you, full power and authority to examine* Edward Willis, *Defendant, touching the matters contained in a Bill of Complaint lately exhibited against him and others, before the Chancellor and Barons of our* Exchequer, *at* Westminster, *by* James Willis, *Complainant, and to make his Answer thereon, and engross the same on parchment; and therefore we command you, that at such day and place, or days and places, as any two of you shall appoint, you, or any two or more of you, do carefully examine the said Defendant, touching the matters aforesaid, upon his corporal Oath, to be by him taken on the Holy Gospels of God, before you, or any two or more of you, and do take his Answer thereon, and engross the same on parchment, and that the said Defendant do sign the same, and do send the same, taken in form aforesaid, before the Barons of our Exchequer, at* Westminster, *on the day of next, closed up under the hands and seals of any two or more of you, together with this Writ. Witness the Right Honourable Sir* Archibald Macdonald,

nald, *Knt. at* Weſtminſter, *the* *day of*
*in the 35th year of our reign.*

*By order of Court made the ſame day, and by the Barons.*

ELIOT.

The Anſwer being duly taken, and ſworn to by the Defendant, it is tranſmitted with the *Dedimus* to the Court, either perſonally by one of the Commiſſioners, or by a meſſenger, who, receiving it immediately from them, ſwears "that it has not been opened, or altered, ſince he ſo received it;" it is then depoſited and filed in the office of the Six Clerks of the Court, there to remain as of record.

If the Plaintiff conceive that the admiſſions of the Defendant's Anſwer are alone ſufficient to ſubſtantiate his caſe, and entitle him to a decree of the Court, he may proceed to ſet down the cauſe for hearing on *Bill* and *Anſwer*; but if the diſcovery be incomplete, or the allegations of the Bill be inſufficiently

replied to, the Plaintiff may prefer *exceptions* to the Defendant's Anſwer, and pray that it may be rendered more full and particular in the points excepted to. Theſe Exceptions will be the next object of our conſideration.

Of

## OF EXCEPTIONS TO A DEFENDANT'S ANSWER.

IF the Anfwer of the Defendant, when filed, appear to be defective or evafive (1), the Plaintiff may take advantage of fuch infufficiency by *Exceptions* (2), in like manner

(1) Or if the Plea or Demurrer of the Defendant be overruled upon hearing, and the Defendant *anfwer* alfo, (even by denying Combination) the Plaintiff muft except to the Defendant's Anfwer, otherwife he will not be obliged to amend it; but if the Demurrer or Plea be to the whole Bill, this is not neceffary. See *Cotes* v. *Turner*, *Bunb.* 123.

(2) In moft of the proceedings which have hitherto been the fubject of our obfervation, we have found an opportunity (of which we have frequently availed ourfelves) to remark the refemblance that generally prevails between the practice of our Courts of Equity and that of the ancient Civil Law; but the fimilarity here fails: Exceptions to the Defendant's Anfwer are purely creatures of our own; the *dilationes*, or *exceptions* of the Civil Law, being confined to the *libellus articulatus*, or *Bill*, and anfwering, in a great meafure, to the *Plea* and *Demurrer* of our Courts. In truth the *refponfio* of the Civil Law could hardly admit of Exceptions, for there the Defendant was examined upon the charges of the libel, *viva voce* by the judge, who obliged him, on pain of

 Contumacy,

manner as we have feen the Defendant might avail himfelf of Objections to the Plaintiff's Bill by *Plea* or *Demurrer*.

The form of thefe Exceptions is the fame in both Courts, and is this :

EXCEPTIONS *to an* ANSWER *in the Courts of* CHANCERY *and* EXCHEQUER.

*In* CHANCERY.

*Between* James Willis, *by* John Willis *his Father and next friend, Complainant,*

Contumacy, to give direct and unequivocal anfwers to each article; and this was formerly the practice, we have before obferved, in our own Courts; the Mafters in *Chancery*, and the Barons of the *Exchequer*, having been ufed to take the Defendant's Anfwer to the feveral Interrogatories of the Bill from his own mouth. See *ante*, p. 12. n. (2). and *For. Rom.* 91. But th having been afterwards left to Counfel and Commiffioners, fometimes proved to be fo negligently performed, as to render the admiffion of Exceptions neceffary in juftice to the parties.

But no Exceptions will hold to the Anfwer of an Infant. See *ante*, p. 120. n. (1). and *Sturdwick* v. *Pargiter*. *Bunb.* 338. Alfo 4 *Brow. Ch. Ca.* 256. Nor to an Anfwer put in without *Oath*. *Hill* v. *E. of Bute*. 2. *Fow.* 11.

and

*and* Edward Willis *and* William Willis, *Defendants.*

EXCEPTIONS *taken by the ſaid Complainant to the Anſwer put in by the ſaid Defendants to the Complainant's Bill of Complaint in this Cauſe.*

Firſt—*For that the ſaid Defendants have not, according to the beſt of their reſpective knowledge, information, and belief, ſet forth and diſcovered in their ſaid Anſwer, whether the ſaid Teſtator,* Thomas Atkins, *in the Complainant's ſaid Bill named, duly made and executed ſuch laſt Will and Teſtament, in writing, of ſuch date, and of ſuch purport and effect, as in the ſaid Bill mentioned, &c.* (purſuing the words of ſuch Interrogatories of the Bill as are not ſufficiently anſwered) (1).

(1) See *ante*, p. 37. Theſe Exceptions muſt ſtate particularly, and with accuracy, the points in which the Defendant's Anſwer is defective, or they will be rejected as vague and impertinent. Care ſhould alſo be taken that no point be omitted to which Exception can be taken, as no new Exceptions can afterwards be added. See *Wickins* v. *Pratt. Bunb.* 246.

 Secondly

Secondly—*For that the ſaid Defendants have not, according to the beſt of their knowledge, information, and belief, anſwered and ſet forth whether the ſaid Complainant hath or hath not, by his ſaid Father and next friend, applied to the ſaid Defendants, &c. &c. or how otherwiſe.*

*In all which, and divers other particulars, the ſaid Complainant is adviſed, and humbly inſiſts, the Anſwer of the ſaid Defendants is altogether evaſive, imperfect, and inſufficient: Wherefore the ſaid Complainant doth except thereto, and humbly prays that the ſaid Defendants may be compelled to amend the ſame, and put in a full and ſufficient Anſwer to the Complainant's ſaid Bill.*

A. MANNING.

Theſe Exceptions, like other pleadings in the Courts of Equity, are required to be ſigned by counſel, as a teſtification of their propriety, and after being fairly tranſcribed, are

are filed (1) in the office of the Six Clerks of the Court, with the reſt of the pleadings in the Cauſe.

(1) The rule preſcribed by the Court of *Chancery* in reſpect to the time of filing Exceptions to a Defendant's Anſwer is, that if the Anſwer be put in during *Term*, the Plaintiff ſhall have *eight* days after the expiration of the Term; and if in a Vacation, he ſhall have till the ſame period in the Term immediately following. But in the *Exchequer*, where greater diſpatch, as we formerly obſerved, is required out of reſpect to the Supreme Magiſtrate, whoſe debtors the ſuitors of that Court are ſuppoſed to be, the Plaintiff muſt produce his Exceptions within *four* days after the commencement of the next Term, after the coming in of the Defendant's Anſwer, and ſet them down to be argued within four days after they are filed. See *Hinde*, 260. 2 *Fow*. 2; and ſee *Bern*. 53.—3 *Atk*. 19.—If Exceptions are not filed within thoſe periods, the Plaintiff is ſuppoſed to acquieſce in the Defendant's Anſwer; unleſs, indeed, upon application to the Court, he afterwards obtain leave to file them *nunc pro tunc*.

It may here be obſerved, that if the Defendant, together with an Anſwer, have either pleaded or demurred to the *Diſcovery* ſought by the Bill, the Plaintiff is to be careful not to except to the Anſwer till the Plea or Demurrer has been argued, for if he do, he admits their validity; it would elſe be impoſſible to determine whether the Anſwer were ſufficient or not: But this rule does not hold where the Plea or Demurrer goes only to the *relief*, and not to the *Diſcovery* of the Bill. See 3 *Peere Wms*. 326. *Lond. Aſſur*. v. *Eaſt Ind. Comp*. and ſee *Baker* v. *Pritchard*, 3 *Atk*. 389.

 If

If the Defendant allow the propriety of the Plaintiff's Exceptions, he muſt, within the time limited by the courſe of the Court (1), put in a *further* Anſwer (2). But if the Defendant conceive his Anſwer to be ſufficient, an order is, in *Chancery*, obtained to have the proceedings (that is to ſay, the Bill, Anſwer, and Exceptions) referred to one of the Maſters of the Court. Should the Maſter report it inſufficient, the Defendant muſt ſubmit to anſwer more particularly, unleſs, by Exceptions to ſuch Report of the Maſter (3), he appeal to the

(1) This in the *Exchequer* is eight days in a Town Cauſe, and a fortnight in a Country Cauſe, though further time will be allowed on application to the Court; and the Author believes it to be the ſame in *Chancery*. See, however, the obſervations made in the caſe of *Gordon* v. *Pitt*, 4 *Brow. Ch. Ca.* 406. and 2 *F. Vez.* 270.

(2) Of which, in the *Exchequer*, he muſt give notice to the Plaintiff. See 1 *Anſtr.* 86. A further Anſwer is in all reſpects ſimilar to and conſidered as part of the firſt Anſwer; if, therefore, any thing contained in the firſt be repeated in the ſecond, (unleſs it vary the Defence in point of ſubſtance) it will be deemed impertinent, and expunged with coſts. See *Mit. Plead.* 252.

(3) No preciſe time, within which Exceptions are to be exhibited to a Maſter's Report, ſeems to be limited by either Court; it muſt, however, be within a reaſonable time after he has prepared his draft, or he may refuſe to receive them. See 1 *Anſtr.* 277.

4 judg-

judgment of the Court, and obtain a different determination.

In the *Exchequer*, the Exceptions were formerly referred to one of the Barons, who examined into their ſufficiency, as the Maſter does in Chancery; but that practice has been long diſcontinued, and they are now argued before the Court in the firſt inſtance, and there receive a final deciſion (1).

Exceptions to the Maſters Report are in the following form:

EXCEPTIONS *to a* MASTER'S REPORT *of the inſufficiency of an* ANSWER.

*In* CHANCERY.

*Between* James Willis, *by* John Willis, *his Father and next friend, Complainant, and* Edward Willis *and* William Willis, *Defendants.*

EXCEPTIONS *taken by the ſaid Complainant to the Report of* E. Leeds, *Eſq. one of the Maſters of*

(1) By a late order of the Court, Exceptions are to be ſet down for argument at the expiration of four days (one excluſive, and the other incluſive) from the day of their being filed: if this be neglected, they are over-ruled, as of courſe. See 2 *Fow. Prac.* 5.

*of this Court, made in this cause, and bearing date the day of 1795.*

First Exception. *For that the said Master has in and by his said Report stated, That, &c.* (pursuing the words of the Report) *but the said Master has not stated or set forth, &c.* (according to the nature of the objections)

Second Exception. *For that, &c.*

*In all which particulars the said Complainant doth except to the said Master's said Report, and humbly appeals therefrom to the judgment of this Honourable Court.*

WADMAN.

That these Exceptions may not be frivolous, or taken merely for the purpose of delay, they are not only required to be signed by Counsel, but a deposit of 5 *l.* is required to be made by the Defendant with the Register of the Court, as a compensation to the Plaintiff

tiff for the delay occafioned in the progrefs of his Suit, in the event of the Exceptions being over-ruled (1).

But if the Mafter's Report be confirmed, and the Anfwer confequently determined to be infufficient, the Defendant muft, within the time before mentioned, *pofitively*, and without further evafion, put in a further Anfwer to the Plaintiff's Bill. Should his further Anfwer be alfo infufficient, it may be excepted to in like manner as the firft. But if it be a third time reported infufficient, the Defendant will be committed to the *Fleet* prifon, till he put in a full and complete Anfwer to every allegation material to be replied to; and if his contumacy ftill continue, the Plaintiff's Bill will be taken *pro confeffo* (2).

But,

(1) And if the Plaintiff prevail in any one of the Exceptions, he will he entitled to the depofit. See 4 *Brow. Ch. Ca.* 1.

(2) This is in conformity to the practice of the Civil Law, where, if the *Reus*, after three fucceffive examinations upon the libel, ftill perfifted in giving a vague and incomplete

But, in order to proceed in our Suit, it is neceſſary for us to preſume that the Defendant's Anſwer was either originally ſufficient, or has at length become ſo by amendment (1); and the next proceeding which occurs will be the Plaintiff's *Replication* (2).

plete Anſwer, he was detained *in vinculis* till he conformed; and in caſe of perſevering in obſtinacy, the Libel was proceeded upon as true, and judgment given accordingly.

(1) Had it occurred to us, we might have before obſerved, that a Defendant will not be permitted (on application) to amend his Anſwer by varying the ſtatement of any material *facts* admitted in the Plaintiff's favour, but he will in ſome caſes be allowed to withdraw the admiſſion of a *point* or concluſion of *law* made by ignorance or inadvertency. See 2 *Vern.* 334, and *Pearce* v. *Grove*, *Amb.* 65.

(2) It were, perhaps, impracticable, conſiſtently with perſpicuity, to inſert in a treatiſe of the preſent nature every proceeding which the variety of circumſtances occaſionally attending one or other of the different ſtages of a Suit may, by *poſſibility*, render neceſſary in the progreſs of a cauſe. Such as moſt frequently occur we ſhall endeavour to recollect as often as occaſion may afford us an opportunity of introducing them. And it may here, therefore, be noticed, that if the Plaintiff perceive by the Anſwer of the Defendant that his Bill is in any reſpect defective as for want of parties, or otherwiſe, he may *before* replication obtain leave (as of *courſe*) to amend his Bill.

An

An *amended Bill* muſt ſtate ſo much of the original Bill as may be neceſſary to introduce the amendments, but no more; if it do more, the redundancies will be deemed impertinent. The amended and original Bills are, to moſt purpoſes, conſidered as but one Bill, and make up the ſame record; and the Defendant, having once appeared, need not be ſerved with a freſh *Subpœna*. See *Abingdon* v. *Butler*, 1 *F. Vez.* 210, and *Angerſtein* v. *Clarke*, *ibid.* 250.

Of

## OF REPLICATION TO DEFENDANT'S ANSWER.

IF the Anſwer of the Defendant controvert the facts charged in the Plaintiff's Bill, or ſet forth new facts and circumſtances which the Plaintiff is not diſpoſed to admit (both of which is uſually the caſe) he may maintain the truth of his own allegations, and deny the validity of thoſe alledged by the other party in a *Replication* (1) to the Defendant's Anſwer.

The

(1) The Replication, according to the modern practice, conſiſts of a *general* averment only, of the truth and ſufficiency of the Plaintiff's Bill, and as general a denial of the ſame properties in the Anſwer of the Defendant; but formerly, if the Defendant's Anſwer ſtated new facts in oppoſition to thoſe alledged in the Bill, the Plaintiff was accuſtomed to reply by a *ſpecial* ſtatement of other facts not before charged. This produced a *Rejoinder* by the Defendant, aſſerting the truth and ſufficiency of his Anſwer, and alledging the contrary of the Plaintiff's Replication. A *Sur-rejoinder* frequently followed the Rejoinder, a *Rebutter* the Sur-rejoinder, and ſo on, as long as new facts were ſet forth by one party, and (in order to put them in iſſue) denied by the other; ſee

The form of a Replication is the ſame in both Courts, and is uſually in theſe words:

*A General* REPLIÇATION *to a Defendant's* ANSWER.

*In* CHANCERY.

*Between* James Willis, *by his Father and next friend, Plaintiff, and* Edward Willis *and* William Willis, *Defendants.*

ſee *Prac. Reg.* 314, 315. But the inconveniencies occaſioned by theſe multifarious pleadings on each ſide gave riſe to the more recent practice (copied from the Civil Law; (*For. Rom.* 108.) of introducing ſuch new poſitions as occur after iſſue joined by *Supplemental Bill.* Which ſee *poſt.*

But there ſtill are caſes where a *ſpecial* Replication may be neceſſary, or at leaſt adviſeable; as where a Plaintiff is deſirous of controverting only a part of the Defendant's Anſwer, and admitting the reſt, or where he would avoid the effects of any improvident demands of his Bill. A form of this ſpecies of Replication will therefore be introduced in a ſubſequent note.

It ſhould be obſerved, that no Replication is to be made where the Defendant *diſclaims* generally to the whole Bill, but otherwiſe when the Diſclaimer goes only to a part of the Bill; See *Williams* v. *Longfellow*, 3 *Atk.* 582.

If the Plaintiff reply to a Plea or Demurrer, he admits them (if true) to be good. *Parker* v. *Blythmore*, *Prec. Chan.* 58.

*The*

*The Replication of* James Willis, *Complainant, to the Answer of* Edward Willis *and* William Willis, *Defendants.*

THIS *Repliant, saving and reserving to himself all and all manner of advantage of Exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the Answer of the said Defendants* (1), *for Replication thereunto, saith, that he doth and will aver, maintain, and prove his said Bill to be true, certain, and sufficient in the Law to be answered unto by the said Defendants, and that the Answer of the said Defendants is very uncertain, evasive, and insufficient in the Law, to be replied*

(1) This reservation of liberty to except to the Defendant's Answer was probably founded on the same presumption as that which anciently suggested the propriety of a similar reservation at the beginning of the Answer itself; see *ante*, p. 115. n. (1). Useless, however, as it was there observed to be in an Answer, it seems to be most peculiarly futile in a Replication; for the Plaintiff was never suffered to except to the Defendant's Answer, after he had once submitted to reply to it, *Prec. Chan.* 58.—The reader will perceive by a preceding note, that these reservations are not used in the case of an *Infant*, though we have here retained it for the sake of uniformity.

*unto*

*unto by this Repliant* (1); *without that that any other matter or thing in the said Answer contained material or effectual in the Law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this Repliant is ready to aver, maintain, and prove as this Honourable Court shall direct, and humbly prays as in and by his said Bill he hath already prayed* (2).

The Replication being merely a contestation of the Defendant's Answer, for the purpose

(1) It may appear a strange inconsistency to a student unused to the uncouth forms of legal proceedings, that the Plaintiff should reply to what he asserts to be "insufficient to be replied unto," and should nevertheless have forborne to except to those insufficiencies, though his Replication begins with an express declaration of his readiness to avail himself of every advantage: But it is to be observed, that the purpose of the Replication is merely to put in *issue*, by an assertion on the one side, and a denial on the other, the matters in question between the parties.

(2) The form we have here given is of a *general* Replication; but we have observed in a preceding page 142, n. (1) that *special* Replications are *sometimes* necessary. The form of a Special Replication may be thus:

L *The*

pose of putting the allegations between the parties completely in *issue*, it is not required to be signed by Counsel, but is filed by the

*The Replication of* J. W. *Complainant, to the Answer of* E. W. *and* W. W. *Defendants:*

THIS *Repliant, saving and reserving,* &c. *for Replication unto the Answer of the said Defendant, saith, that he this Repliant doth, in and by this his Replication, wave his demands of tithes of* Easter Offerings, *demanded by his Bill, and mentioned in the said Defendant's said Answer, and does in no wise insist thereupon or require or intend, any examination of witnesses in this cause concerning or respecting the same, and only insists upon his other demands made in and by his said Bill; and that he doth and will aver, maintain, and prove his said Bill as to all the demands therein contained (except only as to those herein before excepted and waved) to be just and true, certain and sufficient in the law to be answered unto by the said Defendant, and that the Answer of the said Defendant is untrue, uncertain, and insufficient in the law to be replied unto by this Repliant, for divers manifest errors and uncertainties therein contained, without that,* &c.; *all which matters and things this Repliant is ready to aver, maintain, and prove, as this Honourable Court shall direct, and prays as in and by his said Bill he has already prayed, except as herein before excepted.*

A. MANNING.

A Special Replication must be signed by Counsel; and if it be irregularly framed, or contain matter not in the Bill, it may be demurred to. See *Goodfellow* v. *Marshall*, 1 *Ch. Rep.* 137.

Plaintiff's

Plaintiff's Clerk in Court, as of courſe, on receiving inſtructions for that purpoſe (1).— The next proceeding in a Suit is the *Rejoinder* of the Defendant.

(1) In *Chancery*, the Replication muſt be filed within three Terms after the Defendant's Anſwer; and in the *Exchequer*, formerly the *next*, but now the ſame Term. The rule in Chancery appears to be derived from the *Civil* Law, by which, we have ſeen, the *Actor* was obliged to proceed in his Suit within two months, or have his Bill diſmiſſed; but that in the Exchequer ſeems more conformable to the ancient *Common* Law, where, if the Defendant did not reply within the next Term after the Plaintiff's Plea came in, judgment of *non pros* was awarded againſt him. See *For. Rom.* 113. *Hinde* 288. *Fow.* 45.

## OF REJOINDER TO A PLAINTIFF'S REPLICATION.

THE Plaintiff, having filed his Replication, proceeds to ſerve the Defendant with a *Subpœna* to *rejoin* (1) and to join in Commiſſion for the examination of witneſſes.

(1) The *Subpœna* to rejoin anſwers to a ſimilar citation in the Civil Law, which cloſed the *litis conteſtatio*; and the reaſon given by the Civilians for its introduction was probably that which occaſioned it to be adopted by our Courts of Equity, namely, that unleſs the Defendant were cited previous to the examination of witneſſes, the *receptio teſtium* would be a mere nullity, as the Defendant would have no opportunity of enquiring into their credibility, or of co-examining them relative to the facts they were to ſupport, which might poſſibly bring out circumſtances in his favour; but it was not neceſſary with them, nor is it with us, that the Defendant ſhould appear to the Citation, becauſe, as it is a proceſs entirely in his favour, he is left to avail himſelf of it or not at his diſcretion. The cauſe, therefore, is completely at iſſue upon the mere ſervice of the *Subpœna*, and no Rejoinder is, in general, actually filed. And, indeed, Sir *J. Jekyll* ſeems to have held, that the cauſe was ſufficiently at iſſue by the Replication, "for the Iſſue is offered by the Defendant's traverſe, and a Rejoinder is only a fiction of the Court." *Rodney* v. *Hare*, *M.ſ.* 296.

The

The form of this Subpœna is, in *Chancery*, precisely the same as the commom Subpœna *ad respondendum*, and returnable and served in the same manner (1); but in the *Exchequer* the form varies by expressing the cause of citation—As

*Subpœna to* REJOIN *in the* EXCHEQUER.

GEORGE *the Third*, *&c. To* Edward Willis *and* William Willis *greeting: We command and strictly enjoin you, that all excuses apart, you appear before the Barons of our* Exchequer *at* Westminster, *on the day of next, to rejoin to the Replication of* James Willis, *lately made and filed to your Answer; and this in no wise omit under the penalty of £.* 100, *which we shall cause to be levied upon your goods and chattels, lands and tenements,*

(1) See *ante*, p. 61, *et seq.* The ancient practice in respect to the return and service of the *Subpœna* to rejoin may be seen, *For. Rom.* 122.—*Toth.* 20. The present mode is to apply to the Court by Motion to have the *Subpœna* made returnable immediately, and that service on the Defendant's Clerk in Court may be deemed good service.

*tenements, to our use, if you neglect this our present command. Witness, &c.*

ELIOT.

No Indorsement—But labelled,

" To *Edward Willis*, to rejoin to the Replication of *James Willis*, lately filed to your Answer."

The Rejoinder (when used) asserts the truth and sufficiency of the Defendant's Answer, and avers the contrary of the Plaintiff's Replication in the following form:

*A* REJOINDER *of a Defendant to the Plaintiff's* REPLICATION.

*The Rejoinder of* Edward Willis *and* William Willis, *Defendants, to the Replication of* James Willis, *an Infant, Complainant.*

THESE *Defendants, saving and reserving to themselves, severally, all and all manner of benefit and advantage of Exception which may be had or*

*or taken to the many uncertainties, imperfections, and insufficiencies of and in the Replication of the said Complainant, for Rejoinder to the same, do severally say (in all and every matter and thing as in and by their said Answer they have said) they will severally aver, justify, maintain, and prove their said Answer in all and every matter, clause, sentence, article, and allegation therein contained, to be just and true, and certain and sufficient in the Law to be replied unto, in such sort, manner, and form, as in their said Answer the same are set forth and declared, and that the said Replication is very untrue, uncertain, and insufficient in the Law to be rejoined unto by these Defendants; without that that any other matter or thing in the said Replication contained material or effectual in the Law to be rejoined unto by these Defendants and not herein and hereby well and sufficiently rejoined unto, confessed or avoided, traversed or denied, is true; all which matters and things these Defendants are ready to aver and prove, as this Honourable Court shall award and direct; and these Defendants pray, as in and by*

*their said Answer they have already severally prayed.*

The cause being now completely at issue, the parties proceed to prove the several allegations contained in their respective pleadings, by the *examination* of witnesses; which will therefore be the next subject of our enquiries (1).

(1) In a former page, where we spoke of INSTITUTING A SUIT IN EQUITY, we noticed the several kinds of Bills by which such Suit might be commenced; and in an *historical* treatise of this nature, those were, perhaps, all that we could with propriety have there introduced: but, besides the *original* Bills, by which a Suit may be instituted, there are others of an *auxiliary* nature, by which it may be added to, continued, or revived, as circumstances may render necessary. These, arising between the original institution and final determination of the Suit, may not improperly be denominated *interlocutory* Bills, and as they can in no wise become requisite till after issue be joined between the parties, prior to which, (agreeably to the practice of the *Civil* Law) any defect in the Suit may be remedied by amendment, this seems to be the most proper place for adverting to them. These species of Bills, are

1. *A* SUPPLEMENTAL *Bill*, which is used for the purpose of supplying some irregularity discovered in the formation of the original Bill, or in some of the proceedings upon it; or some defect in the Suit, arising from events happening since the points in the original Bill were at issue,

iſſue, and which gives an intereſt to perſons not parties to the Suit. (See 1 *Atk.* 291. 3 *ibid,* 133, 217, 370). This Bill, after reciting the original Bill, and the proceedings which have been had upon it, the circumſtances which render the Supplemental matter neceſſary, and the reſpect in which the ſtate of the cauſe and of the parties is varied by ſuch circumſtance, proceeds:

*To the end, therefore, that the ſaid* E W. *and* W. W. *may ſeverally anſwer all and every the matters and things herein before charged by way of Supplement; and that they may diſcover and ſet forth,* &c. *And that your Orator may be relieved in the premiſes, as the nature and circumſtances of his caſe may require. May it pleaſe your Lordſhip to grant* Subpœna, &c. (as in the original Bill.)

If the Suit, by any event ſubſequent to the inſtitution of the Suit, become abated, it may be renovated

2. By Bill of Revivor; and if the event, occaſioning the abatement, does not affect the intereſt tranſmitted, in ſuch a manner as to make it ſubject to litigation in a Court of Equity, the Suit may be continued by Bill of Revivor *merely*; this, after ſhortly ſetting forth the original Bill, and proceedings, the Abatement, and Title to revive (See *For. Rom.* 210. *Com. Rep.* 590. 3 *P. Wms.* 348.) prays

*To the end, therefore, that the ſaid Bill, Anſwer, and other proceedings thereupon had, may ſtand revived againſt the ſaid Defendants, and be in the ſame plight, ſtate, and condition, as the ſame were in at the time of the Abatement thereof; May it pleaſe your Lordſhip to grant unto your Orator his Majeſty's moſt gracious Writ of* Subpœna ad Revivendum, *to be directed to the ſaid,* &c. *commanding them reſpectively, at a certain day, and under a certain pain, therein to be limited, perſonally to be and appear before your Lordſhip, in this Honourable Court, then and*

*and there to shew cause, if cause there be, why the said Suit and proceedings so abated, as aforesaid, should not be revived, and be in the same plight, state, and condition, as the same were in at the time of the Abatement thereof: and that your Orator may be further relieved in all and singular the premises, as to your Lordship may seem meet, and his case may require: and your Orator shall ever pray, &c.*

And should the event, which occasions the Abatement, be accompanied with *other* circumstances necessary to be stated to the Court, in order to obtain a complete decree, such circumstances must be stated to the Court, by way of Supplemental Bill, added to the Bill of Revivor.

To a Bill of Revivor the Defendant must shew cause in 8 days after Appearance, or the Suit will stand revived as of course. 3 *Peer Wms.* 348.

But if the Abatement of the Suit happen by an event which may occasion the interest transmitted, to be contested in a Court of Equity, the benefit of the Suit cannot be obtained by a Bill of Revivor, *eo nomine*, but must be sought by

3. *An* ORIGINAL BILL *in the* NATURE *of a Bill of* REVIVOR. (See 1 *Eq. Ca. Abr.* 2. 1 *Ch. Ca.* 174. 1 *Vern.* 426. 2 *ib.* 548.) It is said to be *original* merely for want of a privity of Title between the parties to the former, and those to the latter Suit, and when the validity of the alledged transmission of interest is established, the Suit is in the same situation as it would have been by Bill of Revivor merely, in case the establishment of such interest had been unnecessary.

This Bill, like the Bill of Revivor, states the original Bill and proceedings, the Abatement, and the manner in which the interest of the party deceased has been transmitted; and it must likewise *charge* the validity of such transmission, and state the rights which have accrued by it. See *Mit. Plead.* 88.

If, again, the intereſt of a party to the Suit be, by any event, wholly determined, and the property become veſted in others not claiming under him, (ſee 2 *Eq. Ca. Abr.* 3.) the benefit of the original Suit cannot be obtained by either of the laſt mentioned Bills, but by

4. AN ORIGINAL BILL *in the nature of* A SUPPLEMENTAL BILL. This Bill muſt ſtate the original Bill, and the proceedings had upon it; the event which cauſed the Abatement of the Suit, and the manner in which the property in diſpute has become veſted in the perſon entitled; ſhew the equitable grounds upon which the parties are entitled to the benefit of the former Suit, and pray the decree of the Court, adapted to the nature of the Plaintiff's caſe. See *Mit. Plead.* 90.

A Bill for this purpoſe ſeems to differ from an *original Bill* in the *nature* of a Bill of *Revivor*, in this, that "upon an *Original Bill* in the *nature* of a Bill of *Revivor*, the benefit of the former proceedings is abſolutely obtained, ſo that the pleadings in the *firſt* cauſe, as alſo the depoſitions of witneſſes (if any have been taken) may be uſed in the ſame manner as if they had been filed or taken in the *ſecond* cauſe, (1 *Atk.* 89.) and if any decree has been made in the firſt cauſe, the ſame decree will be made in the ſecond cauſe, (2 *Vern.* 548, 672. 1 *Eq. Ca. Abr.* 83). But in the caſe of an *Original Bill* in the nature of a *Supplemental Bill*, a new Defence may be made; the pleadings and depoſitions, though uſed to ſome purpoſe, cannot be uſed to the ſame *extent* as if filed or taken in the ſame cauſe, (ſee *Prec. Ch.* 212) and the decree, if any has been obtained, "is no otherwiſe of advantage than as it may be an inducement to the Court to make a ſimilar decree." *Mit. Plead.* 68. See alſo *Coke* v. *Fountain*, 1 *Vern.* 413.

Of

## OF THE EXAMINATION OF WITNESSES.

IN the feveral proceedings we have hitherto had occafion to enumerate; as applicable to our Courts of Equity, the reader has perceived a great refemblance in *fubftance*, though generally a difference in *form*, to thofe ufed in our Courts of Common Law. But in the Examination of Witneffes, a material difference prevails, both in form and effect. The Examination in Courts of Law being *ore tenus*, in the prefence of the judge and of the Court, and *impromptu* at the time of trial; whilft that in the Courts of Equity, agreeably to the Civil Law, is conducted in *private*, and upon Interrogatories, or queftions in writing, *previoufly* framed for the purpofe (1).

In

(1) The writers upon our Common Law never fail to apprife the ftudent of the fuperior advantages of the former to the latter mode of examination: their remarks are certainly founded on reafon; and they are fanctioned by experience. In a private and fecret Examination, taken down in

In *Chancery*, if the witnesses reside within

20

in writing before an officer or his clerk, (they observe) a witness may frequently depose, what shame or the apprehension of immediate contradiction, would prevent his testifying in a public and solemn tribunal, and in the presence of the witnesses of the adverse party.—That an interested or careless scribe may, in the Courts of Equity, by dressing up the depositions in his own words and language, make a witness speak what he never meant; whereas, at the Common Law, he has an opportunity to correct or explain his testimony, if either he misapprehend the questions put to him, or his answer be misunderstood, or his meaning attempted to be perverted.—That the very manner of the witness giving evidence is not unfrequently a sufficient indication of the truth or falsity of his testimony, an advantage entirely lost in the Courts of Equity: To which may likewise be added the age, quality, and other circumstances attending the person or situation of the witness, which are of infinite use in enabling us to form an opinion of his veracity.—That the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, often (in the language of Sir *Matt. Hale*) "beat and boult out the truth," which might have been suppressed in delivering his evidence under a formal set of Interrogatories, previously framed.—Nor is the presence of the judge, as Sir *William Blackstone* observes, a matter of small importance; for besides the respect and awe with which his presence will naturally inspire the witness, he is able, by use and experience, to keep the evidence from wandering from the point in issue. See 2 *Hale Hist.* 140, 3 *Blac. Com.* 373. The *ancient* Roman law, as may be collected from *Quintilian* (see *Inst. Orat.* l. 5. c. 7.) seems to have been con-

20 miles of *London* (1), this Examination is taken before a public officer, appointed by the Court for that particular purpofe; but if they refide beyond that diftance, a Commiffion, or *Dedimus Poteftatem* is granted to four Com-

conformable to that of our Common Law; and it would be far from an incurious or ufelefs enquiry, to trace the fteps by which fo important a variation from the original and, apparently, more wholefome practice was effected, and the reafons by which it was produced. It is, however, by no means the only inftance to be met with in hiftory, of the wifeft inftitutions degenerating from their original eftablifhment; frequently by the interefted policy, and fometimes by the negligence, of the fovereign or the legiflature.

This mode of Examination by written Interrogatories, is, perhaps, the moft exceptional part of the Conftitution of our Courts of Equity, and, it is feared, has not unfrequently been the means of fheltering from juftice frauds which would have been detected by an *oral* Examination. It was formerly, however, carried on in a manner which rendered it fomewhat lefs exceptionable than it is at prefent. See *poft*, p. 159, n. (2).

(1) The common range of the Court of Chancery, we have before feen to be *ten* miles, and this is the diftance limited by the *Court* in refpect to the Examination of Witneffes, (fee *Ord. Chan.* 109); but in *practice* commiffions are feldom applied for, unlefs the witneffes refide at leaft 20 miles from *London*, as the expence of the Commiffion, when they refide at a lefs diftance, is found to exceed that of a perfonal attendance before the Examiner.

miffioners

missioners (two nominated by each party) (1) authorizing them to take the depositions of the several witnesses, at the respective places of their residence (2).

(1) The usual way of naming Commissioners, is for the Plaintiff and Defendant to produce respectively four names, and each party striking out two, the remaining four are appointed Commissioners. If, however, either of the parties object to all the four named by the other, the objecting party may move the Court that other four may be named in their stead; or if either party refuse to strike out two names, the Court itself, on Petition, will do it. See *Gil.* 126, 135.

(2) We observed, in a former page, that the Bills or Petitions of Suitors, in our Courts of Equity, were anciently perused by the Court itself, previously to their being filed, and the Answer of the Defendant taken by one of the Masters or Barons; but that the Court afterwards became satisfied with their having been perused or taken by a practising barrister or commissioners. In respect to the Bill and Answer, no material inconvenience, perhaps, arose from this deviation from the original practice; but a similar remissness was unfortunately suffered to prevail in the Examination of witnesses, which were formerly questioned *viva voce* upon the several Interrogatories, by the Master of the Rolls in Chancery, and by one of the puisne Barons in the Exchequer. This practice, if revived, would, I apprehend, much weaken the objections urged by the Commentators on our Laws, as mentioned in a preceding note, against the present mode of Examination in Equity. See *ante*, p. 43, n. (2). p. 121, n. (2). p. 156, n. (1).

In

In the *Exchequer* the range of the Court, within which witnesses are examined in *London*, is only 10[a] miles; and the practice there differs from that in Chancery, likewise, in this, that in Chancery there is but one Examiner appointed for the purpose of examining all Witnesses, resident within the Circuit before mentioned, whereas, in the Exchequer, each Baron has his own sworn officer for taking such Examinations; and the several Barons have, moreover, authority to take Examinations personally before themselves; which authority is not confined to the ordinary range of the Court in granting Commissions, but extends to any part of the kingdom.

The form of a Commission is in *Chancery* as follows:

A COMMISSION *to* EXAMINE WITNESSES *in* CHANCERY.

GEORGE *the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender*

[a] *Fow. Prac.* 62.

*of*

*of the Faith, and ſo forth. To* Samuel Johnſon, Mayot Edwards, William Maſon, *and* Peter Warne, *greeting; Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by theſe preſents do give unto you, any three or two of you* (1), *full power and authority diligently to examine all Witneſſes whatſoever, upon certain Interrogatories to be exhibited to you, as well on the part of* James Willis, *Complainant, as on the part of* Edward Willis *and* William Willis, *Defendants* (2), *or either of them; and therefore we command you, any three or two of you, that at certain days and places, to be appointed by you for that purpoſe, you do cauſe the ſaid Witneſſes to come before you, and then and there examine each of them apart, upon the ſaid Interrogatories, on their reſpective corporal Oaths, firſt taken before you, any three or two of you, upon the Holy*

(1) If there be ſeveral Defendants, who have appeared by different clerks in Court, "any two or more of you" is inſerted inſtead of "any three or two of you."

(2) If the Commiſſion be obtained on the part of the Defendant, this order of naming the parties is reverſed.

*Evangelists* (1); *and that you do take such their Examinations, and reduce them into writing on parchment; and when you shall have so taken them, you are to send the same to us in our Chancery*, without delay (2), *wheresoever it shall then be, closed up, and under your seals, or the seals of three or two of you, distinctly and plainly set forth, together with the said Interrogatories, and this Writ: And we further command you, and every of you, that before you act in, or be present at, the swearing or examining any Witness or Witnesses, you do severally take the Oath first specified in the schedule hereunto annexed* (3); *and we do give you, any three, two,*

(1) See *ante*, p. 126, n. (1 & 2.)

(2) A Commission may be made returnable on a general return day, or on any day certain in Term, or "without delay;" in which last case, if it issue in Term, it holds to the first return of the next Term; and if in the Vacation, to the last return of the same Term. See 3 *Atk.* 593.

(3) The form of this Oath, as annexed to the schedule refered to, is this:

*You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this Cause, take the Examinations and depositions of all and every*

*two, or one of you, full power and authority jointly, or severally, to administer such Oath, to the rest or any other of you, upon the Holy Evangelists; and we further command that all and every the clerk or clerks, employed in taking, writing, transcribing, or ingrossing the deposition or depositions of Witnesses, to be examined by virtue of these presents, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at such examination, severally take the Oath last specified in the said schedule annexed* (1): *and we also give you, or*

*every Witness and Witnesses, produced and examined by virtue of the Commission hereunto annexed, upon the Interrogatories now produced and left with you. And you shall not publish, disclose, or make known to any person or persons whomsoever, except to the clerk or clerks by you employed, and sworn to secrecy in the execution of this Commission, the contents of all or any of the depositions of the Witnesses, or any of them, to be taken by you and the other Commissioners in the said Commission named, or any of them by virtue of the said Commission, until publication shall pass by rule, or order of the High Court of Chancery.*

(1) This Oath is as follows:—*You shall truly, faithfully, and without partiality to any or either of the parties in this Cause, take*

*or any one of you, full power and authority, jointly and ſeverally, to adminiſter ſuch Oath to ſuch clerk or clerks, upon the Holy Evangeliſts. Witneſs ourſelf at* Weſtminſter, *the day of in the 36th year of our reign.*

ARDEN.

Indorſed "*By order of Court.*" WINTER.

Label—*To* Samuel Johnſon, Mayot Edwards, William Maſon, *and* Peter Warne, *Gents. any three or two of them, to examine Witneſſes, as well on the part of* James Willis *Plaintiff, as on the part of* Edward Willis *and* William

*take and write down, tranſcribe and ingroſs, the depoſitions of all and every Witneſs and Witneſſes produced and examined by the Commiſſioners, or any of them named in the Commiſſion hereunto annexed, as far forth as you are directed and employed by the ſaid Commiſſioners, or any of them, to take, write down, or ingroſs the ſaid depoſitions, or any of them; and you ſhall not publiſh, diſcloſe, or make known to any perſon or perſons whomſoever, the contents of all or any of the depoſitions of the Witneſſes, or any of them, to be taken, wrote down, tranſcribed, or ingroſſed, by you, or whereto you ſhall have recourſe, or be in any wiſe privy, until publication ſhall paſs by rule or order of the High Court of Chancery.* The form of this, and the preceding Oath, were preſcribed by Lord *Macclesfield* and Sir *J. Jekyl.* See *Ord. Canc.* 207.

Willis

Willis *Defendants, returnable without delay on* 14 *days notice to the Defendants* (1).

ARDEN.

WINTER.

In the *Exchequer* the form is thus:

*A* COMMISSION *to examine Witnesses in the* EXCHEQUER.

GEORGE *the Third, &c. To our beloved* Samuel Johnson, Mayot Edwards, William Mason, *and* Peter Warne, *greeting: Know ye that we give to you, or any two or more of you* (2), *full power and authority to examine certain Witnesses upon Interrogatories, to be exhibited before you, or any two or more of you, as well on the part of* James Willis, *Complainant, as on the behalf of* Edward Willis *and* William

(1) This was the ancient notice of trial in a cause at law, and from thence taken—*For. Rom.* 126. If, however, the commission issue in *Easter* Term, and be returnable in *Trinity*, ten days notice is held to be sufficient on account of the shortness of the Vacation.

(2) See *ante*, p. 161, n. (1).

Willis, *Defendants* (1); *and therefore we command you, that at ſuch day and place, or days and places, as any two or more of you ſhall appoint, you, or any two or more of you, do ſummon the ſaid Witneſſes to appear before you, and do carefully examine them and every of them each ſeparately by himſelf or herſelf upon the ſaid Interrogatories, on their reſpective corporal oaths, to be by them ſeverally taken on the Holy Goſpels of God* (2), *before you, or any two or more of you, and do take their depoſitions thereupon, and engroſs them on parchment, and do ſend the ſame, taken in form aforeſaid, before the Barons of our* Exchequer *at* Weſtminſter, *on, &c.* (3) *cloſed up under the hands and ſeals of any two or more of you, with the ſaid Interrogatories and this Writ: And we further command you, that before any one of you ſhall proceed to adminiſter an oath to any of the ſaid Witneſſes, or to examine any of them, or be preſent at any ſuch Examination, you ſhall take the oath firſt mentioned in the Schedule here-*

(1) See *ante*, p. 161, n. (2).

(2) See *ante*, p. 126, n. (1 & 2).

(3) See *ante*, p. 162, n. (2).

*unto*

*unto annexed* (1) *: And we give to you and every of you full power and authority, jointly or separately, to administer the said Oath on the Holy Gospels of God to the rest, or to any other of you: And we further command, that the person or persons who shall serve as Clerk or Clerks to take, write down, transcribe, or ingross the depositions of the Witnesses to be produced before and examined by you, or any of you, by virtue of these presents, shall, before he or they be permitted to serve as such Clerk or Clerks as aforesaid, or to be present at the Examination of any Witnesses, take the Oath last mentioned in the said Schedule* (2) *; and we give to you and every of you full power and authority, jointly or severally, to administer the said Oath on the Holy Gospels of God corporally to such Clerk or Clerks; provided that the above-named Defendants have fourteen days notice given to them respectively of the day and place of your first*

(1) This Oath is in the same words as that in Chancery. See *ante*, p. 162, n. (3).

(2) See *ante*, p. 163, n. (1).

*sitting about the execution of these presents* (1).
*Witness, &c. at* Westminster, *the* *day of*
*in the 36th year of our reign.*
*By the Barons* (2).

ELIOT.

Proper notice having been given to the Defendants of the time and place of executing the Commission, *Interrogatories*, or questions, previously framed and settled, are produced on each side, and separately read to the respective Witnesses (3), and their responses or *depositions*

(1) See *ante*, p. 165, n. (1).

(2) Or "By *fiat* of *Baron Thompson*," if it issue by the authority of one of the Barons only, and not of the Court itself.

(3) The usual method of procuring the attendance of the witnesses before the Commissioners is by *Summons* under their hands; but as this is not *compulsory*, if there be any reason to apprehend that they will neglect to attend, a *Subpœna* may be procured to compel their appearance. The form of Summonses for this purpose may be seen—*Hinde*, 336.—1 *Fow.* 102. The forms of the *Subpœna* are these:

Subpœna *ad testificandum* in *Chancery*.

GEORGE *the Third, &c. To* James Henry Nevil *greeting: We command and strictly enjoin you that, laying all other matters aside,*

*tions* taken down in writing by the Commiſ-ſioners.

*aſide, and notwithſtanding any excuſe, you perſonally be and appear before* Samuel Johnſon *and others, Commiſſioners appointed in our Chancery, at ſuch times and places as the bearer hereof ſhall appoint, to teſtify the truth in a certain cauſe depending in our ſaid Court on the behalf of* James Willis, *an Infant; and this you may in no wiſe omit, under the penalty of* £.100. *Witneſs,* &c.

Subpœna *ad teſtificandum* in the *Exchequer.*

GEORGE *the Third,* &c. *To* James Henry Nevil, *greeting: We command and ſtrictly enjoin you, that all excuſes apart, you perſonally be and appear before* Samuel Johnſon, Mayot Edwards, William Maſon, and Peter Warne, *our Commiſſioners, or any two or more of them, by virtue of our Commiſſion, under the Seal of our Court of* Exchequer *at* Weſtminſter, *at ſuch day and place, or days and places, which our ſaid Commiſſioners, or any two or more of them ſhall appoint you, to teſtify and inform our ſaid Commiſſioners concerning certain Articles or Interrogatories to be then and there propoſed to you on the part and behalf of* James Willis, *an Infant, Plaintiff, againſt* Edward Willis *and* William Willis, *Defendants; and this you are in no wiſe to omit, under the penalty,* &c. (as in Subpœna to appear and anſwer). *Witneſs,* &c.

The ſame rule is obſerved in regard to the number of witneſſes allowed to be inſerted in theſe Subpœnas as in thoſe we have before ſpoken of; viz. *three* in *Chancery* and *four* in the *Exchequer:* and they are ſerved in the ſame manner as other Subpœnas.

The

The form of such *Interrogatories* in *either* Court *(mutatis mutandis)* may be thus (1):

INTERROGATORIES *exhibited in* EQUITY.

INTERROGATORIES *to be administered to Witnesses to be produced, sworn, and examined in a certain cause depending in the High Court of Chancery; wherein* James Willis, *by* John Willis, *his Father and next friend, is Complainant, and* Edward Willis *and* William Willis, *Executors of the last Will and Testament of* Thomas Atkins, *deceased, are Defendants. On the part and behalf of the said Complainant; that is to say,*

(1) The Interrogatories exhibited by the Commissioners were formerly annexed to the Commission, but by the present practice, founded on the mutual convenience of the parties, they are delivered to the Commissioners at the opening of the Commission: As they are still however supposed to be annexed to the Commission, the Commissioners cannot, without the special leave of the Court, examine the Witnesses upon any new Interrogatories differing from those first delivered to them—See *Prec. Chan.* 386. But in respect to the *Examiner* in Town, who is a public officer of the Court, it is otherwise. See *post.*

First

First Interrogatory—*Do you know* (1) *the parties, Complainants and Defendants, in the Title of these Interrogatories named, or any and which of them, and how long, &c. &c.? Declare the truth and your knowledge therein.*

Second Interrogatory—*Did or did not the said* Thomas Atkins, *in the foregoing Interrogatories named, ever, and when, and where, in your sight or presence, or in the presence of any and what other person or persons to your knowledge, sign, seal, publish or declare, his last Will and Testament in writing, or any and what writing, as and for, or purporting to be, his last Will, &c. &c? Declare.*

Third Interrogatory—*Do you know of any application or applications which have been made by or on the behalf of the above-named Complainant to the Defendants above-named, or either and which of them, for the payment of the Legacy of* £.800,

(1) Interrogatories must be concise, and to the point; if otherwise, or if they be leading or directory, as "do *not* you know," they will be suppressed. See 1 *F. Vez.* 400.

in

*in the pleadings in this cause mentioned to have been bequeathed to or for the benefit of the said Complainant, &c. If yea, set forth when, or about what time or times respectively, and by whom by name, and to whom and where, such application or applications was or were so made, and whether the same was or were in any and what manner complied with or assented to, or refused and rejected, and by whom and for any and what reasons? Declare, &c.*

Lastly—*Do you know of any other matter or thing, or have you heard, or can you say, any thing touching the matters in question in this cause, that may tend to the benefit and advantage of the Complainant in this cause, besides what you have been interrogated unto? If yea, declare the same fully, and at large, as if you had been particularly interrogated thereto.*

A. MANNING (1).

(1) By order of Court, Interrogatories must be perused, and signed by Counsel, before they can be exhibited.

After

After the Oaths have been duly adminiſtered to the Commiſſioners, their clerks, and the reſpective witneſſes, the depoſitions are taken, and fairly tranſcribed, in the following form:

DEPOSITIONS *in* EQUITY *by* COMMISSION.

DEPOSITIONS *of Witneſſes, produced, ſworn, and examined, on the day of in the 36th year of his preſent majeſty, king George the Third, and in the year of our Lord* 1795, *at the houſe of* W. Brown, *known by the ſign of the* Buſh, *ſituated in the pariſh of* Kelſal, *in the county of* Nottingham, *by virtue of a Commiſſion, iſſuing out of his majeſty's High Court of Chancery* (1), *to us* Samuel Johnſon, William Maſon, *and others, directed, for the examination of Witneſſes in a Cauſe there depending, between* James Willis *by* John Willis *his Father and next friend, Plaintiff, and* Edward Willis *and* William Willis, *Defendants, on the*

(1) In the *Exchequer* "out of and under the ſeal of his Majeſty's Court of Exchequer at Weſtminſter," to, &c.

*the part and behalf of the said Complainant* (1); *we, the acting Commissioners under the said Commission, and also the respective clerks by us employed in taking, writing, transcribing, and engrossing the said Depositions, having first duly taken the Oaths annexed to the said Commission, according to the tenor and effect thereof, and as thereby required.*

James Henry Nevil *of* Pelligate, *in the county of* Northampton, *Esq. aged* 30 *years, or thereabouts, a Witness produced, sworn, and examined, on the part and behalf of the said Complainant* (2) James Willis, *deposeth and saith as follows:*

(1) Each party joining in the Commission, usually exhibits Interrogatories; the practice of examining the Defendant's Witnesses upon the Interrogatories of the Plaintiff only, *et e converso*, which is sometimes done, being discountenanced by the Courts as partial and dangerous.

(2) The practice is, when a Witness is produced, that he should be first examined upon the Interrogatories of the party producing him, and then upon the Cross-Interrogatories of the other side.

To

To the first Interrogatory—This *Deponent saith, that he knows the said Complainant* James Willis, *and hath so known him for the space of 3 years last past, or thereabouts, and doth also know and is well acquainted with the said Defendants* Edward Willis *and* William Willis, *&c. &c.*

To the second Interrogatory—This *Deponent saith, that he was present and did see* Thomas Atkins, *in the pleadings in this Cause mentioned, sign, seal, publish, and declare as and for his last Will and Testament, a certain writing, &c. &c.*

To the third Interrogatory—This *Deponent saith, that in or about the month of* January *last, he this Deponent was, together with* John Willis *the Father of the said Complainant* James Willis, *at the house of, and in company with, the said* William Willis, *and doth well remember that the said* John Willis *did then and there address the said Defendant on the part and in behalf of the said Complainant, and requested that*

*that he the ſaid* William Willis *or his Co-executor the ſaid* Edward Willis, *would pay or otherwiſe ſecure for the benefit of the ſaid Complainant the ſaid Legacy of £.800, &c. &c.*

And to the laſt Interrogatory—THIS *Deponent ſaith, he doth not know of any other matter or thing, &c. &c.*

JAMES HENRY NEVIL,
SAMUEL JOHNSON,
WILLIAM MASON (1).

If the Witneſſes be examined in *Town* before an *Examiner* (2), the form of the Depoſition will neceſſarily vary, as

DEPOSI-

(1) The Interrogatories are ſigned by the Witneſſes examined, and the acting Commiſſioners.

(2) As the Examiner is an officer of the Court, acting as its deputy or ſubſtitute, the form of the Subpœna to compel the Appearance of Witneſſes before him, differs from that to teſtify before Commiſſioners, and is preciſely the ſame in form as that which iſſues for the attendance of parties before the Court itſelf, viz. "That you perſonally be and appear *before us in our Chancery* immediately after the receipt

DEPOSITIONS *in* EQUITY *before an* EXAMINER.

WITNESSES *examined in a Cause depending and at issue in this Honourable Court, wherein* James Willis *an Infant by* John Willis *his Father and next friend is Complainant, and* Edward Willis *and* William Willis *are Defendants, on the part and behalf of the said Complainant, by* Alexander Morgan, *Esq. Examiner in Chancery.*

James Henry Nevil *of, &c. aged* 30 *years and upwards, being produced as a Witness on the part and behalf of the Complainant in this Cause, was on the day of in the year of our Lord* 1795, *shewn in person at the seat of Mr.* Hill, *(who is the clerk in Court for the Defendants, in the title hereof*

receipt of this, wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you," &c. As in Chancery, therefore, the Writ appoints no time or place for the party's Appearance, a written notice, signed by the Plaintiff's solicitor, expressing those particulars, and the purpose for which his attendance is required, is delivered to him at the time of service.

*named) by Mr.* Vaugh *one of the sworn clerks in my office, who then also left a note of the name, title, and place of abode of the Deponent, at the seat aforesaid* (1); *and afterwards, on the same day and year, the said Deponent being sworn and examined, deposeth and saith as follows:*

1st. To the first Interrogatories—*The said Deponent saith, that, &c.* (as before[a].)

A. MORGAN,
R. HINDE (2).

The Depositions being completed, they are closely bound up, and (being secured from inspection by the signatures and seals of the several Commissioners), sent to the Court out of which the Commission issued by a messenger, who makes Oath that the "said Depo-

(1) This is required in order to give the adverse party an opportunity of cross-examining the witnesses.

[a] *ante*, p. 175.

(2) Unless the Depositions are signed by the Examiner and six clerk, they will not be permitted to be read at the hearing.

sitions

fitions have not been opened or altered fince they were delivered to his charge." They are then committed to the cuftody of the *clerk in Court,* who prepared the Commiffion, if taken in the Country, or detained by the *Examiner,* if taken in Town, till *publication* has paffed (1) by rule or order of Court. After which they may be infpected, or copies of them delivered, at the requeft of any of the parties.

After publication has paffed, the parties, regularly, are to proceed to a Hearing; but fhould the evidence on either fide appear to be exceptionable, on account of the difcredit or incompetency of any of the Witneffes, leave may be obtained, on motion, to object

(1) When the examination of Witneffes on both fides is perfected, either party ferves the other with a rule or order of Court, importing that the Depofitions will be made public, unlefs fufficient caufe be fhewn againft it, within a time therein expreffed. If no caufe be fhewn, the rule is made abfolute; this is termed "paffing publication," and abfolves the Commiffioners and Examiner from their refpective Oaths of fecrecy.

to the validity of their teſtimony (1). The method of doing which, is by the exhibition of *Articles*, which may be in the following form:

### ARTICLES *of* EXCEPTION *to the* CREDIT *of a* WITNESS *in* CHANCERY.

ARTICLES *exhibited by* James Willis *Complainant, by* John Willis *his Father and next friend, in a certain Cauſe now depending and at iſſue in the High Court of Chancery, wherein the ſaid* James Willis *by his ſaid Father is Complainant, and* Edward Willis *and* William Willis *are Defendants, to diſcredit the Teſtimony of* Henry James Nevil, *a Witneſs examined before* Alexander Morgan, *Eſq. one of the Examiners of the ſaid Court,* (or if the Witneſſes were examined by Commiſſioners)

(1) In ſtrictneſs, the proper time and manner of exhibiting objections againſt the Competency of Witneſſes, is by Interrogatories at the Examination in chief before the Commiſſioners or Examiner; but as their incompetency is ſeldom known till after the publication of their Depoſitions, this indulgence is never refuſed, when grounded upon an affidavit ſubſtantiating it's propriety.

" *by*

*"by virtue of a Commiſſion iſſued out of the ſaid Court to* Samuel Johnſon *and others, directed for the examination of Witneſſes in the ſaid Cauſe, upon certain Interrogatories exhibited before them for that purpoſe;" and which ſaid Witneſs was examined on the part and behalf of the ſaid Defendant.*

Firſt—*The ſaid* James Willis, *by his ſaid Father and next friend, doth charge and allege that the ſaid* Henry James Nevil *hath, ſince his Examination in the ſaid Cauſe, acknowledged that he is to receive and doth expect a conſiderable reward or gratuity in money, from the ſaid Defendant, in caſe the ſaid Cauſe be determined in his the ſaid Defendant's favour; and that he the ſaid* Henry James Nevil *is perſonally intereſted in the iſſue or determination of the ſaid Cauſe.*

Secondly — *The ſaid* James Willis *doth, as aforeſaid, charge and allege, that the ſaid* Henry James Nevil *is a perſon of bad morals and of evil fame and character, and is gener-*

*ally esteemed and reputed so to be; and that the said Witness is a person who hath no regard to the sacredness of an Oath, or belief in a future state, and one whose Testimony is in no respect to be credited.*

A Manning.

These Articles are filed in the office of the Examiner, or of the Six Clerks of the Court, accordingly as the original Depositions were taken before him, or by Commissioners, and Interrogatories (by leave of the Court), are framed upon them, and exhibited before the Examiner in *Chancery*, or a Baron in the *Exchequer*, or by Commission, and the Depositions taken and published, as in other cases. Like Exceptions may also be taken to these, as to those we have already spoken of. These matters being at length finally settled, the parties proceed to a *Hearing*.

Of

## Of the Hearing of a Cause in Equity.

THE Caufe being now ripe for hearing, it may be fet down (1) at the inftance of either party; and a Subpœna to hear judgment (2) procured and ferved as in other cafes.

The

(1) In Chancery, the Caufe may be fet down either before the Lord Chancellor, or the Mafter of the Rolls, at the difcretion of the clerk in Court, regulated by the importance of the Suit, and the number of Caufes depending before each. Till the beginning of the laft reign, the authority of the Mafter of the Rolls to determine Caufes was much doubted and litigated. (3 *Blac. Com.* 450.) By the 3 *Geo.* II. c. 30, it was therefore declared that "all orders and decrees made by the Mafter of the Rolls (except only fuch as by the courfe of the Court are appropriated to the great feal alone) fhall be deemed valid orders and decrees of the Court of Chancery, fubject neverthelefs to be difcharged or altered by the perfon or perfons holding the cuftody of the great feal, and fo as that the fame be not enrolled till figned by him or them."

(2) This Subpœna correfponds with the notion of the civilians, that no act of Court fhould be made *altera parte inaudita:* and by the ancient rule of the Court, there was always a Term between paffing publication and Hearing the



Caufe,

The form of this *Subpœna*, in *Chancery*, is the ſame as that we have already given [a], with a difference only in the Label and Indorſement, which expreſs the purpoſe for which the party's attendance is required, as

*Subpœna to* HEAR JUDGMENT *in* CHANCERY.

GEORGE *the Third*, &c. *To* Edward Willis *and* William Willis, *greeting: For certain cauſes offered before us in our Chancery, we command*, &c. *that you perſonally be and appear before us in our ſaid Chancery, on the* 8th *day of* November *next* (1), *whereſoever it ſhall then be*,

Cauſe, that the ſeveral ſuitors might have time to prepare themſelves for attendance. See *For. Rom.* 134, 151. But now, by *Ord. Can.* 211, the rule in *Chancery* is, that the Plaintiff ſhall have liberty to ſet down his Cauſe for Hearing on the next Term after publication, and, on failure, it may be ſet down by the Defendant on the Term next following; and if the Plaintiff do not then appear, his Bill will be diſmiſſed for want of Proſecution. As to the *Exchequer*, ſee *poſt*.

[a] *ante*, p. 62.

(1) The *Subpœna* to hear *Judgment*, by the practice of the Court, is made returnable three juridical days before

*be, to anſwer, &c.* (as in the Subpœna ad reſpondendum). *Witneſs, &c.*

COURTENAY.

Indorſed—" *By the Court, to hear Judgment the 11th day of* November *next, at the Suit of* James Willis *an Infant.*"

Label—Edward Willis *to appear in Chancery, returnable the* 8*th day of* November *next; to bear Judgment the* 11*th day of the ſame month, at the Suit of* James Willis *an Infant.*

In the *Exchequer* the cauſe of Citation is expreſſed in the body of the Writ, as

fore that in which the Cauſe is appointed to be heard. The time of ſervice, previous to the return, is regulated by the diſtance of the party's reſidence from London. If he reſide within 20 miles, that is to ſay, the uſual range of the Court, 10 days is deemed ſufficient notice; but, if beyond that diſtance, 14 days are allowed; except in the ſhort Vacation of Eaſter, when 8 days only are required in the one caſe, and 10 in the other. See *Prac. Reg.* 349, *Hinds*, 410.

*Subpœna*

## *Subpœna to* HEAR JUDGMENT *in the* EXCHEQUER.

GEORGE *the Third, &c. To* Edward Willis *and* William Willis, *greeting: we firmly enjoin and command you, that, all excuses ceasing, you do personally be and appear before the Chancellor and Barons of our Exchequer, at* Westminster, *in the Court of the Chamber of the said Exchequer, on* Thursday *the · day of next* (1), *to bear the Judgment of the said Chancellor and Barons there, in a certain Cause now there depending by English Bill, wherein* James Willis *an Infant is Complainant, and* Edward Willis *and* William Willis *Defen-*

(1) In the *Exchequer* the days appointed for the Hearing of Causes, are Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays in every Term; the *Subpœna* may, therefore, be returnable on either of those days, "provided they do not fall upon the 30th of Jan. the 2d of Feb. Ascension day, or Midsummer day," 2 *Fow*. 175. The range of the Exchequer in respect to the service of the Subpœna to hear Judgment, is by rule of Court extended to 60 miles, within which 10 days, and beyond which 14 days notice is required to be given to the suitors of the time and place of their attendance, except in the short Vacation between Easter and Trinity Terms, when 10 days are held sufficient at the remotest distance. *ibid.*

*dants:*

*dants: and hereof you are not to fail, on pain, &c. Witness, &c.*

ELIOT.

If, however, the Defendants be a *body corporate*, a Writ of *Distringas*, instead of the *Subpœna*, is to be served upon them, conformably to the practice in requiring their appearance to the Bill [a].

The parties appearing, by their counsel, on the *third* (1) day after the return of the *Subpœna*, the Allegations of the Plaintiff, and the Defendant's Answer are briefly stated to the Court, by the junior counsel on each side. The leading counsel of the Plaintiff then enters

[a] See *ante*, p. 93.

(1) On whatever day the party's appearance may be required by the Writ, he has, in all cases, three days indulgence, (which are called days of *grace*) before his appearance is actually required; "for our sturdy ancestors held it beneath the condition of freemen to appear, or to do any other act at the *precise* time appointed." 3 *Blac. Com.* 278. The Feudal Law, therefore, (from whence is derived the *quarto dies post* of our Common Law) as well as the Canon and Civil Law, allowed three distinct days of Citation before the Defendant was adjudged contumacious for not appearing.

more

more particularly into the nature, circumftances, and merits of his Client's cafe, and informs the Court of the points in iffue between the parties. Such parts of the Depofitions and Anfwer of the Defendant as the Plaintiff chufes to call for, are then read, for the purpofe of receiving the remarks and animadverfions of his counfel. The Defendant afterwards proceeds in the fame manner to make his Defence, and the Plaintiff's counfel are heard in reply, which ends the *forenfis litigatio*; and the Court proceeds to pronounce it's *Decree*, which is the final judgment or fentence of the Court, upon the rights of the feveral parties in the Caufe (1), and is minuted down by the Regifter, from the mouth of the Chancellor or of the Barons.

(1) In a preceding page (121), we have obferved upon the nature and ufe of a Crofs Bill, for the purpofe of removing difficulties to the effectual and equitable determination of a Caufe; if fuch difficulties fhould remain undifcovered, or be unremoved, till the Hearing, the Court will then direct a Bill of this nature to be exhibited, and referve the directions or decree, which it may afterwards pronounce, till fuch new Caufe be ripe for Hearing. 2 *Ch. Ca.* 248.

But

But if the Defendant neglect to appear by his counsel at the Hearing, the counsel for the Plaintiff, on proving service of the *Subpœna ad audiendum judicium*, prays such decree as he deems his Client entitled to (1), which, (not being opposed) is granted as of course, with this reservation only that the Defendant, within a given time, shall be at liberty to shew cause against its being carried into execution. For this purpose the Plaintiff procures a *Subpœna to shew cause*, which, in *Chancery*, is as follows:

(1) But if, on the other hand, the *Plaintiff*, after setting down his Cause for Hearing, neglect to attend, the Court can only order it to be struck out of the paper of Causes to be set down afresh, unless the Defendant have taken the precaution to make an affidavit of his having been served with a Subpœna to hear Judgment at the Plaintiff's Suit, in which case the Bill will be dismissed with costs; "because a Plaintiff may set down his Cause, and yet, upon further consideration of the matter, he may not think fit to serve the Defendant with a *Subpœna* to hear judgment; in which case it must be heard *ad requisitionem Defendentis*, in order to entitle him to a dismission." *For. Rom.* 157.

A Sub-

### *A Subpœna to* SHEW CAUSE *in* CHANCERY.

GEORGE *the Third, &c. To* Edward Willis, *greeting: for certain caufes offered before us, in our Chancery, we command and ftrictly enjoin you, that, laying all other matters afide, and notwithftanding any excufe, you perfonally be and appear before us, in our faid Chancery, on the day of next* (1), *wherefoever it fhall then be, then and there to fhew good and fufficient caufe* (2) *in a certain matter, in our faid Chancery, now in controverfy between* James Willis, *an Infant, Complainant, and* Edward

(1) The *Subpœna* to fhew Caufe, being a *judicial* procefs, muft be made returnable in *Term*, and on a day *certain*, it will otherwife be fet afide for irregularity. See *Fer. Rom.* 155.

(2) Viz. againft the *Decree nifi.* The part of the Decree here referred to, ufually runs thus: "And this Decree is to be binding upon the Defendant, unlefs he, being ferved with a *Subpœna* for that purpofe, fhall, at the return thereof, fhew unto this Court good caufe to the contrary." It is alfo made a part of fuch Decree, that "before the faid Defendant is to be admitted to fhew fuch Caufe, he is to pay unto the Plaintiff his cofts of this day's default of attendance, to be taxed by one of the Mafters of this Court."

Willis *and* William Willis, *Defendants; according to the true intent and meaning of a certain order of our ſaid Court, made between ye in this Cauſe, bearing date the day of laſt, and to do further, and receive, &c.* (as in the Subpœna to Appear and Anſwer), *Witneſs, &c.*

COURTENAY.

Indorſed—"*By the Court.*"

T. C.

Label—Edward Willis *to appear in Chancery, returnable the day of to ſhew Cauſe againſt a Decree, dated the day of at the Suit of* James Willis, *an Infant.*

COURTENAY.

In the *Exchequer* the form is thus:

*Subpœna to* SHEW CAUSE *in the* EXCHEQUER.

GEORGE *the Third, &c. We command you that, every excuſe apart, you do fulfil and perform all and every the matters and things contained and ſpecified in a certain Decree or order of our Court of Exchequer at* Weſtminſter, *made the day*

*day of in the 36th year of our reign, according to the tenor and purport of the said Decree or order; the tenor whereof, for your better information in the premises, we have sent you annexed to these presents; or, in default of your performing the matters and things contained in the said Decree or order, that you be and appear before the Barons of our Exchequer at* Westminster, *on the day of next, to shew Cause to our said Court why you refuse to perform the same; and this you may in no wise omit, &c.* (as in the Subpœna to Appear and Answer), *Witness, &c.*

ELIOT.

These Subpœnas are served in the same *manner* as those formerly spoken of; but there is no rule limited in respect of the *time* of Service, which may therefore be on any day before the return (1).

If

(1) It were to be wished, Ch. Baron *Gilbert* observes, that a time was fixed for the service of this Subpœna, as in the case of Subpœnas to hear Judgment; "for when the Decree is

5

If the Defendant ſhew no cauſe within the time ſpecified in the Order and Subpœna, he is preſumed to ſubmit to the requiſitions of the Decree, and the Cauſe is at an end; but if, at the return of the Subpœna, he offer to the Court ſufficient reaſons againſt the affirmance of the Decree, the Cauſe is reſtored, and the Decree pronounced, in the manner we have before mentioned, after a full diſcuſſion of the merits of the caſe.—This Decree will next engage our attention.

is pronounced in Term time, the party (if the Subpœna is made returnable the ſame Term, as it may be) has but a very few days left to ſhew Cauſe againſt the Decree, and is ſometimes reſtricted in time to do it." *For. Rom.* 156. This inconvenience is, however, in ſome degree alleviated by the liberality of the modern practice, which gives the Defendant 8 days, in which to ſhew Cauſe, excluſive of the day of ſervice. See *Hinde*, 437.

## Of the Decree in Equity.

THE *Decree* or Judgment of a Court of Equity may be either *interlocutory* or *final*; it is final, where all the facts and circumstances material to be ascertained, in order to enable the Court to do complete justice between the parties, are so fully adduced and established, by the several pleadings in the Cause, that no further elucidation is requisite. But where any material fact or circumstance is either omitted, or strongly controverted, in the pleadings, it frequently becomes necessary to supply the defects in the one case, or ascertain the truth in the other, by instituting an enquiry before one of the Masters of the Court, or by obtaining a verdict of a jury at law (1); in these

(1) It seldom happens that the first Decree of the Court is *final*; for if any material circumstance be positively asserted by the one party, and denied by the other, the Court (sensible of the deficiency of its peculiar mode of trial by written depositions)

these cases an *interlocutory* Decree is pronounced to that effect, and the *final* judgment of the Court reserved till the event of those enquiries are known.

depositions) will direct the truth of the fact to be investigated and established by the verdict of a jury. In Chancery, where, by the practice of the Court, no jury can be summoned, the method of trial is by referring the fact to the Court of King's Bench (or to the Assizes if the Cause arise in the country) upon a feigned issue between the parties. The usual method of doing which is for the Plaintiff to commence an action against the Defendant for the amount of a supposed wager laid, that the fact disputed was so and so, as that A was heir at law to B, &c. " the Defendant admits the wager, but avers that A is not heir to B, by which that fact becomes at issue between the parties. These feigned issues seem to be borrowed from the *sponsio judicialis* of the Roman law; for by *Heinec. Antiq.* l. 3, T. 16, § 3, and *Sigon. de Judic.* l. 21, p. 466, " Nota est sponsio judicialis: spondesne quingentos si meus sit? spondeo, si tuus sit. Et tu quoque spondesne quingentos, ni tuus sit? spondeo, ni meus sit." Cit. 3 *B. Com.* 453. Or, in the Court of *Chancery*, if a question of law arise in the course of the hearing, it is referred to the judges of one of the Courts of Law, who certify their opinion to the Chancellor; but in the *Exchequer*, which is a Court of *Law* as well as of Equity, such reference is unnecessary, as the Barons are themselves, in their *legal* capacity, competent to determine the point in question.

But as the queſtions moſt frequently agitated in Courts of Equity are ſuch as involve in their nature or conſequences matters of account, the moſt uſual reference is to one of the *Maſters* in *Chancery*, and the deputy *Remembrancer* in the *Exchequer*, who certifies his opinion to the Court by his *Report* concerning the matters referred to him. This report may be excepted to, if partial or defective, in the ſame manner as was noticed in a former part of this Treatiſe (1).

The

(1) See *ante*, p. 137.—Before the Maſter finally gives his opinion to the Court, he prepares a draft of his Report, of which he gives notice to the ſeveral parties concerned, that they may attend him, and make objections to it, if they think proper, before he ſigns it; and it was formerly the rule that unleſs they excepted to the draft, they ſhould not be allowed to except to the Report itſelf; and this rule was founded on the inconvenience ariſing from the prevailing practice of withholding objections till the Maſter had completed his Report, merely for the purpoſe of delay and vexation; but it is now, unfortunately, a good deal neglected, which has given riſe to too great a frequency of frivolous exceptions, much to the annoyance of the Court and the aggrievance of the party. Some check, however, (though every day's experience ſhews it to be a very inſufficient one)

The Court being at length, by certificate of the judges, the verdict of a jury, or the Report of the Master, possessed of every information necessary to enable it to adjust and decide the rights of all parties, the Cause is again brought to hearing, on the equitable matters reserved, and a definitive Decree made (1), "agree- ably

one) is opposed to the exhibition of such exceptions, by requiring the party excepting, to deposit in the hands of the Register a sum of 5l. to be forfeited if they be disallowed; and he is also ordered (if the exceptions prove extremely frivolous) to pay an extra 10s. for each exception that is over-ruled.

(1) As we have noticed in a former page the accustomed form of proceeding by the parties at the hearing of a Cause in Equity, it may not be amiss to continue that deduction by subjoining here a short account of the manner in which the Decree of the Court is taken and recorded. This is done by the *Register* of the Court, who minutes down, in a book kept for that purpose, A memorandum of the person or persons then presiding on the bench, and present at the hearing; The names of the counsel, on both sides ; The evidence and documents read; The objections (if any) made to such evidence; The manner in which such objections were disposed of; and lastly, The final sentence, judgment, or *Decree* of the Court, pronounced on the rights and interests of the several parties in the Cause. And upon the minutes thus ta- ken

ably to equity and good confcience." This Decree recites the feveral pleadings, orders, and material proceedings had in the Caufe, in the following manner:

*Monday the 12th day of* November, 1795, *in the 36th year of the reign of his Majefty King George the Third—Between* James Willis, *an Infant, by* John Willis *his Father and next friend Plaintiff,* Edward Willis, William Willis, *and* Samuel Dickinfon, *Defendants.*

*This Caufe, coming on this day to be heard and debated before the Right Honourable the Lord High Chancellor of Great Britain, in the prefence of counfel, learned on both fides, the fubftance of the Plaintiff's Bill appeared to be That, &c.* (here the Plaintiff's Bill is fhortly recited). THEREFORE *that the faid Defendant*

ken the Decree of the Court, as afterwards drawn up and recorded, is founded; and with which it muft in fubftance exactly correfpond; for no part of the Decree but what is warranted by the minutes will be binding upon the parties. If, however, they are erroneous they will be rectified on proper application to the Court. See *poft.*

*may*

*may pay, &c.* (the Prayer of the Bill) *and to be relieved is the ſcope of the Plaintiff's Bill; whereto the counſel for the Defendant alledged, that he by Anſwer admits, &c.* (the ſubſtance of the Anſwer ſtated); *whereupon, and upon debate of the matter, and hearing the Will of the ſaid* Thomas Atkins; *the Anſwers of the Defendants, &c. and the proofs taken in this Cauſe read, and what was alledged by the counſel on both ſides, his Lordſhip declared, That, &c.* (the Decree of the Court).

THURLOW, C.

WINTER *for the Plaintiff.*

The Decree being drawn up and approved; and ſigned, in *Chancery*, by the Chancellor, and in the Exchequer, by ſuch of the Barons as were preſent at the Hearing, it is engroſſed on rolls of parchment, and depoſited amongſt the records of the Court, as a perpetual evidence of the proceedings. If, however, either party think himſelf aggrieved by the Decree,

he may, before it's enrollment (1), petition the Court for a *Re-hearing* (2).

(1) Six months are allowed the party gaining the Caufe, to enroll the Decree; if he delay it till after that time, he muft apply to the Court to enroll it, *nunc pro tunc*, which is granted of courfe. Note, Orders for enrolling Decrees *nunc pro tunc* are not, by the prefent practice of the Court, entered and paffed with the Regifter, as other orders are; this omiffion feems to be juftly animadverted upon by *Gilbert* as improper and dangerous, "for fuppofe one of the errors affigned by a Bill of Review fhould be, that by the ancient rules and practice of the Court the Decree is to be enrolled by fuch a time, and yet upon the face of the enrollment it appears to have been enrolled afterwards, without any leave or order of the Court for its being fo; how will fuch an error or miftake be ever cured or got over." *For. Rom.* 189.

(2) If, however, it be only a trifling miftake, it is fometimes, to fave expence to the parties, rectified in the Regifter's minutes without going to a Re-hearing.

OF

## OF RE-HEARING A CAUSE IN EQUITY.

THE Re-hearing of a Cause in Equity can be obtained only whilst the Decree is *in transitu* and incomplete; for if it have received the signature of the Chancellor, or the Barons, it can be revised only by Supplemental Bill[*]. The method of obtaining a Re-hearing, is by entering a Caveat with the proper officer against the enrollment of the Decree (1), and presenting a petition to the Court requesting the indulgence of such Re-hearing (2).

[*] See *post*, & 2 *Atk.* 40. 3 *ibid.* 811. 3 *Brow. Ch. Ca.* 79.

(1) This Caveat proceeds on the principle of preventing the inconvenience which has frequently been found to result from the too speedy signing of Decrees; and it stays the signature one lunar month from the time it is presented to the judge for enrollment. See *Burnet* v. *Theobald.* 1 *Peer Wms.* 610.

(2) By order of Court the application for a Re-hearing must be made within six months after the Decree is pronounced.

The

The form of such Petition may be thus:

*To the Right Honourable the Lord High Chancellor of Great Britain.*

*In a Cause wherein* James Willis *by* John Willis, *his Father and next friend, is Complainant, and* Edward Willis *and* William Willis, *Defendants.*

*The Humble Petition of the Defendants,*

*Sheweth,*

*That your Petitioners find themselves much aggrieved by a decretal order made in this Cause, by your Lordship, the day of whereby your Petitioner is ordered and decreed to pay unto* John Willis *for the benefit of* James Willis *an Infant, the sum of* £.800, *&c.* (1) *such sum having been long since paid,*

(1) 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 generally be complained of, the case of the Petitioners and the decretal part of the order are shortly set forth; and an intimation is also usually given (especially

*paid, and proof thereof made, as your Petitioners conceive and are advised.*

*Your petitioners, therefore, humbly pray that your Lordship will be pleased to vouchsafe a Re-hearing in this cause, before your Lordship; they submitting to pay what costs the Court shall award, in case their Complaint be found groundless; and your Petitioners will ever pray, &c.*

G. MADDOCKS.

A. STAINSBY (1).

pecially if the Cause was heard before a different judge) of the Decree which the Petitioners are advised *ought* to have been made.

(1) To prevent applications for Re-hearings being made for the purpose of delay, it is required, in *Chancery*, by order of Court, that Petitions for this purpose be signed by two barristers at law, as a testification that the Cause is in their opinion proper to be re-heard. But, in the *Exchequer*, where the merits of the Petition are discussed in open Court, this is not necessary. See *post*. But in both Courts, to guard against the same inconvenience of delay, 10l. is required to be deposited in the hands of the Register of the Court, by the Petitioner, to answer costs to the other party, in case the application should prove to be frivolous.

In

In Chancery this Petition is left with the Chancellor, or the Maſter of the Rolls, who ſeldom refuſes to ſubſcribe his *fiat* for the Re-hearing; "for the practice is, that when a Petition of Re-hearing is ſigned by two counſel, ſuch credit is given by the Court to their opinion that it ought to be re-heard, as to order it to be ſet down[a]" But, in the *Exchequer*, the Petition is filed like other proceedings in the Cauſe, and its merits diſcuſſed and determined in open Court.

Upon the Re-hearing, all the evidence taken in Cauſe, whether produced before or not, is now permitted to be read; for it is the Decree of the ſame Court, which now ſits only to hear reaſons why it ſhould not be enrolled and perfected; at which time all omiſſions of either evidence or argument, conducive to their information, may be ſupplied[b].

[a] Per *Hardwicke*, *Ch.* *Amb.* 91.

[b] *Gilb. Rep.* 151. *Prec. Chan.* 496. 2 *Atk.* 408. *Amb.* 90.

5 The

The form of the Decree upon a Re-hearing differs from the firſt Decree only by the recital of ſuch other procedings as have been ſince had in the Cauſe.—Thus

*Whereas by an Order or Decree of the Right Honourable the Lord Chancellor, made on the day of it was ordered, &c.* (reciting the firſt Decree) *with which ſaid order the ſaid Defendant being diſſatisfied, he petitioned his Lordſhip for a Re-hearing of the ſaid Cauſe, and to have the order rectified in ſeveral particulars; and thereupon by an order bearing date, &c. it was ordered that the ſaid Cauſe ſhould be re-heard the day of, &c. upon the Defendant's depoſiting* 10*l. with the Regiſter; and the ſaid Defendant having depoſited the ſaid* 10*l. accordingly; and the ſaid Cauſe coming on to be heard in the preſence of counſel, &c. the counſel for the Defendant inſiſted that, &c.* (here is ſet forth the ſubſtance of the Defendant's arguments, as recited in the order of Re-hearing); *whereto the counſel for the Plaintiff inſiſted that, &c.* (the ſubſtance of the arguments for the Plaintiff),

*whereupon*

*whereupon this Court did declare and decree, That, &c.* (as in the Decree upon Re-hearing).

THURLOW, *C.*

WINTER *for the Plaintiff.*

No farther obſtacles can now be oppoſed to the enrollment of the Decree (1), which is then completely perfected, and is depoſited with the records of the Court, there to remain as of record *in perpetuam rei memoriam.* The Decree being now finally perfected, a mandate of the Court is awarded to enjoin it's performance; which, if the Decree be *in perſonam,* i. e. directed againſt the *perſon* of the Defendant, as for the payment of money, is by *Writ of Execution,* and in failure of that a *Writ of Sequeſtration.*

The form of a Writ of Execution of a Decree, is this:

(1) Unleſs, indeed, by the *death* of the parties, when the Suit may be *revived* at any time before the actual enrolment. See the nature and objects of Bills for this purpoſe, *ante*, p. 153, 154, 155.

A WRIT

## *A* WRIT *of* EXECUTION *of a* DECREE *in* EQUITY.

GEORGE *the Third, &c. To* Edward Willis *and* William Willis, *greeting: whereas by a certain final Judgment or Decree, lately made before us in our Court of Chancery, in a certain Cause there depending, wherein* James Willis, *an Infant, by* John Willis *his Father and next friend, is Complainant, and you the said* Edward Willis *and* William Willis *Defendants.* IT IS ORDERED AND DECREED, *That, &c.* (the decretal part of the order) (1), *as by the said Decree duly enrolled, and remaining as of record in our said Court of Chancery, doth and may more fully appear.* THEREFORE *we strictly enjoin and command you the said* Edward Willis *and* William Willis, *that you do, severally, pay, perform, fulfil, and execute all and every the monies, matters, and things specified and contained in the said final Judgment or Decree, in all things so far as the same any way*

(1) But in the *Exchequer,* instead of inserting the order in the body of the Writ, it is annexed to it.

*relates*

*relates to or concerns you respectively, according to the true meaning and import of the said Decree, and of these presents; and hereof fail not at your peril. Witness ourself at* Westminster, *the day of and in the 36th year of our reign.*

COURTENAY.

If the party neglect to perform the Decree, the ordinary processes of contempt, before enumerated [a], are issued against him, till his effects be sequestered and sold to satisfy the Plaintiff's demands (1).

The

[a] *ante*, p. 74—100.

(1) See *ante*, p. 98. n. (1). and *For. Rom.* 84. The ancient method of compelling the observance of a Decree, was by spending the whole process of the Court, by *Attachment, Proclamation, Commission of Rebellion*, and *Serjeant at Arms*. But in the time of Chancellor *Ellesmere*, a Defendant having been taken upon one of these processes, and still retaining a sum of money which was decreed to the Plaintiff, his Lordship ordered a *Sequestration*. "About the latter end of the reign of Q. Anne, they began to shorten the process for compelling the execution of the Decree; for by beginning with the Attachment, and proceeding to the Commission of Rebellion, a twelvemonth elapsed

The form of the Sequeſtration may be thus:

elapſed before the Plaintiff could receive any benefit from the Decree, they therefore adopted the method of ſerving the Defendant with a copy of the Decree, and upon his neglecting to obey it, he was ordered to be committed; and the practice then was immediately to commit him to the *Fleet*; and upon the return of *non eſt inventus*, by the Warden of the Fleet, the Court ordered a Sequeſtration." But this being complained of by the *Serjeant at Arms* as an infringement upon his accuſtomed privileges, an order was made in the 7th year of *Geo.* I. that there ſhould be no Sequeſtration but upon the return of *non eſt inventus* by that officer. Since which period the practice has been, either to iſſue ſucceſſively the ſeveral proceſſes of the Court, or, upon ſervice of the Decree, to obtain an order that the Defendant ſhould be committed for diſobedience; and upon that order move for a Serjeant at Arms, and a Sequeſtration on his return of *non eſt inventus*. This mode of ſhortening the proceſs is juſtified in the Chief Baron's opinion by the ancient practice of immediately committing the Defendant, on diſobedience to the order of the Court, after having entered his appearance with the Regiſter; "for if a man may be committed for non-performance of an *interlocutory* order, when he has recorded his appearance, and departs in deſpite of the Court, he certainly may be ordered to ſtand committed, after a Decree pronounced for the appearance of the Defendant is recorded at the Hearing; or if the Decree be pronounced in his abſence, it is only conditional, and he is ſerved with a copy of that Decree, and acquieſces in it, before it can be abſolute." *Supra.*

*A* SEQUESTRATION *for performance of a* DECREE *in* EQUITY.

GEORGE *the Third, &c. To our well beloved* Samuel Leghorne, Peter Wilkins, *and* Iſaac Jones [a], *greeting: whereas, by a Decree made by the Barons of our Court of Exchequer* (1), *at* Weſtminſter, *on the day of in a certain Cauſe depending in our ſaid Court, by Engliſh Bill* [b], *between* James Willis *an Infant, by* John Willis *his Father and next friend, Plaintiff, and* Edward Willis *and* William Willis, *Defendants, it was ordered and decreed, That, &c.* (the decretal part of the order) *as by the ſaid order or Decree remaining of record in our ſaid Court may more fully appear. And whereas the ſaid* Edward Willis *and* William Willis, *although duly*

[a] See *ante*, p. 83, n. (1).

(1) The form of the preceding Writ was conformable to that uſed in *Chancery*, this therefore is made agreeably to that in the *Exchequer*; one of each being ſufficient to give the reader an adequate idea of their reſpective natures, and the difference between them too immaterial to juſtify the inſertion of both.

[b] See *ante*, p. 70, n. (1).

*duly ſerved with the ſaid Decree, and a* Subpœna, *under the ſeal of our ſaid Court, in order for his performing the ſeveral matters ſpecified in the ſaid Decree, hath not yet performed the ſame, but hath neglected and refuſed ſo to do; and ſtands in contempt of us and of our ſaid Court. And whereas our Writ of Attachment hath been awarded, under the ſeal of our ſaid Court, againſt them the ſaid Defendants for their ſaid contempt, directed to the Sheriff of* Berkſhire, *who hath returned the ſame into our ſaid Court, and certified thereon that he hath taken the bodies of the ſaid Defendants, as by the ſaid Writ he was commanded: Know ye, therefore, that we, truſting to your fidelity, induſtry, and circumſpection, have appointed you our commiſſioners; and by theſe preſents do give unto you, or any two or more of you, full power, &c.* (as in the Sequeſtration to compel Appearance*), *until they the ſaid Defendants ſhall have reſpectively executed and performed the ſaid Decree, and cleared their contempt, and our*

* *ante*, p. 91.

*ſaid Court ſhall have made further order thereupon. In Witneſs, &c.*

ELIOT.

But if the Decree be *in rem*, i. e. againſt the *Lands* of the Defendant, it is uſual, after ſervice of the Writ of Execution and Attachment, for the Court to award an *Injunction* to give the Plaintiff poſſeſſion.

The form of this Writ may be thus:

GEORGE *the Third, &c. To* Edward Willis, William Willis, *and all other perſon and perſons whatſoever, who are in poſſeſſion of, or have, or claim, any right, title, or intereſt whatſoever, of, in, or to, all or any part of the meſſuages, lands, tenements, or premiſes in queſtion, greeting: whereas it hath been repreſented to us, in our Court of Chancery, in a Cauſe wherein ——— is Plaintiff, and you the ſaid* Edward Willis *and* William Willis *are Defendants; that by the Decree made in this Cauſe,*

*Cause, it was ordered, That you the said Defendants should deliver possession of the premises in question, and all deeds and writings in your custody or power relating thereto, to the said Complainants; that you the said Defendants, who are in possession of the messuages and lands in question, were served with a Writ of Execution of the said Decree, and have been required to deliver possession of the same, which you refuse to do, and a Commission of Rebellion having issued against you, &c. it was ordered that an Injunction be awarded against you the said Defendants, to enjoin you to deliver possession of the said messuages and lands, to the said Complainant, pursuant to the said Decree. We therefore, in consideration of the premises, do strictly enjoin and command you the said* Edward Willis *and* William Willis, *and both of you, and all and every other persons aforesaid, under the penalty of One Thousand Pounds to be levied upon your, each and every of your, lands, goods, and chattels, to our use, that you each and every of you do deliver the possession of the said messu-*

*ages, lands, and premifes, and of every part and parcel thereof to the faid* ——————— *and hereof fail not at your peril. Witnefs ourfelf at* Weftminfter, *the day of in the 36th year of our reign.*

ELIOT.

OF

## OF REVIEWING DECREES IN EQUITY.

IF, after the Enrollment of the Decree, any new matter or evidence be difcovered, which could not have been had, or ufed, when the Decree paffed[a]; or if an apparent Error of Judgment appear on the face of the Decree[b], it may be re-confidered by means of a BILL OF REVIEW (1).

But

[a] 1 *Vez.* 434. 2 *ib.* 576. 3 *P. Wms.* 371.

[b] 1 *Ch. Ca.* 54. *Prec. Ch.* 260. 3 *P. Wms.* 371.

(1) A Bill of Review cannot be filed without leave of the Court, "becaufe the *Chancery* being the Court of the Prince, and the laft refort, the Decrees cannot be changed or altered without leave." *For. Rom.* 185. But this applies only to thofe cafes where the Bill is founded on the difcovery of new matter; for when the error in the Decree appears upon the face of it, the leave of the Court is not neceffary. And this leave is never granted till the party has actually paid obedience to the Decree, as far as he can do it without prejudicing the rights he may feek to eftablifh by the Review, (unlefs indeed in fome *fpecial* cafes, where the Court will difpenfe with the *immediate* performance of the Decree, upon the parties entering into fufficient furety for its performance

 *eventually*)

But in reviewing a Decree, no facts can be entered into which were before in issue, or which were known to the parties at the time of the former trial[a]; for the same reason that no witnesses can be examined in a Cause after publication, that is to say, an apprehension of perjury; and it must always be either for error appearing on the face of the Decree, or upon some new matter, as a Release, &c. "for unless it were confined to such new matter, it might be made use of as a method for a vexatious person to be oppressive to the other side, and for the Cause never to be at rest[b]."

*eventually*); for otherwise it will be presumed that the application is made for the sole purpose of delay, to prevent which, it is also further required, that a certain sum be staked with the Register of the Court, to answer the expence of the Bill of Review; this sum was formerly 10l. but was afterwards increased to 20l. and is now risen to 50l. See *For. Rom.* 185. Also *Tot.* 42. 1 *Vez.* 430. 2 *Brow. Par. Ca.* 24. But no Bill of Review will be entertained after the Decree has been pronounced 20 years, see *Amb.* 645, unless in the case of Infants, or other persons under legal disabilities. 4 *Brow. Ch. Ca.* 441.

[a] 1 *Vez.* 434. 2 *ib.* 576.

[b] Per *Talbot, Chan.* 3 *Peer Wms.* 371.

This

This Bill must recite the former Bill, and the proceedings which have been had upon it; the former Decree of the Court; the points in which such Decree is conceived to be erroneous; and the facts which have come to light since the former hearing; after which the usual form in which it proceeds, is

FOR *all which said errors and imperfections in the said Decree, your Orators have brought this their said Bill of Review, and humbly conceive they should be relieved therein. In tender consideration whereof, and for that there are divers other errors and imperfections in the said Decree and proceedings, by reason whereof the same ought to be reviewed and reversed, To the end therefore that the said Decree, and all the proceedings thereupon, may be reviewed and reversed* (1), *added to, altered, and amended, and that the said*

(1) If the Decree have not been carried into execution, the Bill simply prays a Reversal; but if the Decree have been executed, the Bill may also pray the further Decree of the Court to put the party, complaining of the former Decree, into the situation in which he would have been if that Decree had not been executed. *Plead. Chan.* 81.

James

James Willis *may anſwer the premiſes, and that your Orators may be relieved in all and ſingular the premiſes, according to equity and good conſcience, &c. May it pleaſe, &c.* (to grant *Subpœna* as in other caſes).

A. Stainsby.

To a Bill of Review the Defendant ſeldom anſwers otherwiſe than by demurrer; "for that the ſaid Decree is free from the errors complained of." This Demurrer being ſet down to be argued, the Court proceeds to affirm or reverſe the former Decree, and the prevailing party becomes entitled to the ſum depoſited to anſwer his coſts[a].

[a] See *For. Rom.* 187, 189.

Of

## Of Appeal to the House of Lords.

IF either of the parties be ſtill diſſatisfied with the deciſion of the Court in which the Suit has been proſecuted, they have yet a further reſort, by Appeal to the Houſe of Lords (1); which is made by preferring a Peti-

(1) The Houſe of Peers is the ſupreme Court of Legiſlature in the kingdom, but it has no *original* juriſdiction over Cauſes (except in caſes of impeachment for high miſdemeanors), but only an *appellate* authority from the Courts below, to which it ſucceeded of courſe upon the diſſolution of the *Aula Regis*. "For as the Barons of Parliament were conſtituent members of that Court, and the reſt of its juriſdiction was dealt out to other tribunals, over which the great officers who accompanied thoſe Barons were reſpectively delegated to preſide, it followed that the right of receiving appeals and ſuperintending all other juriſdictions ſtill remained in the reſidue of that noble aſſembly from which every other great Court was derived." 3 *Blac. Com.* 57.

The Houſe of Lords appear to have firſt aſſerted their juriſdiction of hearing appeals from Chancery towards the latter end of *Charles* I. Though there is no written document of ſuch appeal till 18 *James* I. there are accuſations preferred againſt Lord Ch. *Bacon* for corruption and other miſbehaviour

Petition to that assembly in the following form:

*Between* James Willis *by* John Willis *his Father and next friend, Complainant, and* Edward Willis *and* William Willis, *executors of the last Will and Testament of* Thomas Atkins, *Esq. deceased, Defendants.*

*To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled;*

our in his office. See *For. Rom.* 190. and *Lords Jour.* 1621. This appellate jurisdiction was long and warmly controverted by the Commons in the latter part of the reign of *Charles* II. *Com. Jour.* 1675, "but it being obvious to the reason of all mankind that where the Courts of Equity became principal tribunals for deciding Causes of property, a revision of their Decrees, by way of appeal, became equally necessary as a Writ of Error from the judgment of a Court of Law," this dispute is now at rest. 3 *Blac. Com.* 454. *Show. P. C.* 81.

The appeal is heard on a mere paper petition of the party, without any Writ from the king, the foundation of which is said to be that this House being the great court of the king, out of which the Chancery was originally derived, a petition will consequently bring the Cause and Record before them. See *For. Rom.* 190.

The

*The Humble Petition and Appeal of the ſaid Defendants*

SHEWETH,

THAT, *&c.* (ſetting forth the Defendant's caſe) *That the ſaid Complainant* James Willis, *ſome time in or about Trinity Term,* 1785, *exhibited his Bill in the High Court of Chancery againſt your Petitioners, to be relieved, &c.* (the Prayer of the Bill). *To which Bill your ſaid Petitioners appeared and anſwered; and thereby inſiſted that, &c.* (ſuch parts of anſwer as the Defendant alledged in rebuttal of the charges of Plaintiff's Bill). *That the Plaintiff having replied to the ſaid anſwer, and your Petitioners having rejoined, the ſaid Cauſe was at iſſue, and divers Witneſſes being examined on both ſides, the ſame came on to be heard before the Lord Chancellor of Great Britain, the day of* 1785, *when, although your Petitioners by their ſaid Anſwer, and alſo divers Witneſſes by their depoſitions, did expreſsly*

*expressly swear, &c.* (the facts sworn in the Answer, and by the Witnesses, and on the grounds of which the appeal is made) *his Lordship was pleased to decree, That, &c.* (the Decree and subsequent proceedings, if any, before the Master). *That your Petitioners are advised that the said Decree and subsequent orders are erroneous, and humbly appeal therefrom to your Lordships.*

*Your Petitioners, therefore, humbly pray your Lordships to grant to your Petitioners your Lordships Order of Summons to the said Complainant, to put in his Answer to this your Petitioner's Appeal, at such time as your Lordships shall prefix, in order that your Lordships may hear the said Cause; and that your Lordships will please to reverse the said Decree and subsequent orders in the said Cause, or grant to your Petitioners such relief in the premises, as to your Lordships, in your great wisdom shall*

*shall seem meet: and your Petitioner shall ever pray, &c.*

EDWARD WILLIS, } *Appellants.*
WILLIAM WILLIS, }

A. STAINSBY, } *Counsel* (1).
G. MADDOCKS, }

This Petition is lodged with the clerk of the Houfe, (with whom the Appellant depofits 20l. and within eight days enters into a recognizance of 200l. to fatisfy cofts to the other party, in cafe the Decree be affirmed[a];) and being read in the Houfe, the Refpondent is ordered to have a copy of the Appeal, and a

(1) In order that the Houfe may not be troubled with frivolous appeals, preferred for the purpofe of vexation and delay, it is required that the Appellant's Petition be figned by two counfel of character, as a teftimonial of the propriety of the Appeal; and, by order of the Houfe, 1697, they are to be "thofe who have been of counfel in the fame Caufe in the Courts below, or fhall attend as counfel at the bar of the Houfe, when the faid Appeal fhall come on to be heard."

[a] Ord. 27th Jan. 1710.

time

time is given him, within which he is required to put in his anſwer (1).

*The Form of* RESPONDENT'S ANSWER.

*The Anſwer of* James Willis *to the Petition and Appeal of* Edward Willis *and* William Willis.

*This Reſpondent, not confeſſing or acknowledging all or any of the matters or things to be true, as in and by the ſaid Petition and Appeal are mentioned and ſet forth*[a]*: for anſwer thereunto ſaith, that he believes it to be true that ſuch Decree as is complained of, was made by the Court of Chancery, as in the ſaid Petition and Appeal are mentioned and ſet forth; but as to the dates, ſubſtance,*

(1) And "when an order is made for the Reſpondent to anſwer, by a time limited, and no anſwer is put in by that time, upon proof made of due ſervice of ſuch order, a peremptory day ſhall be appointed for putting in the anſwer, without any further notice to be given to the Reſpondents." Ord. 19th Jan. 1719.

[a] See *ante*, p. 115, n. (1).

*and*

*and contents thereof, this Respondent humbly craves leave to refer thereunto, when the same shall be produced; and this Respondent humbly conceives, and is advised, that the said Decree is agreeable to equity and justice; and, therefore, humbly hopes that the same will be affirmed, and that the said Petition and Appeal will be dismissed this most Honourable Court with costs.*

A. MANNING.

The Respondent's answer having come in, a day is appointed, of which notice is given to the other party, for hearing the merits of the Appeal. The case of the Appellant being stated, the Respondent's Defence made, and the evidence entered into on both sides (1), in the order it was gone through at the hearing

(1) In Re-hearings and Reviews, new matter, we have seen, may be added; but in an Appeal to the House of Lords no new evidence is on any account admitted—" This Court being a distinct jurisdiction, which differs very considerably from those instances wherein the same jurisdiction revises

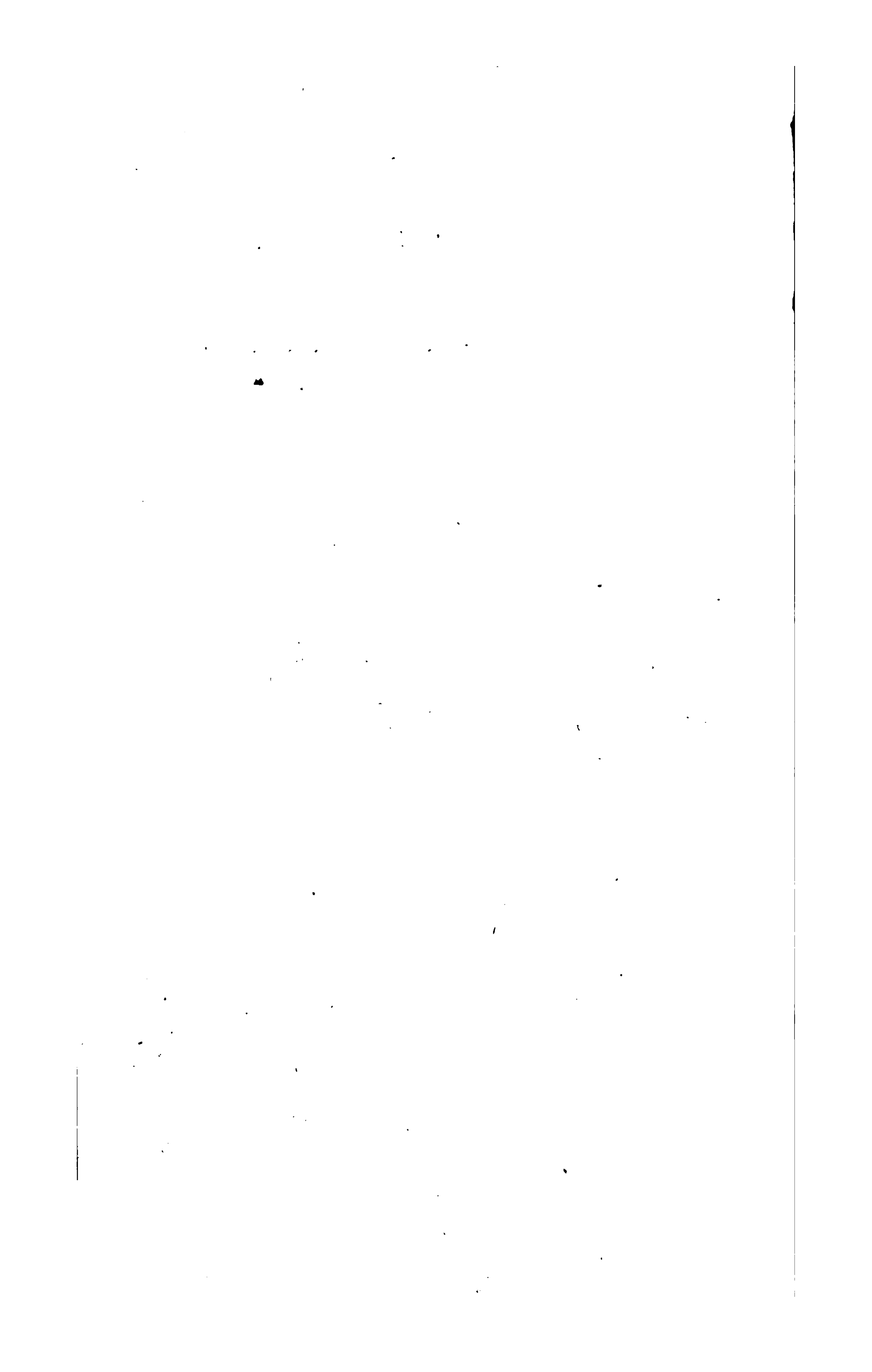
hearing in Court (1), their Lordſhips "ORDER and ADJUDGE the ſaid Appeal to be diſmiſſed, and the Decree therein complained of to be affirmed"—"the ſaid Decree to be reverſed, and the Bill of the ſaid Reſpondent to be diſmiſſed;" or pronounce ſuch other decretal order, affirming, reverſing, or varying, the Decree of the Court below, as to their wiſdom ſeems

reviſes and corrects its own acts." And it is a practice unknown to our Law (though conſtantly followed in the Spiritual Courts) when a ſuperior Court is reviewing the ſentance of an inferior, to examine the juſtice of the former Decree by evidence that was never produced below. 3 *Blac, Com.* 55.

(1) The form of proceeding at the hearing of an Appeal is preſcribed by the Houſe to be that "one of the counſel for the Appellants ſhall open the Cauſe, then the evidence on their ſide ſhall be read; which done, the other counſel for the Appellants may make obſervations on the evidence; then one of the counſel for the Reſpondents ſhall be heard, and the evidence on their ſide read, after which the other counſel for the Reſpondents ſhall be heard, and one counſel only for the Appellants reply." Ord. 2 *Mar.* 1727. And printed copies of the reſpective caſes of the Appellant and Reſpondent are uſually delivered to the Lords, previous to the day appointed for the Hearing. And, by Ord. 19 *Ap.* 1698, they are to be ſigned by the counſel retained in the Cauſe,

ſeems equitable.—And this order being abſo-
lute and irrevocable, puts a final period to our
SUIT IN EQUITY.

Cauſe, of which only two are allowed on each ſide in the
Houſe of Lords; though any number may be engaged in
the Courts below.



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