A

TREATISE

ON THE

PLEADINGS

IN SUITS IN THE

COURT OF CHANCERY,

BY ENGLISH BILL.

BY

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(NOW LORD REDESDALE.)

THE FOURTH EDITION,

WITH ADDITIONAL REFERENCES AND NOTES,

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TO THE READER.

LORD REDESDALE having honoured me with that confidence which was necessary to my superintending a new edition of the following highly valuable work, I proposed to examine the authorities cited in the last edition of it, and to add the references to such new cases as might appear to me to elucidate the subject, a plan in which his Lordship was pleased to concur. In the additions accordingly made by way of note, I have endeavoured, for the most part, to confine myself to the mere citation of authorities, generally selecting those of the latest date; although I have, in some instances

where the decisions did not directly sustain or precisely apply to his Lordship's propositions, but where, nevertheless, notice of them seemed material, made such remarks as were necessary to their introduction. In these respects I have been led into greater detail than was originally intended; but it is hoped that the practical utility of the present publication will be thereby increased. In referring to the authorities, I have made the distinction, which it is now usual to adopt, between decisions and *dicta*, by citing the name of the case in the one instance, and the page of the report in the other. I have also deemed it expedient to render the index more copious and precise. His Lordship has made some few additions and alterations in the text, but I have not been instrumental in withdrawing from the Profession any part of the work itself. And here I may be permitted to remark that it has been a subject of great interest to me, in the course of my inquiries, to perceive that this work, which in its out-

line and substance was the original treatise upon equity pleading, has, from the time of its first publication been so far the guide to subsequent decisions as to have rendered any material correction, or even qualification of the general principles explained in it, wholly unnecessary.

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PREFACE

TO

THE THIRD EDITION.

THE materials from which the first edition of this Treatise was compiled were not very ample or satisfactory; consisting, principally, either of mere books of practice, or of reports of cases, generally short, and in some instances manifestly incorrect and inconsistent; and the author had had little experience to enable him to supply the deficiencies of those materials. The communication of information, and the assistance of experience, were earnestly solicited by the preface to that edition, but with little effect. Four-and-thirty years have since elapsed; and when, at the distance of seven years from the first publication, the second edition was prepared for the press, such observations as had occurred to the author in practice, and such notes as he had collected, were the principal means of improvement which he possessed; and he was then too much engaged in business to give that attention to the subject which it required. Nearly eight-and-twenty years have since passed; and many volumes of reports have

been published, and some treatises have appeared (particularly those by Mr. Fonblanque and Mr. Cooper), from which much assistance might have been derived. During the greater part of this period the author was not only unwilling to engage in the labour of preparing a new edition, but disabled, by various avocations, from attempting to make any important additions. Long absence from the bar, the consequent want of the habits of practice, age, the enjoyment of repose, and the indolence which that enjoyment too often produces, have increased his unwillingness to undertake a work of labour; and that which is now offered is little more than a republication of the second edition, with references to some cases since reported; a few additional notes of cases not reported; some corrections of apparent errors; and some extension of parts which appeared to have been most imperfectly treated in the former editions. It is therefore far from satisfactory to himself; and would not have been now given, if he had not been assured that even a republication of the last edition, with all its imperfections, was desired by the Profession.

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INTRODUCTION.

Of the extraordinary jurisdiction of the court of Chancery; and of the manner in which Suits to that jurisdiction are instituted, defended, and brought to a decision.

THE Chancery of England has various offices and jurisdictions. The most important jurisdiction is that which it exercises as a court of equity, usually styled its extraordinary jurisdiction, to distinguish it from those which are termed its ordinary jurisdictions, and are chiefly incident to its ministerial offices, and the privileges of its officers.

The exercise of this extraordinary jurisdiction by courts distinct from those usually styled courts of common law, to which the ordinary administration of justice in civil suits is intrusted, seems to be, in a great degree, a peculiarity in the jurisprudence of the country, but pervading the whole system of its judicial polity. The origin of these courts is involved in great obscurity; their authority has been formerly questioned, and the subjects and limits of their juris-

diction were then but imperfectly ascertained. Time has given them full establishment, and their powers and duties have become fixed and acknowledged. If any doubt on the extent of their duties has occurred of late years, it has principally arisen from the liberality with which the courts of common law have noticed and adopted principles of decision established in courts of equity; a liberality generally conducive to the great ends of justice, but which may lead to great inconvenience, if the whole system of the administration of justice by courts of equity, the extent of their powers and means of proceeding, the subservience of their principles of decision to the principles of the common law, the preference which they have allowed to common-law rights where in conscience the parties have stood on equal grounds, and the defect in the powers of the courts of common law arising from their mode of proceeding, should not be fully considered, in all their consequences (*a*).

In the construction of every system of laws, the principles of natural justice have been first considered; and the great objects of municipal laws have been, to enforce the observance of those principles, and to provide a positive rule where some rule has been deemed necessary or expedient and natural justice has prescribed none. It has also been an object of municipal law to establish modes of administering justice.

(*a*) See Lord Hardwicke's judgment in Wortley and Birkhead, 2 Vez. 573, 574. And see 6 Ves. 39.

The wisdom of legislators in framing positive laws to answer all the purposes of justice has ever been found unequal to the subject; and therefore, in all countries, those to whom the administration of the laws has been intrusted, have been compelled to have recourse to natural principles, to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity. Hence a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left, at least in their superior courts, to the same tribunal. In prescribing forms of proceeding in courts of justice human foresight has also been defective; and therefore it has been commonly submitted to the discretion of the courts themselves, to vary or add to established forms, as occasion and the appearance of new cases have required.

In England a policy somewhat different has prevailed. The courts established for the ordinary administration of justice, usually styled courts of common law, have, as in other countries, recourse to principles of equity in the interpretation and application of the positive law: but they are bound to established forms of proceeding; are in some degree limited in the objects of their jurisdiction; have been embarrassed by a rigid adherence to rules of decision, originally framed, and in general retained, for wise purposes, yet, in their application, sometimes incompatible with the principles of natural and universal justice, or not equal to the full application of those principles; and

the modes of proceeding in those courts, though admirably calculated for the ordinary purposes of justice, are not in all cases adapted to the full investigation and decision of all the intricate and complicated subjects of litigation, which are the result of increase of commerce, of riches, and of luxury, and the consequent variety in the necessities, the ingenuity, and the craft of mankind. Their simplicity, clearness and precision, are highly advantageous in the ordinary administration of justice; and to alter them materially would probably produce infinite mischief: but some change would have been unavoidable if the courts of common law had been the only courts of judicature.

Early therefore in the history of our jurisprudence the administration of justice by the ordinary courts appears to have been incomplete, and to supply the defect the courts of equity have exerted their jurisdiction: assuming the power of enforcing the principles upon which the ordinary courts also decide when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (contrary to the purpose of their original establishment) instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law, as in the case of trusts, is silent (*b*). The courts of

(*b*) Principles of decision thus adopted by the courts of equity, when fully established and made the grounds of successive decisions, are considered by those courts as rules to be

equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and, without pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence, which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation (*c*).

This establishment, as before observed, has obtained throughout the system of our judicial polity; most of the branches of that system having their

observed with as much strictness as positive law. See the judgment of Sir Joseph Jekyll, quoted by Sir Thomas Clarke, in Blackst. Rep. 152. Pluraque quæ usu fori comprobata, denique juris scripti auctoritatem propter vetustatem obtinuerunt. Cic. de invent. lib. 2. c. 22. Heinecc. de edict. præt. lib. 1. c. 6. p. 129.

(*c*) It is not a very easy task accurately to describe the jurisdiction of our courts of equity. This general description, though imperfect, and in some respects inaccurate, is offered only for the purpose of elucidating the following treatise, in the course of which the subject must be in many points more fully considered.

peculiar courts of equity (*d*), and the court of chancery assuming a general jurisdiction, which extends to cases not within the bounds or beyond the powers of other jurisdictions (*e*).

The existence of this extraordinary jurisdiction, entirely distinct from the ordinary courts, though frequently considered as an enormity requiring redress, has perhaps produced a purity in the administration of justice which could not have been effected by other means; and it is in truth, in a great degree, a consequence of that jealous anxiety with which the principles and forms established by the common law have been preserved in the ordinary

(*d*) Thus the court of exchequer, established for the particular purpose of enforcing the payment of debts due to the king, and incidentally administering justice to the debtors and accountants to the Crown, has its own peculiar court of equity. The courts of Wales, of the Counties Palatine, of London, of the Cinque Ports, and other particular jurisdictions, have also their peculiar courts of equity.

(*e*) The court of equity in the exchequer chamber is also frequently considered as a court of general jurisdiction, and in effect it is so, in a great degree, though in principle it is not. For its jurisdiction is in strictness confined to suits of the Crown, and of debtors and accountants to the Crown; and a suggestion, the truth of which the court will not permit to be disputed, "that its suitor is a "debtor and accountant to the "Crown," is still used to give it more extensive jurisdiction. This practice, as well as a similar fiction used to give general jurisdiction to the common-law court in the exchequer, and the fiction used to give jurisdiction to the court of king's bench in a variety of civil suits of which it has not strictly cognizance, may appear the objects of censure; but they have probably had the effect of preventing that abuse of power which is too often the consequence of the single jurisdiction of one supreme court.

courts as the bulwarks of freedom, and of the absolute necessity of preventing the strict adherence to those principles and forms from becoming intolerable.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition (*f*), to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal (*g*); or to the king himself in his court of chancery, in case the person holding the seal is a party (*h*), or the seal is in the king's hands (*i*). But if the suit is instituted on behalf of the Crown (*k*), or of those who partake of its prerogative (*l*), or whose rights are under its particular protection as the objects of a public charity (*m*), the matter of complaint is offered to the court by way of information, given by the proper officer, and not by way of petition (*n*).

(*f*) 9 Edw. IV. 41. Prac. Reg. p. 57, Wyatt's Edit. This book, and other books of practice, are only cited where no other authority occurred, or where they might lead the reader to further information on the subject. The Practical Register is mentioned by Lord Hardwicke, 2 Atk. 22, as a book, though not of authority, yet *better collected than most of the kind.*

(*g*) As to the authority of a lord-keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.

(*h*) 4 Vin. Ab. 385. L. Leg. Jud. in Ch. 44. 255. 258. Jud. Auth. M. R. 182. 2 Prax. Alm. Cur. Canc. 463. Ld. Chan. Jefferies against Witherly.

(*i*) 1 West. Symb. Cha. 194. b.

(*k*) 1 Roll. Ab. 373. *Att. Gen.* v. *Vernon*, 1 Vern. 277. 370.

(*l*) As to idiots and lunatics, see Chap. 1, sect. 1.

(*m*) 1 Ca. in Cha. 158. Anon. 3 Atk. 276. See 1 Swanst. 292.

(*n*) On the subject of informations, see Chap. 1, sect. 3.

Except in some few instances (*o*), bills and informations have been always in the English language; and a suit preferred in this manner in the court of chancery has been therefore commonly termed a suit *by English bill*, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court as a court of common law, which, till the statute of the 4 Geo. II. c. 26, were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

Every bill must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may either complain of some injury which the person exhibiting it suffers, and pray relief according to the injury; or, without praying relief, may seek a discovery of matter necessary to support or defend another suit; or, although no actual injury is suffered, it may complain of a threatened wrong, and stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed. As the court

(*o*) There are some bills in early time in the French language. See Calendars of Proceed. in Chan. printed under authority of Commiss. on Public Records, 1827.

of chancery has general jurisdiction in matters of equity not within the bounds or beyond the powers of inferior jurisdictions (*p*), it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this, it requires the party injured to institute a suit in the court of chancery, the sole object of which is the removal of the former suit by means of a writ called a writ of *certiorari*; and the prayer of the bill used for this purpose is confined to that object.

The bill, except it merely prays the writ of certiorari, generally requires the answer of the defendant, or party complained of, upon oath. An answer is thus required, in the case of a bill seeking the decree of the court on the subject of the complaint, with a view to obtain an admission of the case made by the bill, either in aid of proof, or to supply the want of it; a discovery of the points in the plaintiff's case controverted by the defendant, and of the grounds on which they are controverted; and a discovery of the case on which the defendant relies, and of the manner in which he means to support it. If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant upon oath may be required to obtain an admission of the plaintiff's title, and a discovery of the claims of the defendant, and of the grounds on which those claims are intended to be supported. When the sole object of a bill is a dis-

(*p*) The court of equity in the exchequer chamber, though a particular, is not an inferior, jurisdiction.

covery of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery. The plaintiff may, if he thinks proper dispense with this ceremony, by consenting to or obtaining an order of the court for the purpose; and this is frequently done for the convenience of parties where a discovery on oath happens not to be necessary. And where the defendant is entitled to privilege of peerage, or as a lord of parliament, or is a corporation aggregate, the answer, in the first case, is required upon the honour of the defendant(*q*), and in the latter, under the common seal(*r*).

To the bill thus preferred, unless the sole object of it is to remove a cause from an inferior court of equity, it is necessary for the person complained of either to make defence, or to disclaim all right to the matters in question by the bill. As the bill calls

(*q*) Ord. in Cha. Ed. Bea. 105. 261. 18 Ves. 470. 1 Vez. 470. 1 Ves. and B. 187. 1 Jac. and W. 526. And see *Robinson* v. *Lord Rokeby*, 8 Ves. 601, as to Irish peers.

(*r*) It may be observed, that although in ordinary cases the answer is *required* upon oath, other sanctions are in certain instances allowed in practice: a quaker puts in his answer upon his solemn affirmation and declaration, see 7 W. & M. c. 34. 8 Geo. 1. c. 6. Ord. in Cha. Ed. Bea. 247. *Wood* v. *Story*, 1 P. Wms. 781. *Marsh* v. *Robinson*, 2 Anstr. 479, and so it appears does a moravian, see 22 Geo. 2. c. 30. And infidels are permitted to swear according to the forms of the religion which they profess, provided such forms constitute an appeal to the Supreme Being, see the well-known cases of *Omychund* v. *Barker*, 1 Atk. 21. S. C. 2 Eq. Ca. Abr. 397, and *Ramkissenseat* v. *Barker*, 1 Atk. 51: a jew makes oath upon the pentateuch, *Robeley* v. *Langston*, 2 Keble, 314, Anon. 1 Vern. 263: and a mahometan upon the koran, Stra. 1104.

upon the defendant to answer the several charges contained in it, he must do so, unless he can dispute the right of the plaintiff to compel such an answer, either from some impropriety in requiring the discovery sought by the bill, or from some objection to the proceeding to which the discovery is proposed to be assistant; or unless by disclaiming all right to the matters in question by the bill he shows a further answer from him to be unnecessary (*s*).

A defendant to a bill may have an interest to support the plaintiff's case, or his interest may not be adverse to that claim; he may be a mere trustee, or brought before the court in some character necessary to sustantiate the suit, that there may be proper parties to it. In such cases, his answer may often be mere matter of form, submitting the subject of the suit to the judgment of the court; and, if any act should be required to be done by him, desiring only to be indemnified by the decree of the court.

The grounds on which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are various. The subject of the suit may not be within the jurisdiction of a court of equity: or some other court of equity may have the proper jurisdiction: the plaintiff may not be entitled to sue by reason of some personal disability: if he has no such

(*s*) In some cases a defendant may be compelled to answer, though he has no interest in the matters in question. See Chap. II. sect. II. part I.

disability he may not be the person he pretends to be: he may have no interest in the subject: or if he has an interest, he may have no right to call upon the defendant concerning it: the defendant may not be the person he is alleged to be by the bill: or he may not have that interest in the subject which can make him liable to the claims of the plaintiff: and, finally, if the matter is such as a court of equity ought to interfere in, and no other court of equity has the proper jurisdiction, if the plaintiff is under no personal disability, if he is the person he pretends to be, and has a claim of interest in the subject, and a right to call upon the defendant concerning it; if the defendant is the person he is alleged to be, and also claims an interest in the subject which may make him liable to the demands of the plaintiff; still the plaintiff may not be entitled, in the whole or in part, to the relief or assistance he prays: or if he is so entitled, the defendant may also have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties; the effecting complete justice, and finally determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity. Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill, and may not be sufficient to protect him from making the discovery sought by it; and where there is no ground for disputing the right of the plaintiff to the relief prayed, or if no relief is prayed, yet if there is any

impropriety in requiring the discovery sought by the bill, or if the discovery can answer no purpose, the impropriety or immateriality of the discovery may protect the defendant from making it.

The defence which may be made on these several grounds may be founded on matter apparent on the bill, or on a defect either in its frame or in the case made by it; and may on the foundation of the bill itself demand the judgment of the court whether the defendant shall be compelled to make any answer to the bill, and consequently whether the suit shall proceed; or it may be founded on matter not apparent on the bill, but stated in the defence, and may on the matter so offered demand the judgment of the court, whether the defendant shall be compelled to make any other answer to the bill, and consequently whether the suit shall proceed, except to try the truth of the matter so offered; or it may be founded on matter in the bill, or on further matter offered, or on both, and submit to the judgment of the court on the whole case made on both sides; and it may be more complex, and apply several defences differently founded to distinct parts of the bill.

The form of making defence varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court. If it rests on the bill, and on the foundation of matter there apparent demands the judgment of the court whether the suit shall proceed at all, it is termed a demurrer; if on the foundation of new matter offered, it demands the judgment of the court whether the

defendant shall be compelled to answer further, it assumes a different form, and is termed a plea; if it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called an answer. If the defendant disclaims all interest in the matters in question by the bill, his answer to the complaint made is again varied in form, and is termed a disclaimer. And all these several forms of defence, and disclaimer, or any of them, may be used together, if applying to separate and distinct parts of the bill.

A demurrer, being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in the part of the bill to which it extends; and therefore, as no fact can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer, which, if favourable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer, if allowed, consequently prevents any further proceeding (*t*). A plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the

(*t*) An amendment of a bill has been permitted by a court of equity after a demurrer to the whole bill had been allowed; but this seems not to have been strictly regular; 2 P. Wms. 300; and it seems most proper, if the ground of demurrer may be removed by amendment, to make a special order, adapted to the circumstances of the case. See Chap. 2. sect. 2. part 1.

purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true: but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings(*u*); though, if the truth of the plea shall not be supported, further proceedings may be had, which will be noticed in a subsequent page (*x*). An answer generally controverts the facts stated in the bill, or some of them, and states other facts to show 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 upon the case thus made to the judgment of the court. If an answer admits the facts stated in the bill, or such as are material to the plaintiff's case, and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the answer is considered as true, and the court will decide upon it. But if the answer does not admit all the facts in the bill material to the plaintiff's case, or states any fact which the plaintiff is not disposed to admit, the truth of the answer, or of any

(*u*) See Chap. III. (*x*) See Chap. II. sect. 2. part 2.

part of it, may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted, by a replication, which in this case also concludes the pleadings according to the present (*y*) practice of the court. If a demurrer or plea is over-ruled upon argument the defendant must make a new defence. This he cannot do by a second demurrer of the same extent after one demurrer has been over-ruled; for although by a standing order of the court a cause of demurrer must be set forth in the pleading, yet if that is overrruled, any other cause appearing on the bill may be offered on argument of the demurrer, and, if valid will be allowed; the rule of the court affecting only the costs. But after a demurrer has been overruled new defence may be made by a demurrer less extended, or by plea, or answer; and after a plea has been over-ruled defence may be made by demurrer, by a new plea, or by an answer: and the proceedings upon the new defence will be the same as if it had been originally made (*z*). A disclaimer, neither asserting any fact, nor denying any right sought by the bill, admits of no further pleading (*a*). If the sole object of a suit is to obtain a discovery, there can be no proceeding beyond an answer by which the discovery is obtained. A suit which only seeks to remove a cause from an inferior court of equity does not require any defence, and consequently there can be no pleading beyond the bill.

(*y*) See Chap. III.
(*z*) See Chap. II. sect. 2. part 1.
(*a*) See Chap. II. sect. 2. part 3.

Suits thus instituted are sometimes imperfect in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed pending the suit in various ways. To supply the defects arising from any such circumstances new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party sometimes renders a litigation by another party necessary, to operate as a defence, or to obtain a full decision on the rights of all parties. Where the court has given judgment on a suit it will in some cases permit that judgment to be controverted, suspended, or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court. Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining, the benefit of a suit thus instituted, of instituting a cross-suit, and of impugning the judgment of the court on a suit brought to a decision, or of carrying a judgment into execution; and on all the different kinds of bills there may be the same pleadings, as on a bill used for instituting an original suit.

It frequently happens, that pending a suit the parties discover some error or defect in some of the pleadings, and if this can be rectified by amendment of the pleading the court will in many cases permit

it. This indulgence is most extensive in the case of bills; which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiencies, and avoid the consequences of errors, by special replications. But this tending to long and intricate pleading, the special replication requiring a rejoinder, in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might surrejoin, the special replication is now disused for this purpose, and the court will, in general, permit a plaintiff to rectify any error, or supply any defect in his bill, either by amendment, or by a supplemental bill; and will also permit, in some cases, a defendant to rectify an error or supply a defect in his answer, either by amendment, or by a further answer.

Summary jurisdiction has been given by authority of Parliament to courts of equity in certain cases, arising incidentally from the provisions of acts of Parliament, both public and private, without requiring the ordinary proceeding by bill or information, and substituting a simple petition to the court; the assistance of the court being required only to provide for the due execution of the provisions of such acts.

But by an act of the 52 of Geo. 3, c. 101, a summary jurisdiction, on petition only, has been given in the case of abuses of trusts created for charitable purposes, which before were the subjects of information by the King's Attorney General, to which the persons of whom complaint was made might make

defence, according to the nature of the case stated in the information, by demurrer, plea or answer, so that the court might have before it the whole case on which its judgment might be required, and to which evidence to be produced in support of or in answer to the complaint made might be properly applied.

The loose mode of proceeding authorized by this act was probably intended to save expense in investigating abuses of charities: but in practice it unavoidably led to great inconvenience; the court not having before it any distinct record to which its judgment might be properly applied, and especially with respect to those against whom complaint might be made, or those against whom no such complaint could be made, but whose interests might be affected by the judgment of the court. This inconvenience became apparent in a case which was made the subject of appeal to the House of Lords, who finally determined, that a jurisdiction, so summary, and in which the proceedings were so loose, ought, in just construction of the act, to be confined to the simple case of abuse of a clear trust, not involving any question beyond the question of such abuse, and particularly not involving the interests of persons to whom such abuse of trust could not be imputed (*b*).

In an inquiry into the nature of the several pleadings thus used, it seems most convenient to consider them in the order in which they have their

(*b*) Corp^{n} of *Ludlow* v. *Greenhouse*. D. Proc. Feb. 1827.

effect, and consequently to treat, 1, of bills; 2, of the defence to bills, and therein of demurrers, pleas, answers and disclaimers; 3, of replications; and 4, to notice matters incidental to pleadings in general, and particularly the cases in which amendments of inaccurate or erroneous pleadings are permitted.

CHAPTER THE FIRST.

OF BILLS.

SECTION I.

By whom, and against whom, a Bill may be exhibited.

IN treating of bills, it will be proper to consider, I. The several persons who are capable of exhibiting a bill, by themselves, or under the protection, or in the name of others; and against whom a bill may be exhibited: II. The several kinds and distinctions of bills: and III. The frame and end of the several kinds of bills. An information differing from a bill in little more than in name and form, its nature will be principally considered under the general head of bills, and its peculiarities will be afterwards noticed.

It has been already observed that suits on behalf of the Crown, and of those who partake of its prerogative or claim its peculiar protection, are instituted by officers to whom that duty is attributed (*a*). These are, in the case of the Crown, and of those whose rights are objects of its particular attention,

(*a*) See above, p. 7.

the king's attorney(*b*) or solicitor-general(*c*); and as these officers act merely officially, the bill they exhibit is by way, not of petition or complaint, but of information to the court of the rights which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the suit does not immediately concern the rights of the Crown, its officers depend on the relation of some person, whose name is inserted in the information, and who is termed the relator; and as the suit is carried on under his direction, he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it(*d*). It sometimes happens that this person has an in-

(*b*) See 1 Swanst. 290, 291, 294, and *Rex* v. *Austen*, 8 Pri. Exch. R. 142. And the Crown may be represented as plaintiff by the attorney general, and as defendant by the solicitor general, in the same suit, where there are conflicting claims between the King and persons partaking of his prerogative, or under his peculiar protection. See *Att. Gen.* v. *Mayor of Bristol.* 3 Madd. 319. S. C. 2 Jac. & W. 294. *Att. Gen.* v. *Vivian.* 1 Russ. R. 226.

(*c*) See, as to the solicitor-general, Wilkes's Case, 4 Burr. 2527. *Sol. Gen.* v. *Dovy*, 6 May, 1735, and *Sol. Gen.* v. *Warden and Fellowship of Sutton Coldfield*, Mich. 1763, in Chancery. This subject is particularly considered in part iii. sect. 4, of a manuscript treatise on the Star-chamber, in the British Museum, Harl. MSS. vol. i. No. 1226, mentioned in 4 Bl. Com. 267.

(*d*) 1 Russ. R. 236. It appears, as intimated in the text, that it is not absolutely necessary, even in the instances there alluded to, that a relator should be named, 2 Swanst. 520. 4 Dow, P. C. 8, although the practice of naming one seems to have been universally adopted, 1 Ves. J. 247. 4 Dow, P. C. 8. 1 Sim. & Stu. 396. But it may be remarked that the Legislature, in certain special cases in which the right may be doubtful, has

terest in the matter in dispute, of the injury to which interest he has a right to complain. In this case his personal complaint being joined to, and incorporated with, the information given to the court by the officer of the Crown, they form together an information and bill, and are so termed (*e*). But if the suit *immediately* concerns the rights of the Crown, the information is generally exhibited without a relator (*f*); and where a relator has been named, it has been done through the tenderness of the officers of the Crown towards the defendant, that the court might award costs against the relator, if the suit should appear to have been improperly instituted, or in any stage of it improperly conducted (*g*). The queen-consort, partaking of the

empowered the attorney-general to institute a suit, by information, without requiring that a relator should be named. See 59 Geo. 3. c. 91, and see 1 Sim. & Stu. 396.

(*e*) See as instances, *Att. Gen.* v. *Oglender*, 1 Ves. J. 247. *Att. Gen.* v. *Brown*, 1 Swanst. 265. *Att. Gen.* v. *Master and Fell. of Cath. Hall*, 1 Jac. R. 381. *Att. Gen.* v. *Heelis*, 2 Sim. & Stu. 67, and *Att. Gen.* v. *Vivian*, 1 Russ. R. 226. If the relator should not be entitled to the equitable relief which he seeks for himself, the suit may nevertheless be supported on behalf of the Crown, 1 Swanst. 305; and upon an information and bill, the bill alone may be dismissed, see *Att. Gen.* v. *Vivian*, 1 Russ. R. 226. And see *Att. Gen.* v. *Moses*, 2 Madd. 294, a case of information and bill, in which the King having had no interest, the attorney-general was an unnecessary party.

(*f*) *Att. Gen.* v. *Vernon*, 1 Vern. 277. 370. *Att. Gen.* v. *Crofts*. 4 Bro. P. C. 136, Toml. Ed.

(*g*) The propriety of naming a relator for this purpose, and the oppression arising from a contrary practice, were particularly noticed by baron Perrot, in a cause in the Exchequer, *Att. Gen.* v. *Fox*. In that cause no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. See 2 Swanst. 520. 1 Sim. & Stu. 397. 1 Russ. R. 236. If

prerogative of the Crown, may also inform by her attorney (*h*).

Suits on behalf of bodies politic and corporate, and of persons who do not partake of the prerogative of the Crown, and have no claim to its particular protection, are instituted by themselves, either alone or under the protection of others. Bodies politic and corporate (*i*), and all persons of full age, not being feme-covert, idiot or lunatic, may by themselves alone exhibit a bill. A feme-covert, if her husband is banished (*k*) or has abjured the realm (*l*), may do so likewise; for she then may act in all respects as a feme-sole (*m*). Those, therefore, who are incapable of exhibiting a bill by themselves alone, are, 1, infants; 2, married women, except the wife of an exile, or of one who has abjured the realm; 3, idiots and lunatics (*n*).

the relator should die, this court would appoint another. *Att. Gen.* v. *Powel*, Dick. 355.

(*h*) 10 Edw. III. 179. Collins, 131. 2 Rol. Ab. 213.

(*i*) 3 Swanst. 138. As examples of suits by such bodies, see the *Charitable Corporation* v. *Sutton*, 2 Atk. 406. *Universities of Oxford and Cambridge* v. *Richardson*, 6 Ves. 689. *Mayor, &c. of London* v. *Levy*, 8 Ves. 398. *City of London* v. *Mitford*, 14 Ves. 41. *Bank of England* v. *Lunn*, 15 Ves. 569. *Mayor of Colchester* v. *Lowten*, 1 Ves. & B. 226. *Dean and Chapter of Christchurch* v. *Simonds*, 2 Meriv. 467. *East India Comp.* v. *Keighley*, 4 Madd. 10. *Vauxhall Bridge Company* v. *Earl Spencer*, 1 Jac. R. 64. *President, &c. of Magdalen College* v. *Sibthorp*, 1 Russ. R. 154.

(*k*) 1 Hen. IV. 1. *Sybell Belknap's case*, 2 Hen. IV. 7. a. 11 Hen. IV. 1. a. b.

(*l*) *Thomas of Weyland's case*, 19 Edw. I. 1 Inst. 133. a.

(*m*) See *Newsome* v. *Bowyer*, 3 P. Wms. 37.

(*n*) It may seem, that the disabilities arising from outlawry, excommunication, conviction of Popish recusancy, attainder, and alienage, and

1. An infant is incapable *by himself* of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit (*o*). When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the court of chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his *next friend*. But as it frequently happens that the nearest relation of the infant himself withholds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favour of infants, will permit any person to institute suits on their behalf (*p*); and who-

those which formerly arose from villenage and profession, ought to be here noticed. Such of them as subsist do not, and the others did not, absolutely disable the person suffering under them from exhibiting a bill. Outlawry, excommunication, and conviction of Popish recusancy, are not in some cases any disability; and where they are a disability, if it is removed by reversal of the outlawry, by purchase of letters of absolution in the case of excommunication, or by conformity in the case of a popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue than as they deprive him of the property which may be the object of the suit. Villenage and profession were in the same predicament. See Chap. 2, sect. 2, part 2.

(*o*) *Turner* v. *Turner*, Stran. 708.

(*p*) *Andrews* v. *Cradock*, Prec. in Chan. 376. Anon. 1 Atk. 570. 2 P. Wms. 120. 1 Ves. J. 195.

ever acts thus the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill (*q*). The next friend is liable to the costs of the suit (*r*), and to the censure of the court, if the suit is wantonly or improperly instituted (*s*); but if the infant attains twenty-one, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs (*t*). If the

(*q*) 2 Eq. Cas. Abr. 239. 1 Ves. J. 195.

(*r*) 4 Madd. 461; and see *Turner* v. *Turner*, 2 P. Wms. 297. S. C. on appeal, 2 Eq. Ca. Ab. 238; and Strange, 708. It is hence, of course, important to the defendant that the prochein amy, or next friend of the infant, be a person of substance, Anon. 1 Atk. 570; and, where the contrary appears to be the fact, on an application by the defendant before answer, he will be compelled to give security for costs, or another person will be appointed to sue in his stead, *Wale* v. *Salter*, Mosely, 47. Anon. Mosely, 86. Anon. 1 Ves. J. 409; and see *Pennington* v. *Alvin*, 1 Sim. & Stu. 264.

(*s*) And if the next friend of an infant do not proceed in the cause, this court, if it be desirable, will supersede him, *Ward* v. *Ward*, 3 Meriv. 706; 1 Jac. & W. 483; but the next friend of an infant cannot procure the substitution of another person to act in his place, without submitting to an investigation into his past conduct by the court, *Melling* v. *Melling*, 4 Madd. 261. If the next friend should die, the court will take upon itself to appoint another, *Lancaster* v. *Thornton*, Ambl. 398. *Bracey* v. *Sandiford*, 3 Madd. 468.

(*t*) In *Turner* and *Turner*, 2 P. Wms. 297, Lord King was first of opinion that upon a bill filed in the name of an infant who attained twenty-one, the plaintiff was liable to the costs, though he did not proceed after he attained that age; but upon a rehearing he changed his opinion, and dismissed the bill without costs, the prochein amy being dead. See S. C. Strange, 708, and 2 Eq. Ca. Ab. 238. It now seems, that if no misconduct (*Pearce* v. *Pearce*, 9 Ves. 548.) be proved against the next friend, either in the institution, or progress of the suit, the late infant, although he should not adopt it, will be liable to the costs, Anon. 4 Madd. 461.

person who thus acts as friend of an infant does not lay his case properly before the court, by collusion, neglect or mistake, a new bill may be brought on behalf of the infant; and if a defect appears on hearing of the cause, the court may order it to stand over, with liberty to amend the bill(*u*).

The next friend of an infant plaintiff is considered as so far interested in the event of the suit that he or his wife(*x*) cannot be examined as a witness. If their examination is necessary for the purposes of justice his name must be struck out of the bill, and that of another responsible person substituted, which the court, upon application, will permit to be done(*y*). As some check upon the general license to institute a suit on behalf of an infant, if it is represented to the court that a suit preferred in his name is not for his benefit, an inquiry into the fact will be directed to be made by one of the masters; and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings(*z*). And if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit; and

(*u*) *Serle* v. *St. Eloy*, 1 P. Wms. 386. *Pritchard* v. *Quinchant*, Ambl. 147.

(*x*) *Head* v. *Head*, 3 Atk. 511.

(*y*) Strange, 708. As a general rule, it may be stated that this is done upon the next friend giving security for the costs incurred in his time, *Witts* v. *Campbell*, 12 Ves. 493. *Davenport* v. *Davenport*, 1 Sim. & Stu. 101.

(*z*) *Da Costa* v. *Da Costa*, 3 P. Wms. 140. Strange, 709. 2 Eq. Ca. Ab. 239. Such an inquiry will not be directed upon the application of the next friend himself. *Jones* v. *Powell*, 2 Meriv. 141.

when that point is ascertained will stay proceedings in the other suit (*a*).

2. A married woman being under the protection of her husband, a suit respecting her rights is usually instituted by them jointly (*b*). But it sometimes happens that a married woman claims some right in opposition to rights claimed by her husband; and then the husband being the person, or one of the persons, to be complained of, the complaint cannot be made by him. In such case, therefore, as the wife being under the disability of coverture cannot sue alone, and yet cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name by her next friend (*c*), who is also named in the bill in the same manner as in the case of an infant (*d*). But a bill cannot in the case of a feme-covert be filed without her consent (*e*). The consent of an infant to a bill filed in his name is not necessary (*f*).

(*a*) 1 Ves. 545; *Owen* v. *Owen*, Dick. 310. *Sullivan* v. *Sullivan*, 2 Meriv. 40. *Mortimer* v. *West*, 1 Swanst. 358; but it seems an application for this purpose should not be made except in a strong case, *Stevens* v. *Stevens*, 6 Madd. 97; nor generally, after a decree in one of the suits, 1 Jac. R. 528.

(*b*) *Smith* v. *Myers*, 3 Madd. 474. *Farrer* v. *Wyatt*, 5 Madd. 449. *Hughes* v. *Evans*, 1 Sim. & Stu. 185.

(*c*) *Griffith* v. *Hood*, 2 Vez. 452. *Lady Elibank* v. *Montolieu*, 5 Ves. 737. *Pennington* v. *Alvin*, 1 Sim. & Stu. 264.

(*d*) But, it seems, the next friend of a feme-covert is not always, in the first instance, liable to the costs. Strange, 709. 2 Eq. Ca. Ab. 239. *Barlee* v. *Barlee*, 1 Sim. & Stu. 100.

(*e*) *Andrews* v. *Cradock*, Prec. in Ch. 376. S. C. 1 Eq. Cas. Abr. 72. 1 Sim. & Stu. 265.

(*f*) *Andrews* v. *Cradock*, Prec. in Ch. 376.

3. The care and commitment of the custody of the persons and estates of idiots and lunatics are the prerogative of the Crown, and are always intrusted to the person holding the great seal, by the royal sign-manual. By virtue of this authority, upon an inquisition finding any person an idiot or a lunatic, grants of the custody of the person and estate of the idiot or lunatic are made to such persons as the lord chancellor, or lord keeper, or lords commissioners for the custody of the great seal for the time being, think proper(*g*). Idiots and lunatics, therefore, sue by the committees of their estates(*h*). Sometimes, indeed, informations have been exhibited by the attorney-general on behalf both of idiots and lunatics, considering them as under the peculiar protection of the Crown(*i*), and particularly if the interests of the committee have clashed with those of the lunatic(*k*). But in such cases, a proper relator ought to be named(*l*); and where a person found a lunatic has had no committee, such an information has been filed, and the court has proceeded to give

(*g*) 3 P. Wms. 106, 107. *Ex parte Pickard*, 3 Ves. & Bea. 127.

(*h*) 1 Ca. in Cha. 19; *Ridler* v. *Ridler*, 1 Eq. Ca. Ab. 279. Prac. Reg. 272. Wy. Ed.

(*i*) *Att. Gen.* v. *Parkhurst*, 1 Ca. in Cha. 112. *Att. Gen.* v. *Woolrich*, 1 Ca. in Cha. 153. 3 Bro. P. C. 633. Toml. Ed.

(*k*) See *Att. Gen.* v. *Panther*, Dick. 748.

(*l*) *Att. Gen.* at relation of *Griffith Vaughan*, a lunatic, against *Tyler* and others, 11 July 1764. On motion, ordered that a proper relator should be appointed, who might be responsible to the defendants for the costs of the suit. See Dick. 378. 2 Eden, 230. And see *Att. Gen.* v. *Plumptree*, 5 Madd. 452, though the case of a charity information.

directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee (*m*).

Persons incapable of acting for themselves, though not idiots or lunatics, or infants, have been permitted to sue by their next friend, without the intervention of the attorney-general (*n*).

A bill may be exhibited against all bodies politic and corporate, and all persons, as well infants, married women, idiots and lunatics, as those who are not under the same disability, excepting only the king and queen (*o*). But to a bill filed against a married woman her husband must also be a party, unless he is an exile, or has abjured the realm; and the committee of the estate of on idiot or lunatic must be made defendant with the person whose property is under his care. Where the rights of the Crown are concerned, if they extend only to the superintendence of a public trust, as in the case already mentioned of a charity, the king's attorney-general may be made a party to sustain those rights; and in other cases, where the Crown is not in possession, a title vested in it is not impeached, and its rights are only incidentally concerned, it has generally been considered that the king's attorney-general may be made

(*m*) *Att. Gen.* on behalf of *Maria Lepine*, a lunatic, at the relation of *John Fox*; and also *Maria Lepine* against *Earl* and *Countess Howe* and others; 26 March 1793.—3 Apr. 1794.

(*n*) *Eliz. Liney*, a person deaf and dumb, by her next friend, against *Thomas Witherly* and others. In chancery—Decree, 1 Dec. 1760. Decree on supplemental bill, 4 March 1779. See *Wartnaby* v. *Wartnaby*, 1 Jac. R. 377.

(*o*) See Chap. 2, sect. 1.

a party in respect of those rights, and the practice has been accordingly (*p*). But where the Crown is in possession, or any title is vested in it which the suit seeks to divest or affect, or its rights are the immediate and sole object of the suit, the application must be to the King by petition of right (*q*), upon which, however, the Crown may refer it to the chancellor to do right, and may direct that the attorney-general shall be made a party to a suit for that purpose; or a suit may be instituted in the court of exchequer, as a court of revenue, and general auditor for the King, and relief there obtained, the attorney-general being made a party (*r*). The Queen has also the same prerogative (*s*).

A suit may affect the rights of persons out of the jurisdiction of the court, and consequently not compellable to appear in it. If they cannot be prevailed upon to make defence to the bill, yet, if there are other parties, the court will in some cases proceed against those parties (*t*); and if the absent parties are merely passive objects of the judgment of the

(*p*) See *Balch* v. *Wastall*, 1 P. Wms. 445. *Dolder* v. *Bank of England*, 10 Ves. 352.

(*q*) See legal judic. in Chanc. stated p. 18. *Reeve* against *Att. Gen.* mentioned in *Penn* against *Lord Baltimore*, 1 Vez. 445, 446. The bill was dismissed 27 Nov. 1741, by Lord Hardwicke.

(*r*) Lord Hardwicke in *Huggins and York-buildings company*, in chancery, 24 Oct. 1746. *Pawlet* v. *Att. Gen.* in Excheq. Hardres, 465. *Poole* v. *Att. Gen.* Excheq. Parker, 272. *Wilkes*'s case, Exch. Lane, 54.

(*s*) 2 Roll. Ab. 213. But see Staunf. Prær. 75, 6. 9 Hen. 6, 53. Writ of annuity against Joan queen dowager of Hen. IV.

(*t*) *Williams* v. *Whinyates*, 2 Bro. C. C. 399. 1 Sch. & Lefr. 240. 16 Ves. 326.

court, or their rights are incidental to those of parties before the court, a complete determination may be obtained (*u*); but if the absent parties are to be active in the performance of a decree, or if they have rights wholly distinct from those of the other parties, the court cannot proceed to a determination against them (*x*).

(*u*) In *Att. Gen.* at relation of *University of Glasgow*, against *Baliol College* and others, in Chancery, Dec. 11th 1744, which was an information filed, impeaching a decree made in 1699, on an information by the attorney-general against the trustees of a testator, his heirs at law, and others, to establish a will, and a charity created by it, alleging that the decree was contrary to the will, and that the university of Glasgow had not been made party to the suit; Lord Hardwicke overruled the latter objection, as the university of Glasgow was a corporation out of the reach of the process of the court, which warranted the proceeding without making that body party to the suit. See *Walley* v. *Whalley*, 1 Vern. 487. *Rogers* v. *Linton*, Bunb. 200. *Quintine* v. *Yard*, 1 Eq. Ca. Abr. 74.

(*x*) See *Fell* v. *Brown*, 2 Bro. C. C. 276. Hence there sometimes arises an absolute defect of justice, which seems to require the interposition of the Legislature.

CHAPTER I.

SECTION II.

Of the several kinds and distinctions of Bills.

IT has been mentioned in the introduction that different kinds of bills are used to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining the benefit of a suit thus instituted, of instituting a cross-suit, of impugning the judgment of the court on a suit brought to a decision, and of carrying a judgment into execution. The several kinds of bills have been usually considered as capable of being arranged under three general heads. I. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests. II. Bills not original, which are either an addition to, or a continuance of, an original bill, or both. III. Bills, which, though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of the former bill, but in the nature of original bills. And though this arrangement is not perhaps the most perfect, yet, as it is nearly just, and has been very generally adopted in argument, and in the books of reports and of practice, it will be convenient to treat of the different kinds of bills with reference to it.

I. A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the plaintiff to defend himself against a possible future injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills have therefore been again divided into bills praying relief, and bills not praying relief.—An original bill praying relief may be, 1. A bill praying the decree or order of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. 2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. 3. A bill praying the writ of certiorari to remove a cause from an inferior court of equity.—An original bill not praying relief may be, 1. A bill to perpetuate the testimony of witnesses. 2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II. A suit imperfect in its frame, or become so by accident before its end has been obtained, may, in many cases, be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to or continuance of the former bill, or both. A bill of this kind may be, 1. A supplemental bill, which is merely an addition to the

original bill. 2. A bill of revivor, which is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. 3. A bill both of revivor and supplement, which continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit.

III. Bills for the purposes of cross litigation of matters already depending before the court, of controverting, suspending, avoiding or carrying into execution, a judgment of the court, or of obtaining the benefit of a suit which the plaintiff is not entitled to add to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by or seeking the benefit of former bills: and may be, 1. A cross-bill, exhibited by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first bill. 2. A bill of review, to examine and reverse a decree made upon a former bill, and signed by the person holding the great seal, and enrolled, whereby it has become a record of the court. 3. A bill in the nature of a bill of review, brought by a person not bound by the former decree. 4. A bill to impeach a decree upon the ground of fraud. 5. A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of matter arisen subsequent to it. 6. A bill to carry a decree made

in a former suit into execution. 7. A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill. 8. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective, without abatement in cases which do not admit of a supplemental bill to supply that defect.

CHAPTER I.

SECTION III.

Of the frame and end of the several kinds of Bills; and of Informations.

THE several kinds of bills have been already considered as divided into three classes. In the first class have been ranked original bills; in the second, bills not original; in the third, bills in the nature of original bills, though occasioned by former bills. The frame and end of the several kinds of bills will be treated with reference to this distribution, and the peculiarities of informations will be considered under a fourth head.

I. Original bills have been mentioned as again divisible into bills praying relief, and bills not praying relief.

Original bills praying relief have been ranked under three heads.—1. 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. 2. Bills of interpleader. And, 3. Certiorari bills.—Bills of the first kind are the bills most usually exhibited in the court; and as the several other kinds of bills are either consequences of this, or very similar to it in many respects, the consideration of bills of this kind will in a great measure involve the consideration of bills in general.

1. An original bill, praying the decree of the court touching rights claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited, must show the rights of the plaintiff, or person exhibiting the bill; by whom, and in what manner, he is injured; or in what he wants the assistance of the court; and that he is without remedy, except in a court of equity, or at least is properly relievable, or can be most effectually relieved there. Having thus shown the plaintiff's title to the assistance of the court, the bill may pray, that the defendant, or person against whom the bill is exhibited, may answer upon oath the matters charged against him; and it may also pray the relief or assistance of the court which the plaintiff's case entitles him to. For these purposes the bill must pray, that a writ, called a writ of subpœna, may issue under the great seal, which is the seal of the court, to require the de-

fendant's appearance, and answer to the bill; unless the defendant has privilege of peerage, or as a lord of parliament, or is made a defendant as an officer of the Crown. In the case of a peer or peeress, or lord of parliament, the bill must first pray the letter of the person holding the great seal, called a letter missive, requesting the defendant to appear to and answer the bill (*a*); and the writ of subpœna only in default of compliance with that request. And if the attorney-general is made a defendant as an officer of the Crown, the bill must pray, instead of the writ of subpœna (*b*), that he, being attended with a copy, may appear and put in an answer. It is usual to add to the prayer of the bill a general prayer of that relief which the circumstances of the case may require; that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has a right (*c*). Indeed it has been said, that a prayer of general relief, without a special prayer of the particular relief to which the plaintiff thinks himself entitled, is sufficient (*d*); and that the particular relief which the case requires

(*a*) This mark of courtesy is in respect of peerage generally, see *Lord Milsington* v. *Earl of Portmore*, 1 Ves. & B. 419; and is to be observed towards Scotch peers, see Act of Union with Scotland, 5 & 6 Anne, c. 8, art. 23, and Irish peers not members of the House of Commons, see Act of Union with Ireland, 39 & 40 Geo. 3, c. 67, art. 4, and *Robinson* v. *Lord Rokeby*, 8 Ves. 601.

(*b*) See *Barclay* v. *Russell*, Dick. 729, S. C. 3 Ves. 424.

(*c*) *Hollis* v. *Carr*, 2 Mod. 86.

(*d*) See *Cook* v. *Martyn*, 2 Atk. 3. The report of this case is apparently very inaccurate. See 1 Eden. R. 26. 11 Ves. 574.

may, at the hearing, be prayed at the bar (*e*). But this relief must be agreeable to the case made by the bill (*f*), and not different from it (*g*); and the court will not in all cases be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. If, therefore, the plaintiff doubts his title to the relief he wishes to pray, the bill may be framed with a double aspect; that if the court determines against him in one view of the case, it may yet afford him assistance in another (*h*). Upon an information by the attorney-general on behalf of a charity, the court will give the proper directions as to the charity, without regarding the propriety or impropriety of the prayer of the information (*i*).

All persons interested in the subject of the suit ought generally to be parties (*k*), if within the ju-

(*e*) See *Wilkinson* v. *Beal*, 4 Madd. 408.

(*f*) *Beaumont* v. *Boultbee*, 5 Ves. 485. *Hiern* v. *Mill*, 13 Ves. 114. 2 Sch. & Lefr. 10. 729. 3 Swanst. 208, note.

(*g*) 2 Atk. 141. 3 Atk. 132. 1 Ves. J. 426. 2 Vez. 299. *Birch* v. *Corbin*, 9 Dec. 1784, in Chan. 1 Ves. J. 426. *Lord Walpole* v. *Lord Orford*, 3 Ves. 402. *Palk* v. *Lord Clinton*, 12 Ves. 48.

(*h*) 2 Atk. 325; and see *Perry* v. *Phelips*, 17 Ves. 173.

(*i*) *Att. Gen.* v. *Jeanes*, 1 Atk. 355. 1 Vez. 43. 72. 418. *Att. Gen.* v. *Breton*, 2 Vez. 426, 427. 11 Ves. 247. 367. 2 Jac. & W. 370; and it seems that a similar observation would in some instances apply upon a bill filed on behalf of an infant, *Stapilton* v. *Stapilton*, 1 Atk. 2; and see *Durant* v. *Durant*, 1 Cox, 58, in which, on reference to the record, it appears that the daughter was an infant, Reg. Lib. 1783, p. 192.

(*k*) This proposition, although undoubtedly correct in relation to suits for relief, *Pawlet* v. *Bishop of Lincoln*, 2 Atk. 296. *Poore* v. *Clark*, 2 Atk. 515. 1 Ves. J. 39. 7 Ves. 563. 1 Meriv. 262. 3 Meriv. 512.

risdiction of the court (*l*). Who are the necessary parties to a suit will be considered in the next chapter, in treating of demurrers; but if any necessary parties are omitted, or unnecessary parties are inserted, the court, upon application, will in general permit the proper alterations to be made. The cases in which this permission is usually granted, and the terms upon which it may be obtained, will be more particularly the subject of consideration in the fourth chapter.

It is the practice to insert in a bill a general charge, that the parties named in it combine together, and with several other persons unknown to the plaintiff, whose names, when discovered, the plaintiff prays he may be at liberty to insert in the bill. This practice is said to have arisen from an idea that without such a charge parties could not be added to the bill by amendment; and in some cases perhaps the charge has been inserted with a view to give the court jurisdiction. It has been probably for this reason generally considered, that a defendant demurring to a bill comprising persons whose interests are so distinct that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. The denial of combination usually inserted as words of course at the close of an answer, is a denial of unlawful com-

has been said, but upon somewhat doubtful authority, not to apply where discovery alone is sought, *Sangosa* v. *E. I. Comp.* Eq. Ca. Ab. 170.

(*l*) As to mode of framing the bill, where a defendant is out of the jurisdiction, see 1 Sch. & Lefr. 240; *Wilkinson* v. *Beal*, 4 Madd. 408.

bination; and it has been determined that a general charge of combination need not be answered (*m*). An answer to a charge of unlawful combination cannot be compelled; and a charge of lawful combination ought to be specific to render it material. For where persons have a common right they may join together in a peaceable manner to defend that right; and though some of them only may be sued, the rest may contribute to the defence, at their common charge (*n*): and if on the ground of such a combination the jurisdiction of a court of equity is attempted to be sustained, where the jurisdiction is properly at the common law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction by a court of equity. From whatever cause the practice of charging combination has arisen, it is still adhered to, except in the case of a peer, who was never charged with combining with others to deprive the plaintiff of his right, either from respect to the peerage, or perhaps from apprehension that such a charge might be construed a breach of privilege.

The rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly yet succinctly, alleged. Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged

(*m*) See *Oliver* v. *Haywood*, 1 Anstr. Exch. Rep. 82.

(*n*) See *Lord Howard* v. *Bell*, Hob. 91.

positively (*n*), and with precision (*o*); but the claims of the defendant may be stated in general terms; and if a matter essential to the determination of the plaintiff's claims is charged to rest in the knowledge of the defendant, or must of neccessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, a precise allegation is not required (*p*).

As the bill must be sufficient in substance, so it must have convenient form (*q*). The form of an original bill commonly used consists of nine parts:—The first part is the address of the bill to the person holding the great seal, the terms of which are always prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is committed.—In the second place are contained the names of the parties complainants, and their descriptions (*r*), in which their abode is particularly required to be set forth, that the court, and the parties defendants to the bill, may know where to resort to compel obedience to any

(*n*) It has been determined, upon demurrer, that it is not a sufficient allegation of fact in a bill, to state that the plaintiff is so informed. *Lord Uxbridge* v. *Staveland*, 1 Vez. 56.

(*o*) See *E. I. Comp.* v. *Henchman*, 1 Ves. J. 287. *Cressett* v. *Mytton*, 3 Bro. C. C. 481. *Ryves* v. *Ryves*, 3 Ves. 343. *Mayor of London* v. *Levy*, 8 Ves. 398. *Carew* v. *Johnston*, 2 Sch. & Lefr. 280. *Albretcht* v. *Sussman*, 2 Ves. and Bea. 323.

(*p*) See *Baring* v. *Nash*, 1 Ves. & Bea. 551.

(*q*) 9 Edw. IV. 41. Prac. Reg. 57. Wy. Ed.

(*r*) It seems, however, that the description, so given, of a plaintiff, is not considered to be an allegation of the truth thereof, see *Albretcht* v. *Sussman*, 2 Ves. & Bea. 323.

order or process of the court, and particularly for payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit.—The third part contains the case of the plaintiffs, and is commonly called the stating-part of the bill (*s*).—In the fourth place is the general charge of confederacy against the persons complained of, which has been already mentioned as commonly inserted, though it seems unnecessary.—Fifthly, if the plaintiffs are aware of a defence which may be made, and have any matter to allege which may avoid it, the general charge of confederacy is usually followed by an allegation that the defendants pretend or set up the matter of their defence, and by a charge of the matter which may be used to avoid it. This is commonly called the charging-part of the bill, and is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiffs to admit; for which purpose the charge of pretence of the defendant is held to be sufficient (*t*). Thus, if a bill is filed on any equitable ground by an heir, who apprehends his ancestor has made a will, he may state his title as heir; and alleging the will by way of pretence of the defendant's claiming under it, make it a part of the case without admitting it.—The sixth part of the bill is intended to give jurisdiction of the suit to the court by a general averment that the acts complained of are contrary to equity, and tend to the

(*s*) See 11 Ves. 574. See also *Flint* v. *Field*, 2 Anstr. 543.
(*t*) 3 Atk. 626. 11 Ves. 575.

injury of the complainants, and that they have no remedy or not a complete remedy, without the assistance of the court; but this averment must be supported by the case shown in the bill, from which it must be apparent that the court has jurisdiction.—The bill having shown the title of the persons complaining to relief, and that the court has the proper jurisdiction for that purpose, in the seventh place prays, that the parties complained of may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and the belief they are enabled to form on the subject. A principal end of an answer upon the oath of the defendants, is to supply proof of the matters necessary to support the case of the plaintiffs; and it is therefore required of the defendants, either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare themselves unable to form any belief concerning it. But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and the variations to

which it may be subject, with a view to prevent evasion, and compel a full answer. This is commonly termed the interrogating-part of the bill; and as it was originally used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters (*u*). Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory the defendant is not compellable to answer it: a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill. But a variety of questions may be founded on a single charge, if they are relevant to it (*x*). Thus, if a bill is filed against an executor for an account of the personal estate of his testator, upon the single charge that he has proved the will may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required. The prayer of relief is the next and eighth part of the bill, and is varied according to the case made, concluding always with a prayer of general relief, at the discretion of the court (*y*).—To attain all the ends of the bill, it, ninthly, and lastly, prays that process may issue (*z*) requiring the Defendants to appear to and

(*u*) 1 Vez. 538. 6 Ves. 62. *Faulder* v. *Stuart*, 11 Ves. 296. *Bullock* v. *Richardson*, 11 Ves. 373. 11 Ves. 574.

(*x*) 1 Vez. 318. 11 Ves. 301. 376.

(*y*) Vide sup. p. 38.

(*z*) They alone are defendants against whom process is prayed. See *Fawkes* v. *Pratt*, 1 P. Wms.

answer the bill, and abide the determination of the court on the subject; adding, in case any defendant has privilege of peerage, or is a lord of parliament, a prayer for a letter missive before the prayer of process; and in case the attorney-general, as an officer of the Crown, is made a defendant, the bill, as before observed, instead of praying process against him, prays that he may answer it upon being attended with a copy.—For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ; as the writ of injunction, to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act(*z*); the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom(*a*); and other writs of a similar nature. When

593; and *Windsor* v. *Windsor*, Dick, 707.

(*z*) It is a general rule, that the writ of injunction will not be granted unless prayed for by a bill which is already filed, *Savory* v. *Dyer*, Ambl. 70, or, under special circumstances, which the party applying undertakes to file forthwith, *M'Namara* v. *Arthur*, 2 Ball & B. 349; but there are exceptions to this general rule, see *Wright* v. *Atkyns*, 1 Ves. & B. 313. *Casamajor* v. *Strode*, 1 Sim. & Stu. 381. *Amory* v. *Brodrick*, 1 Jac. R. 530.

(*a*) It seems requisite that the writ of *ne exeat regno* should be prayed for by bill. Anon. 6. Madd. 276; unless the application be made in a cause depending. *Collinson* v. ——, 18 Ves. 353; *Moore* v. *Hudson*, 6 Madd. 218; see further on the subject of this writ. *Hyde* v. *Whitfield*, 19 Ves. 342. *Raynes* v. *Wyse*, 2 Meriv. 472. *Flack* v. *Holm*, 1 Jac. & W. 405. and the cases therein cited, *Leake* v. *Leake*, 1 Jac. & W. 605. *Graves* v. *Griffith*, 1 Jac. & W. 646. *Blaydes* v. *Calvert*, 2 Jac. & W. 211. *Pannell* v. *Tayler*, 1 Turn. R. 96.

a bill seeks to obtain the special order of the court, or a provisional writ, for any of these purposes, it is usual to insert, immediately before the prayer of process, a prayer for the order or particular writ which the case requires; and the bill is then commonly named from the writ so prayed, as an injunction-bill, or a bill for a writ of *ne exeat regno*. Sometimes the writ of injunction is sought, not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff; and the prayer of the bill must then be framed accordingly.

These are the formal parts of an original bill as usually framed. Some of them are not essential, and particularly it is in the discretion of the person who prepares the bill, to allege any pretence of the defendant, in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a bill in all cases has given rise to a common reproach to practisers in this line, that every bill contains the same story three times told. In the hurry of business it may be difficult to avoid giving ground for the reproach; but in a bill prepared with attention the parts will be found to be perfectly distinct, and to have their separate and necessary operation.

The form of every kind of bill bears a resemblance to that of an original bill; but there are necessarily some variations, either arising from the purposes for which the bill is framed, or the circumstances under which it is exhibited; and those variations will be noticed, together with the peculiarities attending each kind of bill.

Every bill must be signed by counsel(*a*); and if it contains matter criminal, impertinent, or scandalous, such matter may be expunged, and the counsel ordered to pay costs to the party aggrieved(*b*). But nothing relevant is considered as scandalous(*c*).

2. Where two or more (*d*) persons claim(*e*) the same thing by different or separate interests(*f*), and another person, not knowing to which of the claimants he ought of right to render a debt or duty(*g*), or to deliver property in his custody(*h*), fears he may

(*a*) *Dillon* v. *Francis*, Dick. 68. *French* v. *Dear*, 5 Ves. 547. 2 Ves. & B. 358. *Kirkley* v. *Burton*, 5 Madd. 378. n. *Webster* v. *Threlfall*, 1 Sim. & Stu. 135. *Pitt* v. *Macklew*, 1 Sim. & Stu. 136. n. Lord Eldon declared that the signature of counsel to a bill is to be regarded as a security, that, judging from written instructions laid before him of the case of the defendant as well as of the plaintiff, there appeared to him, at the time of framing it, good ground of suit. 3d June 1826. MSS. And see 3 Ves. 501.

(*b*) Ord. in Cha. Ed. Bea. 165. *Emerson* v. *Dallison*, 1 Ch. Rep. 194; 6 Madd. 252.

(*c*) 2 Vez. 24. 15 Ves. 477.

(*d*) *Angell* v. *Hadden*, 15 Ves. 244.

(*e*) See 2 Ves. Jun. 107. 15 Ves. 245. *Stevenson* v. *Anderson*, 2 Ves. & B. 407. *Morgan* v. *Marsack*, 2 Meriv. 107.

(*f*) And this may be where the claim of one is by virtue of an alleged legal, and that of the other upon an alleged equitable, right, *Paris* v. *Gilham*, Coop. R. 56. *Martinius* v. *Helmuth*, 2 Ves. & B. 412 (2d edit.) *Morgan* v. *Marsack*, 2 Meriv. 107.

(*g*) 1 Eq. Ca. Abr. 80. 2 Ves. Jun. 310; and see *Farebrother* v. *Prattent*, 1 Dan. Exch. R. 64. *Farebrother* v. *Harris*, ibid. 68.

(*h*) This will not extend to cases of bailment where the parties may be compelled to interplead at law. See *Langston* v. *Boylston*, 2 Ves. Jun. 101. 1 Meriv. 405. It may be observed that he must not himself claim any interest in the property. *Mitchell* v. *Hayne*, 2 Sim. and Stu. 63.

be hurt by some of them (*i*), he may exhibit a bill of interpleader against them (*k*). In this bill he must state his own rights, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. If any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding till the right is determined (*l*).

As the sole ground on which the jurisdiction of the court in this case is supported is the danger of injury to the plaintiff from the doubtful titles of the defendants, the court will not permit the proceeding to be used collusively to give an advantage to either party, nor will it permit the plaintiff to delay the payment of money due from him, by suggesting a doubt to whom it is due; therefore, to a bill of interpleader the plaintiff must annex an affidavit that there is no collusion between him and any of the parties (*m*); and if any money is due from him he must bring it into court, or at least offer so to do by his bill (*n*).

(*i*) 1 Eq. Ca. Ab. 80.

(*k*) 2 Eq. Ca. Ab. 173. *Cooper* v. *Chitty*, 1 Burr. 20, and see ib. 37. Prac. Reg. 78. Wy. Ed.

(*l*) Prac. Reg. 78. Wy. Ed. *E. I. Comp.* v. *Edwards*, 18 Ves. 376. *Croggon* v. *Symons*, 3 Madd. 130. See 1 Jac. R. 205.

(*m*) 2 Eq. Ca. Ab. 173. *Errington* v. *Att. Gen.* Bunb. 303. 2 Ves. & B. 410. 1 Jac. R. 205.

(*n*) Prac. Reg. 79. Wy. Ed. *Earl of Thanet* v. *Paterson*, 3 Barnard, 247. 2 Ves. J. 109. *Burnett* v. *Anderson*, 1 Meriv. 405. *Warington* v. *Wheatstone*, 1 Jac. R. 202. *E. I. Comp.* v. *Edwards*, 18 Ves. 376. And see *Statham* v. *Hall*, 1 Turn. R. 30. In some instances it seems, that if an injunction should

3. When an equitable right is sued for in an inferior court of equity, and by means of the limited jurisdiction of the court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant(*o*) may file a bill in chancery, praying a special writ, called a writ of certiorari, to remove the cause into the court of chancery(*p*). This species of bill, having no other object than to remove a cause from an inferior court of equity, merely states the proceedings in the inferior court, shows the incompetency of that court, and prays the writ of certiorari. It does not pray that the defendant may answer, or even appear to to the bill, and consequently it prays no writ of subpœna(*q*). The proceedings upon the bill are peculiar, and are particularly mentioned in the books which treat of the practice of the court(*r*). It may seem improper to consider certiorari bills under the

have been prayed, it would not be granted unless the money should have been actually paid into court, *Dungey* v. *Angove*, 3 Bro. C. C. 36. And it may be observed, that where the whole subject matter of the suit is money, and the same has been paid into court, and the cause heard, the suit is at an end, so far as the plaintiff is concerned. See Anon. 1 Vern. 351. 3 Barnard, 250.

(*o*) *Sowton* v. *Cutler*, 2 Chan. Rep. 108.

(*p*) Prac. Reg. 41. Boh. Priv. Lond. 291. *Hilton* v. *Lawson*, Cary's Rep. 48. 1 Vern. 178.

(*q*) There are cases mentioned in the books apparently to the contrary; but they seem not to have been cases of bills praying merely the writ of certiorari. See 1 Ca. in Cha. 31.

(*r*) Prac. Reg. 82. Wy. Ed. *Stephenson* v. *Houlditch*, 2 Vern. 491. *Woodcraft* v. *Kinaston*, 2 Atk. 317. *Pierce* v. *Thomas*, 1 Jac. R. 54. *Edwards* v. *Bowen*, 2 Sim. & Stu. 514.

head of bills praying relief; but as they always allege some incompetency of the inferior court, or injustice in its proceedings(*s*), and seek relief against that incompetency or injustice, they seem more properly to come into consideration under this head than under any other. In case the court of chancery removes the cause from the inferior court, the bill exhibited in that court is considered as an original bill in the court of chancery, and is proceeded upon as such.

Original bills not praying relief have been already mentioned to be of two kinds, 1, bills to perpetuate the testimony of witnesses; and 2, bills of discovery.

1. A bill to perpetuate the testimony of witnesses must state the matter touching which the plaintiff is desirous of giving evidence, and must show that he has some interest in the subject(*t*), and pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated(*u*).

The bill ought also to show that the facts to

(*s*) 1 Vern. 442.

(*t*) *Mason* v. *Goodburne*, Rep. Temp. Finch. 391. *Smith* v. *Att. Gen.* Mich. 1777, in Chan. As to the nature of the interest which is sufficient whereupon to institute such a suit, see 6 Ves. 260, 261. *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251. *Allan* v. *Allan*, 15 Ves. 130.

(*u*) *Rose* v. *Gannel*, 3 Atk. 439. 1 Sch. & Lefr. 316. As relief is not prayed by a bill to perpetuate the testimony of witnesses, *Dalton* v. *Thomson*, Dick. 97, the suit is terminated by their examination; and of course, therefore, is not brought to a hearing, *Hall* v. *Hoddesdon*, 2 P. Wms. 162. 2 Vez. 497. *Anon.* Ambl. 237. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lefr. 316. *Morrison* v. *Arnold*, 19 Ves. 670.

which the testimony of the witnesses proposed to be examined is conceived to relate cannot be immediately investigated in a court of law, as in the case of a person in possession without disturbance (*x*); or that before the facts can be investigated in a court of law the evidence of a material witness is likely to be lost, by his death, or departure from the realm (*y*). To avoid objection to a bill framed on the latter ground it seems proper to annex to it an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost (*z*); a

(*x*) See *Duke of Dorset* v. *Girdler*, Prec. in Cha. 531. 1 Sim. & Stu. 88.

(*y*) According to the latter part of this proposition the right of action may be either in the plaintiff or defendant in equity. With reference to the defendant, the time of bringing the action depending upon his will, the situation of the plaintiff would be similar to that intimated in the former part of the proposition in the text, 1 Sim. & Stu. 89; and with respect to the plaintiff, it must be understood to relate to the case of his not being able at present to sustain an action, *Cox* v. *Colley*, Dick. 55. 1 Sim. & Stu. 114; for, if he should have such present right, his object could only be what is technically termed an examination *de bene esse*, upon the ground of his having only one witness to a matter on which his claim depends, or, if he have more, on the ground of their being aged, or too ill or infirm to attend in a court of law, and that he is therefore likely to lose their testimony before the time of trial, 1 Sim. & Stu. 90, in which case it seems that it ought to be stated in the bill that the action was brought before the same was filed. *Angell* v. *Angell*, 1 Sim. & Stu. 83. On the general subject see the cases cited, 1 Sim. & Stu. 93, note, and *Teale* v. *Teale*, 1 Sim. & Stu. 385.

(*z*) *Earl of Suffolk* v. *Green*, 1 Atk. 450. An affidavit of like circumstances is also requisite, where the object is merely the examination of the witnesses *de bene esse*. *Angell* v. *Angell*, 1 Sim. & Stu. 83;

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, and which will be afterwards more particularly noticed. It seems another requisite to a bill of this kind that it should state that the defendant has, or that he pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject of the proposed testimony (*a*).

2. Every bill is in reality a bill of discovery; but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery should be made. This bill is commonly used in aid of the jurisdiction of some other court, as to enable the plaintiff to prosecute or defend an action at law (*b*), a proceeding before the King in council (*c*), or any other legal proceeding of a nature merely civil (*d*) before a jurisdiction which cannot compel a discovery on oath (*e*); except that the court has in some instances refused to give this aid to the jurisdiction of inferior courts (*f*). Any person in possession of an estate, as tenant or otherwise, may file

and see *Philips* v. *Carew*, 1 P. Wms. 117. *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77.

(*a*) See *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251.

(*b*) 5 Madd. 18.

(*c*) 1 Ves. 205.

(*d*) 2 Ves. 398.

(*e*) *Dunn* v. *Coates*, 1 Atk. 288. 1 Ves. 205. Anon. 2 Ves. 451.

(*f*) 1 Ves. 205.

a bill against a stranger, bringing an ejectment, to discover the title under which the ejectment may be brought (*g*), though the plaintiff may not claim any title beyond that of mere tenant or occupant. A bill of this nature must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other (*h*).

A bill seeking a discovery of deeds or writings sometimes prays relief, founded on the deeds or writings of which the discovery is sought. If the relief so prayed be such as might be obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant (*i*); but a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit (*k*).

If the title to the possession of the deeds and writings of which the plaintiff prays possession depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of

(*g*) 1 Vez. 249.

(*h*) *Cardale* v. *Watkins*, 5 Madd. 18; and see *Moodaly* v. *Moreton*, Dick. 652, S. C. 1 Bro. C. C. 468.

(*i*) 1 Vez. 344. *Hook* v. *Dorman*, 1 Sim. & Stu. 227.

(*k*) *Godfrey* v. *Turner*, 1 Vern. 247. *Whitchurch* v. *Golding*, 2 P. Wms. 541. 1 Vez. 344. 3 Atk. 132. But see *Aston* v. *Lord Exeter*, 6 Ves. 288.

the deeds or writings of which he prays the delivery, he must establish his title to the property at law before he can come into a court of equity for delivery of the deeds or writings (*l*).

II. Bills not original are either an addition to or a continuance of an original bill, or both. An imperfection in the frame of a bill may generally be remedied by amendment; but the imperfection may remain undiscovered whilst the proceedings are in such a state that an amendment can be permitted according to the practice of the court. This is particularly the case where, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision; or, before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined (in which case the practice of the court will not generally permit an amendment of the original bill) (*m*), some other point appears necessary to

(*l*) See *Jones* v. *Jones*, 3 Meriv. 161. 1 Madd. R. 193. *Crow* v. *Tyrrell*, 3 Madd. 179. *Field* v. *Beaumont*, 1 Swanst. 204.

(*m*) See Chap. 4. An amendment for the purpose of adding parties, Anon. 2 Atk. 15. 3 Atk. 111, 371. and *Palk* v. *Lord Clinton*, 12 Ves. 48. *Daws* v. *Benn*, 1 Jac. & W. 513. *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40; or to correct a mere clerical error, *Att. Gen.* v. *Newcombe*, 14 Ves. 1, will be allowed at the hearing of the cause. In the case of an infant complainant, this liberty it seems would be granted without restriction, if for his benefit, *Pritchard* v. *Quinchant*, Ambl. 147; and even in ordinary cases great indulgence has in this respect been shown. See *Filkin* v. *Hill*, 4 Bro. P. C. 640. Toml. Ed. *Palk* v. *Lord Clinton*, 12

be made, or some additional discovery is found requisite (*n*). And though a suit is perfect in its institution, it may by some event subsequent to the filing of the original bill become defective, so that no proceeding can be had, either as to the whole, or as to some part, with effect; or it may become abated, so that there can be no proceeding at all, either as to the whole, or as to part of the bill. The first is the case, when, although the parties to the suit may remain before the court, some event subsequent to the institution of the suit has either made such a change in the interests of those parties, or given to some other person such an interest in the matters in litigation, that the proceedings, as they stand, cannot have their full effect. The other is the case when, by some subsequent event, there is no person before the court by whom, or against whom, the suit, in the whole or in part, can be prosecuted.

It is not very accurately ascertained in the books of practice, or in the reports, in what cases a suit

Ves. 48. *Woollands* v. *Crowcher*, 12 Ves. 174. *Hamilton* v. *Houghton*, 2 Bligh, P. C. 169. And with regard to the practice before the hearing, it may be observed, that after the cause is at issue this court will not give the plaintiff leave to amend, unless he shows not only the materiality of the proposed alteration, but also that he was not in a condition to have made it earlier. See *Longman* v. *Calliford*, 3 Anstr. 807. Forrest, Exch. R. 13. *Lord Kilcourcy* v. *Ley*, 4 Madd. 212. *Dean of Christchurch* v. *Simonds*, 2 Meriv. 467. *Wright* v. *Howard*, 6 Madd. 106. *M'Neill* v. *Cahill*, 2 Bligh, P. C. 228. See *Barnett* v. *Noble*, 1 Jac. & W. 227.

(*n*) See *Jones* v. *Jones*, 3 Atk. 110. *Goodwin* v. *Goodwin*, 3 Atk. 370.

becomes defective without being absolutely abated; and in what cases it abates as well as becomes defective. But upon the whole it may be collected (*o*), that if by any means any interest of a party to the suit in the matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained (*p*). And if such a change of interest is occasioned by, or is the consequence of, the death of a party whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole. For as far as the interest of a party dying extends, there is no longer any person before the court by whom or against whom the suit can be prosecuted; and a married woman is incapable by herself of prosecuting a suit. As the interest of a plaintiff generally extends to the whole suit, therefore, in general, upon the death of a plaintiff, or marriage of a female plaintiff, all proceedings become abated (*q*). Upon the death of a defendant, likewise, all proceedings abate

(*o*) It is impossible to give authorities for every thing asserted upon this head. The books, in words, almost as frequently contradict as support these assertions. But it is conceived, that from an attentive perusal of the cases it will be found, that, in general, the grounds of the decisions warrant the conclusions here drawn.

(*p*) As an example, see *Mole* v. *Smith*, 1 Jac. & W. 665.

(*q*) 1 Eq. Ca. Ab. 1, margin. Dick. 8. *Adamson* v. *Hull*, 1 Sim. & Stu. 249.

as to that defendant. But upon the marriage of a female defendant the proceedings do not abate (*r*), though her husband ought to be named in the subsequent proceedings (*s*). If the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency, the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties; but if the party dying be the only plaintiff, or only defendant, there may be necessarily an end of the suit, no subject of litigation remaining. If the whole interest of a party dying survives to another party, so that no claim can be made by or against the representatives of the party dying, as, if a

(*r*) 4 Vin. Ab. 147. Pl. 20. 1 Vern. 318.

(*s*) 1 Vez. 182. The reason of the difference between the cases of a female plaintiff and defendant seems to be, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not entitled to sue for it; but a defendant merely justifying a possession, the plaintiff cannot be injured by a decree against the person holding that possession. And it has been determined, that where a female plaintiff has married, and has, notwithstanding, proceeded in a suit as a feme sole, the *mere want* of a bill of revivor is not error for which a decree can be reversed upon a bill of review brought by the defendant, *Lady Cramborne* v. *Dalmahoy*. 1 Chan. Rep. 231. Nels. Rep. 86. "And at law, if a woman sues or be sued as sole, and judgment is against her as such, though she was covert, she shall be estopped, and the sheriff shall take advantage of the estoppel." 1 Salk. 310. 1 Rol. Ab. 869. l. 50.

bill is filed by or against trustees or executors, and one dies not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit, or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives (*t*), the proceedings do not abate. So if a surviving party can sustain the suit, as in the case (*u*) of several creditors, plaintiffs on behalf of themselves and other creditors (*x*). For the persons remaining before the court, in all these cases, either have in them the whole interest in the matter in litigation, or at least are competent to call upon the court for its decree. If, indeed, upon the death of the husband of a female plaintiff suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to the costs (*y*). But if she thinks proper to proceed in the cause, she may do so without a bill of revivor; for she alone has the whole interest, and the husband was a party in her right, and therefore the whole advantage of the proceedings survives to her; so that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it (*z*). But if she takes any

(*t*) *Dr. Pary* v. *Juxon*, 3 Chan. Rep. 40. 2 Freem. 133. *Shelberry* v. *Briggs*, 2 Vern. 249. Anon. 3 Atkyns, 726. See *Humphreys* v. *Hollis*, 1 Jac. R. 73.

(*u*) As another example of the proposition in the text, the case of a suit by joint-tenants generally, may be mentioned. See 11 Ves. 309. 1 Meriv. 364.

(*x*) 1 Meriv. 364. *Burney* v. *Morgan*, 1 Sim. & Stu. 358. 1 Sim. & Stu. 494, 495.

(*y*) Treat. on Star-cham. p. 3. sect. 3. Harl. MSS.

(*z*) *Coppin* v. ——. 2 P. Wms. 496.

step in the suit after her husband's death she makes herself liable to the costs from the beginning. If a female plaintiff marries pending a suit, and afterwards, before revivor, her husband dies (*a*), a bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed; but the subsequent proceedings ought to be in the name and with the description which she has acquired by the marriage. A decree on a bill of interpleader may terminate the suit as to the plaintiff, though the litigation may continue between the defendants by interpleader (*b*); and in that case the cause may proceed without revivor (*c*), notwithstanding the death of the plaintiff (*d*).

There is the same want of accuracy in the books in ascertaining the manner in which the benefit of a suit may be obtained after it has become defective, or abated by an event subsequent to its institution,

(*a*) *Godkin and others* against *Earl Ferrers*, 1772.

(*b*) See above, p. 49. note (n.)

(*c*) Anon. 1 Vern. 351.

(*d*) Where on a bill filed by a corporation aggregate, suing in their corporate capacity only, the names of the persons forming the same had been inadvertently and unnecessarily inserted, the members of the corporation having had individually no interest in the subject, the death of a person so improperly named in the bill was not considered as operating to abate the suit. 3 Swanst. 138; and see *Blackburn* v. *Jepson*, 17 Ves. 473, S. C. 3 Swanst. 132. But where a bill is filed by a corporation sole, having a personal interest, the suit necessarily abates by his death, so far as it affects his personal interest, and to that extent may be revived by his personal representative; and if the suit affect the rights of his successor, such successor may obtain the benefit of it in a different form.

as there is in the distinction between the cases where a suit becomes defective merely, and where it likewise abates. It seems, however, clear, that if any property, or right in litigation, vested in a *plaintiff*, is transmitted to another, the person to whom it is transmitted is entitled to supply the defects of the suit, if become defective merely, and to continue it, or at least to have the benefit of it, if abated. It seems also clear, that if any property or right, before vested in a *defendant*, becomes transmitted to another, the plaintiff is entitled to render the suit perfect, if become defective, or to continue it, if abated, against the person to whom that property or right is transmitted.

The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are, 1, by supplemental bill; 2, by bill of revivor; 3, by bill of revivor and supplement; 4, by original bill in the nature of a bill of revivor; and, 5, by original bill in the nature of a supplemental bill. The distinctions between the cases in which a suit may be added to, or continued, or the benefit of it obtained, by these several means, seem to be the following:

1. Where the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely (*e*). Thus a

(*e*) As a general rule, it has been laid down, that events which have happened subsequently to the filing of the original bill, ought not to be made the subject of amendment,

supplemental bill may be filed to obtain a further discovery (*f*) from a defendant, to put a new matter in issue, or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose (*g*). And this may be done as well after as before a decree; and the bill may be either, in aid of the decree, that it may be carried fully into execution (*h*), or that proper directions may be given upon some matter omitted in the original bill (*i*), or not put in issue by it, or by the defence made to it (*k*); or to bring formal parties before the court (*l*): or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place. But wherever the same end may be obtained by amendment the court will not permit a supplemental bill to be filed (*m*).

but that they should be brought before the court by a supplemental bill. *Humphreys* v. *Humphreys*, 3 P. Wms. 349. *Brown* v. *Higden*, 1 Atk. 291. 3 Atk. 217. *Pilkington* v. *Wignall*, 2 Madd. R. 240. *Usborne* v. *Baker*, 2 Madd. R. 379. See a very peculiar case on this subject, in which the plaintiff, upon facts stated in the answer of the defendant, amended his bill in order to meet the defence which arose therefrom, *Knight* v. *Matthews*, 1 Madd. R. 566.

(*f*) *Boeve* v. *Skipwith* 2 Ch. Rep. 142. *Usborne* v. *Baker*, 2 Madd. R. 379.

(*g*) *Goodwin* v. *Goodwin*, 3 Atk. 370. There is the form of a bill of this nature in 1 Pres. Prac. of Chan. 146.

(*h*) *Woodward* v. *Woodward*, Dick, 33. Or it may be filed for the purpose of appealing against the decree. See *Giffard* v. *Hort*, 2 Sch. & Lefr. 386.

(*i*) 3 Atk. 133.

(*k*) *Jones* v. *Jones*, 3 Atk. 110.

(*l*) Ibid. 217.

(*m*) See *Baldwin* v. *Mackown*, 3 Atk. 817; see note last page.

When any event happens subsequent to the time of filing an original bill(*n*), which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill which is usually called a supplemental bill(*o*), and is in fact merely so with respect to the rest of the suit, though with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happens which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or if a plaintiff suing in his own right is entirely deprived of his interest, but he is not the sole plaintiff, the defect arising from this event may be supplied by a bill of the same kind, which is likewise commonly termed, and is, in some respects, a supplemental bill merely, though in other respects, and especially against any new party, it has also in some degree the effect of an original bill. In all these cases the parties to the suit are able to proceed in it to a certain extent, though from the defect arising

(*n*) 1 Atk. 291. 3 Atk. 217. See above, p. 61, note (e).

(*o*) It may here be remarked, that such subsequent event must not only be relevant, but material, see *Milner* v. *Lord Harewood*, 17 Ves. 144, and of such a nature, that the relief sought in respect thereof cannot be obtained under the original bill, *Adams* v. *Dowding*, 2 Madd. R. 53. *Mole* v. *Smith*, 1 Jac. & W. 665.

from the event subsequent to the filing of the original bill the proceedings are not sufficient to attain their full object.

If the interest of a *plaintiff suing in auter droit* entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of new assignees under a commission of bankrupt, upon the death or removal of former assignees(*p*), or in the case of an executor or administrator, upon the determination of an administration *durante minori ætate*(*q*), or *pendente lite*, the suit may be likewise added to and continued by supplemental bill(*r*). For in these cases there is no change of interest which can affect the questions between the parties, but only a change of the person in whose name the suit must be prosecuted; and if there has been no decree, the suit may proceed, after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff. But if a decree has been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree

(*p*) Anon. 1 Atk. 88. S. C. 1 Atk. 571. *Brown* v. *Martin*, 3 Atk. 218.

(*q*) See *Jones* v. *Basset*, Prec. in Ch. 174. Cary's Rep. 22. *Stubbs* v. *Leigh*, 1 Cox, R. 133.

(*r*) In the case of an administration determined by death, a bill of *revivor* by a subsequent administrator has been admitted. *Owen* v. *Curzon*, 2 Vern. 237. *Huggins* v. *York Build. Comp.* 2 Eq. Ca. Ab. 3.

on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual (*s*).

If *a sole plaintiff suing in his own right* is deprived of his whole interest in the matters in question by an event subsequent to the institution of a suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees, or in case such a plaintiff assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest (*t*), and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be sought by an original bill (*u*) in the nature of a supplemental bill, which will be the subject of discussion in a subsequent page.

(*s*) *Brown* v. *Martin*, 3 Atk. 218.

(*t*) Upon the question whether the bankruptcy of a sole plaintiff is, or ought to be considered, an abatement of a suit, some difference of opinion has prevailed. See *Sellas* v. *Dawson*, rep. 1 Atk. Sand. Ed. 263. note, 4 Madd. 171, and the cases of *Randall* v. *Mumford*, 18 Ves. 424, and *Porter* v. *Cox*, 5 Madd. 80, in which revivor seems to have been thought necessary. But as it cannot be stated *à priori*, that there will not be any surplus of the bankrupt's estate after satisfaction of the creditors, who may prove under the commission, it seems impossible to insist, even where a plaintiff suing in his own right becomes a bankrupt, that, as a general rule, the suit abates. And the truth of the proposition will be more apparent from what is further stated in the next page of the text.

(*u*) See *Harrison* v. *Ridley*, Com. Rep. 589.

If a commission of bankrupt issues against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject is, unless he is a mere trustee, generally transferred to his assignees (*x*); and to bring them before the court a supplemental bill is necessary, to which the bankrupt or insolvent debtor is not usually required to be a party, although a bankrupt may dispute the validity of the commission issued against him (*y*). But, if plaintiff, a bankrupt may proceed himself in the suit, if he disputes the validity of the commission, or a bankrupt or insolvent may proceed if the suit is necessary for his protection (*z*), or if his assignees do not think fit to prosecute the suit, and he conceives that it is for his

(*x*) 9 Ves. 86, 1 Ves. & B. 547; and see, as to the exceptions, *Copeman* v. *Gallant*, 1 P. Wms. 314. 2 P. Wms. 318. *Ex parte Ellis*, 1 Atk. 101. 1 Atk. 159. 234. 6 Ves. 496. *Joy* v. *Campbell*, 1 Sch. & Lefr. 328. *Ex parte Martin*, 19 Ves. 491. S. C. 2 Rose, B. C. 331. *Ex parte Gillett*, 3 Madd. 28.

(*y*) The commission, however, cannot be actually impeached by him in the suit: his proper mode of disputing its validity is by an action at law, or by a petition to supersede the same. See *Hammond* v. *Attwood*, 3 Madd. 158; and see *Bryant* v. *Withers*, 2 Maul & Selw. 123. 15 Ves. 468. *Ex parte M'Gennis*, 18 Ves. 289. S. C. 1 Rose, B. C. 60. *Ex parte Bryant*, 2 Rose, B. C. 1. *Ex parte Northam*, 2 Ves. & B. 124. S. C. 2 Rose, B. C. 140. *Ex parte Price*, 3 Madd. 228. *Ex parte Ranken*, 3 Madd. 371. *Ex parte Bass*, 4 Madd. 270. *Bayley* v. *Vincent*, 5 Madd. 48. *Ex parte Gale*, 1 Glyn & J. 43.

(*z*) *Anon.* 1 Atk. 263. 1 Madd. R. 425. And this seems to be another reason, why it cannot be a general rule that the bankruptcy of the plaintiff causes an abatement, even where he sues in his own right.

advantage to prosecute it(*a*). Under those circumstances, however, he must bring the assignees before the court by supplemental bill, as any benefit which may be derived from the suit must be subject to the demands of the assignees(*b*), unless he seeks his personal protection only against a demand which cannot be proved, or which the person making the demand may not think fit to prove, under the commission issued against the bankrupt, or from which the insolvent debtor may not be discharged(*c*).

And if by any event the whole interest of a *defendant* is entirely determined, and the same interest is become vested in another by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate-tail, and the vesting of a subsequent re-

(*a*) *Lowndes* v. *Taylor*, 1 Madd. R. 423. S. C. 2 Rose, B. C. 365. 432. If an uncertificated bankrupt should be desirous that a suit in respect of the property should be commenced or prosecuted, and his assignees should refuse to adopt that course, it seems, that to attain his object, he must petition for leave to use their names for the purpose of the proceeding, he indemnifying them, 5 Ves. 587. 590. *Benfield* v. *Solomons*, 9 Ves. 77. 3 Madd. 158.

(*b*) Although, it seems, the bankruptcy of a plaintiff, suing even in his own right does not, at least as a general rule, abate the suit, it unquestionably renders it defective, 18 Ves. 427; and this court upon a special application will dismiss the bill, (but, as it seems, without costs,) unless the plaintiff make his assignees, or upon notice they make themselves parties thereto by supplemental bill within a limited time, *Williams* v. *Kinder*, 4 Ves. 387. *Randall* v. *Mumford*, 18 Ves. 424. *Wheeler* v. *Malins*, 4 Madd. 171. *Porter* v. *Cox*, 5 Madd. 80. S. C. 1 Buck, B. C. 469. *Sharp* v. *Hullett*, 2 Sim. & Stu. 496.

(*c*) See above, note (*a*).

mainder in possession, the benefit of the suit against the person becoming entitled by the event described must also be obtained by original bill in the nature of a supplemental bill: though if the defendant whose interest has thus determined is not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered. But if the interest of a *defendant* is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as become defective (*d*). For in these cases the new party comes before the court exactly in the same plight and condition as the former party, is bound by his acts, and *may* be subject to all the costs of the proceedings from the beginning of the suit (*e*).

In all these cases, if the suit has become abated as well as defective, the bill is commonly termed a

(*d*) See *Rutherford* v. *Miller*, 2 Anstr. 458. *Russell* v. *Sharp*, 1 Ves. & B. 500. *Whitcombe* v. *Minchin*, 5 Madd. 91. *Foster* v. *Deacon*, 6 Madd. 59. *Turner* v. *Robinson*, 1 Sim. & Stu. 3. In the cases of *Monteith* v. *Taylor*, 9 Ves. 615, and *Rhode* v. *Spear*, 4 Madd. 51, a motion on the part of the defendant, after his bankruptcy, that the bill might be dismissed, was allowed to be proper under the circumstances; which affords a ground, besides the reasons already intimated in relation to the plaintiff becoming bankrupt, so far as they apply, for presuming that the bankruptcy of the defendant does not abate the suit, but merely renders it defective.

(*e*) 1 Atk. 89.

supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor in continuing the suit.

2. Wherever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir at law, executor or administrator, so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise by bill of revivor merely.

When a suit became abated after a decree signed and enrolled (*f*), it was anciently the practice to revive the decree by a subpœna in the nature of a *scire facias* (*g*), upon the return of which the party to whom it was directed might show cause against the reviving of the decree (*h*), by insisting that he was not bound by the decree (*i*), or that for some other reason it ought not to be enforced against him, or that the person suing the subpœna was not entitled to the benefit of the decree. If the opinion of the court was in his favour he was dismissed with costs. If

(*f*) 1 Vez. 182. 184. (*g*) 11 Ves. 311.
(*h*) See 1 Vern. 426. *Sayer* v. *Sayer*, Dick. 42.
(*i*) *Brown* v. *Vermuden*, 1 Ca. in Cha. 272.

it was against him (*i*), or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter necessary to the procedings (*k*). If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree this process was ineffectual (*l*), as it revived the decree only, and the subsequent proceedings could not be revived but by bill; and the enrolment of decrees being now much disused, it is become the practice to revive in all cases, indiscriminately, by bill (*m*).

3. If a suit becomes abated, and by any act besides the event by which the abatement happens the rights of the parties are affected, as by a settlement (*n*), or a devise (*o*) under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of

(*i*) 1 Ca. in Cha. 273.

(*k*) *Anon.* 2 Freem. 128.

(*l*) *Croster* v. *Wister*, 2 Cha. Rep. 67. *Thorn* v. *Pitt*, Sel. Ca. in Cha. 54. S. C. 2 Eq. Ca. Ab. 180.

(*m*) See *Dunn* v. *Allen*, 1 Vern. 426. Pract. Reg. 90. Wy. Ed.

(*n*) See *Merrywether* v. *Mellish*, 13 Ves. 161.

(*o*) See *Rylands* v. *Latouche*, 2 Bligh, P. C. 566.

revivor, show the settlement, or devise, or other act by which their rights are affected. And, in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill, added to the bill of revivor (*p*).

4. If the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of a real estate (*q*), the suit is not permitted to be continued by a bill of revivor. An original bill, upon which the title may be litigated (*r*), must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor (*s*).

(*p*) See *Russell* v. *Sharp*, 1 Ves. & Bea. 500.

(*q*) *Backhouse* v. *Middleton*, 1 Ca. in Cha. 173. S. C. 3 Ch. Rep. 39, & 2 Freem. 132. Mosely, 44.

(*r*) 1 Eq. Ca. Ab. 2, pl. 2 & 7. *Huet* v. *Lord Say and Sele*, Sel. Ca. in Cha. 53.

(*s*) *Clare* v. *Wordell*, 2 Vern. 548. 1 Eq. Ca. Ab. 83. *Minshull* v. *Lord Mohun*, 2 Vern. 672. 6 Bro. P. C. 36, Toml. Ed.

5. If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming entitled upon the death of a prior tenant under the same settlement (*t*), the suit cannot be continued by bill of revivor, nor can its defects be supplied by a supplemental bill. For though the successor in the first case, and the remainder-man in the second, have the same property which the predecessor, or prior tenant, enjoyed, yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But, in general, by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained (*u*). If the party whose interest is thus determined was not the sole plaintiff or defendant, or if the property which occasions a bill of this nature affects only a part of the suit, the bill, as to the other parties and the rest of the suit, is, as has been before observed, supplemental merely.—There seems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill. Upon the first the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of wit-

(*t*) 2 Eq. Ca. Ab. 3. in marg. *Osborne* v. *Usher*, 6 Bro. P. C. 20. Toml. Ed. 1 Bro. P. C. 205. *Lloyd* v. *Johnes*, 9 Ves. 37.

(*u*) 9 Vez. 54, 55.

nesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause (*x*); and if any decree has been made in the first cause, the same decree shall be made in the second (*y*). But in the other case a new defence may be made; the pleadings and depositions (*z*) cannot be used in the same manner as if filed or taken in the same cause; 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 (*a*).

The voluntary alienation of property pending a suit by any party to it, is not permitted to affect the rights of the other parties if the suit proceeds without disclosure of the fact, except as the alienation may disable the party from performing the decree of the court (*b*). Thus, if pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity of redemption, who can only have the benefit of a title so gained by filing a bill for that purpose (*c*). But upon a bill by a mortgagor to redeem, if the mortgagee assigns *pendente lite*,

(*x*) See *Houlditch* v. *Marquis of Donegall*, 1 Sim. & Stu. 491.

(*y*) *Clare* v. *Wordell*, 2 Vern. 548; *Minshull* v. *Lord Mohun*, 2 Vern. 672. 1 Eq. Ca. Ab. 83. 1 Atk. 89.

(*z*) *Earl of Peterborough* v. *Duchess of Norfolk*, Prec. in Chan. 212. See also *Coke* v. *Fountain*, 1 Vern. 413, and *City of London* v. *Perkins*, 3 Bro. P. C. 602. Toml. Ed. as to reading in one cause depositions taken in another.

(*a*) See *Lloyd* v. *Johnes*, 9 Ves. Jun. 37.

(*b*) 2 Ves. & B. 205, 206. 4 Dow. P. C. 435.

(*c*) 2 Atk. 175. 11 Ves. 199.

the assignee must be brought before the court by the mortgagor, who cannot otherwise have a re-conveyance of the mortgaged property (*b*). The bill necessary in the last case is merely supplementary; but in the former, the bill must be an original bill in the nature of a cross-bill, to redeem the mortgaged property. If the party aliening be plaintiff in the suit, and the alienation does not extend to his whole interest, he may also bring the alienee before the court by a bill, which, though in the nature of an original bill against the alienee, will be supplemental against the parties to the original suit, and they will be necessary parties to the supplemental suit only so far as their interests may be affected by the alienation (*c*). Generally, in cases of alienation *pendente lite*, the alienee is bound by the proceedings in the suit after the alienation, and before the alienee becomes a party to it (*d*); and depositions of witnesses taken after the alienation, before the alienee became a party the suit, may be used by the other parties against the alienee as they might have been used against the party under whom he claims (*e*).

Having considered generally the distinctions be-

(*b*) 11 Ves. 199; and see *Wetherell* v. *Collins*, 3 Madd. 255.

(*c*) There is an instance, in which the court, in a case of this kind, allowed an alienee of a plaintiff to participate in certain interlocutory proceedings, without previously requiring a supplemental bill to be filed for the purpose of making him a party to the suit. *Toosey* v. *Burchell*, 1 Jac. R. 159.

(*d*) It may be observed, however, that the alienee may by supplemental bill, in the nature of an original bill, make himself a party to the suit. *Foster* v. *Deacon*, 6 Madd. 59; and see *Binks* v. *Binks*, reported 2 Bligh, P. C. 593, note.

(*e*) See *Garth* v. *Ward*, 2 Atk. 174.

tween the several kinds of bills by which a suit become defective or abated may be added to or continued, or by which the benefit of the suit may be obtained, it remains in this place to consider more particularly the frame of the first three of those kinds. The other two will form part of the subject to be considered under the next head.

1. A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter (*f*). If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only (*g*); unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for

(*f*) 2 Madd. R. 60. (*g*) See *Brown* v. *Martin*, 3 Atk. 217.

the purpose of bringing formal parties before the court as defendants, the parties defendants to the original bill need not in general be made parties to the supplemental (*h*).

2. A bill of revivor must state the original bill, and the several proceedings thereon, and the abatement; it must show a title to revive (*i*), and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party (*k*). In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill. If a defendant to an original bill dies before putting in an answer, or after an answer to which

(*h*) See *Brown* v. *Martin*, 3 Atk. 217.

(*i*) Com. Rep. 590.

(*k*) Prac. Reg. 90. Wy. Ed.

exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered.

Upon a bill of revivor the defendants must answer in eight days after appearance, and submit that the suit shall be revived, or show cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course (*l*). The ground for this is an allegation that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in; it is therefore presumed that the defendant can show no cause against reviving the suit in the manner prayed by the bill (*m*).

An order to revive may also be obtained in like manner if the defendant puts in an answer submitting to the revivor, or even without that submission, if he shows no cause against the revivor. Though the suit

(*l*) See *Harris* v. *Pollard*, 3 P. Wms. 348.

(*m*) The court, after abatement of a suit, has acted without revivor in some instances, where the rights of the parties have been fully ascertained by decree, or by subsequent proceedings; but in general revivor is necessary to warrant any proceeding after abatement, 1 Vez. 186, *Roundell* v. *Currer*, 6 Ves. 250, except proceedings to compel revivor, or to prevent injury to the surviving parties, if the persons entitled to revive neglect to do so.

is revived of course in default of the defendant's answer within eight days, he must yet put in an answer if the bill requires it; as, if the bill seeks an admission of assets, or calls for an answer to the original bill, the end of the order of revivor being only to put the suit and proceedings in the situation in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the further proceeding on the bill, and which will be noticed in treating of the different modes of defence to bills of revivor; and though these steps should not be taken, yet if the plaintiff does not show a title to revive he cannot finally have the benefit of the suit when the determination of the court is called for on the subject (*n*).

If a decree be obtained against an executor for payment of a debt of his testator, and costs, out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets of the testator may be pursued in his hands, without reviving against the representative of the original defendant (*o*).

After a cause is revived, if the person reviving finds the original bill to require amendment, and the pleadings are in such a state that amendment of the

(*n*) 3 P. Wms. 348.

(*o*) 3 Atk. 773; and see *Johnson* v. *Peck*, 2 Ves. 465.

bill would be permitted if the deceased party were living, the bill may be amended notwithstanding the death of that party, and matters may be inserted which existed before the original bill was filed, and stated as if the deceased party had been living (*p*).

After a decree a defendant may file a bill of revivor, if the plaintiffs, or those standing in their right, neglect to do it (*q*). For then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it (*r*). The bill of revivor in this case, therefore, merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings (*s*), except so far as they remain undecided. In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is entitled to revive (*t*). A suit become entirely abated may be

(*p*) *Kelips* v. *Paine*, 15 March, 1745. *Philips* v. *Derbie*, Dick. 98.

(*q*) The general proposition, that a defendant or his representatives, if he or they have an interest in the further prosecution of the suit, may revive, if the plaintiffs, or those standing in their right, neglect so to do, seems to be now fully established. See *Kent* v. *Kent*, Prec. in Chan. 197. 1 Eq. Ca. Ab. 2. 2 Vern. 219. 297. *Williams* v. *Cooke*, 10 Ves. 406. *Horwood* v. *Schmedes*, 12 Ves. 311. And see *Gordon* v. *Bertram*, 1 Meriv. 154. *Adamson* v. *Hall*, 1 Turn. R. 258. *Bolton* v. *Bolton*, 2 Sim. & Stu. 371.

(*r*) See, however, *Anon.* 3 Atk. 691, and *Lord Stowell* v. *Cole*, 2 Vern. 296.

(*s*) See *Finch* v. *Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

(*t*) That is, of course, after he hath proved his debt. See *Pitt and the creditors of the*

revived as to part only of the matter in litigation, or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit upon his death become vested, part in his real, and part in his personal, representatives, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends (*u*).

3. A bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon in the same manner.

III. Bills in the nature of original bills, though occasioned by former bills, are of eight kinds: 1. Cross-bills. 2. Bills of review, to examine and reverse decrees signed and enrolled. 3. Bills in the nature of bills of review, to examine and reverse decrees either signed and enrolled, or not, brought by persons not bound by the decrees. 4. Bills impeaching decrees upon the ground of fraud. 5. Bills to suspend the operation of decrees on special circumstances, or to avoid them on the ground of matter subsequent. 6. Bills to carry decrees into execution. 7. Bills in the nature of bills of revivor. And 8, bills in the nature of supplemental bills.

1. A cross-bill is a bill brought by a defendant against a plaintiff (*x*), or other parties in a former

Duke of Richmond, 1 Eq. Ca. Ab. 3; and see *Dixon* v. *Wyatt*, 4 Madd. 392. 1 Sim. & Stu. 494. And, in such a suit, the personal representative of one of the plaintiffs deceased may revive. *Burney* v. *Morgan*, 1 Sim. & Stu. 358.

(*u*) *Ferrers* v. *Cherry*, 1 Eq. Ca. Ab. 3, 4.

(*x*) It has been decided, that a cross-bill may be filed in

bill depending, touching the matter in question in that bill (*y*). A bill of this kind is usually brought to obtain either a necessary discovery, or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court (*z*). A cross-bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But a cross-bill being generally considered as a defence (*a*), or as a pro-

Chancery to an original bill in the Exchequer. *Glegg* v. *Legh*, 4 Madd. 193. *Parker* v. *Leigh*, 6 Madd. 115.

(*y*) For an example of the sense in which this proposition is to be understood, see *Hilton* v. *Barrow*, 1 Ves. J. 284, and see *Piggott* v. *Williams*, 6 Madd. 95.

(*z*) There is an instance, however, in which this Court will, it seems, contrary to the old practice, give the benefit of a cross-bill to a defendant upon his answer, namely, where the original bill is for specific performance, and he proves an agreement different from that insisted on by the plaintiff, and submits to perform the same, for, in such a case, if the Court decide in favour of that stated by the defendant, it will decree the same to be executed. *Fife* v. *Clayton*, 13 Ves. 546. 15 Ves. 525.

(*a*) 3 Atk. 812.

ceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court (*b*).

A cross-bill may be filed to answer the purpose of a plea *puis darrein continuance* at the common law. Thus, where pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it *viva voce* at the hearing, it was determined that the release not being in issue in the cause, the court could not try the fact, or direct a trial at law for that purpose; and that a new bill must be filed to put the release in issue. In the case before the court, indeed, the bill directed to be filed seems to have been intended to impeach the release on the ground of fraud or surprise, and therefore to have been a proceeding on the part of the plaintiff in the original bill. But it was clearly determined that without being put in issue in the cause by a new bill it could not be used in proof (*c*).

Upon hearing a cause it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants, so that the

(*b*) *Doble* v. *Potman*, Hardr. 160. And see Sir John Warden's case, mentioned by Blackstone, in 1 Bl. Rep. 132.

(*c*) *Hayne* v. *Hayne*, 3 Ch. Rep. 19. 3 Swanst. 472, 474. See as to filing a supplemental bill where a matter has not been properly put in issue, *Jones* v. *Jones*, 3 Atk. 110. 1 Jac. & W. 339.

court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision; and will reserve the directions or declarations which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing (*d*).

2. The object of a bill of review is to procure an examination and reversal of a decree (*e*) made upon a former bill, and signed by the person holding the great seal, and enrolled (*f*). It may be brought upon error of law appearing (*g*) in the body of the

(*d*) If a creditor who hath come in under a decree against his debtor require relief for the purpose of assisting the investigations before the master, which cannot be obtained by a re-hearing of the original cause, he may, without direction of the court, seek it by a cross-bill. *Latouche* v. *Lord Dunsany*, 1 Sch. & Lefr. 137.

(*e*) There can be no bill of review upon a decree of the court on exceptions to a decree of commissioners of charitable uses, under the statute. See *Windsor* v. *Inhabitants of Farnham*, Cro. Car. 40. *Saul* v. *Wilson*, 2 Vern. 118. Nor, upon a decree of this Court confirming a judgment of the lord mayor, respecting tithes in London, under the statute 37 Hen. 8. c. 12. Pridgeon's Case, Cro. Car. 351.

(*f*) Tothill, 47. Boh. Curs. Canc. 353. *Taylor* v. *Sharp*, 3 P. Wms. 371.

(*g*) 1 Roll. Ab. 382. *Venables* v. *Foyle*, 1 Ca. in Cha. 4. Tothill, 41.

decree itself (*h*), or upon discovery of new matter (*i*). In the first case the decree can only be reversed upon the ground of the apparent error (*k*); as if an absolute decree be made against a person, who upon the face of it appears to have been at the time an infant (*l*). A bill of this nature may be brought without the leave of the court previously given (*m*). But if it is sought to reverse a decree signed and enrolled, upon discovery of some new matter (*n*), the leave of the court must be first obtained (*o*); and this will not be granted but upon allegation upon oath that the new matter (*p*) could not be produced, or used (*q*) by the party claiming the benefit of it at the time when the decree was made (*r*). If the court is satisfied that the new matter is relevant and material, and such as might probably have

(*h*) *Grice* v. *Goodwin*, Prec. in Chan. 260. 3 P. Wms. 371.

(*i*) *Le Neve* v. *Norris*, 2 Bro. P. C. 73. Toml. Ed. And see 17 Ves. 178. This term includes new evidence of facts put in issue, which would materially affect the judgment of the court, 16 Ves. 350. See *Ord* v. *Noel*, 6 Madd. 127, which, although a case relating to a supplemental bill in the nature of a bill of review, seems to show that the matter must be material, and such at the least as will raise a fit subject for judgment in the cause.

(*k*) *Lady Cramborne* v. *Dalmahoy*, 1 Ch. Rep. 231. Nels. Rep. 86. Prac. Reg. 94. Wy. Ed. 4 Vin. Ab. 414.

(*l*) Prac. Reg. 225. Wy. Ed. 17 Ves. 178.

(*m*) 2 Atk. 534. *Houghton* v. *West*, 2 Bro. P. C. 88. Toml. Ed.

(*n*) 2 Vez. 576. 3 P. Wms. 372. Nels. Rep. 52.

(*o*) Tothill, 42. 2 Atk. 534. 17 Ves. 177.

(*p*) See *O'Brien* v. *O'Connor*, 2 Ball & B. 146.

(*q*) See 1 Vez. 434. *Patterson & Slaughter*, Ambl. 292, and 16 Ves. 350.

(*r*) 2 Bro. P. C. 71. Toml. Ed. Pract. Reg. 95. Wy. Ed. Ambl 293.

occasioned a different determination (*q*) it will permit a bill of review to be filed (*r*).

Error in matter of form only, though apparent on the face of a decree, seems not to have been considered as sufficient ground for reversing the decree (*s*); and matter of abatement has also been treated as not capable of being shown for error to reverse a decree (*t*).

It has been questioned whether the discovery of new matter not in issue in the cause in which a decree has been made, could be the ground of a bill of review (*u*); and whether the new matter on which bills of review have been founded has not always been new matter to be used as evidence to prove matter in issue, in some manner, in the original bill (*x*). A case, indeed, can rarely happen in which new matter discovered would not be, in some degree, evidence of matter in issue in the original cause, if the pleadings were properly framed. Thus, if after a decree, founded on a revocable deed, a deed of revocation, and new limitations, were discovered; as it would be a necessary allegation of title under

(*q*) *Lord Portsmouth* v. *Lord Effingham*, 1 Vez. 430. *Bennet* v. *Lee*, 2 Atk. 529. And see *Willan* v. *Willan*, 16 Ves. 86.

(*r*) *Lord Portsmouth* v. *Lord Effingham*, 1 Vez. 430. *Young* v. *Keighly*, 16 Ves. 348. But leave to file a bill of review is matter of discretion with the court. See *Wilson* v. *Webb*, 2 Cox, R. 3.

(*s*) *Jones* v. *Kenrick*, 5 Bro. P. C. 244, Toml. Ed. but the cause was compromised. *Hartwell* v. *Townsend*, 2 Bro. P. C. 107. Toml. Ed.

(*t*) *Slingsby* v. *Hale*, 1 Ca. in Cha. 122, S. C. 1 Eq. Ca. Ab. 164.

(*u*) See 16 Ves. 354.

(*x*) Ambl. 293.

the revocable deed that it had not been revoked, the question of revocation would have been in issue in the original cause, if the pleadings had been properly framed. So if after a decree founded on a supposed title of a person claiming as heir, a settlement or will were discovered which destroyed or qualified that title, it would be a necessary allegation of the title of the person claiming as heir, that the ancestor died seised in fee-simple, and intestate. But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained (*x*). It is scarcely possible, however, that such a case should arise which might not be deemed in some degree a case of fraud, and the decree impeachable on that ground. In the case where the doubt before mentioned appears to have been stated, the new matter discovered, and alleged as ground for a bill of review,

(*x*) This Court refused its leave to file a bill of review, where it would have been the means of introducing an entirely new case, of the matter of which the plaintiff was sufficiently well apprized to have been able, with the exertion of reasonable diligence, to have brought the same at first completely before the Court. *Young* v. *Keighly*, 16 Ves. 348. And see *Ord* v. *Noel*, 6 Madd. 127, and *Bingham* v. *Dawson*, 1 Jac. R. 243, which, although cases relating to supplemental bills in the nature of bills of review, illustrate this principle. See also *Ludlow* v. *Lord Macartney*, 2 Bro. C. C. 67. Toml. Ed. *Le Neve* v. *Norris*, 2 Bro. P. C. 73. Toml. Ed. *M'Neill* v. *Cahill*, 2 Bligh, P. C. 228.

was a purchase for valuable consideration, without notice of the plaintiff's title: this could only be used as a defence; and it seems to have been thought that although it might have been proper, under the circumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer and put it in issue, yet it could not be made the subject of a bill of review; because it created no title paramount to the title of the plaintiff, but merely a ground to induce a court of equity not to interfere. And where a settlement had been made on a marriage in pursuance of articles, and the settlement following the words of the articles had made the husband tenant for life, with remainder to the heirs-male of his body, and the husband claiming as tenant in tail under the settlement had levied a fine, and devised to trustees, principally for the benefit of his son, and the trustees had obtained a decree to carry the trusts of the will into execution against the son, the son afterwards, on discovery of the articles, brought a bill to have the settlement rectified according to the articles, and a decree was made accordingly. In this case the new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that on which the first decree was made (*y*).

(*y*) *Roberts* v. *Kingsly*, 1 Vez. 238. If this case is accurately reported, the bill seems to have been filed without the previous leave of the court; and on the hearing an inquiry was directed as to the fact of the discovery of the articles. See *Young* v. *Keighly*, 16 Ves. 348.

A bill of review upon new matter discovered has been permitted even after an affirmance of the decree in parliament(*z*); but it may be doubted whether a bill of review upon error in the decree itself can be brought after affirmance in parliament(*a*). If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal(*b*). But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and enrolled, a bill of review cannot be brought(*c*); and after a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought(*d*). It is a rule of the court, that the bringing a bill of review shall not prevent the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the the bill of review is filed, though it may afterwards be ordered to be refunded(*e*).

In a bill of this nature it is necessary to state(*f*) the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by

(*z*) *Barbon* v. *Searle*, 1 Vern. 416; and see 16 Ves. 89.

(*a*) 1 Vern. 418.

(*b*) 2 Chan. Pract. 633. And see *Neal* v. *Robinson*, Dick. 15; but see 1 Vern. 417.

(*c*) *Sherrington* v. *Smith*, 2 Bro. P. C. 62. Toml. Ed. *Smythe* v. *Clay*, 1 Bro. P. C. 453. Toml. Ed. *Edwards* v. *Carroll*, 2 Bro. P.C. 98. Toml. Ed. *Lytton* v. *Lytton*, 4 Bro. C. C. 441.

(*d*) *Dunny* v. *Filmore*, 1 Vern. 135.

(*e*) Ord. in Cha. Ed. Bea. 3. 2 Brown P. C. 65. Toml. Ed. note.

(*f*) 2 Prax. Alm. Cur. Can. 520. 2 Chan. Prac. 629.

it(*g*); and the ground of law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it(*h*), and the fact of the discovery(*i*). It has been doubted whether after leave given to file the bill, that fact is traversable; but this doubt may be questioned if the defendant to the bill of review can offer evidence that the matter alleged in the bill of review was within the knowledge of the party who might have taken the benefit of it in the original cause(*k*). The bill may pray simply that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution(*l*). If it has been carried into execution 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. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand(*m*). The bill may also, if the original suit has become abated, be at the same time a bill of revivor(*n*). A supple-

(*g*) 4 Vin. Ab. 414. Pl. 5.

(*h*) See 1 Vern. 292. Boh. Curs. Canc. 396, 397.

(*i*) *Hanbury* against *Stevens*, *Trin.* 1784, in Chancery.

(*k*) In the above-mentioned case of *Hanbury* and *Stevens*, which was upon a supplemental bill in nature of a bill of review, the court seemed to be of opinion that the fact of the discovery was traversable; and not being admitted by the defendant, ought to have been proved by the plaintiff to entitle him to proceed to the hearing of the cause.

(*l*) 17 Ves. 177.

(*m*) 2 Chan. Prac. 634.

(*n*) 2 Prax. Alm. Cur. Canc. 522.

mental bill may likewise be added, if any event has happened which requires it(*o*); and particularly if any person not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement(*p*).

To render a bill of review necessary the decree sought to be impeached must have been signed and enrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill, in nature of a bill of review, where any new matter has been discovered since the decree(*q*). As a decree not signed and enrolled may be altered upon a re-hearing, without the assistance of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings(*r*),

(*o*) *Price* v. *Keyte*, 1 Vern. 135.

(*p*) *Sands* v. *Thorowgood*, Hardr. 104.

(*q*) 2 Atk. 40. 178. 3 Atk. 811. *Gartside* v. *Isherwood*, Dick. 612. 17 Ves. 177. Or, at the least, the new matter should have been discovered after the time when it could have been introduced into the original cause. *Ord* v. *Noel*, 6 Madd. 127, and see *Barrington* v. *O'Brien*; 2 Ball & B. 140.

(*r*) The re-hearing, which is thus far alluded to, not being sought in respect of any new matter, is obtained upon certificate of counsel, 18 Ves. 325, by a petition merely, which states the case as brought before the court when the decree was made, *Wood* v. *Griffiths*, 1 Meriv. 35, and the grounds on which the re-hearing is prayed, 1 Sch. & Lefr. 398. And here it may not be improper to notice, that the court will not, without consent, 3 Swanst. 234, vary a decree after it has been passed and entered, except as to mere clerical errors, *Lane* v. *Hobbs*, 12 Ves. 458, *Weston* v. *Haggerston*, Coop. R. 134, *Hawker* v. *Duncombe*, 2 Madd. R. 391, 3 Swanst. 234, *Tomlins* v. *Palk*, 1 Russ. R. 475, or, matters of course, 7 Ves. 293, *Pickard* v. *Mattheson*, 7 Ves. 293, *Newhouse* v. *Mitford*, 12 Ves. 456, unless, upon a petition of re-hearing, or upon a bill of

the investigation of the decree must be brought on by a petition of re-hearing (*s*): and the office of the supplemental bill, in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill (*t*). It is necessary to obtain the leave of the court to bring a supplemental bill of this nature (*u*), and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review on discovery of new matter (*x*). The bill in its frame nearly resembles a bill of review, except that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is re-heard upon the original bill,

review, or bill in the nature of a bill of review, 4 Madd. 32, *Grey* v. *Dickenson*, 4 Madd. 464, *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391, *Willis* v. *Parkinson*, 3 Swanst. 233, *Brookfield* v. *Bradley*, 2 Sim. & Stu. 64, according as the decree has or has not been signed and enrolled; and as it is sought to have the case re-heard as originally brought before the court, or accompanied with new matter. See Text.

(*s*) *Taylor* v. *Sharp*, 3 P. Wms. 371. 2 Ves. 598. *Gore* v. *Purdon*, 1 Sch. & Lefr. 234. 2 Jac. & W. 393. It must be remarked that where there is new matter, a petition to rehear the original cause must be presented, and be brought before the court at the same time as the supplemental bill, in the nature of a bill of review, *Moore* v. *Moore*, Dick. 66. 17 Ves. 178.

(*t*) *Standish* v. *Radley*, 2 Atk. 177.

(*u*) Order, 17 Oct. 1741. Ord. in Cha. Ed. Bea. 366. 2 Atk. 139, *n.* 3 Atk. 811. 2 Vez. 597, 598. *Bridge* v. *Johnson*, 17 Dec. 1737.

(*x*) As to the general principles adopted by the court in relation to bills of this kind, see *Ord* v. *Noel*, 6 Madd. 127. *Bingham* v. *Dawson*, 1 Jac. R. 243.

and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires (*y*).

3. If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest (*z*), relief may be obtained against error in the decree by a bill in the nature of a bill of review (*a*). Thus, if a decree is made against a tenant for life only, a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life but by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court (*b*).

4. If a decree has been obtained by fraud it may be impeached by original bill (*c*) without the leave of

(*y*) See 17 Ves. 177, 178.

(*z*) *Brown* v. *Vermuden*, 1 Ca. in Cha. 272.

(*a*) See 17 Ves. 178.

(*b*) *Osborne* v. *Usher*, 6 Bro. P. C. 20. Toml. Ed.

(*c*) 1 P. Williams, 736. *Loyd* v. *Mansell*, 2 P. Wms. 73. 3 P. Wms. 111. *Wichalse* v. *Short*, 3 Bro. P. C. 558. Toml. Ed; and see *Kennedy* v. *Daly*, 1 Sch. & Lefr. 355, and *Giffard*

the court (*d*); the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be (*e*). Beside cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que* trust not being before the court, and the trust not discovered, or against a person who has made some conveyance or encumbrance not discovered, or where a decree has been made in favour of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit, the concealment of the trust, or subsequent conveyance, or encumbrance, or will, in these several cases, ought to be treated as a fraud (*f*). It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached

v. *Hort*, 1 Sch. & Lefr. 386. In 3 P.Wms. 111, it is said that a decree in such case may be set aside on petition; but this was probably meant to extend only to the case of a decree not signed and enrolled, and where the fact of fraud could not be controverted. See *Mussel* v. *Morgan*, 3 Bro. C. C. 74. 2 Sch. & Lefr. 574.*

(*d*) 3 Atk. 811. 1 Vez. 120. Ca. Temp. Talbot, 201.

(*e*) *Birne* v. *Hartpole*, 5 Bro. P. C. 197. Toml. Ed.; and see *Powell* v. *Martin*, 1 Jac. & W. 292. And it may be remarked, that where the enrolment of the decree by the one party is a fraud or surprize upon the other, it will be vacated. *Stevens* v. *Guppy*, 1 Turn. R. 178.

(*f*) See *Style* v. *Martin*, 1 Ca. in Cha. 150. *Earl of Carlisle* v. *Goble*, 3 Cha. Rep. 94.

by original bill (*g*). When a decree has been made by consent, and the consent has been fraudulently obtained, the party grieved can only be relieved by original bill (*h*).

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached. The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court.

5. The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus, during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest and costs, due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court, upon a new bill, enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree (*i*).

(*g*) 1 P. Wms. 737. 2 Vez. 232.

(*h*) Ambl. 229.

(*i*) *Cocker* v. *Bevis*, 1 Ca. in Cha. 61. See also *Venables* v. *Foyle*, 1 Ca. in Cha. 3; and

6. Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court (*k*). This happens, generally, in cases where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution (*l*). Or it may be brought by or against a person claiming as assignee of a party to the decree (*m*). The court in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered

Whorewood v. *Whorewood*, 1 Ca. in Cha. 250; *Wakelin* v. *Walthal*, 2 Ca. in Cha. 8. The embarrassments occasioned by the civil war in the reign of Charles I, and the state of affairs after his death, before the restoration of Charles II. occasioned many extraordinary applications to the court of chancery for relief, and perhaps induced the court to go far in extending relief; but there were many cases of extreme hardship in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the Restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution.

(*k*) 2 Chanc. Rep. 128. 2 Vern. 409.

(*l*) See peculiar case of *Rylands* v. *Latouche*, 2 Bligh, P. C. 566.

(*m*) *Organ* v. *Gardiner*, 1 Ca. in Cha. 231. *Lord Carteret* v. *Paschal*, 3 P. Wms. 197. S. C. on appeal, 2 Bro. P. C. 10. Toml. Ed. *Binks* v. *Binks*, rep. 2 Bligh, P. C. 593, note.

the directions, and varied them in case of a mistake(*n*); and it has even on circumstances refused to enforce the decree(*o*); though in other cases the court, and the House of Lords, upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution (*p*). Such a bill may also be brought to carry into execution the judgment of an inferior court of equity (*q*) if the jurisdiction of that court is not equal to the purpose; as in the case of a decree in Wales, which the defended avoided by flying into England (*r*): but in this case the court thought itself entitled to examine the

(*n*) See, for example, *Hamilton* v. *Houghton*, 2 Bligh, P. C. 164; and see Sel. Ca. in Cha. 13.

(*o*) *Att. Gen.* v. *Day*, 1 Vez. 218. 1 Vez. 245. *Johnson* v. *Northey*, Prec. in Ch. 134. S. C. 2 Vern. 407. In the last case the Lord Keeper (1700) seemed to think that a bill by creditors to carry into execution a decree in favour of their debtor, had opened that decree.—In the case of Sir *John Worden* v. *Gerard*, in Ch. 1718, the interests of an infant party being affected by the decree, the court refused to carry it into execution upon a bill for that purpose, and made a decree according to the rights of the parties. See *Lechmere* v. *Brasier*, 2 Jac. & W. 287. But in *Shephard* v. *Titley*, 2 Atk. 348, on a bill to foreclose a mortgage, after a bill to redeem, on which a decree had been made, the bill of foreclosure insisting on an encumbrance not noticed in the former cause, the latter was on hearing ordered to stand over, that the question might be brought on by re-hearing of the former cause, or by bill of review.

(*p*) 2 Vez. 232, *Smythe* v. *Clay*, 1 Bro. P. C. 453. Toml. Ed. See also *Minshull* v. *Lord Mohun*, 2 Vern. 672, and S. C. on appeal, 6 Bro. P. C. 32. Toml. Ed.

(*q*) 1 Roll. Ab. 373.

(*r*) *Morgan* v. ——, 1 Atk. 408. The case referred to of a decree in Wales seems to have been a case of *Halford* v. *Morgan*.

justice of the decision, though affirmed in the House of Lords (*s*).

A bill for this purpose is, generally, partly an original bill, and partly a bill in the nature of an original bill, though not strictly original (*t*); and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly.

7. It has been already mentioned (*u*), that when the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in this court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted: but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original merely for want of that privity of title between the party to the former and the party to the

(*s*) See Douglas, 6.

(*t*) In the case of *Pott* v. *Gallini*, a decree in a former suit was, in effect, extended upon an original bill. 1 Sim. & Stu. 206.

(*u*) See above, p. 71.

latter bill, though claiming the same interest, as would have permitted the continuance of the suit by a bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by or have advantage of the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest (*x*); and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by the original bill if it could have been continued by bill of revivor merely (*y*).

8. It has been also mentioned (*z*), that if the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but that by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained (*a*). A bill for this

(*x*) *Clare* v. *Wordell*, 2 Vern. 548. 1 Eq. Ca. Ab. 83. *Minshull* v. *Lord Mohun*, 2 Vern. 672. *Mordaunt* v. *Minshull*, 6 Bro. P. C. 32. Toml. Ed. *Johnson* v. *Northey*, Prec. in Cha. 134. S. C. 2 Vern. 407. 1 Sim. & Stu. 495.

(*y*) *Child* v. *Frederick*, 1 P. Wms. 266.

(*z*) See above p. 72.

(*a*) See *Houlditch* v. *Marquis of Donegall*, 1 Sim. & Stu. 491.

purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill (*b*). This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings on the former bill (*c*).

IV. Informations (*d*) in every respect follow the nature of bills, except in their style. When they concern only the rights of the Crown, or of those whose rights the Crown takes under its particular protection, they are exhibited in the name of the king's attorney or solicitor-general as the informant; and, as before observed, in the latter case always, and in the former, sometimes, a relator is named, who in reality sustains and directs the suit. It may happen that this person has an interest in the matter in dispute, and sustains the character of plaintiff as well as of relator; and in this case the pleading is styled an information and bill. An information concerning the rights of the Queen is exhibited also in the name of her attorney-general.

(*b*) 6 Bro. P. C. 24. Toml. Ed.
(*c*) See 9 Ves. 55. above, p. 73.
(*d*) See above, p. 22.

The proceedings upon an information can only abate by the death, or determination of interest, of the defendant. If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the court will not permit any further proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly (*e*), otherwise there would be no person liable to pay the costs (*f*) of the suit in case the information should be deemed improper, or for any other reason should be dismissed.

The difference in form between an information and a bill consists merely in offering the subject-matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named, and in stating the acts of the defendant to be injurious to the Crown, or to those whose rights the Crown thus endeavours to protect. When the pleading is at the same time an information and bill it is a compound of the forms used for each when separately exhibited (*g*).

(*e*) *Att. Gen.* v. *Powel*, Dick. 355. And the application must be made by the attorney general, or with his consent. *Att. Gen.* v. *Plumptree*, 5 Madd. 452. *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40; and see *Anon.* Sel. Ca. in Cha. 69. *Att. Gen.* v. *Fellows*, 1 Jac. & W. 254.

(*f*) 1 Vez. 72. *Att. Gen.* v. *Middleton*, 2 Vez. 327.

(*g*) It may here be observed, with respect to informations on behalf of public charities, that the practice of this court has been to control the governors or other directors of them, in those cases only in which they

In this investigation of the frame and end of the several kinds of bills the matters requisite to the sufficiency of each kind have been generally considered; but they will in some degree be more particularly noticed in the following chapter, in treating of the defence which may be made to the several kinds of bills, and consequently of the advantages which may be taken of their insufficiency both in form and substance.

have had the disposition of its revenues; and that this limited authority has been exerted under its general jurisdiction in relation to trusts: although it has gone beyond the ordinary cases on that subject by regulating the exercise of their discretion. 2 Vez. 89. 2 Vez. 328. *Att. Gen.* v. *Foundling Hospital*, 2 Ves. J. 42. S. C. 4 Bro. C. C. 165. *Att. Gen.* v. *Dixie*, 13 Ves. 519. *Att. Gen.* v. *Earl of Clarendon*, 17 Ves. 491. 3 Ves. & Bea. 154. *Att. Gen.* v. *Brown*, 1 Swanst. 265. *Att. Gen.* v. *Mayor of Bristol*, 3 Madd. 319. S. C. 2 Jac. & W. 294. *Foley* v. *Wontner*, 2 Jac. & W. 245. *Att. Gen.* v. *Buller*, 1 Jac. R. 407. *Att. Gen.* v. *Heelis*, 2 Sim. & Stu. 67. *Att. Gen.* v. *Mayor of Stamford*, reported 2 Swanst. 591. *Att. Gen.* v. *Vivian*, 1 Russ. R. 226. It has already been observed in the text, p. 18, that this Court is empowered by the 52 Geo. 3, c. 101, to interfere in such cases as relate only to the plain breach of trusts created for charitable purposes, on what is technically termed a petition in a summary way. As to which see also *ex parte Berkhampstead School*, 2 Ves. & Bea. 134. *Ex parte Rees*, 3 Ves. & Bea. 10. *Ex parte Brown*, Coop. R. 295. *Ex parte Skinner*, 2 Meriv. 453. S. C. 1 Wils. R. 14. *Ex parte Greenhouse*, 1 Swanst. 60. S. C. 1 Wils. R. 18. *In re Slewings Charity*, 3 Meriv. 707. *Att. Gen.* v. *Green*, 1 Jac. & W. 303. *In re Bedford Charity*, 2 Swanst. 470. In the matter of *St. Wenns Charity*, 2 Sim. & Stu. 66; and see 2 Swanst. 518. 525. And, it may here be added, that it is also authorized to decide in certain other cases relating to the property of charities, upon a petition, by the 59 Geo. 3, c. 91.

CHAPTER THE SECOND.

Of the DEFENCE to BILLS.

SECTION I.

By whom a Suit may be defended.

IN treating of the defence which may be made to a bill it will be proper to consider, I. By whom a suit may be defended. II. The nature of the various modes of defence; under which head will be considered, 1, demurrers, 2, pleas, 3, answers and disclaimers, or any two or more of them jointly, each referring to a separate and distinct part of the bill.

When the interest of the Crown, or of those whose rights are under its particular protection, is concerned in the defence of a suit, the King's attorney-general, or during the vacancy of that office the solicitor-general, becomes a necessary party to support that interest(*a*); but it has been already observed, that a suit in the court of chancery is not the proper remedy where the Crown is in possession, or any title vested in it is sought to be divested, or affected(*b*), or its rights are the immediate and sole object of the suit. The Queen's attorney or soli-

(*a*) *Balch* v. *Wastall*, 1 P. Wms. 445. 2 Sch. & Lefr. 617.

(*b*) See above, p. 31.

citor seems to be the party necessary to defend her rights (*c*).

All other bodies politic and corporate, and persons who do not partake of the prerogative of the Crown, and have no claim to its particular protection, defend a suit either by themselves, or under the protection of or jointly with others. Bodies politic and corporate, and persons of full age, not being married women, or idiots or lunatics, defend a suit by themselves; but infants, idiots and lunatics, are incapable by themselves of defending as they are of instituting a suit; and married women can only defend jointly with their husbands, except under particular circumstances, unless a special order is obtained to authorize or compel their defending separately.

Infants institute a suit by their next friend; but to defend a suit the court appoints them guardians who are usually their nearest relations, not concerned in point of interest in the matter in question (*d*). If a person is by age, or infirmities, reduced to a second infancy, he may also defend by guardian (*e*).

Idiots and lunatics defend by their committees (*f*),

(*c*) See 2 Roll. Ab. 213. But a queen dowager has been sued as a common person. 9 Hen. VI. 53. Writ of annuity against Joan, queen dowager of Henry IV.

(*d*) *Offley* v. *Jenney*, 3 Ch. Rep. 51. On the subject of appointing guardians *ad litem* for infant defendants, see *Brassington* v. *Brassington*, 3 Anstr. 369. *Eyles* v. *Le Gros*, 9 Ves. 12. *Jongsma* v. *Pfiel*, 9 Ves. 357. *Williams* v. *Wynn*, 10 Ves. 159. *Hill* v. *Smith*, 1 Madd. R. 290. *Lushington* v. *Sewell*, 6 Madd. 28. *sed. vid. Tappen* v. *Norman*, 11 Ves. 563.

(*e*) *Leving* v. *Caverly*, Prec. in Chan. 229. 1 Eq. Ca. Ab. 281. *Wilson* v. *Grace*, 14 Ves. 172. And see *Att. Gen.* v. *Waddington*, 1 Madd. R. 321.

(*f*) 1 Vern. 106. *Lyon* v. *Mercer*, 1 Sim. & Stu. 356.

who are by order of the court appointed guardians for that purpose as a matter of course (*g*); and if it happens that an idiot or lunatic has no committee (*h*), or the committee has an interest opposite to that of the person whose property is intrusted to his care (*i*), an order may be obtained for appointing another person as guardian for the purpose of defending a suit (*k*). So if a person who is in the condition of an idiot or lunatic, though not found such by inquisition, is made a defendant, the court upon information of his incapacity will direct a guardian to be appointed (*l*).

A married woman, though she cannot by herself institute a suit, and if her husband is not joined with her must seek the protection of some other person as her next friend, may yet, by leave of the court, defend a suit separately from her husband without the protection of another (*m*). Thus, if she claims, in opposition to any claims of her husband, or if she lives separate from him (*n*), or disapproves the defence he wishes her to make (*o*), she may obtain an order for liberty to defend the suit separately (*p*),

(*g*) *Westcomb* v. *Westcomb*, Dick. 233.

(*h*) *Howlett* v. *Wilbraham*, 5 Madd. 423.

(*i*) *Snell* v. *Hyat*, Dick. 287. see *Lloyd* v. ——, Dick. 460.

(*k*) *Howlett* v. *Wilbraham*, 5 Madd. 423.

(*l*) *Anon.* 3 P. Wms. 111, n. See *Wilson* v. *Grace*, 14 Ves. 172.

(*m*) 4 Vin. Ab. 147. Baron & Feme, I. a. 20. 1 Sim. & Stu. 163.

(*n*) *Portman* v. *Popham*, Tothill, 75. *Jackson* v. *Haworth*, 1 Sim. & Stu. 161.

(*o*) *Ex parte Halsam*, 2 Atk. 50. 2 Eq. Ca. Ab. 66.

(*p*) *Powel* v. *Prentice*, Ca. t. Hardw. 258. *Wybourn* v. *Blunt*, Dick. 155. A separate answer put in by a married woman without an order for the purpose may

and her answer may be read against her (*q*). If a husband is plaintiff in a suit, and makes his wife a defendant, he treats her as a feme sole, and she may answer separately without an order of the court for the purpose (*r*). The wife of an exile, or of one who has abjured the realm, may defend as she may sue alone (*s*); and if a husband is out of the jurisdiction of the court (*t*), though not an exile, or if he cannot be found (*u*), his wife may be compelled to answer separately. If a married woman obstinately refuses to join in defence with her husband, she may also be compelled to make a separate defence; and for that purpose an order may be obtained that process may issue against her separately (*x*). Except under such circumstances a married woman can only defend jointly with her husband (*y*).

be suppressed as irregularly filed. But if filed with her approbation, and accepted by the plaintiff, it will not be deemed irregular upon objection taken by her merely for want of the order for leave to file it separately; and she will be bound by an offer contained in it. See *Duke of Chandos* v. *Talbot*, 2 P. Wms. 371. S. C. Sel. Ca. in Cha. 24.

(*q*) *Travers* v. *Buckly*, 1 Vez. 383.

(*r*) *Ex parte Strangeways*, 3 Atk. 478. *Brooks* v. *Brooks*, Prec. in Chan. 24. *Ainslie* v. *Medlicott*, 13 Ves. 266.

(*s*) See page 24, 19 Co. Litt. 132. b. 133. a. and 2 Vern. 105.

(*t*) *Carleton* v. *M'Enzie*, 10 Ves. 442. *Bunyan* v. *Mortimer*, 6 Madd. 278.

(*u*) *Bell* v. *Hyde*, Prec. in Ch. 328.

(*x*) *Pain* v. ——, 1 Ca. in Cha. 296. 1 Sim. & Stu. 163.

(*y*) As to the answer of a married woman, see further, *Plomer* v. *Plomer*, 1 Ch. Rep. 68. *Wrottesley* v. *Bendish*, 3 P. Wms. 235. *Penne* v. *Peacock*, Ca. t. Talb. 41. *Murriet* v. *Lyon*, Bunbury, 175. *Ex parte Halsam*, 2 Atk. 50. *Traverse* v. *Buckley*, 1 Wils. R. 264. *Barry* v. *Cane*, 3 Madd. 472. *Jackson* v. *Haworth*, 1 Sim. & Stu. 161. *Garey* v. *Whittingham*, 1 Sim. & Stu. 163. *Bushell* v. *Bushell*, 1 Sim. & Stu. 164.

CHAPTER II.

SECTION II.

PART I.

Of the Nature of the various Modes of Defence to a Bill; and first of Demurrers.

IT has been mentioned (*a*) that the person against whom a bill is exhibited, being called upon to answer the complaint made against him, may defend himself, 1, By demurrer, by which he demands the judgment of the court whether he shall be compelled to answer the bill or not (*b*). 2, By plea, whereby he shows some cause why the suit should be dismissed, delayed, or barred (*c*). 3, By answer, which, controverting the case stated by the plaintiff, confesses and avoids, or traverses and denies, the several parts of the bill (*d*); or, admitting the case made by the bill, submits to the judgment of the court upon it, or upon a new case made by the answer, or both: or by disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill (*e*). And all or any of these modes of defence may be joined, provided each relates to a separate and distinct part of the bill.

It has also been observed that the grounds on

(*a*) Page 13, 14, 15, 16.
(*b*) Pract. Reg. 162. Wy. Ed.
(*c*) Ibid. 324. Wy. Ed.
(*d*) 2 West. Symb. Chan. 194. Pract. Reg. 11. Wy. Ed.
(*e*) Pract. Reg. 175. Wy. Ed.

which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are various both in their nature and in their effect. Some of them, though a complete defence as to any relief, are not so as to a discovery; and when there is no ground for disputing the right of the plaintiff to the relief prayed, or if the bill seeks only a discovery, yet if there is any impropriety in requiring the discovery, or if it can answer no purpose for which a court of equity ought to compel it, the impropriety of compelling the discovery, or the immateriality of the discovery if made, may be used as a ground to protect the defendant from making it. Different grounds of defence therefore may be applicable to different parts of a bill; and every species of bill requiring its own peculiar ground to support it, and its own peculiar form to give it effect, a deficiency in either of these points is a ground of defence to it.

Whenever any ground of defence is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. A demurrer is an allegation of a defendant, which, admitting the matters of fact (*f*) alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer (*g*); or that for some

(*f*) A demurrer confesses matter of fact only, and not matter of law. Lord Raym. 18. 1 Ves. J. 78. 289. 2 Ves. & B. 95. 3 Meriv. 503. *Cuthbert* v. *Creasy*, 6 Madd. 189.

(*g*) Prac. Reg. 162 Wy. Ed.

reason apparent on the face of the bill (*h*), or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof (*i*). The causes of demurrer are merely upon matter in the bill (*k*), or upon the omission (*l*) of matter which ought to be therein or attendant thereon; and not upon any foreign matter alleged by the defendant (*m*). The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer. For, in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases in which the court has given relief upon hearing, though a demurrer to the relief would probably have been allowed (*n*). But the cases are rare.

(*h*) Ord. in Cha. 26. Ed. Bea.

(*i*) 3 P. Wms. 80. Prac. Reg. 162. Wy. Ed. See 2 Sch. & Lefr. 206.

(*k*) 2 Vez. 247.

(*l*) 3 P. Wms. 395.

(*m*) Ord. in Cha. 26. Ed. Bea.

(*n*) 3 P. Wms. 150. 12 Mod. 171. It seems that the court, upon the argument of a demurrer, decides upon the facts as stated in the bill, whether if the cause were to proceed to a hearing, and they were proved or confessed, a decree would then be made. See 2 Ves. J. 97. *Brook* v. *Hewitt*, 3 Ves. 253. 6 Ves. 686. 7 Ves. 245. 2 Sch. & Lef. 638. 6 Madd. 95.

Bills have been already considered under three general heads; 1, original bills; 2, bills not original; and, 3, bills in the nature of original bills. The several kinds of bills ranged under the second and third heads being consequences of bills treated of under the first head, the defence which may be made to original bills in its variety comprehends the several defences which may be made to every other kind of bill, except such as arise from the peculiar form and object of each kind. In treating therefore of demurrers it will be convenient first to consider demurrers to original bills, under which head the nature of demurrers in general, and the principal grounds of demurrer to every kind of bill, will be necessarily noticed: the distinct causes of demurrer peculiar to the several other kinds of bills will be then mentioned; and in the third place will be considered the frame of demurrers in general, and the manner in which their validity is determined.

In treating of original bills they have been divided into bills praying relief, and bills not praying relief; and it has been mentioned that both require a discovery from the party against whom the bill is exhibited. Demurrers to original bills may therefore be considered under two heads; first, demurrers to relief, which frequently include a demurrer to discovery; and secondly, demurrers to discovery only, which sometimes consequentially affect the relief. Under these heads will necessarily be considered the causes of demurrer, as well to bills which seek a discovery only as to such as likewise pray relief.

From what has been observed in a preceding page it may be collected that the principal grounds of objection to the relief sought by an original bill, which can appear on the bill itself, and may therefore be taken advantage of by demurrer, are these (*o*); I, that the subject of the suit is not within the jurisdiction of a court of equity; II, that some other court of equity has the proper jurisdiction; III, that the plaintiff is not entitled to sue by reason of some personal disability; IV, that he has no interest in the subject, or no title to institute a suit concerning it; V, that he has no right to call on the defendant concerning the subject of the suit; VI, that the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff; VII, that for some reason founded on the substance of the case the plaintiff is not entitled to the relief he prays. To these may be added, VIII, the deficiency of the bill to answer the purpose of complete justice: and IX, the impropriety of confounding distinct subjects in the same bill, or of unnecessarily multiplying suits. When the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery may have a further purpose, the plaintiff may be entitled to it though he has no title to

(*o*) It has been said that a defendant may demur to a bill if it appears upon the face of it to be brought for a very small sum; but it is most usual to apply to the court that the bill may be dismissed. *Anon.* Mosely, 47. 356. *Anon.* Bunbury, 17. *Owens* v. *Smith*, Comyn, 715. *Brace* v. *Taylor*, 2 Atk. 253.

relief. In considering, therefore, these several grounds of demurrer to relief, such as may, and such as cannot, extend to discovery likewise, will be distinguished.

I. The general objects of the jurisdiction of a court of equity have been noticed in a former page(*p*); and from thence it may be collected, that the jurisdiction, when it assumes a power of decision, is to be exercised, 1, where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; 2, where the courts of ordinary jurisdiction are made instruments of injustice; 3, where the principles of law by which the ordinary courts are guided give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent: and it may also be collected that courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction, 4, to remove impediments to the fair decision of a question in other courts; 5, to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; 6, to restrain the assertion of doubtful rights in a manner pro-

(*p*) Page 4, 5.

ductive of irreparable damage; 7, to prevent injury to a third person by the doubtful title of others; and 8, to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits: and further, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction, 9, to compel a discovery, or obtain evidence which may assist the decision of other courts; and 10, to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.

1. Cases frequently occur in which the principles (*q*) by which the ordinary courts are guided in their administration of justice give a right, but from accident or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the

(*q*) The existence of courts of equity in England distinct from the courts of ordinary jurisdiction, has suggested an idea that the ordinary courts, and especially the courts of common law, have not in their administration of justice any recourse to such principles of decision as are merely rules of equity. But in fact those principles have been as constantly applied by the ordinary courts as by the courts of equity, except where they have clashed with established rules of the common law, and where the forms observed in the proceedings of the ordinary courts have not admitted of the application. And from time to time the courts of common law have also been induced to admit, as grounds of their decision, rules established in the courts of equity, which they had before rejected as clashing with established rules of the common law; and for some purposes they have also noticed principles of decision established in the courts of equity, which the forms of proceeding in the courts of common law have not enabled them directly to enforce.

most complete remedy; and sometimes the effect of a remedy attempted to be given by a court of ordinary jurisdiction is defeated by fraud or accident. In such cases courts of equity will interpose to give those remedies which the ordinary courts would give if their powers were equal to the purpose, or their mode of administering justice could reach the evil; and also to enforce remedies attempted to be given by those courts when their effect is so defeated.

Thus where an instrument on which a title is founded, as a bond, is lost, a court of equity will interfere to supply the defect occasioned by the accident, and will give the same remedy which a court of common law would have given if the accident had not happened (*r*). If an instrument has been destroyed, or is fraudulently suppressed, or withheld from the party claiming under it, courts of equity will also give relief (*s*); as they will generally lend their aid whenever by fraud or accident a person is prevented from effectually asserting in the courts of ordinary jurisdiction rights founded on principles acknowledged by those courts.

In some instances courts of law have acted on the

(*r*) 1 Ca. in Cha. 11. 1 Eq. Ca. Ab. 92. 1 Atk. 287. *Anon.* 2 Atk. 61. *Anon.* 3 Atk. 17. 1 Vez. 344. 5 Ves. 238. 7 Ves. 19. *East India Company* v. *Boddam*, 9 Ves. 464. *Seagrave* v. *Seagrave*, 13 Ves. 439. *Smith* v. *Bicknell*, 3 Ves. & B. 51, n. *Stokoe* v. *Robson*, 3 Ves. & B. 51.

(*s*) See *Lord Hunsdon's* case, Hob. 109. *Eyton* v. *Eyton*, 2 Vern. 380. *Sanson* v. *Rumsey*, 2 Vern. 561. *Dalston* v. *Coatsworth*, 1 P. Wms. 731. *Cowper* v. *Earl Cowper*, 2 P. Wms. 720. *Atkins* v. *Farr*, 1 Atk. 287. *Tucker* v. *Phipps*, 3 Atk. 359. 1 Vez. 392. *Saltern* v. *Melhuish*, Ambl. 249. *Bowles* v. *Stewart*, 1 Sch. & Lefr. 209.

supposed destruction or suppression of an instrument where formerly those courts conceived they could not act for want of the instrument, especially in the particular mode of proceeding. Thus in the supposed suppression or destruction of a lease for lives under a power in a settlement, the supposed lessee was permitted to obtain on parol testimony a verdict and judgment in ejectment, upon a feigned demise, the form of the proceeding not requiring the lease in question to be in any manner stated in the pleadings, so that it could not appear upon the record under what title the recovery was had, or what specific lands were in the supposed lease, what were the lives for which it was granted, what the rent reserved, or what covenants bound either party; or whether the lease was or was not according to the powers under which it was alleged to have been made. The consequence necessarily was a suit in equity to have all those facts ascertained, and to restrain the execution of the judgment in ejectment in the mean time.

In restraining waste by persons having limited interests in property, the courts of equity have generally proceeded on the ground of the common-law rights of the parties, and the difficulty of obtaining immediate preservation of property from destruction or irreparable injury by the process of the common law (*t*); but upon this subject the jurisdiction has

(*t*) See *Field* v. *Jackson*, Dick. 599. *Davis* v. *Leo*, 6 Ves. 784. *Smith* v. *Collyer*, 8 Ves. 89. 9 Ves. 356. 19 Ves. 154.

been extended to cases in which the remedies provided in those courts could not be madeto apply (*u*).

Where an act of parliament has expressly given a right, the courts of ordinary jurisdiction have been found incompetent to give, in all cases, a full and complete remedy, and the courts of equity have therefore interposed. Thus in the case of a person who had been discharged under an act for relief of insolvent debtors, by which his future effects were made liable to the demand of his creditors, but his person was protected; the court of chancery, exercising its extraordinary jurisdiction, enforced a judgment of a court of common law against his effects, which were so circumstanced as not to be liable to execution at the common law (*x*).

Where parties by contract have given a right, but have not provided a sufficient remedy, the courts of equity have also interfered. Thus where a rent was

(*u*) As to the instances where the title is legal, and the courts of law admit the existence of an injury, but do not afford a remedy, see 2 Freem. 54. *Perrot* v. *Perrot*, 3 Atk. 94. 3 Atk. 210. *Farrant* v. *Lovel*, 3 Atk. 723. 3 Atk. 755, 756. *Mollineux* v. *Powell*, 3 P. Wms. 268, n. 3 Bro. C. C. 544. *Onslow* v. ——, 16 Ves. 163. *Pratt v. Brett*, 2 Madd. R. 62. *Brydges* v. *Stephens*, 6 Madd. 279; as to those where the title is equitable, see 19 Ves. 151. 155; and as to those where the injury is not acknowledged at law, which are cases of equitable waste, see *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166. S. C. Dick. 600. *Marquis of Downshire* v. *Sandys*, 6 Ves. 107. *Lord Tamworth* v. *Lord Ferrers*, 6 Ves. 419. *Williams* v. *M'Namara*, 8 Ves. 70. *Burges* v. *Lamb*, 16 Ves. 174. *Day* v. *Merry*, 16 Ves. 375. *Marchioness of Ormonde* v. *Kynersley*, 5 Madd. 369. *Lushington* v. *Boldero*, 6 Madd. 149. *Coffin* v. *Coffin*, 1 Jac. R. 70.

(*x*) *Edgell* v. *Haywood*, 3 Atk. 352. See 1 Jac. & W. 371.

settled upon a woman by way of jointure, but she had no power of distress, or other remedy at law, the payment, according to the intent of the conveyance, was decreed in equity (*y*). So where parties, meaning to create a perfect title, have used an imperfect instrument, as a feoffment without livery of seisin (*z*); a bargain and sale without enrolment (*a*); a surrender of a copyhold not presented according to the custom of the manor (*b*); courts of equity have considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect even against judgment-creditors (*c*) who had gained a lien in the land in question, though when the consideration has been inadequate relief has not been extended so far (*d*). Where the Legislature has declared that an instrument wanting a particular form should be null and void to all intents and purposes, and it was manifestly the design of the Legislature that those words should operate to the fullest extent, relief has been refused. Thus a bill of sale of a ship wanting a formality required by the Register-act was not made good in equity against assignees of the vendor become bankrupt (*e*).

(*y*) *Plunket* v. *Brereton*, 1 Ch. Rep. 5; and see *Duke of Leeds* v. *Powell*, 1 Vez. 171.

(*z*) *Burgh* v. *Francis*, cited P. Wms. 279. *Burgh* v. *Burgh*, Rep. t. Finch, 28.

(*a*) 6 Ves. 745.

(*b*) *Taylor* v. *Wheeler*, 2 Vern. 564.

(*c*) See 1 P. Wm. 279.

(*d*) *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 277. 283.

(*e*) *Hibbert* v. *Rolleston*, 3 Bro. C. C. 571. 6 Ves. 745. *Speldt* v. *Lechmere*, 13 Ves. 588. *Thompson* v. *Leake*, 1 Madd. R. 39.

Relief has also been given where a remedy at law was originally provided, but by subsequent accident could not be enforced, as, where by confusion of boundaries of lands remedy by distress for rent was defeated (*f*). So if the remedy afforded by the ordinary courts is incomplete a court of equity will lend its aid to give a complete remedy (*g*). Upon this ground a bill was admitted for recovery of an ancient silver altar claimed by the plaintiff as treasure-trove within his manor: for though he might have recovered at law the value in an action of trover, or the thing itself, if it could be found, in an action of detinue, yet as the defendant might deface it, and thereby depreciate the value, it was determined that the defect of the law in that particular ought to be supplied in equity (*h*). And where an estate was held by a horn, and a bill was brought by the owner of the estate to have the horn delivered to him, a demurrer was over-ruled (*i*).

Upon the same principle (*k*) the jurisdiction of the court is supported in the very common case of a bill for delivery of deeds or writings (*l*), suggesting that

(*f*) 1 Vez. 172. See *North* v. *Earl and Countess of Strafford*, 3 P. Wms. 148. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200, and *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. C. C. 338, S. C. ib. 518, and the cases there cited.

(*g*) See 9 Ves. 33.

(*h*) *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390; and see *Fells* v. *Read*, 3 Ves. 71. *Lowther* v. *Lord Lowther*, 13 Ves. 95.

(*i*) *Pusey* v. *Pusey*, 1 Vern. 273; and see *Earl of Macclesfield* v. *Davis*, 3 Ves. & Bea. 16.

(*k*) See 2 Atk. 306.

(*l*) The court of chancery has long exercised its extraordinary jurisdiction in this case. See 9 Edw. IV. 41 B. and Stat. 32 Hen. VIII. c. 36. s. 9; and see on this subject *Brown* v. *Brown*, Dick. 62. 1 Madd.

they are in the custody or power of the defendant; though in early times it seems to have been considered that the jurisdiction did not extend to cases where an action of detinue would lie(*m*).

In the case of contracts or agreements this principle is carried to the extent. The principles by which the courts of common law direct their decisions on the subject acknowledge the mutual right of the contracting parties to specific performance of the agreements they have made; but the mode of proceeding in those courts enables them only to attempt to compel performance by giving damages for non-performance. Here therefore the courts of equity interfere to give that remedy which the ordinary courts would give if their mode of administering justice would reach the evil, by decreeing, according to the principles of the common law as well as of natural justice, specific performance of the agreement(*n*). This however extends only to contracts of which a specific performance is essential to

R. 192. *Crow* v. *Tyrrell*, 3 Madd. 179. *Knye* v. *Moore*, 1 Sim. & Stu. 61. *Balch* v. *Symes*, 1 Turn. 87.

(*m*) 9 Edw. IV. 41 B. See also 39 Hen. VI. 26. Brooke Prær. 45; which seems to have been in effect a bill for discovery and account.

(*n*) 13 Ves. 76. 228. 2 Sch. & Lefr. 556. 1 Jac. & W. 370. The courts of equity decree performance of agreements in many cases where no action would lie at the common law for non-performance; and on this head great complaints have been made, the justice of which it is beyond the purpose of this treatise to consider. See 1 Fonbl. Treat. of Eq. 151, n. (*c*) and 2 Sch. & Lefr. 347, and *Williams* v. *Steward*, 3 Meriv. 472. As to the propriety of extending the application of the doctrine of part performance, see 3 Ves. 712, 713. 6 Ves. 32. 37. 2 Sch. & Lefr. 5.

justice (*o*); for if damages for non-performance are all that justice requires, as in the case of a contract for stock in the public funds, a court of equity will not interfere (*p*). In other cases where compelling a specific act is the only complete remedy for an injury, and the ordinary courts can attempt to give this remedy only by giving damages, the courts of equity will interfere to give the specific remedy, especially if the right has been established by the determination of the ordinary courts (*q*).

In some cases, as in matters of account (*r*), partition of estates between tenants in common (*s*), and

(*o*) See 3 Bro. C. C. 543. 8 Ves. 163. 2 Sch. & Lefr. 347.

(*p*) *Cud* v. *Rutter*, 1 P. Wms. 570. 10 Ves. 161. 13 Ves. 37.

(*q*) It is difficult to reconcile all the cases in which the courts of equity have compelled the performance of agreements, or refused to do so, with each other; and in some cases where performance has been decreed, it is difficult to reconcile the decisions with the principles of equal justice. The cases and their varieties are numerous, and have been ably collected in 1 Fonbl. Treat. of Equity. Of the later cases on the subject, see *Morphett* v. *Jones*, 1 Swanst. 172. S. C. 1 Wils. Ch. R. 100. *Garrard* v. *Grinling*, 2 Swanst. 1. 244. S. C. 1 Wils. Ch. R. 460. *Walker* v. *Barnes*, 3 Madd. 247. *Hudson* v. *Bartram*, 3 Madd. 440. *Franklyn* v. *Tuton*, 5 Madd. 469. *Dawson* v. *Ellis*, 1 Jac. & W. 524. *Baxter* v. *Conolly*, 1 Jac. & W. 576. *Martin* v. *Mitchell*, 2 Jac. & W. 413. *Beaumont* v. *Dukes*, 1 Jac. R. 422. *Gordon* v. *Smart*, 1 Sim. & Stu. 66. *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74. *Doloret* v. *Rothschild*, 1 Sim & Stu. 590. *Lingen* v. *Simpson*, 1 Sim. & Stu. 600. *Agar* v. *Macklew*, Sim. & Stu. 418. *Hasker* v. *Sutton*, 2 Sim. & Stu. 513. *Lewin* v. *Guest*, 1 Russ. R. 325. *Attwood* v. ——, 1 Russ. R. 353.

(*r*) See 2 Ves. 388. *Corporation of Carlisle* v. *Wilson*, 13 Ves. 276. 1 Sch. & Lefr. 309.

(*s*) See 2 Freem. 26. 2 Ves. J. 570. *Turner* v. *Morgan*, 8 Ves. 143. 17 Ves. 552. 1 Ves. & B. 555. *Miller* v. *Warmington*, 1 Jac. & W. 484.

assignment of dower (*t*), a court of equity will entertain jurisdiction of a suit, though remedy might perhaps be had in the courts of common law. The ground upon which the courts of equity first interfered in these cases seems to have been the difficulty of proceeding to the full extent of justice in the courts of common law (*u*). Thus though accounts may be taken before auditors in an action of account in the courts of common law, yet a court of equity by its mode of proceeding is enabled to investigate more effectually long and intricate accounts in an adverse way, and to compel payment of the balance which ever way it turns.

In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties (*x*). But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition,

(*t*) See *Curtis* v. *Curtis*, 2 Bro. C. C. 620. 2 Ves. J. 129. 17 Ves. 552.

(*u*) 2 Vez. 388. 13 Ves. 279. Perhaps in some of these cases the jurisdiction was first assumed to prevent multiplicity of suits.

(*x*) See *Cartwright* v. *Pultney*, 2 Atk. 380. 2 Sch. & Lefr. 372. 1 Jac. & W. 493.

give possession, and order enjoyment accordingly until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause should be shown, or cause shown should not be allowed, the decree may then be extended to compel mutual conveyances (*y*). If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill will be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment (*z*).

In the case of dower the widow is often much embarrassed in proceeding upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower, to ascertain their comparative value, and obtain a fair assignment of a third. How far the courts of equity will assist a widow in the assignment of dower has been at different times a subject of much question; but the result of various decisions seems to have settled, that where there is no ground of equity, as a purchase for valuable consideration (*a*), to prevent their interference, the courts will proceed to set out dower; though if the title to

(*y*) See *Att. Gen.* v. *Hamilton*, 1 Madd. R. 214.

(*z*) See the case of *Wills* v. *Slade*, 6 Ves. 498.

(*a*) *Williams* v. *Lambe*, 3 Bro. C. C. 264.

dower be disputed it must be first established at law (*a*).

In all these cases the courts of equity will lend their aid; but they have generally considered themselves in so doing as proceeding merely on rights which may be asserted in a court of common law, and therefore in the two cases of partition, and assignment of dower, as no costs can be given in a court of common law upon a writ of partition or a writ of dower, no costs have been commonly given in a court of equity upon bills brought for the same purposes (*b*); and as arrears of dower can be recovered at common law only from demand, the same rule was adopted in the courts of equity, unless particular circumstances had occurred to warrant a departure from the course of the common law, founded

(*a*) *Curtis* v. *Curtis*, 2 Bro. C. C. 620. *Mundy* v. *Mundy*, 2 Ves. jun. 122. The last case was upon a demurrer, which after much consideration was over-ruled. Lord Talbot had over-ruled a demurrer under similar circumstances in *Moor* v. *Blake*, 26 July 1735, reported Ca. Temp. Talb. 126, by the name of *Moore* and *Black*. And a like decision was made in *Meggott* v. *Meggott*, in Cha. 15 Oct. 1743. But in *Read* v. *Read*, 15 Dec. 1744, the court retained the bill, and ordered the deeds to be produced, with liberty to the plaintiff to bring a writ of dower, which was also done in *Curtis* v. *Curtis*, 15 May, 1778; finally reported in 2 Bro. C. C. 620. See also the case of *D'Arcy* v. *Blake*, 2 Sch. & Lefr. 387.

(*b*) See *Lucas* v. *Chalcraft*, Dick. 594. With respect to costs in cases of partition, see *Calmady* v. *Calmady*, 2 Ves. J. 568, *Agar* v. *Fairfax*, 17 Ves. 533, 1 Ves. & Bea. 554; and in cases of dower, see *Lucas* v. *Calcraft*, 1 Bro. C. C. 134, and S. C. 1 Ves. & Bea. 20, note, 2 Vez. 128, *Worgan* v. *Ryder*, 1 Ves. & Bea. 20.

on the terms of a statute (*c*). The courts of equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction (*d*) with the courts of common law in cases where no difficulty would have attended the proceeding in those courts.

But except in these instances, and in some cases noticed in a subsequent page, the courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice; and therefore, in general, where a plaintiff can have as effectual and complete remedy in a court of law as in a court of equity, and that remedy is clear and certain (*e*), a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold (*f*).

If an accident is made a ground to give jurisdiction to the court in a matter otherwise clearly cognizable in a court of common law, as the loss or want of an instrument on which the plaintiff's title is

(*c*) In the case of *Curtis* v. *Curtis*, 2 Bro. C. C. 620, this rule was not observed.

(*d*) 13 Ves. 279. 1 Sch. & Lefr. 309. 1 Ves. & Bea. 555.

(*e*) *Parry* v. *Owen*, 3 Atk. 740. *Ghettoff* v. *Lond. Assur. Comp.* 4 Bro. P. C. 436. Toml. Ed. 1 Eq. Ca. Ab. 131. *Bensley* v. *Burdon*, 2 Sim. & Stu. 519.

(*f*) As courts of equity disclaim all right to decide upon the validity of wills, whether of real or of personal estate, a demurrer to a bill whereby such a determination is sought, will hold. See *Jones* v. *Jones*, 3 Meriv. 161. *Jones* v. *Frost*, 3 Madd. 1. S. C. 1 Jac. R. 466.

founded, the court will not permit a bare suggestion in a bill to support its jurisdiction; but requires a degree of proof of the truth of the circumstance on which it is sought to transfer the jurisdiction from a court of common law to a court of equity (*g*), by an affidavit of the plaintiff annexed to and filed with the bill. Thus if a bill is brought to obtain the benefit of an instrument upon which an action at law would lie, alleging that it is lost, and that the plaintiff therefore cannot have remedy at law, an affidavit of the loss must be annexed to the bill, or a demurrer will hold (*h*).

So in the case of a bill for discovery of any instrument, suggesting that it is in the custody or power of the defendant, and praying any relief which might be had at law if the instrument was in the hands of the plaintiff, an affidavit must be annexed to the bill that the instrument is not in his custody or power, and that he knows not where it is, unless it is in the hands of the defendant. But if the relief sought extends merely to the delivery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary (*i*). It is also unnecessary in the case of a bill for discovery of a cancelled instrument, and to have another deed executed (*k*); for if the plaintiff had the cancelled instrument in his hands he could make

(*g*) *Whitchurch* v. *Golding*, 2 P. Wms. 541. 3 Atk. 132.

(*h*) See *Walmsley* v. *Child*, 1 Vez. 342. *Hook* v. *Dorman*, 1 Sim. & Stu. 227.

(*i*) *Whitworth* v. *Golding*, Mos. 192. Nels. Rep. 78. *Anon.* 3 Atk. 17.

(*k*) *King* v. *King*, Mos. 192.

no use of it at law, and indeed the relief prayed is such as a court of equity only can give.

A suggestion that the evidence of the plaintiff's demand is not in his power is essential to a bill under these circumstances; and if it is defective in this point the defendant may by demurrer allege that there is no such charge in the bill (*l*).

Where a right of action at law was in a trustee, and the person beneficially entitled filed a bill for relief, suggesting a refusal by the trustee to suffer an action to be brought in his name, a demurrer has been allowed (*m*); and if a mere suggestion to this effect would support a bill, the jurisdiction in many cases might improperly be transferred from a court of law to a court of equity.

By demurring to a bill because the plaintiff may have remedy at law, the defendant will not be debarred of relief in equity upon another bill, if the plaintiff in the first bill should proceed at law and recover (*n*).

This objection to a bill is not confined to cases cognizable in courts of common law. If any other court of ordinary jurisdiction, as an ecclesiastical court, court of admiralty, or court of prize, is competent to decide upon the subject, a demurrer will equally hold; except that the courts of equity have in the case of tithes, and in the disposition of the effects of persons dying testate or intestate, assumed

(*l*) 3 P. Wms. 395.

(*m*) *Ghettoff* v. *Lond. Assur. Comp.* 4 Brown, P. C. 436. Toml. Ed. And see 1 Atk. 547.

(*n*) *Humphreys* v. *Humphreys*, 3 P. Wms. 395.

a concurrent jurisdiction with the ecclesiastical courts, as far as the jurisdiction of those courts extends; and indeed the courts of equity in many of these cases can give more complete remedy than can be afforded in the ecclesiastical courts, and in some cases the only effectual remedy.

Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction; and therefore a bill may be brought to obtain the execution or the benefit of an elegit (*o*), or a fieri facias (*p*), when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where courts of equity formerly lent their aid, the Legislature has by express statute provided for the relief of creditors in the courts of common law; and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case to procure relief in equity the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus in the cases alluded to of an elegit and fieri facias he must show that he has sued out the writs the execution of which is avoided, or the defendant may demur (*q*); but it is not neces-

(*o*) *Lewkner* v. *Freeman*, Pr. in Ch. 105. *Higgins* v. *York Build. Comp.* 2 Atk. 107. *Stileman* v. *Ashdown*, 2 Atk. 608.

(*p*) *Smithier* v. *Lewis*, 1 Vern. 399. *Balch* v. *Wastall*, 1 P. Wms. 445.

(*q*) *Angell* v. *Draper*, 1 Vern. 398. *Shirley* v. *Watts*, 3 Atk. 200.

sary for the plaintiff to procure returns to those writs (*r*).

The judgments of the ecclesiastical courts giving civil rights will receive the same aid from a court of equity as those of the courts of common law; and therefore where a person against whom there was a sentence in an ecclesiastical court at the suit of his wife for alimony, intended to avoid the execution of the sentence by leaving the kingdom, the court of chancery entertained a bill for a writ of ne exeat regno, to restrain him from leaving the kingdom until he had given security to pay the maintenance decreed (*s*).

2. Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which must necessarily make that court an instrument of injustice; and it is therefore against conscience that he should use the advantage. In such cases, to prevent a manifest wrong, courts of equity have interposed, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained; and upon these principles bills to restrain proceedings in courts of ordinary jurisdiction are still frequent, though the

(*r*) *Manningham* v. *Ld. Bolinbroke*, Elegit, Easter 1777, in Chan. *Kennard* v. *Moore*, in Ch. June 23, 1756. 2 Eq. Ca. Ab. 251. *King* v. *Marissal*, 3 Atk. 192. S. C. ib. 200. But see *Balch* v. *Wastall*, 1 P. Wms. 445.

(*s*) *Read* v. *Read*, 1 Ca. in Cha. 115. Sir *Jerom. Smithson's* case, 2 Ventr. 345. *Anon.* 2 Atk. 210. Ambl. 76. *Shaftoe* v. *Shaftoe*, 7 Ves. 171. *Dawson* v. *Dawson*, ib. 173. *Oldham* v. *Oldham*, ib. 410. *Haffey* v. *Haffey*, 14 Ves. 261.

courts of common law have been enabled, by the assistance of the Legislature, as well as by a more liberal exertion of their inherent powers, to render applications of this nature to a court of equity unnecessary in many cases where formerly no other remedy was provided. Thus if a deed is fraudulently obtained without consideration, or for an inadequate consideration, or if by fraud, accident or mistake, a deed is framed contrary to the intention of the parties in their contract on the subject, the forms of proceeding in the courts of common law will not admit of such an investigation of the matter in those courts as will enable them to do justice. The parties claiming under the deed have therefore an advantage in proceeding in a court of common law which it is against conscience that they should use; and a court of equity will on this ground interfere to restrain proceedings at law until the matter has been properly investigated, and if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, will in the first case compel the delivery and cancellation of the deed, or order it to be deposited with an officer of the court; and will compel a reconveyance of property if any has been so conveyed that a reconveyance may be necessary (*t*); and in the second

(*t*) See on this subject, *Bishop of Winchester* v. *Fournier*, 2 Vez. 445. *Bates* v. *Graves*, 2 Ves. J. 287. *Pringle* v. *Hodgson*, 3 Ves. 617. *Wright* v. *Proud*, 13 Ves. 136. *Ware* v. *Horwood*, 14 Ves. 28. *Huguenin* v. *Baseley*, 14 Ves. 273. *Willan* v. *Willan*, 16 Ves. 72. *Murray* v. *Palmer*, 2 Sch. &

case will either rectify the deed according to the intention of the parties, or will restrain the use of it in the points in which it has been framed contrary to, or in which it has gone beyond, their intention in their original contract (*u*). The instances of the exercise of the jurisdiction of courts of equity in these cases, and especially in the case of a deed fraudulently obtained, are numerous (*x*). On the ground of mistake the courts of equity have also frequently interfered in a variety of instances, and particularly

Lefr. 474. *Walker* v. *Symonds*, 3 Swanst. 1. *Gordon* v. *Gordon*, 3 Swanst. 400. *Wood* v. *Abrey*, 3 Madd. 417. *Tweddell* v. *Tweddell*, 1 Turn. R. 1.

(*u*) See 2 Atk. 33. 203. *Henkle* v. *Royal Exchange Assur. Comp.* 1 Ves. 317. *Rogers* v. *Earl*, Dick. 294. *Marquis of Townshend* v. *Stangroom*, 6 Ves. 328. *Clowes* v. *Higginson*, 1 Ves. & Bea. 524. *Beaumont* v. *Bramley*, 1 Turn. R. 41. *Ball* v. *Storie*, 1 Sim. & Stu. 210. 2 Sim. & Stu. 178.

(*x*) It has been sometimes doubted whether the court ought to compel the delivery and cancellation of an instrument which ought not to be enforced, and whether the more proper course would not be to order a perpetual injunction to restrain the use of the instrument. See 1 Ves. jun. 284. *Ryan* v. *Mackmath*, 3 Bro. C. C. 15, and the cases there cited, and *Mason* v. *Gardiner*, 4 Bro. C. C. 436. But if the instrument ought not to be used, it is against conscience for the party holding it to retain it, as he can only retain it for some sinister purpose; and in the case of a negotiable instrument it may be used for a fraudulent purpose, to the injury of a third person. See *Bromley* v. *Holland*, Coop. R. 9. 11 Ves. 535. 17 Ves. 112. 1 Ves. & Bea. 244. *Wynne* v. *Callandar*, 1 Russ. R. 293; and see 2 Swanst. 157, note, where the leading authorities on this subject are collected. Of a forged instrument the court ought to take the custody; and in such a case the instrument has been generally ordered to be deposited with an officer of the court. *Bishop of Winchester* v. *Fournier*, 2 Vez. 445, and cases there cited.

in the cases of defective securities for money (*y*), and of marriage settlements founded on previous articles, where the settlement has been contrary to the evident intention of the parties in the articles (*z*).

The courts of equity will interfere upon the same grounds to relieve against instruments which destroy, as well as against instruments which create, rights; and therefore will prevent a release which has been fraudulently or improperly obtained from being made a defence in an action at law. And where a fine and non-claim were set up as a bar to an ejectment by an heir at law, who had filed a bill in equity before the time had run on the fine, for discovery of title deeds, and for other purposes, with a view to try his title at law, the House of Lords upon an appeal restrained the setting up the fine (*a*). In many cases of accident, as lapse of time, the courts of equity will also relieve against the consequences of the accident in a court of law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law upon default of payment of the mortgage-money at the time stipulated for payment (*b*).

(*y*) *Sims* v. *Urry*, 2 Ca. in Chan. 225. S. C. Rep. temp. Finch, 413, & 2 Freem. 16. *Burgh* v. *Francis*, 1 Eq. Ca. Ab. 320. *Taylor* v. *Wheeler*, 2 Vern. 564. *Jennings* v. *Moore*, 2 Vern. 609. *Bothomly* v. *Lord Fairfax*, 1 P. Wms. 334.

(*z*) On this subject, see *Randall* v. *Willis*, 5 Ves. 262. *Taggart* v. *Taggart*, 1 Sch. & Lefr. 84. *Blackburn* v. *Stables*, 2 Ves. & Bea. 367. 1 Turn. R. 52.

(*a*) *Pincke* v. *Thornycroft*, 1 Bro. C. C. 289.

(*b*) See 7 Ves. 273. 2 Sch. & Lefr. 685.

As the courts of equity will prevent the unfair use of an advantage in proceeding in a court of ordinary jurisdiction gained by fraud or accident, they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights. Upon this ground there are many instances of bills to prevent the effect of a judgment at law, and to obtain relief in equity where it was impossible by any means to have the matter properly investigated in a court of law; or where the matter might be so investigated, to bring it again into a course of trial (*c*).

Bills of the latter description, or (as they are usually called,) bills for a new trial, have not been of late years much countenanced. In general, it has been considered that the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be ground for a bill of review of a decree in a court of equity upon discovery of new matter (*d*); and therefore where judgment has been obtained against one underwriter on a policy of insurance, a point of law being adjudged on a case reserved in favour of the plaintiff at law; and afterwards in other actions on the same policy, against other underwriters, judgment was given for the defendants on the same point, the first judgment being deemed to have been clearly erroneous; a demurrer

(*c*) *Curtess* v. *Smalridge*, 1 Ca. in Cha. 43. 3 C. Rep. 17. *Robinson* v. *Bell*, 2 Vern. 146. *Thomas* v. *Gyles*, 2 Vern. 232. *Tilly* v. *Wharton*, 2 Vern. 378. S. C. ib. 419. 1 Eq. Ca. Ab. 377, 378. *Countess of Gainsborough* v. *Gifford*, 2 P. Wms. 424. *Hankey* v. *Vernon*, 2 Cox's R. 12. 2 Ves. J. 135.

(*d*) 1 Ca. in Cha. 43.

was allowed to a bill brought by the defendant in the first action for a new trial. No new matter of fact had been discovered; and if this bill had been sustained, a similar bill might have been filed, whenever a court of law had pronounced an erroneous judgment which could not be reversed by a writ of error (*e*). So if the defendant in an action at law submits to go to trial without filing a bill in equity for a discovery of evidence, and after verdict against him attempts to obtain that discovery as a ground for a new trial, the court of equity will not countenance such a proceeding when there is no fraud in the conduct of the plaintiff at law (*f*).

Cases of oppression, where a man has taken advantage of the situation of another to obtain from him an unreasonable contract, have been the subjects of relief on the same ground (*g*); and in some cases the courts of equity have rescinded improper contracts on the grounds of general policy, and to prevent a public inconvenience, as in the case of securities given for marriage-brokage (*h*), or for the obtaining of public offices, or employments (*i*).

(*e*) *Gibson* v. *Bell* on demurrer, 30 July 1800, in Chan.

(*f*) *Richards* v. *Symes*, 2 Atk. 319. *Williams* v. *Lee*, 3 Atk. 223. *Manning* v. *Mestaer*, in Chan. 9 Dec. 1786, on cause shown against dissolving injunction. See *Field* v. *Beaumont*, 2 Swanst. 204.

(*g*) *Bosanquett* v. *Dashwood*, Ca. t. Talb. 38. *Osmond* v. *Fitzroy*, 3 P. Wms. 131. *Cooke* v. *Clayworth*, 18 Ves. 12. 6 Madd. 109.

(*h*) *Smith* v. *Bruning*, 2 Vern. 392. 3 P. Wms. 394. *Williamson* v. *Gihon*, 2 Sch. & Lefr. 357.

(*i*) *Law* v. *Law*, 3 P. Wms. 391. *Whittingham* v. *Bourgoyne*, 3 Anstr. 900. *Hannington* v. *Du Chatel*, 1 Bro. C. C. 124. S. C. 2 Swanst. 159, note.

If a bill for any of these purposes does not show a sufficient ground for a court of equity to interfere, the defendant may demur for want of matter of equity in the plaintiff's case to support the jurisdiction of the court. And the courts of equity will thus restrain and relieve against the effect of proceedings in other courts in such cases only as concern mere civil rights; and therefore if a bill is brought for relief against a proceeding at law upon a criminal prosecution, as an indictment, or information, or a mandatory writ, as a writ of prohibition, a mandamus, or any writ which is mandatory and not remedial, the defendant may demur (*k*).

3. The principles of law which guide the decisions of the courts of ordinary jurisdiction, and especially the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence it has happened that, according to the principles of natural and universal justice, there are many rights for injuries to which the law, as administered by those courts, has provided no remedy. This is particularly the case in matters of trust and confidence, of which the ordinary courts, taking in a variety of instances no cognizance, and the positive law being silent on the subject, the courts of equity, considering the conscience of the party intrusted as bound to perform the trust, have interfered to compel the performance. And it has long been settled, that where trustees are desirous of acting under the direc-

(*k*) *Lord Montague* v. *Dudman*, 2 Ves. 396. 1 Eq. Ca. Ab. 131; and see 18 Ves. 220.

tion and protection of a court of equity, they may file a bill for those purposes against the persons interested in the trust-property (*l*). And in many other cases where the positive law has been silent, and there are rights in conscience for injuries to which the ordinary courts afford no remedy, the courts of equity have also interfered; enforcing the principles of universal justice upon the ground of obligation on the conscience of the party against whom they are enforced (*m*). To support a bill in any of these cases it is necessary for the plaintiff to show that the subject of the suit is such upon which a court of equity will assume jurisdiction; and if he fails to do so the defendant may demur.

4. Courts of equity in many cases will act as ancillary to the administration of justice in other courts, by removing impediments to the fair decision of a question. Thus, if an ejectment is brought to try a right to land in a court of common law, a court of equity will restrain the party in possession from setting up any title which may prevent the fair trial of the right; as a term for years, or other interest in a trustee, lessee, or mortgagee (*n*). But this will not be done in every case; for as the court proceeds upon the principle that the party in pos-

(*l*) *Leech* v. *Leech*, 1 Ca. in Cha. 249. And see *Fielden* v. *Fielden*, 1 Sim. & Stu. 255.

(*m*) It is said, 1 P. W. 777, that before the statute of the 3 & 4 W. and M. c. 14, courts of equity made an heir responsible to creditors for the value of assets which he had aliened.

(*n*) 6 Ves. 89. 1 Sch. & Lefr. 429; and see 13 Ves. 298. *Armitage* v. *Wadsworth*, 1 Madd. R. 189. *Barney* v. *Luckett*, 1 Sim. & Stu. 419. *Northey* v. *Pearce*, ib. 420.

session ought not in conscience to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle the court will not interfere. Therefore, if the possessor is a purchaser for a valuable consideration without notice of the title of the claimant, this is a title in conscience equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession (*o*). It can hardly appear upon the face of a bill that the defendant is in such a situation, and therefore the benefit of this defence must generally be taken by plea: but if the case should be so stated, the defendant might demur; because the case stated would appear to be such in which a court of equity ought not to assume jurisdiction. If the matter suggested in a bill as an impediment to the determination of a question in a court of ordinary jurisdiction in fact is not so, the defendant may also demur; for then there is no pretence for the interference of a court of equity.

5. Pending a litigation the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interpose to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose. Thus during a suit in an ecclesiastical court for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation

(*o*) See 2 Ves. jun. 457, 458. *Maundrell* v. *Maundrell*, 7 Ves. 567. S. C. 10 Ves. 246.

of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration *pendente lite*, will provide for the collection of the effects (*p*). And, pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, ploughing ancient meadow, or otherwise (*q*). Against this inconvenience a remedy at the common law was in many cases provided during the pendency of a real action by the writ of estrepement (*r*); and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect.

But, in general, if the court in which the suit is depending can itself provide for the safety of the property, a demurrer will hold. The interference to preserve the effects of a person dead pending a litigation in the ecclesiastical court, touching the administration of those effects, scarcely forms an exception to this rule; for the protection afforded by an administration *pendente lite* has been often a very insufficient protection; and in the administration of personal effects the courts of equity have assumed a concurrent jurisdiction with the ecclesiastical courts,

(*p*) *King* v. *King*, 6 Ves. 172. *Richards* v. *Chave*, 12 Ves. 462. *Edmunds* v. *Bird*, 1 Ves. & Bea. 542. *Atkinson* v. *Henshaw*, 2 Ves. & B. 85. *Ball* v. *Oliver*, 2 Ves. & B. 96. *Rutherford* v. *Douglas*, rep. 1 Sim. & Stu. 111, n. 3 Meriv. 174. *Jones* v. *Frost*, 3 Madd. 1. S. C. 1 Jac. R. 466. 6 Madd. 49. 105.

(*q*) *Pulteney* v. *Shelton*, 5 Ves. 260, note. *Lathropp* v. *Marsh*, 5 Ves. 259; and see *Onslow* v. ——, 16 Ves. 173.

(*r*) F. N. B. 60.

and for many purposes have a much more effectual jurisdiction, particularly for payment of creditors, and concluding all parties by the judgment of the court in the distribution of the effects, and preserving the surplus for the benefit of those who may finally appear to be entitled to it.

6. Doubts have been suggested how far a court of equity ought to interfere to prevent injury arising to property pending a suit founded on trespass. This doubt, it should seem, ought to be confined to cases of mere trespass, and where the injury done is not probably irreparable (*s*). But when a doubtful right has been asserted in a manner productive of irreparable injury the courts have interfered. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the court of chancery entertained a bill at the suit of the lord of the manor to restrain this assertion of it (*t*); and indeed the commission of waste of every kind, as the cutting of timber, pulling down of houses, ploughing of ancient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity have also extended their relief to restrain the owner of a mine from working minerals in the adjoing land of another, though a mere trespass under the cover of a right (*u*).

(*s*) *Hanson* v. *Gardiner*, 7 Ves. 305. 10 Ves. 291. 17 Ves. 110. 281. 1 Swanst. 208. 210. See above, 115, note (*u*).

(*t*) *Stonor* v. *Strange*, Mich. 1767, and *Stonor* v. *Whiting*, Hil. 1768. in Chan. 1 Sch. & Lefr. 8.

(*u*) *Mitchell* v. *Dors*, 6 Ves.

The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copy-right of printed books, and of patentees of alleged inventions, in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees. But in both these cases the bill usually seeks an account; in one, of the books printed, and in the other, of the profit arisen from the use of the invention: and in all the cases alluded to it is frequently, if not constantly, made a part of the prayer of the bill that the right, if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final object of the bill being a perpetual injunction to restrain the infringement of the right claimed by the plaintiff (*x*).

In all cases of waste committed on lands or tenements the courts of equity originally proceeded by analogy to the provisions of the old common law, by which tenant by the courtesy and in dower answered only for the value of the waste done, and a custos was assigned to prevent further waste. The statute of Marlebridge, 52 H. III. c. 23, added a fine for the offence to full damage for the injury done; and after-

147. 7 Ves. 308. *Thomas* v. *Oakley*, 18 Ves. 184.

(*x*) On the subject of copy-right, see *Hogg* v. *Kirby*, 8 Ves. 215. *Longman* v. *Winchester*, 16 Ves. 269. *Wilkins* v. *Aikin*, 17 Ves. 422. *Southey* v. *Sherwood*, 2 Meriv. 435. *Lord and Lady Percival* v. *Phipps*, 2 Ves. & Bea. 19. *Gee* v. *Pritchard*, 2 Swanst. 402. *Rundell* v. *Murray*, 1 Jac. R. 311. *Lawrence* v. *Smith*, 1 Jac. R. 471. *Barfield* v. *Nicholson*, 2 Sim & Stu. 1; on that of patents, see *Harmer* v. *Plane*, 14 Ves. 130. *Canham* v. *Jones*, 2 Ves. & Bea. 248. *Hill* v. *Thompson*, 3 Meriv. 622.

wards the statute of Gloucester, 6 Edw. I. c. 5, gave treble damages, and the forfeiture of the place wasted by tenant by the courtesy, for life, or for years. The forfeiture by waste, and all penalties, ought to be waved in a bill for restraining waste (*y*), the courts of equity declining to compel a discovery which may subject a defendant to any penalty or forfeiture, and confining the relief given to compensation for the damage done, and restraining future injury. So at law the person entitled to the benefit of forfeiture for waste might wave the action for waste, and maintain an action of trover for trees felled by a tenant impeachable for waste (*z*).

With respect to copyholds, the courts appear, in some instances, to have refused to restrain waste, and left the lord to his legal remedy by forfeiture (*a*). The rights of the lord and tenant of copyholds depending on the custom of each manor, it has perhaps been thought that the lord is not entitled to that protection which is given to rights ascertained by the common law of the land, and that he has generally the remedy in his own hands. Upon a lease of land in Ireland for lives, renewable for ever, the courts of equity there have declined restraining waste not specially provided for by the terms of the lease (*b*).

(*y*) 1 Atk. 451.

(*z*) *Berry* v. *Heard*, Cro. Car. 242.

(*a*) *Dench* v. *Bampton*, 4 Ves. 700. In a cause, however, of *Richards* v. *Noble*, before Lord *Erskine*, when Chancellor, now reported in 3 Meriv. 673, this decision was overruled.

(*b*) *Calvert* v. *Gason*, 2 Sch. & Lefr. 561.

But in the case of waste the courts of equity have in many instances given remedies where the common law has provided none. Thus in the case of coparceners (*c*) and tenants in common (*d*), the court has interfered to prevent the destruction of the property by one coparcener, or one tenant in common, to the injury of the rest (*e*). So where tenant for life not impeachable for waste has proceeded to destruction of a mansion-house (*f*), or to cut down ornamental trees, or trees necessary for the protection of a mansion, or young saplins (*g*). In these cases it should seem that the courts have proceeded on the ground that the acts done were an unconscientious use of the powers given to the particular tenant, and in some instances, perhaps, partaking of the nature of mere malicious mischief (*h*). It has been much doubted whether in some instances this relief has not been carried to an extent which may be found productive of great inconvenience, and perhaps injustice, if the decisions should be implicitly followed (*i*).

Where persons were bound by covenant to keep the banks of a river in repair, and by their acts in contravention of the covenant great injury was likely

(*c*) *Beaumont and Sharp*, May 9, 1751.

(*d*) *Hole* v. *Thomas*, 7 Ves. 589. *Twort* v. *Twort*, 16 Ves. 128.

(*e*) 7 Ves. 590. 16 Ves. 131.

(*f*) *Vane* v. *Lord Barnard*, 2 Vern. 738.

(*g*) *Abraham* v. *Bubb*, 2 Freem. 53. *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166, and cases there cited; and see above, p. 115, note.

(*h*) 2 Freem. 278. *Bishop of London* v. *Web*, 1 P. Wms. 527.

(*i*) See 16 Ves. 185.

to arise, a court of equity has interfered by injunction (*k*).

In all the cases in which the interference of a court of equity is thus sought, if the bill should not clearly show the title of the plaintiff, or his right to demand the assistance of the court in his favour, or that the case is one to which the court will apply the remedy sought, the defendant may demur.

7. It has been mentioned (*l*) that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him; and that the bill exhibited for this purpose is termed a bill of interpleader, the object of it being to compel the claimants to interplead, so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified. The principles upon which the courts of equity proceed in these cases are similar to those by which the courts of law are guided in the case of bailment; the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in certain cases only, as where the property has been bailed to the third person by both claimants, or by those under whom both make title; or where the property came to the hands of the third person by accident; and the courts of equity extending the remedy to all cases to which

(*k*) *Lord Kilmorey* v. *Thackeray*, cited 2 Brown, C. C. 65.
(*l*) See above p. 48.

in conscience it ought to extend, whether any suit has been commenced by any claimant, or only a claim made (*m*).

This remedy has been applied to the case of tenants of lands charged with annuities, and liable to distress by their landlord, and the claimants of annuities (*n*), and to other cases of disputed titles (*o*), in which the tenants have been permitted to pay their rents into court (*p*).

If a bill of interpleader does not show that each of the defendants whom it seeks to compel to interplead claims a right, both the defendants may demur ; one, because the bill shows no claim of right in him, the other, because the bill showing no claim of right in the co-defendant shows no cause of interpleader (*q*). Or if the plaintiff shows no right to compel the defendants to interplead, whatever rights they may

(*m*) It may here be noticed, that if at the hearing the question between the defendants be ripe for decision, this court will make a decree ; and that if such be not the case, it will direct an action, an issue, or a reference to a Master, in order to bring the matter to a determination. See *Duke of Bolton* v. *Williams*, 2 Ves. jun. 138. S. C. 4 Bro. C. C. 297. *Angell* v. *Hadden*, 16 Ves. 202.

(*n*) *Surry and others*, tenants of Lord Waltham, against *Vaux and others*, 28 Feb. 1785. *Aldridge* v. *Thompson*, 2 Bro. C. C. 150. *Lord Thomond's Case*, cited 9 Ves. 107. *Angell* v. *Hadden*, 15 Ves. 244, S. C. 16 Ves. 202.

(*o*) *Wood* v. *Kay and wife and others*, 19 Dec. 1786. 2 Ves. jun. 312. 16 Ves. 203, 204.

(*p*) It is however observable, that in such cases the Court interferes on the ground of privity having been created by the act of the landlord between his tenant and the other claimant. See *Cowtan* v. *Williams*, 9 Ves. 107. *Clarke* v. *Byne*, 13 Ves. 383. *E. I. Comp.* v. *Edwards*, 18 Ves. 376.

(*q*) 1 Vez. 249.

claim, each defendant may demur (*r*). A bill of this nature is also liable to a peculiar cause of demurrer; for as the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff, as has been already mentioned, is required to annex to his bill an affidavit that it is not exhibited in collusion with any of the parties, to induce the court to entertain jurisdiction of the suit; and the want of that affidavit is therefore a ground of demurrer (*s*). A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money due into court (*t*). If he does not do so it is perhaps in strictness a ground of demurrer.

8. In many cases the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an

(*r*) As, for example, if a tenant were to file such a bill against his landlord, and a person with whom he himself has no privity, but who claims by a title adverse to that of the landlord. *Dungey* v. *Angove*, 2 Ves. jun. 304. 2 Anstr. 532; *Johnson* v. *Atkinson*, 3 Anstr. 798; or, an agent against his principal and a third person, *Nicholson* v. *Knowles*, 5 Madd. 47; or, a debtor against his creditor become a bankrupt, and the assignees of the latter. *Harlow* v. *Crowley*, 1 Buck, B. C. 273, and *Lowndes* v. *Cornford*, 18 Ves. 299. S. C. 1 Rose, B. C. 180.

(*s*) *Metcalf* v. *Harvey*, 1 Vez. 248; and see 2 Ves. & Bea. 410.

(*t*) *Lord Thanet* v. *Patterson*, 3 Barnard, 247. 2 Ves. jun. 108, 109. It seems that there might be a case in which a demurrer would be prevented by the money being brought into court. See 19 Ves. 323.

end to the oppression occasioned by the abuse of this privilege the courts of equity have assumed a jurisdiction (*u*). Thus, actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and, after repeated trials, and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation (*x*), and thus have in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions (*y*).

Upon the same principle (*z*) the courts of equity seem to have interfered in cases as well of private as of public nuisance; in the first, at the suit of the party injured (*a*), in the second, at the suit of the attorney-general (*b*); restraining the exercise of the nuisance where the proceedings at law are ineffectual for the purpose, and preventing the creation of a nuisance where irreparable injury to individuals, or great public injury, would ensue (*c*). In the case of a private nuisance it seems necessary that a judgment at law, ascertaining the rights of

(*u*) 2 Sch. & Lefr. 211.

(*x*) *Earl of Bath* v. *Sherwin*, Prec. in Chan. 261. S. C. 4 Brown, P. C. 373, Toml. Ed. *Leighton* v. *Leighton*, 1 P. Wms. 671. S. C. 4 Bro. P. C. 378, Toml. Ed. And see *Anon.* Gilb. Eq. R. 183. S. C. 2 Eq. Abr. 172. *Barefoot* v. *Fry*, Bunb. 158. 2 Sch. & Lefr. 211.

(*y*) Strange, 404.

(*z*) See Dick. 164. 16 Ves. 342. 19 Ves. 622.

(*a*) See *Ryder* v. *Bentham*, 1 Vez. 543. *Att. Gen.* v. *Nichol*, 16 Ves. 338. S. C. 3 Meriv. 687.

(*b*) See *Anon.* 3 Atk. 750. S. C. named *Baines* v. *Baker*, Ambl. 158. *Att. Gen.* v. *Cleaver*, 18 Ves. 211.

(*c*) 16 Ves. 342.

the parties, should have been previously obtained (*d*). On informations by the attorney-general on behalf of the Crown the court of exchequer has proceeded to the abatement of nuisances injurious to the royal prerogative, such as nuisances in harbours, or even trespasses on the public rights of the Crown without any nuisance (*e*). If a trespass is made on the soil of the Crown, whether reserved for the private use of the Sovereign, or for public purposes, and the trespass does not produce a public injury, the jurisdiction may be founded on the right of the Crown to have the land arrented, and the profit accounted for as part of the royal revenue, in the nature of an assart; and if the trespass produces, or may in its consequences produce, public injury, the Crown is entitled to the most effectual means of preventing the injury (*f*).

Courts of equity will also prevent multiplicity of suits; and the cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right (*g*). Thus where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by

(*d*) 19 Ves. 622. *Chalk* v. *Wyatt*, 3 Meriv. 688. *Wynstanley* v. *Lee*, 2 Swanst. 333.

(*e*) *Att. Gen.* v. *Forbes*, Excheq. Trin. 1795. Hale de Jure Maris, p. 1, c. 4. p. 13. *Churchman* v. *Tunstal*, Hardr. 162. *Att. Gen.* v. *Richards*, Anstr. 603.

(*f*) 18 Ves. 218.

(*g*) 2 Atk. 484. 11 Ves. 444. *Corporation of Carlisle* v. *Wilson*, 13 Ves. 276. *Duke of Norfolk* v. *Myers*, 4 Madd. 83. 1 Jac. & W. 369.

the lords of manors and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was over-ruled (*h*).

As the object of such bills is to prevent multiplicity of suits by determining the rights of the parties upon issues directed by the court, if necessary for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and defendant in it, such a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law (*i*). Indeed in most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favour before he files his bill in equity (*k*); and if he has not so done, and the right he claims has not the sanction of long possession (*l*), and he has any means of trying the matter at law (*m*), a demurrer will hold. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may bring a bill to establish it though he has not previously recovered in affirmance of it at law, and in such a case a demurrer has been over-ruled (*n*).

(*h*) *Mayor of York* v. *Pilkington*, 1 Atk. 282.

(*i*) *Lord Teynham* v. *Herbert*, 2 Atk. 483.

(*k*) 1 Atk. 284. *Anon.* 2 Vez. 414. 2 Sch. & Lefr. 208. 11 Ves. 444. 1 Jac. & W. 369.

(*l*) *Bush* v. *Western*, Prec. in Chan. 530.

(*m*) *Whitchurch* v. *Hide*, 2 Atk. 391. *Wells* v. *Smeaton*, in Chan. 27 May 1784.

(*n*) 1 Atk. 284. And see *Duke of Dorset* v. *Girdler*, Prec.

It is not necessary to establish a right at law before filing a bill where the right appears on record, as under letters patent for a new invention, in which case a demurrer to a bill for an injunction to restrain an infringement of the patent right has been overruled (*o*). So in the cases of bills brought by authors or their assignees to restrain the sale of books where the right which is the foundation of the bill is grounded on an act of parliament (*p*). And where a right appeared on record by a former decree of the court it was determined that it was not necessary to establish it at law before filing a bill (*q*). Where a right *prima facie* and of common right is vested in the Crown, it will receive the same protection (*r*), and this principle may be applied to some of the cases mentioned in a preceding page.

A court of equity will thus protect private rights, or rights of those who may be comprehended under one common capacity, as the inhabitants of a parish, or the tenants of a manor, which has been frequently done in bills to establish parochial customs of tithing disputed by the tithe-owner, and more rarely in bills to establish the customs of manors disputed by the lord (*s*); but will not establish or decree a per-

in Chan. 531. But see *Welby* v. *Duke of Rutland*, 2 Bro. P. C. 39. Toml. Ed. 2 Sch. & Lefr. 209.

(*o*) *Horton* and *Maltby*, in Chan. 23 July 1783. 3 Meriv. 624.

(*p*) 1 Vez. 476.

(*q*) Ibid.

(*r*) See 6 Ves. 713. *Grierson* v. *Eyre*, 9 Ves. 341. 13 Ves. 508.

(*s*) *New Elme Hospital* v. *Andover*, 1 Vern. 266. *Baker* v. *Rogers*, Sel. Ca. in Cha. 74. *Cowper* v. *Clerk*, 3 P. Wms. 155. 2 Eq. Ca. Ab. 172.

petual injunction for the enjoyment of a right in contradiction to a public right, as a right to a highway, or a common navigable river, for that would be to enjoin all the people of England (*t*), although it will restrain a public nuisance at the suit of the attorney-general.

A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading (*u*). Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances (*x*).

9. To administer to the ends of justice without pronouncing any judgment which may affect any rights, the courts of equity in many cases compel a discovery which may enable other courts to decide on the subject. The cases in which this jurisdiction is exercised will be considered in treating of demurrers to discovery only.

10. When the testimony of witnesses is in danger of being lost before the matter to which it relates can

(*t*) *Lord Hardwicke*, in *Lord Fauconberg* and *Pierse*, 11th of May 1753. 2 Eq. Ca. Ab. 171. Ambl. 210.

(*u*) Co. Litt. 100. a.

(*x*) *Lord Ranelaugh* v. *Hayes*, 1 Vern. 189, 190, and on the general subject, see also 1 Vez. 283. *Flight* v. *Cook*, 2 Vez. 619. *Green* v. *Pigot*, 1 Bro. C.C. 103. *Brown* v. *Dudbridge*, 2 Bro. C. C. 321.

be made the subject of judicial investigation, a court of equity will lend its aid to preserve and perpetuate the testimony (*y*); and as the courts of common law cannot generally examine witnesses except *vivâ voce* upon the trial of an action, the courts of equity will supply this defect by taking and preserving the testimony of witnesses going abroad, or resident out of the kingdom (*z*), which may be afterwards used in a court of common law. As the object of this jurisdiction is to assist other courts, and by preserving evidence to prevent future litigation, there are few cases in which the court will decline to exercise it. A demurrer to a bill seeking the benefit of it will therefore seldom lie (*a*); and in a case where the court was of opinion that the defendant might demur both to the discovery sought and the relief prayed by a bill, it was held that to so much of the bill as sought to perpetuate the testimony of witnesses the defendant could not demur (*b*). But if the case made by the bill appears to be such on which the jurisdiction of the court does not arise, as if the matter to which the required

(*y*) See above, 52, note (*y*).

(*z*) As to the examination of witnesses resident abroad, see *Cock* v. *Donovan*, 3 Ves. & Bea. 76. *Bowden* v. *Hodge*, 2 Swanst. 258. *Cheminant* v. *De la Cour*, 1 Madd. R. 208. *Devis* v. *Turnbull*, 6 Madd. 232. *Baskett* v. *Tooscy*, 6 Madd. 261. *Angell* v. *Angell*, 1 Sim. & Stu. 83. *Mendizabel* v. *Machado*, 2 Sim. & Stu. 483.

(*a*) 1 Atk. 451. 571. 1 P. Wms. 117. *Tirrell* v. *Co*, 1 Rol. Ab. 383. *Mendez* v. *Barnard*, 16 May, 1735, on demurrer. *Lord Dursley* v. *Fitzhardinge*, 6 Ves. jun. 251 to 266. See however, *The Earl of Belfast* v. *Chichester*, 2 Jac. & W. 439.

(*b*) *Earl of Suffolk* v. *Green*, 1 Atk. 450. See *Thorpe* v. *Macaulay*, 5 Madd. 218. *Shakell* v. *Macauley*, 2 Sim. & Stu. 79.

testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses are resident in England, a demurrer will hold (*c*). Still, however, where from circumstances, as the age or infirmity of witnesses, or their intention of leaving the kingdom, it has been probable that the plaintiff would lose the benefit of their testimony, though he should proceed with due diligence at law, the court has sustained a bill for their examination (*d*); and to avoid a demurrer in this case it seems necessary to annex to the bill an affidavit of the circumstance by means of which the testimony may probably be lost (*e*). A bill for the examination of a single witness has been permitted where his evidence was of the utmost importance, and he was the only witness to the point, apparently upon the single ground, that as he was the only witness there was danger of losing all evidence of the matter before it could be given in a court of law: but in this case an affidavit of the witness was annexed to the bill (*f*). The principle on which it is required in these cases to annex to the bill an affidavit of the circumstance which renders the examination of witnesses proper

(*c*) *Lord North* v. *Lord Gray*, Dick. 14. 1 Sim. & Stu. 89.

(*d*) As to the examination of witnesses under such circumstances, *de bene esse*, see *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77. *Palmer* v. *Lord Aylesbury*, 15 Ves. 176. *Andrews* v. *Palmer*, 1 Ves. & B. 21. *Corbett* v. *Corbett*, 1 Ves. & B. 335. *Atkins* v. *Palmer*, 5 Madd. 19. *Dew* v. *Clarke*, 1 Sim. & Stu. 108.

(*e*) *Philips* v. *Carew*, 1 P. Wms. 117. 1 Ves. & B. 23.

(*f*) *Shirley* v. *Earl Ferrers*, 4th Seal after Trin. Term, 1730. MS. N. 3 P. Wms. 77. M. 1730. 8 Ves. 32. See above, p. 52, note (*z*).

in a court of equity, though the matter is capable of being made immediately the subject of a suit at law, seems to be the same as that on which the practice of annexing an affidavit of the loss or want of an instrument, to a bill seeking to obtain in a court of equity the mere legal effect of the instrument, is founded, namely, that the bill tends to alter the ordinary course of the administration of justice, which ought not to be permitted upon the bare allegation of a plaintiff in his bill.

II. It has been before noticed, that the establishment of courts of equity has obtained throughout the whole system of our judicial polity; and that most of the inferior branches of that system have their peculiar courts of equity, the court of chancery assuming a general jurisdiction in cases not within the bounds, or beyond the powers of inferior jurisdictions. The principal of the inferior jurisdictions in England are those of the counties palatine of Chester, Lancaster, and Durham, the courts of great session in Wales, the courts of the two universities of Oxford and Cambridge, the courts of the city of London and of the Cinque-ports (*g*). These are necessarily bounded by the locality either of the subject of the suit or of the residence of the parties litigant. Where those circumstances occur which give them jurisdiction they have exclusive jurisdiction in matters of equity as well as matters of law; and they have

(*g*) The court of exchequer, as a court of equity, does not seem to give to any person the privilege of being sued there.

their own peculiar courts of appeal, the court of chancery assuming no jurisdiction of that nature, though it will in some cases remove a suit before the decision into the chancery by writ of certiorari. When therefore it appears on the face of a bill that another court of equity has the proper jurisdiction, either immediately, or by way of appeal, the defendant may demur to the jurisdiction of the court of chancery. Thus to a bill of appeal and review of a decree in the court of the county palatine of Lancaster the defendant demurred, because on the face of the bill it was apparent that the court of chancery had no jurisdiction; and the demurrer was allowed (*h*). But demurrers of this kind are very rare; for the want of jurisdiction can hardly appear upon the face of the bill, at least so conclusively as is necessary (*i*) to deprive the chancery, a court of general jurisdiction, of cognizance of the suit; and a demurrer for want of jurisdiction founded on locality of the subject of the suit, which alone can exclude the jurisdiction of the chancery in a matter cognizable in a court of equity, has even been treated as informal and improper (*k*). This, however, can only be considered as referring to cases where *circumstances may* give the chancery jurisdiction, and not to cases where *no circumstance can* have that effect. Thus the counties palatine having their peculiar and exclusive courts of equity under certain circumstances, which will be

(*h*) *Jennet* v. *Bishopp*, 1 Vern. 184.

(*i*) See 1 Vez. 203, 204.

(*k*) See *Roberdeau* v. *Rous*, 1 Atk. 543.

more fully considered in another place (*l*), the court of chancery will not interfere when all those circumstances attend the case, and they are shown to the court; though if those circumstances are not shown, or if they are not shown in proper time, and the defendant, instead of resting upon them and declining the jurisdiction, enters into the defence at large, the court, having general jurisdiction, will exercise it. But where *no circumstance can* give the chancery jurisdiction, as in the case alluded to of a bill of appeal and review of a decree in a county palatine, it will not entertain the suit, even though the defendant does not object to its deciding on the subject.

III. If a plaintiff is not entitled to sue by reason of any personal disability (*m*), which is apparent in the bill, the defendant may demur. Therefore, if an infant, or a married woman, an idiot or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur; but if the incapacity does not appear upon the face of the bill the defendant must take advantage of it by plea. This objection extends to the whole bill, and advantage may be taken of it as well in the case of a bill for discovery merely as in the case of a bill for relief. For the defendant in a bill for a discovery merely, being always entitled to costs after a full answer as a matter of course, would be materially injured by being compelled to

(*l*) See pleas to the jurisdiction of the court of chancery.

(*m*) See *Wartnaby* v. *Wartnaby*, 1 Jac. R. 377.

answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs.

IV. Interest in the subject of the suit, or a right in the thing demanded, and proper title to institute a suit concerning it, are essentially necessary to sustain a bill; and if they are not fully shown by the bill itself the defendant may demur (*m*). Therefore, where a protestant next of kin claimed a rent-charge settled on a papist on her marriage, a demurrer was allowed (*n*), for the plaintiff had evidently no right to the thing which he demanded by his bill, the papist being incapable of taking by purchase, and the grant of the rent-charge being therefore utterly void. And where a plaintiff claimed under a will, and it was apparent upon the construction of the will that he had no title, a demurrer was allowed (*o*). But in this case it was said, that if upon arguing the demurrer the court had not been satisfied, and had been therefore desirous that the matter should be more fully debated at a deliberate hearing (*p*), the demurrer would have been over-ruled without prejudice to the defendant's insisting on the same

(*m*) See 2 Sch. & Lefr. 638. *Darthez* v. *Winter*, 2 Sim. & Stu. 536.

(*n*) See *Michaux* v. *Grove*, 2 Atk. 210.

(*o*) *Brownsword* v. *Edwards*, 2 Vez. 243. See also *Beech* v. *Crull*, Prec. in Chan. 589. *Parker* v. *Fearnley*, 2 Sim. & Stu. 592.

(*p*) Perhaps this declaration fell from the Court rather incautiously; as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer as at the hearing of a cause in the ordinary course; and the difference in expense to the parties may be considerable. See above p. 108. note (*n*)

matter by way of answer (*q*), which indeed it should seem may in all cases be done without the special declaration of the court, that the over-ruling of the demurrer shall be without prejudice.

Though the plaintiff in a bill may have an interest in the subject, yet if he has not a proper title to institute a suit concerning it a demurrer will hold (*r*). Therefore, where persons who had obtained letters of administration of the estate of an intestate in a foreign court, on that ground filed a bill seeking an account of the estate, a demurrer was allowed (*s*), because the plaintiffs did not show by their bill a complete title to institute a suit concerning the subject; for though they might have a right to administration in the proper ecclesiastical court in England, and might therefore really have an interest in the thing demanded by their bill, yet not showing that they had obtained such administration they did not show a complete title to institute their suit. And where an executor does not appear by his bill to have proved the will of his testator, or appears to have proved it in an improper (*t*) or insufficient (*u*) court, as he does not show a complete title to sue as executor a demurrer will hold.

Want of interest in the subject of a suit, or of a title to institute it, are objections to a bill seeking any kind of relief, or filed for the purpose of dis-

(*q*) 2 Vez. 247.

(*r*) It seems the plaintiff must distinctly show a title in equity; for, where one stated a title either at law or in equity a demurrer was allowed. *Edwards* v. *Edwards*, 1 Jac. & R. 335.

(*s*) *Tourton* v. *Flower*, 3 P. Wms. 369.

(*t*) 3 P. Wms. 371.

(*u*) *Comber's Case*, 1 P. Wms. 766.

covery merely. Thus, though there are few cases in which a man is not entitled to perpetuate the testimony of witnesses, yet if upon the face of the bill the plaintiff appears to have no certain right to or interest in the matter to which he craves leave to examine, in present or in future (*x*), a demurrer will hold. Therefore, where a person claiming as devisee in the will of a person living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will against the presumptive heir at law (*y*); and where persons who would have been entitled to the personal estate of a lunatic if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill, in the life-time of the lunatic, to perpetuate the testimony of witnesses to his legitimacy, against the attorney-general as supporting the rights of the Crown (*z*), demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit; they sustained no character under which they could afterwards use the depositions (*a*), and therefore the depositions, if taken, would have been wholly nugatory.

So in every case where the plaintiff in a bill shows only the probability of a future title upon an event

(*x*) *Smith* v. *Att. Gen.* in Chan. Mich. 1777. 6 Ves. 260. *Allan* v. *Allan*, 15 Ves. 130.

(*y*) *Sackvill* v. *Ayleworth*, 1 Vern. 105. 1 Eq. Ca. Ab. 234. *Smith* v. *Watson*, in Chan. 20 June 1760. 2 Prax. Alm. Cur. Canc. 500, where there is the form of a demurrer.

(*z*) *Smith* v. *Att. Gen.* in Chan. Mich. 1777. 6 Ves. 256. 260. 15 Ves. 133. 136.

(*a*) See 2 Prax. Alm. Cur. Can. 501; and see *The Earl of Belfast* v. *Chichester*, 2 Jac. & W. 439.

which may never happen he has no right to institute any suit concerning it; and a demurrer will hold to any kind of bill on that ground, which will extend to any discovery as well as to relief (*b*).

If the claim of the plaintiff is of a matter in itself unlawful, as of money promised to a counsellor at law for advice and pains in carrying on a suit (*c*); or of money bequeathed by a will to purchase a dukedom (*d*); the defendant may demur to the bill, for the plaintiff not having a lawful claim has no title to sue in a court of justice.

There are grounds of demurrer to a bill for a discovery merely as well as to a bill for relief. But if a plaintiff shows a complete title, though a litigated one, or one that may be litigated, as that of an administrator, where a suit is depending to revoke the administration (*e*); or of an administrator where there may be another personal representative (*f*); a demurrer will not hold, at least to discovery. For in the first case, till the litigation is determined the plaintiff's title is good, and in the second case, the court will not consider the ecclesiastical court as having done wrong. And where a doubtful title only is shown it is necessarily sufficient to support a bill seeking the assistance of the court to preserve property in dispute pending a litigation. Therefore where

(*b*) *Sackvill* v. *Ayleworth*, Vern. 105. 1 Eq. Ca. Ab. 234. *Smith* v. *Att. Gen.* Mich. 1777.

(*c*) *Penrice* v. *Parker*, Rep. Temp. Finch. 75; and see *Moor* v. *Rowe*, 1 Rep. in Cha. 38. 2 Atk. 332.

(*d*) *Earl of Kingston* v. *Lady Pierepont*, 1 Vern. 5.

(*e*) *Wright* v. *Blicke*, Ibid. 106.

(*f*) 3 P. Wms. 370.

a suit was pending in an ecclesiastical court touching the representation to a person deceased, a demurrer of one of the parties to that suit, who had possessed the personal estate of the deceased, to a bill for an account filed by the other party, was over-ruled (*g*). The ground of this decision seems to have been the deficient powers of the ecclesiastical court for securing the effects whilst the suit there was depending; and the doubt as to the title of the parties was the very ground of the application to the court.

V. A plaintiff may have an interest in the subject of his suit, and a right to institute a suit concerning it, and yet may have no right to call on a defendant to answer his demand. This may be for want of privity between the plaintiff and defendant. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demands in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy (*h*). For there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator; unless by collusion between the representative and the

(*g*) *Phipps* v. *Steward*, 1 Atk. 286. And see *Andrews* v. *Powys*, 2 Brown, P. C. 504, Toml. Ed. See also *Wills* v. *Rich*, 2 Atk. 285, and *Morgan* v. *Harris*, 31 Oct. 1786. Demurrer over-ruled. 2 Bro. C. C. 121.

(*h*) *Bickly* v. *Dorrington*, 10 March 1736, Rolls, 12 Nov. 1737. Lord Chan. on Appeal, cited Barnard. 32, & 6 Ves. 749. *Monk* v. *Pomfret*, cited ibid. *Alsager* v. *Rowley*, 6 Ves. 748, and the cases there cited and referred to. 9 Ves. 86.

debtors, or other collateral circumstance, a distinct ground is given for a bill by the legatee against the debtors (*h*). So a bill filed by the creditors of a person who was one of the residuary legatees of a testator, against the executors of the testator, the other residuary legatees, and the executrix of their debtor, was dismissed (*i*).

But where an agent has been employed, his principal has in many cases a right to a discovery of his transactions, and to demand the property with which he has been intrusted, or the value of it, against those with whom the agent has had dealings; and therefore, where a merchant who had employed a factor to sell his goods filed a bill against the persons to whom the goods had been sold, for an account, and to be paid the money for which the goods had been sold, and which had not been paid to the factor, a demurrer was over-ruled (*k*). So where a merchant acting upon a commission del credere became bankrupt, having sold goods of his principals for which he had not paid them, and shortly before his bankruptcy drew bills on the vendees, which he delivered to some of his creditors to discharge their demands, they knowing his insolvency, a suit by the principals was maintained against the persons who had received the bills, for an account and payment of the produce. But the

(*h*) 3 Madd. 159.

(*i*) *Elmslie* v. *M'Aulay*, 3 Bro. C. C. 624. And see *Utterson* v. *Mair*, *Vernon* and others, on demurrer, 10 April 1793. 2 Ves. jun. 95. S. C. 4 Bro. C. C. 270.

(*k*) *Lisset* v. *Reave*, 2 Atk. 394.

book-keeper of the bankrupt having been made a party, as one of the persons to whom bills had been so delivered, and having denied that fact by his answer, he was not compelled to answer to the rest of the bill, which, independent of that fact, was, as to him, a mere bill for discovery of evidence (*l*).

VI. The plaintiff must by his bill show some claim of interest in the defendant in the subject of the suit (*m*), which can make him liable to the plaintiff's demands, or the defendant may demur (*n*). Therefore, if a bill is filed to have the benefit of or to impeach an award, and the arbitrators are made parties, they may demur to the whole bill, as well to discovery as relief (*o*); for the plaintiff can have no decree against

(*l*) *Neuman* v. *Godfrey*, 2 Bro. C. C. 332. 2 Ves. J. 457. See *Att. Gen.* v. *Skinners Comp.* 5 Madd. 173, particularly at p. 194. But see *Cookson* v. *Ellison*, 2 Bro. C. C. 252, and the other subsequent cases on the necessity of answering fully. See below, Chap. 2. sect. 2. part. 3.

(*m*) See *Dowlin* v. *Macdougall*, 1 Sim. & Stu. 367.

(*n*) 2 Eq. Ca. Ab. 78. There are, however, instances in which persons not interested in the subject of dispute, may by their conduct so involve themselves in the transaction relating to it, that they may be held liable to costs; and under such circumstances it seems they cannot demur to the bill, if the fraudulent or improper conduct be charged, and the costs be prayed against them. See 7 Ves. 288. 14 Ves. 252. *Le Texier* v. *Margravine of Anspach*, 15 Ves. 159. *Bowles* v. *Stewart*, 1 Sch. & Lefr. 209. ib. 227. 1 Meriv. 123. And, this observation of course applies more strongly where the parties may be interested, but cannot otherwise be made defendants for want of privity. See 3 Barnard. 32. *Doran* v. *Simpson*, 4 Ves. 651. 6 Ves. 750. 9 Ves. 86. *Salvidge* v. *Hyde*, 5 Madd. 138. S. C. 1 Jac. R. 151.

(*o*) *Steward* v. *E. I. Comp.* 2 Vern. 380. See 14 Ves. 254. *Goodman* v. *Sayers*, 2 Jac. & W. 249.

them, nor can he read their answer against the other defendants. Indeed, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the court has gone so far as to order them to pay the costs (*p*); and probably, therefore, in such a case a demurrer to the bill would not have been allowed. A bankrupt made party to a bill against his assignees touching his estate may demur to the relief all his interest being transferred to his assignees (*q*); but it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees; and otherwise the bankruptcy might entirely defeat justice (*r*). Upon the same principle it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.

It is difficult to draw a precise line between the

(*p*) *Lingood* v. *Croucher*, 2 Atk. 395. *Chicot* v. *Lequesne*, 2 Vez. 315, and the case of *Ward* v. *Periam*, cited ib. 316. 1 Turn. R. 131, note. *Lord Lonsdale* v. *Littledale*, 2 Ves. jun. 451. 14 Ves. 252.

(*q*) *Whitworth* v. *Davis*, 1 Ves. & Bea. 545. S. C. 2 Rose, B. C. 116. *Bailey* v. *Vincent*, 5 Madd. 48. *Lloyd* v. *Lander*, 5 Madd. 282; but, it seems, that if fraud were charged and costs were prayed against him, he could not demur, ib. and 15 Ves. 164. See also *King* v. *Martin*, 2 Ves. jun. 641.

(*r*) Upon this passage see 1 Ves. & Bea. 548, 549, 550.

cases in which a person having no interest may be called upon to answer for his own acts, and those in which he may demur, because he has no interest in the question. Thus, where a creditor who had obtained execution against the effects of his debtor filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was over-ruled, and the decision affirmed on re-hearing (*s*). A difference has also been taken where a person concerned in a transaction impeached on the ground of fraud has been made party to a bill for discovery merely (*t*); or as having the custody of an instrument for the mutual benefit of others (*u*).

To prevent a demurrer a bill must in many cases not only show that the defendant has an interest in the subject, but that he is liable to the plaintiff's de-

(*s*) *King* v. *Martin* and others, 25 July 1795, rep. 2 Ves. jun. 641.

(*t*) *Cotton* v. *Luttrell*, Trin. 1738. *Bennet* v. *Vade*, 2 Atk. 324. See above, p. 160, note (*n*). See also *Bridgman* v. *Green*, 2 Vez. 627. 629, as to the evidence of a person charged as particeps criminis, in support of a transaction impeached as fraudulent.

(*u*) 3 Atk. 701.

mands(*x*). As where a bill was brought upon a ground of equity by the obligee in a bond against the heir of the obligor, alleging that the heir having assets by descent ought to satisfy the bond; because the bill did not expressly allege that the heir was bound in the bond, although it did allege that the heir ought to pay the debt, a demurrer was allowed (*y*). So where a bill was brought by a lessor against an assignee touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, did not therefore bind assigns, and was not stated by the bill expressly to bind assigns, the assignee demurred, and the demurrer was allowed (*z*).

VII. If for any reason founded on the substance of the case as stated in the bill the plaintiff is not entitled to the relief he prays, the defendant may demur. Many of the grounds of demurrer already mentioned are perhaps referrible to this head; and in every instance, if the case stated is such that admitting the whole bill to be true the court ought not to give the plaintiff the relief or assistance he requires in the whole or in part, the defect thus appearing on the face of the bill is sufficient ground of demurrer (*a*).

VIII. It is the constant aim of a court of equity to do complete justice by deciding upon and settling

(*x*) See *Ryves* v. *Ryves*, 3 Ves. 343.

(*y*) *Crosseing* v. *Honor*, 1 Vern. 180.

(*z*) *Lord Uxbridge* v. *Staveland*, 1 Vez. 56.

(*a*) 7 Ves. 245. 2 Sch. & Lefr. 638. 6 Madd. 95.

the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation (*b*). For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice, by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented (*c*).

This general rule, however, admits of many qualifications. When a person who ought to be a party is out of the jurisdiction of the court, that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is in most cases a sufficient reason for not bringing him before the court; and the court will proceed without him against the other parties, as far as circumstances will permit (*d*). It is usual, however, to add the name of a person out of the jurisdiction of the court as a party to the bill, so far as may be necessary to connect his case with that of

(*b*) See *Knight* v. *Knight*, 3 P. Wms. 331. But see also *Cullen* v. *Duke of Queensberry*, 1 Bro. C. C. 101.

(*c*) 3 P. Wms. 333, 334. 2 Atk. 51. 7 Ves. 563. 12 Ves. 53. 1 Meriv. 262. *Beaumont* v. *Meredith*, 3 Ves. & Bea. 182. 1 Sch. & Lefr. 298.

(*d*) 1 Vez. 385; and see *Cowslad* v. *Cely*, Prec. in Chan. 83. *Darwent* v. *Walton*, 2 Atk. 510. *Williams* v. *Whinyates*, 2 Bro. C. C. 399; and, if the disposition of the property be in the power of the other parties, the Court, it seems, will act upon it. 1 Sch. & Lefr. 240.

the other parties; and the bill may also pray process against him in case he should become amenable to such process; and if in fact he should become so amenable pending the suit he ought to be brought before the court, either by issuing process against him, if process should have been prayed against him, and if not, by amending the bill for that purpose, if the state of the proceedings will admit of such amendment, or by supplemental bill if they will not (*e*). If a person so out of the power of the court is required to be an active party in the execution of its decree, as where a conveyance by him is necessary, or if the decree ought to be pursued against him, as the foreclosure of a mortgagee against the original mortgagor, or his representative or assign, the proceedings will unavoidably be to this extent defective (*f*). A foreign corporation not amenable to the jurisdiction of the court falls within this description, and a corporation in Scotland is considered for this purpose as a foreign corporation (*g*).

When the object of a suit is to charge the personal property of a deceased person with a demand, it is generally sufficient to bring before the court the person constituted by law to represent that property, and to answer all demands upon it; and the difficulty of bringing before the court, in some cases, all the persons interested in the subject of a suit, has also

(*e*) See *Haddock* v. *Thomlinson*, 2 Sim. & Stu. 219.

(*f*) *Fell* v. *Brown*, 2 Bro. C. C. 277; see above, p. 32.

(*g*) *Att. Gen.* v. *Baliol*, Coll. in Cha. 10 Dec. 1744. Lord *Hardwicke*, as to the University of Glasgow.

induced the court to depart from the general rule (*h*), where the suit is on behalf of many in the same interest, and all the persons answering that description cannot easily be discovered or ascertained. Thus a few creditors may substantiate a suit on behalf of themselves and the other creditors of their deceased debtor, for an account and application of his assets, real as well as personal, in payment of their demands (*i*); and the decree being in that case applied to all the creditors, the other creditors may come in under it, and obtain satisfaction of their demands equally with the plaintiffs in the suit; and if they decline to do so they will be excluded the benefit of the decree, and will yet be considered as bound by acts done under its authority (*k*). As a single creditor may sue for his demand out of personal assets, it is rather matter of convenience than of indulgence to permit such a suit by a few on behalf of all the creditors; and it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome on the fund to be administered; for if a bill be brought by a single creditor for his own debt,

(*h*) Prec. in Chan. 592. *Pearson* v. *Belchier*, 4 Ves. 627. *Lloyd* v. *Loaring*, 6 Ves. 773. 11 Ves. 367. *Adair* v. *New River Comp.* 11 Ves. 429. *Cockburn* v. *Thompson*, 16 Ves. 321. *Beaumont* v. *Meredith*, 3 Ves. & Bea. 180. *Meux* v. *Maltby*, 2 Swanst. 277, and cases there cited; and see below, 170, notes (*u*) and (*x*). *Ellison* v. *Bignold*, 2 Jac. & W. 503. *Manning* v. *Thesiger*, 1 Sim. & Stu. 106. *Gray* v. *Chaplin*, 2 Sim. & Stu. 267.

(*i*) 2 Vez. 313. *Law* v. *Rigby*, 4 Bro. C. C. 60.

(*k*) See *Good* v. *Blewitt*, 19 Ves. 336, and *Angell* v. *Haddon*, 1 Madd. R. 529.

he may as at law gain a preference by the judgment in his favour over other creditors in the same degree, who may not have used equal diligence (*l*).

But some of a number of creditors, parties to a trust-deed for payment of debts, have been permitted to sue on behalf of themselves and the other creditors named in the deed for execution of the trust (*m*), although one of those creditors could not in that case have sued for his single demand without bringing the other creditors before the court. This seems to have been permitted purely to save expense and delay. If a great number of creditors, thus specially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants the same inconvenience might happen, and additional expense would unavoidably be incurred.

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and other legatees; and as he might sue for his own legacy only, a suit by one on behalf of all the legatees has the same tendency to prevent inconvenience and expense as a suit by one creditor on behalf of all creditors of the same fund (*n*); but in a suit by a single legatee for

(*l*) See *Att. Gen.* v. *Cornthwaite*, 2 Cox, R. 44; an instance of a bill by a single creditor. And see *Haycock* v. *Haycock*, 2 Ca. in Cha. 124. *Bedford* v. *Leigh*, Dick. 707. *Hall* v. *Binney*, 6 Ves. 738.

(*m*) *Corry* against *Trist*, 1 Dec. 1766. *Routh* v. *Kinder*, 3 Swanst. 144, n. *Boddy* v. *Kent*, 1 Meriv. 361. *Weld* v. *Bonham*, 2 Sim. & Stu. 91. *Handford* v. *Storie*, 2 Sim. & Stu. 196.

(*n*) 6 Ves. 779; and see *Morse* v. *Sadler*, 1 Cox, R. 352.

his own legacy, unless the personal representative of the testator, by admitting assets for payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound (*n*), the court will direct a general account of all the legacies of the same testator, and payment of the legacy claimed rateably only with the other legacies, no preference being allowed amongst legatees in the administration of assets (*o*).

When the court has pronounced a decree for an account and payment of debts or legacies under which all creditors or legatees may claim, it will restrain subsequent proceedings by a separate creditor or legatee, either at law or in equity, as the just administration of the assets would be greatly embarrassed by such proceedings (*p*).

Where all the inhabitants of a parish had rights of common under a trust, a suit by one on behalf of

(*n*) See *Boys* v. *Ford*, 4 Madd. 40.

(*o*) To a bill by a specific or pecuniary legatee for payment, neither the residuary legatees, (see 1 Vern. 261; *Wainwright* v. *Waterman*, 1 Ves. jun. 311; 1 Madd. R. 448), nor generally, (see 2 Ca. in Cha. 124; and see *Morse* v. *Sadler*, 1 Cox, R. 352,) any other of the legatees, need be made parties; but on such a bill by one of several residuary legatees, he must in general bring before the court all the other persons interested in the residue, after satisfaction of the creditors and the specific and pecuniary legatees. 2 Ca. in Cha. 124. *Parsons* v. *Neville*, 3 Bro. C. C. 365. 16 Ves. 328. And see 1 Sim. & Stu. 106.

(*p*) 1 Sch. & Lefr. 299, and cases cited there, in note (*b*); and see *Douglas* v. *Clay*, Dick. 393. *Brooks* v. *Reynolds*, Dick. 603. S. C. 1 Bro. C. C. 183. *Rush* v. *Higgs*, 4 Ves. 638. *Paxton* v. *Douglas*, 8 Ves. 520. *Terrewest* v. *Featherby*, 2 Meriv. 480. *Curre* v. *Bowyer*, 3 Madd. 456. *Farrell* v. *Smith*, 2 Ball & B. 337. 1 Jac. R. 122. *Lord* v. *Wormleighton*, 1 Jac. R. 148.

himself and the other inhabitants was admitted (*q*). It has been doubted whether the attorney-general ought not to have been a party to that suit (*r*), and accordingly, on a bill filed by some of the sufferers by a fire against the trustees of a collection made for the sufferers generally, it was objected at the hearing, that the attorney-general ought to have been a party, and that otherwise the decree would not be conclusive; and the cause was accordingly ordered to stand over for the purpose of bringing the attorney-general before the court (*s*). But where a bill was brought for distribution of private contributions, the objection that the attorney-general was not a party was overruled (*t*).

For the application of personal estate amongst next of kin, or amongst persons claiming under a general description, as the relations of a testator or other person, where it may be uncertain who are all the persons answering that description, a bill has been admitted by one claimant on behalf of himself and the other persons equally entitled (*u*). And the necessity of the case has induced the court, especially of late years, frequently to depart from the general rule,

(*q*) 1 Ca. in Cha. 269. *Blackham* against *the Warden and Society of Sutton Coldfield.* See *Att. Gen.* v. *Heelis*, 2 Sim. & Stu. 67.

(*r*) See *Att. Gen.* v. *Moses*, 2 Madd. R. 294.

(*s*) *Overall* v. *Peacock*, 6 Dec. 1737. See *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40.

(*t*) *Lee* v. *Carter*, 17 Nov. 1740, MS. N. reported 2 Atk. 84; but this point is not noticed by Atkyns. *Nutt* v. *Brown*, 20 July 1745. *Anon.* 3 Atk. 227. 1 Sim. & Stu. 43. The attorney or solicitor-general is usually a necessary party to suits relating to charity funds. See *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40; and above, pp. 22. 99.

(*u*) See Ambl. 710; 1 Russ. R. 166.

where a strict adherence to it would probably amount to a denial of justice; and to allow a few persons to sue on behalf of great numbers having the same interest (*u*).

There are also other cases in which the interests of persons not parties to a suit may be in some degree affected, and yet the suit has been permitted to proceed without them, as a bill brought by a lord of a manor against some of the tenants, or by some of the tenants against the lord, on a question of common; or by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general parochial modus (*x*).

In many cases the expression that all persons interested in the subject must be parties to a suit, is not to be understood as extending to all persons who

(*u*) *Chancey* v. *May*, Prec. in Chan. 592 (Finch Ed.). Gilb. 230. 1 Atk. 284. *Leigh* v. *Thomas*, 2 Ves. 312. *Pearson* v. *Belchier*, 4 Ves. 627. *Lloyd* v. *Loaring*, 6 Ves. 773. *Good* v. *Blewitt*, 13 Ves. 397. *Cockburn* v. *Thompson*, 16 Ves. 321. 3 Meriv. 510. *Manning* v. *Thesiger*, 1 Sim. & Stu. 106. *Baldwin* v. *Lawrence*, 2 Sim. & Stu. 18. *Gray* v. *Chaplin*, 2 Sim. & Stu. 267; but it seems that except, perhaps, in the common cases of this kind, it is necessary to allege that the parties are too numerous to be individually named, *Weld* v. *Bonham*, 2 Sim. & Stu. 91. See, however, *Van Sandau* v. *Moore*, 1 Russ. R. 441.

(*x*) 1 Atk. 283. 3 Atk. 247. *Chaylor* v. *Trin. Coll.* Anst. 841. 11 Ves. 444; and see *Adair* v. *New River Comp.* 11 Ves. 429. 16 Ves. 328. 1 Jac. & W. 369. 2 Swanst. 282; but it appears that where it is attempted to proceed against some individuals representing a numerous class, as against churchwardens representing the parishioners in respect of a church-rate, it must be alleged that the suit is brought against them in such representative character, 5 Madd. 13.

may be consequentially interested. Thus, in the case of a bill which may be brought by a single creditor for satisfaction of his single demand out of the assets of a deceased debtor, as before noticed, although the interest of every other unsatisfied creditor may be consequentially affected by the suit, yet that interest is not deemed such as to require that the other creditors should be parties; notwithstanding, the decree if fairly obtained will compel them to admit the demand ascertained under its authority as a just demand, to the extent allowed by the court in the administration of assets; but they will not be bound by any account of the assets taken under such a decree. So in all cases of bills by creditors, or legatees, the persons entitled to the personal assets of a deceased debtor or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to contest the demands of the creditors and legatees; and, if the suits be fairly conducted, they will be bound to allow the demands admitted in those suits by the court, though they will not be bound by any account of the property taken in their absence (*y*).

To a bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir at law of the testator is deemed a necessary party, that the title may be quieted against his demand; for which purpose the bill

(*y*) See the case of *Bedford* v. *Leigh*, Dick. 707. And see *Lawson* v. *Barker*, 1 Bro. C. C. 303. *Wainwright* v. *Waterman*, 1 Ves. J. 313. *Brown* v. *Dowthwaite*, 1 Madd. R. 448.

usually prays that the will may be established against him by the decree of the court; but if the testator has made a prior will containing a different disposition of the same property, and which remains uncancelled, and has not been revoked except by the subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties; though if the subsequent will be not valid, those persons may disturb the title under it as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument notwithstanding the subsequent will, the persons claiming under it may be brought before the court, to quiet the title, and protect those who may act under the orders of the court in executing the latter instrument (*z*).

If no heir at law can be found, the king's attorney-general is usually made a party to a bill for carrying the trusts of a devise of real estate into execution, supposing the escheat to be to the Crown, if the will set up by the bill should be subject to impeachment (*a*). But if any person should claim the escheat against the Crown, that person may be a necessary party.

If the heir at law of a testator who has devised a real estate on trusts should be out of the jurisdiction of the court, and that fact should be charged

(*z*) See on the general subject, *Harris* v. *Ingledew*, 3 P. Wms. 91. *Lewis* v. *Nangle*, 2 Vez. 431. 1 Ves. jun. 29.

(*a*) See the case of *Att. Gen.* v. *Mayor of Bristol*, 3 Madd. 319. S. C. 2 Jac. & W. 294.

and proved, the court will proceed to direct the execution of the trusts upon full proof of the due execution of the will and sanity of the testator; though that evidence cannot be read against the heir if he should afterwards dispute the will, and the court therefore cannot establish the will against him, or in any manner ensure the title under it against his claims (*b*).

Where real property in question is subject to an entail it is generally sufficient to make the first person in being, in whom an estate of inheritance is vested, a party with those claiming prior interests, omitting those who may claim in remainder or reversion after such vested estate of inheritance (*c*); and a decree against the person having that estate of inheritance will bind those in remainder or reversion, though by failure of all the previous estates the estates then in remainder or reversion may afterwards vest in possession (*d*). It has therefore been determined that a person so entitled in remainder, and afterwards becoming entitled in possession, may appeal from a decree made against a person having a prior estate of inheritance, and cannot avoid the effect of the decree by a new bill (*e*).

Contingent limitations and executory devises to persons not in being may in like manner be bound

(*b*) See *Williams* v. *Whinyates*, 2 Bro. C. C. 399; and see *French* v. *Baron*, 2 Atk. 120. S. C. Dick, 138.

(*c*) 2 Sch. & Lefr. 210; and see *Anon.* 2 Eq. Ca. Ab. 166. 2 Vez. 492. *Pelham* v. *Gregory*, 1 Eden, R. 518. S. C. 3 Bro. P. C. 204. Toml. Ed.

(*d*) See *Lloyd* v. *Johnes*, 9 Ves. 37. 16 Ves. 326.

(*e*) *Giffard* v. *Hort*, 1 Sch. & Lefr. 386, ib. 411.

by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights (*f*).

If a person entitled to an interest prior in limitation to any estate of inheritance before the court, should be born pending the suit, that person must be brought before the court by a supplementary proceeding. And if by the determination of any contingency a new interest should be acquired, not subject to destruction by a prior vested estate of inheritance, the person having that interest must be brought before the court in like manner. And if by the death of the person having, when the suit was instituted, the first estate of inheritance, that estate should be determined, the person having the next estate of inheritance, and all the persons having prior interests, must be so brought before the court (*g*).

Trustees of real estate for payment of debts or legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which in many cases would be almost impossible; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees (*h*).

The interests of persons claiming under the pos-

(*f*) See *Handcock* v. *Shaen*, Coll. P. C. 122, and *Anon.* 2 Eq. Ca. Abr. 166. *Sherrit* v. *Birch*, 3 Bro. C. C. 229.

(*g*) See 2 Sch. & Lefr. 210.

(*h*) See *Franco* v. *Franco*, 3 Ves. 75; and see *Curteis* v. *Candler*, 6 Madd. 123.

session of a party whose title to real property is disputed, as his occupying tenants, under leases, are not deemed *necessary* parties; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a court of equity in their absence; and though if his title was equitable merely they may be affected by a decision against that title. Sometimes, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances. If therefore it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, as a mortgage, the person claiming it is usually made a party (*i*).

To a suit for the execution of a trust, by or against those claiming the ultimate benefit of the trust, after the satisfaction of prior charges, it is not necessary to bring before the court the persons claiming the benefit of such prior charges; and therefore, to a bill for application of a surplus paid after payment of debts and legacies, or other prior encumbrances, the creditors, legatees, or other prior encumbrancers, need not be made parties (*k*). And persons having demands prior to the creation of such a trust may enforce those demands against the trustees without bringing before the court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees. But if the trus-

(*i*) See 2 Vez. 450. (*k*) See *Anon.* 3 Atk. 572.

tees have no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also be parties. Persons having specific charges on the trust-property in many cases are also necessary parties; but this will not extend to a general trust for creditors or others whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust-property (*l*).

If a debt by a covenant or obligation binding the heir of the debtor is demanded against his real assets in the hands of a devisee under the statute 3 and 4 W. & M. c. 14, the heir must always be a party (*m*); and if any assets have descended to the heir they are first applicable, unless the assets devised are charged with debts in exoneration of the heir. The personal representative of the deceased debtor is also generally a necessary party (*n*), as a court of equity will first apply the personal, in exoneration of the real, assets.

(*l*) As to *cestui que trusts* being parties, see *Kirk* v. *Clark*, Pre. in Cha. 275. *Adams* v. *St. Leger*, 1 Ball & B. 181. *Calverley* v. *Phelp*, 6 Madd. 229. *Douglas* v. *Horsfall*, 2 Sim. & Stu. 184. It may here be observed, that if the trust-property be personal, and its amount be ascertained, one entitled to an aliquot part thereof may sue the trustees for the same, without making the persons claiming the other shares thereof parties to the suit. *Smith* v. *Snow*, 3 Madd. 10.

(*m*) *Gawler* v. *Wade*, 1 P. Wms. 100. *Warren* v. *Stawell*, 2 Atk. 125.

(*n*) *Knight* v. *Knight*, 3 P. Wms. 331. 3 P. Wms. 350. 3 Atk. 406. 1 Eq. Ca. Abr. 73. *Lowe* v. *Farlie*, 2 Madd. R. 101. 2 Sim. & Stu. 292.

When there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required. In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court. This seems to be required rather to satisfy the court that there are no such assets to satisfy the demand: for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the ecclesiastical court before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such assets to be collected, or a general administration would be obtained (*o*).

The personal representative thus brought before the court must be a representative constituted in England; and although there may be personal assets in another country, and a personal representative constituted there, yet as he may not be amenable to the process of the court, and those assets must be

(*o*) See the case of *Glass* v. *Oxenham*, 2 Atk. 121. Where probate has been granted, and the executor has subsequently departed out of the realm, a special administration may, after twelve months from the decease of the testator, be obtained to defend a suit, or to carry a decree into execution, by virtue of stat. 38 Geo. 3, c. 87. *Rainsford* v. *Taynton*, 7 Ves. 460.

subject to administration according to the laws of that country, such a representative is not deemed a necessary party to substantiate a demand against the real assets in England (*p*).

Where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim; and when a right is clearly vested, as a trust-term, which is required to be assigned, an administration of the effects of the deceased trustee limited to the trust-term is necessary to warrant the decree of the court for assignment of the term.

In some cases, when it has appeared at the hearing of a cause, that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative on the hearing, the court has made a decree directing proceedings before one of the masters of the court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the master on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the

(*p*) See *Jauncy* and *Scalcy*, 1 Vern 397. and *Lowe* v. *Farlie*, 2 Madd. R. 101. *Logan* v. *Farlie*, 2 Sim. & Stu. 284.

master is considered as a party to the cause in the subsequent proceedings (*p*).

In most cases the person having the legal title in the subject must be a party, though he has no beneficial interest, that the legal right may be bound by the decree of the court (*q*). Thus if a bond or judgment be assigned, the assignor as well as the assignee must be a party, for the legal right of action remains in the assignor (*r*).

In some cases, however, it may still remain a question of considerable difficulty who are necessary parties to a suit. It may indeed be doubtful until the decision of the cause what interests may be affected by that decision; and sometimes parties must be brought before the court to litigate a question, who had, according to the decision, no interest in the subject; and as to whom therefore whether plaintiffs or defendants, the bill may be finally dismissed, though the court may make a decree on the subject as between other parties, which will be conclusive on the persons as to whom the bill may be so dismissed, but which the court would not pronounce in their absence, if amenable to its jurisdiction.

Sometimes, too, a plaintiff, by waving a particular claim, may avoid the necessity of making parties

(*p*) See *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497. 1 Ves. jun. 69.

(*q*) As to the case of a trustee, see Pre. in Cha. 275. 3 Barnard, 325. *Burt* v. *Dennet*, 2 Bro. C. C. 225. 7 Ves. 11. *Cholmondeley* v. *Clinton*, 2 Meriv. 71.

(*r*) See *Cathcart* v. *Lewis*, 1 Ves. J. 463; but see *Brace* v. *Harrington*, 2 Atk. 235, and *Blake* v. *Jones*, 3 Anstr. 651. See also *Ryan* v. *Anderson*, 3 Madd. 174. *Edney* v. *Jewell*, 6 Madd. 165. 2 Sim. & Stu. 253.

who might be affected by it, though that claim might be an evident consequence of the rights asserted by the bill against other parties. This, however, cannot be done to the prejudice of others.

Whenever a want of parties appears on the face of a bill, the want of proper parties is a cause of demurrer (*s*). But if a sufficient reason for not bringing a necessary party before the court is suggested by the bill; as if a personal representative is a necessary party, and the representation is charged to be in litigation in the ecclesiastical court (*t*); or if the bill seeks a discovery of the parties interested in the matter in question for the purpose of making them parties, and charging that they are unknown to the plaintiff; a demurrer for want of the necessary parties will not hold (*u*).

A demurrer for want of parties must show who are the proper parties: not indeed by name, for that

(*s*) *Clark* v. *Lord Angier*, 1 Ca. in Cha. 41. Nels. R. 78, 93. *Astley* v. *Fountaine*, Finch, R. 4. *Weston* v. *Keighley*, Finch, R. 82. *Atwood* v. *Hawkins*, Finch, R. 113. *Galle* v. *Greenhill*, Finch, R. 202. 3 P. Wms. 311, note. *Knight* v. *Knight*, 3 P. Wms. 331. 2 Atk. 570. 1 Eq. Ca. Ab. 72. 2 Eq. Ca. Ab. 165. *Cockburn* v. *Thompson*, 16 Ves. 321. *Cook* v. *Butt*, 6 Madd. 53. *Weld* v. *Bonham*, 2 Sim. & Stu. 91. *Gray* v. *Chaplin*, 2 Sim. & Stu. 267. *Maule* v. *Duke of Beaufort*, 1 Russ. R. 349. *Quære*, whether a demurrer for want of parties should be to the whole bill. See *E. I. Company* v. *Coles*, reported 3 Swanst. 142, note; and see the cases of *Atwood* v. *Hawkins*, Finch, R. 113. *Astley* v. *Fountaine*, Finch, R. 4, and *Bressenden* v. *Decreets*, 2 Ca. in Cha. 197, cited 3 Swanst. 144. n.

(*t*) 2 Atkyns, 51; and see *Jones* v. *Frost*, 3 Madd. 1.

(*u*) *Bowyer* v. *Covert*, 1 Vern. 95. *Heath* v. *Percival*, 1 P. Wms. 682. 684.

might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties (*x*). In case of a demurrer for want of parties the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument (*y*).

IX. The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants (*z*); for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection. A defendant may therefore demur, because the plaintiff demands several matters of different natures of several defendants by the same bill (*a*). But as the defendants may combine together to defraud the plaintiff of his rights, and such a combination is usually charged by a bill, it has been held that the defendant must so far answer the bill as to deny combination (*b*). In this however,

(*x*) Upon this subject see 6 Ves. 781; 11 Ves. 369; 16 Ves. 325; 3 Madd. 62.

(*y*) *Bressenden* v. *Decreets*, 2 Ch. Ca. 197.

(*z*) See 5 Madd. 146.

(*a*) *Berke* v. *Harris*, Hardr. 337. And, as late instances of demurrers for multifariousness, see *Ward* v. *Cooke*, 5 Madd. 122. *Salvidge* v. *Hyde*, 5 Madd. 138. S. C. 1 Jac. R. 153. *Turner* v. *Doubleday*, 6 Madd. 94. *Exeter Coll.* v. *Rowland*, 6 Madd. 94. *Kaye* v. *Moore*, 1 Sim. & Stu. 61. *Dew* v. *Clarke*, 1 Sim. & Stu. 108. *Turner* v. *Robinson*, 1 Sim. & Stu. 313, and *Shackell* v. *Macaulay*, 2 Sim. & Stu. 79.

(*b*) *Powell* v. *Arderne*, 1 Vern. 416. As to the interpretation to be put upon this passage, see 8 Ves. 527; and as to general charge of combination, see sup. p. 40, 41. The proposition in the text, however, so far as it may apply to the usual general charge of combination, seems

the defendant must be cautious; for if the answer goes farther than merely to deny combination, it will over-rule the demurrer (*c*). A demurrer of this kind will hold only where the plaintiff claims several matters of different natures; but when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold (*d*). As where a person claiming a general right to the sole fishery of a river, filed a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise (*e*). For in this case the plaintiff did not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendants; but he claimed one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants. So where a lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders, and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries; and it was objected at the hearing, that the

now to have been over-ruled, *Brookes* v. *Lord Whitworth*, 1 Madd. R. 86. *Salvidge* v. *Hyde*, 5 Madd. 138. And the ultimate decision in the latter case upon appeal, reversing the former, does not appear to have had any reference to that proposition. S. C. 1 Jac. 151.

(*c*) *Hester* v. *Weston*, 1 Vern. 463.

(*d*) See the cases cited above, pp. 145, 146. And see *Buccle* v. *Atleo*, 2 Vern. 37. As to cases of infringement of copyrights and patents, see *Dilly* v. *Doig*, 2 Ves. jun. 486.

(*e*) *Mayor of York* v. *Pilkington*, 1 Atk. 282.

suit was improper, as it brought before the court many parties having distinct interests; it was answered, that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements, and a decree was made accordingly (*f*).

As the court will not permit the plaintiff to demand by one bill several matters of different natures against several defendants, so it will not permit a bill to be brought for part of a matter only; but to prevent the splitting of causes, and consequent multiplicity of suits, will allow a demurrer upon this ground (*g*).

A discovery being compelled upon a bill praying relief, for the purpose of enabling the plaintiff to obtain that relief, the discovery is in general incidental to the relief (*h*), and a demurrer to the relief consequently extends to the discovery likewise (*i*). But as the court entertains a jurisdiction in certain cases for the mere purpose of compelling a discovery, without administering any relief, it was formerly conceived that though a plaintiff prayed by his bill relief to which he was not entitled, he might yet

(*f*) *Magdalen Coll.* against *Athill and others*, at the Rolls, 26 Nov. 1753. See the distinctions taken in *Berke* v. *Harris*, Hardres, 337.

(*g*) 1 Vern. 29. *Edgworth* v. *Swift*, 4 Bro. P. C. 654, Toml. ed. See above, p. 146.

(*h*) 1 Sim. & Stu. 93.

(*i*) See *Baker* v. *Mellish*, 10 Ves. 544; 3 Meriv. 502. It may happen, however, that the relief sought may be consequential to discovery to which the plaintiff is entitled, in which case, a general demurrer would perhaps be over-ruled. See *Brandon* v. *Sands*, 2 Ves. J. 514; *Brandon* v. *Johnson*, ib. 517.

show a title to a discovery; and therefore, though a demurrer might hold to the relief, the defendant might notwithstanding be compellable to answer to the discovery, the bill being then considered as in effect a bill for a discovery merely (*k*). This, however, has since been determined otherwise (*l*); and where a plaintiff entitled to a discovery added to his bill a prayer for relief (*m*), a demurrer has been allowed (*n*). And where a defendant had demurred to the discovery sought by a bill, *for want of title in the plaintiff to require the discovery*, but had omitted to demur to the relief prayed, to which that discovery was merely incidental, it was conceived the demurrer must, in point of form, be over-ruled; for the demurrer, applying to the discovery only, admitted the title to relief, and consequently admitted the title to the discovery, which was only incidental to

(*k*) See *Fry* v. *Penn*, 2 Bro. C. C. 280.

(*l*) See *Price* v. *James*, 2 Bro. C. C. 319.

(*m*) It is presumed, that in order to the defendant being thus able by demurrer wholly to protect himself against the interference of the court, it must appear from the manner in which the plaintiff states his case, that he seeks the discovery as incidental to the relief. See cases in the next note.

(*n*) *Collis* v. *Swayne*, 4 Bro. C. C. 480. *Loker* v. *Rolle*, 3 Ves. 4. *Ryves* v. *Ryves*, 3 Ves. 343. 6 Ves. 63. 6 Ves. 686. 8 Ves 3. *Gordon* v. *Simpkinson*, 11 Ves. 509. 17 Ves. 216. 1 Ves. & Bea. 539. 2 Ves. & Bea. 328. *Jones* v. *Jones*, 3 Meriv. 161. 3 Meriv. 502. This may probably have the effect of compelling a plaintiff, in a doubtful case, to frame his bill for a discovery only in the first instance; and, having obtained it, by amending his bill to try the question whether he is also entitled to relief; which was formerly a frequent practice, and possibly a greater inconvenience.

the relief (*o*). But though a plaintiff may be entitled to the relief he prays, there may yet be reasons to induce a court of equity to forbear compelling a discovery (*p*).

It remains therefore to consider the objections to a bill which are causes of demurrer to discovery only. These are, I. That the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery: II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery: III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery: IV. Although both plaintiff and defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill: V. That the discovery if obtained cannot be material: and, VI. That the situation of the defendant renders it improper for a court of equity to compel a discovery.

I. Where a bill prays relief the discovery if material to the relief being incidental to it, a plaintiff showing a title to relief also shows a case in which a court of equity will compel discovery, unless some circumstance in the situation of the

(*o*) *Morgan* v. *Harris*, in Ch. 31, Oct. 1786, reported 2 Bro. C. C. 121. *Waring* v. *Mackreth*, Forrest. 129.

(*p*) A plaintiff may be entitled to relief in equity, independently of the discovery, 1 Swanst. 294. And there may be instances in which a defendant, although he should think proper to give the discovery, may yet demur to the relief. 2 Atk. 157. *Hodgkin* v. *Longden*, 8 Ves. 2. *Todd* v. *Gee*, 17 Ves. 273.

defendant renders it improper. But where the bill is a bill of discovery merely, it is necessary for the plaintiff to show by his bill a case in which a court of equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction is exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the court itself or in some other court (*q*). Where the object of a bill is to obtain a discovery to aid the prosecution or defence of a suit in the court itself, as the court has already jurisdiction of the subject, to state the suit depending is sufficient to give the court jurisdiction upon the bill of discovery. But if a bill is brought to aid, by a discovery, the prosecution or defence of any proceeding not merely civil in any other court, as an indictment or information, a court of equity will not exercise its jurisdiction to compel a discovery, and the defendant may demur (*r*). And in the case of suits merely civil in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere (*s*). Therefore, where a bill was filed for a discovery of the value of the respective real and personal estates of the inhabitants of a parish in which a church rate had been assessed, and of the applica-

(*q*) See *Moodaly* v. *Moreton*, Dick. 652. S. C. 1 Bro. C. C. 469. *Bishop of London* v. *Fytche*, 1 Bro. C. C. 96. *Cardale* v. *Watkins*, 5 Madd. 18. A discovery has been compelled to aid the jurisdiction of a foreign court. *Crowe* and others against *Del Ris* and *Vallego*, in Chan. 11th July 1769.

(*r*) 2 Ves. 398; and see *Thorpe* v. *Macauley*, 5 Madd. 218. *Shackell* v. *Macaulay*, 2 Sim. & Stu. 79.

(*s*) 1 Atk. 288. 1 Vez. 205. *Anon.* 2 Vez. 451.

tion of the money collected, a demurrer was allowed; because the ecclesiastical court, to which the ordinary jurisdiction belonged, was capable of compelling the discovery (*t*).

II. A bill must show an interest in the plaintiff in the subject to which the required discovery relates (*u*), and such an interest as entitles him to call on the defendant for the discovery. Therefore where a plaintiff filed a bill for a discovery merely, to support an action, which he alleged by his bill he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet the court being of opinion that the case stated by the bill was not such as would support an action, a demurrer was allowed (*x*); for unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case (*y*). And upon a bill filed by a creditor, alleging that he had obtained judgment against his debtor, and that the defendant to deprive him of the benefit of his judgment had got into his hands goods of the debtor under pretence of a debt due

(*t*) *Dunn* v. *Coates*, 1 Atk. 288.

(*u*) *Ramere* v. *Rawlins*, Rep. Temp. Finch. 36. *Newman* v. *Holder*, ib. 44; and see 2 Vez. 247. *Northleigh* v. *Luscombe*, Ambl. 612, and *Wright* v. *Plumtree*, 3 Madd. 481.

(*x*) *Debbieg* and *Lord Howe* in Chan. Hil. 1782; cited 3 Bro. C. C. 155. *Wallis* v. *Duke of Portland*, 3 Ves. 494. *Lord Kensington* v. *Mansell*, 13 Ves. jun. 240.

(*y*) See *The Mayor of London* v. *Levy*, 8 Ves. 398.

to himself, and praying a discovery of the goods; the defendant demurred, because the plaintiff had not alleged that he had sued out execution, and because until he had so done the goods were not bound by the judgment, and consequently the plaintiff had no title to the discovery; and the demurrer was allowed (*y*).

III. Unless a defendant has some interest in the subject he may be examined as a witness, and therefore cannot in general be compelled to answer a bill for a discovery (*z*); for such a bill can only be to gain evidence, and the answer of the defendant cannot be read against any other person, not even against another defendant to the same bill (*a*). But if the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, of course will not hold (*b*), though the defendant has no interest; and he can then only avoid answering the bill by plea or disclaimer. There seems to be an exception to the rule in the case of a corporation; for as a corporation can answer no otherwise than under their common seal, and therefore, though they answer falsely, there is no remedy against them for perjury, it has been usual, where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make

(*y*) *Angell* v. *Draper*, 1 Vern. 399. But see *Taylor* v. *Hill*, 1 Eq. Ca. Ab. 132.

(*z*) *Steward* v. *E. I. Comp.* 2 Vern. 380. *Dineley* v. *Dineley*, 2 Atk. 394. *Plummer* v. *May*, 1 Vez. 426. 1 Ves. jun. 294, note (*e*). *Fenton* v. *Hughes*, 7 Ves. 287. 14 Ves. 252. *How* v. *Best*, 5 Madd. 19.

(*a*) 2 Vern. 380. 3 P. Wms. 311, and ib. note (*h*).

(*b*) 1 Vez. 426.

their secretary or book-keeper or other officer a party (*c*); and a demurrer because the bill showed no claim of interest in the defendant has been in such case overruled (*d*). So where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears in the books of a demurrer by such a party because he had no claim of interest in the matter in question by the bill. Indeed an attorney under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs (*e*); apparently on the same ground as costs were awarded against arbitrators in the cases of their misconduct before noticed (*f*).

IV. Although both plaintiff and defendant may have an interest in the subject to which the discovery required is supposed to relate, yet there may not be that privity of title between them which can give the plaintiff a right to the discovery. Thus where a bill was filed by a person claiming to be lord of a manor against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery in what manner

(*c*) *Anon.* 1 Vern. 117.

(*d*) *Wych* v. *Meal*, 3 P.Wms. 310. 7 Ves. jun. 289. 14 Ves. 252. *et seq.* *Gibbons* v. *Waterloo Bridge Comp.* 5 Pri. Ex. R. 491.

(*e*) *Bennet* v. *Vade*, 2 Atk. 324. 1 Sch. & Lefr. 227. *Fenwick* v. *Reed*, 1 Meriv. 114.

(*f*) Vid. sup. p. 161.

the defendant derived title to the manor, the defendant demurred, because the plaintiff had shown no right to the discovery, and the demurrer was allowed (*g*).

So where a bill was filed by a person claiming under a grant from the duchy of Lancaster, to be bailiff of a liberty within the duchy, with a right to all waifs, estrays, and other casualties within the liberty, and all fees and perquisites respecting the same, against the owner of an inn in the liberty, and his tenants, alleging that the inn-yard had been used as a common pound within the liberty for all waifs and strays and casualties; and that the tenant, under demise from the owner, had seized and taken all waifs and strays and other casualties; and received the fees and perquisites thereon; and required the owner to discover how he derived title thereto, and what leases or demises he had made thereof; a demurrer to the discovery was allowed (*h*). In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the

(*g*) *Adderley* and *Sparrow*, in Chan. Hil. 1779.

(*h*) *Ritson* v. *Sir John Danvers*, in Duchy C of Lancaster, 28 Oct. 1787, by the Chancellor, assisted by Lord Loughborough and Mr. Justice Wilson. The cases of *Sparrow* v. *Adderley*, *Hungerford* v. *Goreing*, 2 Vern. 38, *Stapleton* v. *Sherrard*, 1 Vern. 212, *Sherbone* v. *Clerk*, 1 Vern. 273, and *Welby* and *D.* of *Rutland*, 2 Brown P. C. 39 Toml. Ed. were cited; and Lord Loughborough mentioned a case of *Sir William Wake* and *Conyers* before Lord Northington. See also *Corporation of Dartmouth* against *Seale* in Chan. 18 Dec. 1717. rep. 1 Cox. R. 416. See also *Ritson* v. Sir *John Danvers*, 24 Nov. 1790, on demurrer to an amended bill, Baron *Thomson* assisting the Chancellor; and *Att. Gen.* v. Sir *John Danvers*, 25 Jan. 1792. Grose J. and Thomson B. assisting.

defendant is not bound to discover the evidence of the title under which he claims (*i*). And therefore, on a bill filed by an heir ex parte materna against a general devisee and executor, who had completed by conveyance to himself a purchase of a real estate contracted for by the testator after the date of his will, alleging that there was no heir ex parte paterna, but that the devisee set up a title under a release from his father as heir ex parte paterna of the testator, and praying a conveyance to the plaintiff, and seeking a discovery in *what manner* the father claimed to be heir ex parte paterna, and the particulars of the pedigree, under which he claimed, a demurrer to that discovery was allowed (*k*).

V. As the object of the court in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If therefore the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays relief, or does not show a title to sue the defendant in some other court (*l*), or that he is actually involved in litigation

(*i*) *Stroud* v. *Deacon*, 1 Vez. 37. *Buden* v. *Dore*, 2 Vez. 445. *Sampson* v. *Swettenham*, 5 Madd. 16. *Tyler* v. *Drayton*, 2 Sim. & Stu. 309, and the cases therein cited; and see *Chamberlain* v. *Knapp*, 1 Atk. 52.

(*k*) *Ivie* v. *Kekewich* in Ch. 27 July, 1795, rep. 2 Ves. J. 679.

(*l*) *Debbieg* and *Lord Howe*, in Chan. Hil. 1782; cited 3 Bro. C. C. 155. *Wallis* v. *Duke of Portland*, 3 Ves. 494. *The Mayor of London* v. *Levy*, 8 Ves. 398. *Lord Kensington*, v. *Mansell*, 13 Ves. jun. 240.

with the defendant, or liable to be so, and does not also show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer will hold (*m*). Therefore where a bill filed by a mortgagor against a mortgagee to redeem sought a discovery, whether the mortgagee was a trustee, a demurrer to the discovery was allowed. For as there was no trust declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the defendant or not (*n*). So where a bill was filed by a lord of a borough, praying, amongst other things, a discovery, whether a person applying to be admitted tenant was a trustee, the defendant demurred (*o*), it being wholly immaterial to the plaintiff's case whether the defendant was a trustee or not. And where a bill was brought for a real estate, and sought discovery of proceedings in the ecclesiastical court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the ecclesiastical court being immaterial to the plaintiff's case (*p*). Again, where a bill, to establish an agreement for a separate maintenance for the defendant's wife, prayed a discovery of ill treatment of the wife, to make her recede from the agreement, the defendant demurred to the dis-

(*m*) See cases cited last page, note (*l*); and see 1 Vez. 249, 1 Bro. C. C. 97, and *Askam* v. *Thompson*, 4 Pri. Exch. R. 330. *Cardale* v. *Watkins*, 5 Madd. 19.

(*n*) *Harvey* v. *Morris*, Rep. Tem. Finch. 214.

(*o*) *Lord Montague* v. *Dudman*, 2 Vez. 396.

(*p*) 2 Atk. 388.

covery (*q*) which could not be material to the case made by the bill. But in general, if it can be supposed that the discovery may in any way be material to the plaintiff in the support or defence of any suit, the defendant will be compelled to make it (*r*). Thus where a bishop filed a bill against the patron of a living and a clerk presented by him, to discover whether the clerk had given a bond of resignation, and the patron demurred, because the discovery either was such as might subject him to penalties and forfeitures, or it was immaterial to the plaintiff, the demurrer was over-ruled; the court declaring a clear opinion that the bond was not simoniacal, but conceiving that the discovery might be material to support a defence to a *quare impedit*, upon this ground, "that the bond put the clerk under the power of "the patron, in derogation of the rights of the or-"dinary (*s*)."

VI. The situation of a defendant may render it improper for a court of equity to compel a discovery, either because the discovery may subject the defend-

(*q*) *Hincks* v. *Nelthrope*, 1 Vern. 204.

(*r*) 1 Vez. 205; and see *Richards* v. *Jackson*, 18 Ves. 472. 1 Madd. R. 192. *Att. Gen.* v. *Berkeley*, 2 Jac. & W. 291.

(*s*) *Bishop of London*, against *Ffytche*, in Chan. Trin. 1781. In consequence of this decision an answer was put in admitting the bond; and a *quare impedit* being brought, it was finally determined in the house of lords against the patron, and he consequently lost his presentation. Perhaps, therefore, the overruling the demurrer was in contradiction to the principles on which courts of equity have proceeded in the cases considered under the next head. See the case reported in 1 Bro. C. C. 96, and Cunningham's Law of Simony. See also *Grey* v. *Hesketh*, Ambl. 268.

ant to pains or penalties, or to some forfeiture, or something in the nature of a forfeiture; or it may hazard his title in a case where in conscience he has at least an equal right with the person requiring the discovery, though that right may not be clothed with a perfect legal title (*t*).

It is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of the punishment (*u*). If therefore a bill requires an answer which may (*x*) subject the defendant to any pains or penalties, he may demur to so much of the bill (*y*). As if a bill charges any thing which, if confessed by the answer, would subject the defendant to any criminal prosecution (*z*), or to any particular penalties, as an usurious contract (*a*), maintenance (*b*), champerty (*c*), simony (*d*). And in such cases, if the defendant is

(*t*) See *Ivy* v. *Kekewich*, 2 Ves. J. 679. *Lord Shaftesbury* v. *Arrowsmith*, 4 Ves. 66. 13 Ves. 251. 15 Ves. 378. *Wright* v. *Plumtree*, 3 Madd. 481. *Glegg* v. *Legh*, 4 Madd. 193.

(*u*) 2 Vez. 245, and the authorities referred to in note, 1 Eq. Ca. Ab. 131, 11 Ves. 525, 2 Swanst. 214.

(*x*) 1 Atk. 539, 1 Swanst. 305.

(*y*) See *Billing* v. *Flight*, 1 Madd. R. 230. And it may be observed, that such a demurrer will not be regarded as any admission of the truth of the charge; 16 Ves. 69.

(*z*) *East India Company* v. *Campbel*, 1 Vez. 246. *Chetwynd* v. *Lindon*, 2 Vez. 451. *Cartwright* v *Green*, 8 Ves. 405. 14 Ves. 65.

(*a*) *Fenton* v. *Blomer*, Tothill 135. *Earl of Suffolk* v. *Green*, 1 Atkyns 450. 2 Atk. 393. 22 Vin. Ab. Usury, Q. 4. *Whitmore* v. *Francis*, 8 Pri. Ex. R. 616.

(*b*) *Penrice* v. *Parker*, Rep. Temp. Finch. 75. *Sharp* v. *Carter*, 3 P. Wms. 375. *Wallis* v. *Duke of Portland*, 3 Ves. 494.

(*c*) See 2 Sim. & Stu. 252.

(*d*) *Att. Gen.* v. *Sudell*, Prec. in Ch. 214. 1 Meriv. 401. But see p. 193, note (*s*)

not obliged to answer the facts he need not answer the circumstances, though they have not such an immediate tendency to criminate (*d*).

If the plaintiff is alone entitled to the penalties, and expressly waves them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty (*e*). As if a rector, or impropriator or vicar, files a bill for tithes, he may wave the penalty of the treble value (*f*), to which he is entitled by the statute of 2 & 3 Edward VI. and thus become entitled to a discovery of the tithes subtracted. And though a discovery may subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot wave, yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, which is the common case with respect to servants of the East-India company, he shall be compelled to answer (*g*). Where, too, a person by his own agreement subjects himself to a payment in the nature of a penalty if he does a particular act, a demurrer to discovery of that act will not hold (*h*). Thus where a lessee covenanted not to dig loam, clay, sand or gravel, except for the purpose of building on the land demised, with a proviso that if he should dig any of those articles for

(*d*) 1 Vez. 247, 248. 19 Ves. 227, 228.

(*e*) *Lord Uxbridge* v. *Staveland*, 1 Vez. 56. And see 1 Vern. 129. *Bullock* v. *Richardson*, 11 Ves. 373.

(*f*) *Anon.* 1 Vern. 60.

(*g*) *South Sea Comp.* v. *Bumsted*, 1 Eq. Ca. Ab. 77. *E. I. Comp.* v. *Atkins*, 2 Vez. 108. And see *Paxton* v. *Douglas*, 16 Ves. 239.

(*h*) See *Morse* v. *Buckworth*, 2 Vern. 443. *E. I. Comp.* v. *Neave*, 5 Ves. 173.

any other purpose, he should pay to the lessor twenty shillings a cart-load, and he afterwards dug great quantities of each article; upon a bill for discovery of the quantities, waving any advantage of possible forfeiture of the term; a demurrer of the lessee, because the discovery might subject him to a payment by way of penalty, was over-ruled (*g*).

And a party shall not protect himself against relief in a court of equity, by alleging that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime, though the court will not force him by his own oath to subject himself to punishment; and therefore in the case of a bill to inquire into the validity of deeds upon a suggestion of forgery, the court has entertained jurisdiction of the cause; and though it has not obliged the party to a discovery of any fact which might tend to show him guilty of the crime, has directed an issue to try whether the deeds were forged (*h*).

It should seem that a demurrer will also hold to any discovery which may tend to show the defendant guilty of any moral turpitude, as the birth of a child out of wedlock (*i*). But a mother has been compelled to discover where her child was born, though it might tend to show the child to be an alien (*k*); for that was not a discovery of any illegal act, or

(*g*) *Richards* against *Cole*, or *Brodrepp* against *Cole*, in Chan. Hil. vacation 1779.

(*h*) 2 Vez. 246. See also 1 Eq. Ca. Ab. 131, p. 11. *Att. Gen.* v. *Sudell*, Prec. in Cha. 214.

(*i*) Parker, 163. 2 Vez. 451. *Franco* v. *Bolton*, 3 Ves. 368. *King* v. *Burr*, 3 Meriv. 698.

(*k*) *Att. Gen.* v. *Duplessis*, 2 Vez. 287, ib. 494.

of any act which could affect the character of the defendant (*l*).

A demurrer will likewise hold to a bill requiring a discovery which may subject the defendant to any forfeiture (*m*) of interest: as if a bill is brought to discover whether a lease has been assigned without licence (*n*); or whether a defendant, entitled during widowhood (*o*), or liable to forfeiture of a legacy in case of marriage without consent (*p*), is married; or to discover any matter which may subject a defendant entitled to any office or franchise to a *quo warranto* (*q*). But if the plaintiff is alone entitled to the benefit of the forfeiture, and expressly waves (*r*) it by the bill, as in the case of a bill for discovery of waste (*s*), a demurrer will not hold; for the waver gives the court a ground of equity to award an injunction, if the plaintiff sues for the forfeiture (*t*). If the discovery sought is of a matter which would show the defendant incapable of having any interest or title; as whether a person claiming a real estate under a devise was an alien, and consequently incapable of taking by purchase (*u*); a demurrer will not hold. And where a devise over of an estate in case of marriage was considered as a conditional limitation

(*l*) 1 Meriv. 400.

(*m*) Tothill, 69.

(*n*) *Lord Uxbridge* v. *Staveland*, 1 Vez. 56.

(*o*) *Monnins* v. *Monnins*, 2 Chan. Rep. 68.

(*p*) *Chauncey* v. *Tahourden*, 2 Atk. 392. *Chancey* v. *Fenhoulet*, 2 Vez. 265.

(*q*) 1 Eq. Ca. Ab. 131, p. 10.

(*r*) 1 Vez. 56. See above, p. 195, note (*e*).

(*s*) 2 Atk. 393. *Att. Gen.* v. *Vincent*, 2 Eq. Ca. Ab. 378. S. C. cited Com. R. 664.

(*t*) 1 Vez. 56.

(*u*) *Att. Gen.* v. *Duplessis*, Parker, 144.

and not as a forfeiture, a demurrer to a bill for a discovery of marriage was over-ruled (*x*).

A defendant may in the same manner demur to a discovery which may subject him to any thing in the nature of a forfeiture (*y*); as where a discovery was sought whether the defendant was educated in the popish religion, by which he might have incurred the incapacities in the statute 11 and 12 Will. III. (*z*); or whether a clergyman was presented to a second living, which avoided the first (*a*).

But where a person against whom a commission of bankrupt had issued, had brought actions against the assignees under the commission, disputing its validity, and particularly insisting that he had not been a trader within the meaning of the bankrupt laws, and in those actions the validity of the commission had been established; and the assignees filed a bill against him, stating these facts, and that being harassed by these actions, and threatened with other actions, they were not able to distribute the effects under the commission, and therefore praying a perpetual injunction to restrain further actions, and requiring a discovery amongst other things, of acts of trading, a demurrer to that discovery was over-ruled (*b*).

(*x*) 2 Atk. 393. *Lucas* v. *Evans*, 3 Atk. 260. 2 Vez. 265.

(*y*) 3 Atk. 457.

(*z*) *Jones* v. *Meredith*, Com. 661; and see ib. 664. *Smith* v. *Read*, 3 Bac. Ab. 800. 1 Atk. 527. 2 Vez. 394. The 18 Geo. 3, c. 60, the 31 Geo. 3, c. 32, and the 43 Geo. 3, c. 30, do not entirely remove these incapacities.

(*a*) *Boteler* v. *Allington*, 3 Atk. 453.

(*b*) *Chambers* v. *Thomson*, 1 Nov. 1793. rep. 4 Bro. C. C. 434, affirmed on rehearing, March 1794. See *Protector* and *Lord Lumley*, Hardres 22. See also *Selby* v. *Crew*, 1 Anstr. 504.

If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold (*c*). The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim (*d*). Upon the same principle a jointress may in many cases demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the bill; though ordinarily advantage is taken of this defence by way of plea (*e*).

This arises from that singularity in the jurisprudence of this country, produced by the establishment of the extraordinary jurisdiction of courts of equity distinct from the ordinary jurisdictions noticed in a former page, and necessarily creating a distinction between legal and equitable rights (*f*). Where the courts of equity are called upon to administer justice upon grounds of equity against a legal title, they allow a superior strength to the legal title when the rights of the parties are in conscience equal; and where a legal title may be enforced in a court of ordinary jurisdic-

(*c*) See *Glegg* v. *Legh*, 4 Madd. 193.

(*d*) 2 Ves. J. 458. *Sweet* v. *Southcote*, 2 Bro. C. C. 66.

(*e*) *Chamberlain* v. *Knapp*, 1 Atk. 52. 2 Vez. 450, 2 Vez. 662.

(*f*) 2 Vez. 573, 574.

tion to the prejudice of an equitable title, the courts of equity will refuse assistance to the legal against the equitable title where the rights in conscience are equal.

If the grounds on which a defendant might demur to a particular discovery appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering the rest of the bill, declines answering to so much, the court will not compel him to make the discovery (*g*). But in general, unless it appears clearly by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold; and the defendant, unless he can protect himself by plea, must answer.

Where the sole object of a bill is to obtain a discovery, some grounds of demurrer, which if the bill prayed relief would extend to discovery as well as to the relief, will not hold. Thus a demurrer to a bill for a discovery merely will not hold for want of parties, for the plaintiff seeks no decree; nor, in general, for want of equity in the plaintiff's case for the same reason; nor because the bill is brought for the discovery of part of a matter, for that is merely a demurrer because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters against several distinct defendants. For though a defendant is always eventually paid his costs upon

(*g*) See *Wrottesley* v. *Bendish*, 3 P. Wms. 235. 1 Meriv. 401. See below, Chap. 2. sect. 2. part 3.

a bill of discovery if both parties live, and the plaintiff by amendment of his bill does not extend it to pray relief, yet the court ought not to permit the defendant to be put to any unnecessary expense, as either the plaintiff or defendant may die pending the suit (*g*).

After an answer to a bill of discovery, when time for excepting to it as insufficient is expired, the defendant may apply for costs as a matter of course (*h*), unless the plaintiff shall in the mean time have obtained an order to amend his bill; which may be done either to obtain a fuller discovery, or if the case appearing on the answer will warrant the proceeding, by adding to the bill a prayer for relief (*i*).

Demurrers have hitherto been noticed with reference only to original bills. As every other kind of bill is a consequence of an original bill, many of the causes of demurrer which will apply to an original bill will also apply to every other kind; but the peculiar form and object of each kind afford distinct causes of demurrer to each. Thus if a bill of revivor does not show a sufficient ground for reviving the suit (*k*), or any part of it (*l*), either by or against (*m*)

(*g*) See next page and notes (*p*) and (*q*).

(*h*) See 4 Ves. 746. *Hewart* v. *Semple*, 5 Ves. 86. *Noble* v. *Garland*, 1 Madd. 344. But, it seems that the time within which the exceptions must be filed, has latterly, under special circumstances, been extended. See *Baring* v. *Prinsep*, 1 Madd. R. 526.

(*i*) On this subject see *Butterworth* v. *Bailey*, 15 Ves. 358.

(*k*) *Humphreys* v. *Incledon*, Dick. 38. *Harris* v. *Pollard*, 3 P. Wms. 348.

(*l*) 1 Eq. Ca. Ab. 3, 4.

(*m*) *University College* v. *Foxcroft*, 2 Ch. Rep. 244.

the person by or against whom it is brought, the defendant may by demurrer show cause against the revival (*n*). Indeed though the defendant does not demur, yet if the plaintiff does not show a title to revive, he will take nothing by his suit at the hearing (*o*). A demurrer will also in many cases hold to a bill of revivor brought singly for costs (*p*); the court in general not permitting a suit to be revived for that purpose only, except where the costs have been actually taxed before the abatement happened (*q*).

If a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur (*r*). If a bill is brought as a supplemental bill upon matter arising subsequent to the time of filing the original bill, against a person who claims no interest arising out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may also demur; especially if the bill prays that he may answer the matters charged in the former bill. These, however, are grounds of demurrer arising

(*n*) 3 P. Wms. 348.

(*o*) 3 P. Wms. 348.

(*p*) 2 Eq. Ca. Ab. 3. 2 Ves. J. 315. 10 Ves. 572. *Jupp* v. *Geering*, 5 Madd. 375.

(*q*) *Hall* v. *Smith*, 1 Bro. C. C. 438. *Morgan* v. *Scudamore*, 2 Ves. J. 313. S. C. 3 Ves. 195. *Lowten* v. *Mayor and Commonalty of Colchester*, 2 Meriv. 113. 3 Madd. 377.

(*r*) *Baldwin* v. *Mackown*, 3 Atk. 817, 2 Madd. R. 387; or, if the matter should have arisen subsequently, but be immaterial, the defendant may also demur. See *Milner* v. *Lord Harewood*, 17 Ves. 144. *Adams* v. *Dowding*, 2 Madd. R. 53. Ibid 388.

rather from the plaintiff's having mistaken his remedy, than from his being without remedy.

A cross-bill having nothing in its nature different from an original bill, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of demurrer to such a bill which will not equally hold to an original bill. And a demurrer for want of equity will not hold to a cross-bill filed by a defendant in a suit against the plaintiff in the same suit touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to show a ground of equity to support its jurisdiction (*s*), a cross-bill being generally considered as a defence (*t*).

A bill filed by the direction of the court for the purpose of obtaining its decree touching some matter not in issue by a former bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the court upon hearing of another cause, there is little probability that such a bill should be liable, in substance to any demurrer.

The constant defence to a bill of review for error apparent upon a decree has been said to be by plea of the decree, and demurrer against opening the enrolment. (*u*). There seems, however, no necessity for

(*s*) *Doble* v. *Potman*, Hardres, 160. 1 Eden. R. 190.

(*t*) 3 Atkyns, 812.

(*u*) *Dancer* v. *Evett*, 1 Vern. 392. *Smith* v. *Turner*, 1 Vern. 273. 2 Atk. 534. See also 3 Atkyns, 627. *O'Brien* v. *O'Connor*, 2 Ball & B. 146.

pleading the decree, if fairly stated in the bill: the books of practice contain the forms of a demurrer only to such a bill, and there are cases accordingly (*x*).

On argument of a demurrer to a bill of review where several errors in the decree have been assigned, if the plaintiff should prevail only in one, the demurrer must be over-ruled, as one error will be sufficient to open the enrolment; and on argument of a demurrer to a bill of review for error apparent in the decree, the court has ordered the defendant to answer, saving the benefit of the demurrer to the hearing, and on the hearing has finally allowed the demurrer (*y*).

Where the decree has been pronounced above twenty years, the length of time is good cause of demurrer (*z*).

Where any matter beyond the decree is to be offered against opening the enrolment, that matter must be pleaded (*a*); and it has been said that length

(*x*) *Slingsby* v. *Hale*, 1 Ca. in Cha. 122. 1 P. Wms. 139; and see *Jones* v. *Kenrick*, 5 Bro. P. C. 244, and ib. 248; in which case the defendant appears to have pleaded the decree enrolled in bar of the first bill which did not state the decree, but to have demurred alone to the bill of review. And in *Helbut* and *Philpot*, in the house of Lords, 11 March 1725, the defendant demurred alone to a bill of review, and the demurrer was allowed, and the order affirmed by the Lords; and see *Denny* v. *Filmore*, 1 Vern. 135. S. C. 2 Freeman, 172.

(*y*) *Denny* v. *Filmer*, 2 Freeman, 172.

(*z*) *Edwards* v. *Carroll*, 2 Bro. P. C. 98, Toml. ed.; and see *Smythe* v. *Clay*, 4 Bro. C. C. 539, n. S. C. 1 Bro. P. C. 453, Toml. Ed. S. C. Ambl. 645.

(*a*) See *Hartwell* v. *Townsend*, 2 Bro. P. C. 107. Toml. Ed.

of time must be pleaded to a bill of review, and that otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like (*a*). A bill of review upon the discovery of new matter, and a supplemental bill of the same nature, being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy, ought to be considered at the time leave is given to bring the bill (*b*). Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill. If upon argument of a demurrer to a bill of review the demurrer is

(*a*) *Gregor* v. *Molesworth*, 2 Vez. 109. See, however, *Sherrington* v. *Smith*, 2 Bro. P. C. 62, Toml. ed. *Gorman* v. *M'Cullock*, 5Bro. P. C. 597, Toml. ed. See 3 P. Wms. 287, note B, and post. p. 212, as to a demurrer on the ground of length of time; and it should seem that if the plaintiff can allege any exception to a positive rule, he ought to do so by his bill. In *Lytton* v. *Lytton*, 4 Bro. C. C. 441, the exception was stated in the bill, and admitted by the answer. If length of time must be pleaded, yet the plaintiff can have no benefit of exception not stated in the bill, unless it should be required that the plea should be supported by averments negativing every *possible* exception, to which there seem to be great objections.

(*b*) 2 Atkyns, 40. See what is stated in regard to a mere supplemental bill, 17 Ves. 148, 149. 2 Madd. R. 61. And see above 202, note (*r*).

allowed, the order allowing it, being enrolled, is an effectual bar to another bill of review (*c*).

If upon the face of a bill to carry a decree into execution the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.

Bills in the nature of bills of revivor and supplement are liable to objections of the same sort as may be made to the kinds of bills of whose nature they partake.

In addition to the several particular causes of demurrer applicable to particular kinds of bills, it may be observed that any irregularity in the frame of a bill of any sort may be taken advantage of by demurrer. Thus if a bill is brought contrary to the usual course of the court, a demurrer will hold (*d*). As where after a decree directing encumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over the demands of some of the defendants (*e*). This was a bill to vary a decree, and yet was neither a bill of review, nor a bill in nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a de-

(*c*) See *Denny* v. *Filmer*, 2 Ca. in Cha. 133. S. C. 1 Vern. 135, and ib. 417. *Pitt* v. *Earl of Arglass*, ib. 441. *Woots* v. *Tucker*, 2 Vern. 120.

(*d*) See *Wortley* v. *Birkhead*, 3 Atk. 809. S. C. 2 Ves. 571. *Lady Granville* v. *Ramsden*, Bunb. 56. *Earl of Darlington* v. *Pulteney*, 3 Ves. 386. *Fletcher* v. *Tollett*, 5 Ves. 3. *Ogilvie* v. *Herne*, 13 Ves. 563. *Maule* v. *Duke of Beaufort*, 1 Russ. R. 349.

(*e*) 3 Atk. 811.

cree (*f*), unless the decree has been obtained by fraud (*g*). So if a supplemental bill is brought against a person not a party to the original bill, praying that he may answer the original bill, and no reason is suggested why he could not be made a party to the original bill by amendment, he may demur (*h*). If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. As if a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill (*i*), which consequently ought to be the subject of a supplemental bill, or bill of revivor. But if a matter arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill, is stated by amendment, and the defendant answers the amended bill, it is too late to object to the irregularity at the hearing (*k*). For as the practice of introducing by supplemental bill matter arisen subsequent to the institution of a suit has been established merely to preserve order in the pleadings, the reason on which it is founded ceases when all the proceedings to obtain the judgment of the court have been had without any inconvenience arising from the irregularity (*l*).

(*f*) Arg^do^ 3 Atk. 811. *Read* v. *Hambey*, 1 Ca. in Cha. 44. S. C. 2 Freem. 179. 13 Ves. 564.

(*g*) Arg^do^ 3 Atk. 811. *Galley* v. *Baker*, Ca. t. Talb. 199. *Manaton* v. *Molesworth*, 1 Eden. R. 25. 13 Ves. 564.

(*h*) *Baldwin* v. *Mackown*, 3 Atk. 817.

(*i*) 1 Atkyns, 291. *Pilkington* v. *Wignall*, 2 Madd. 240.

(*k*) *Belchier* against *Pearson*, at the Rolls, 13 July 1782.

(*l*) See above, p. 202.

Having thus considered the several grounds of demurrer, it may be proper to observe some particulars with respect to the frame of demurrers, the manner in which they are offered to the court, and the manner in which their validity may be determined, or their consequences avoided.

A demurrer must be signed by counsel (*l*); but is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill (*m*). It is therefore considered, that the defendant may, by advice of counsel, upon the sight of the bill only, be enabled to demur thereto (*n*); and for this reason it is always made the special condition of an order giving the defendant time to demur plead or answer to the plaintiff's bill, that he shall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to or answer some part of the bill (*o*). It has been held, that

(*l*) See Ord. in Cha. 172. Ed. Bea.

(*m*) 2 Vez. 247. 1 Madd. R. 236.

(*n*) Ord. in Cha. 172. Ed. Bea.

(*o*) If the defendant should apply for time to answer generally, it would be presumed that his case does not require the usual indulgence to the extent mentioned in the text; and the order would be drawn up accordingly, see 10 Ves. 448. 1 Ves. & B. 186, and, he would be bound to answer, 10 Ves. 446; but a plea would be considered within the meaning of this term, see *Roberts* v. *Hartley*, 1 Bro. C. C. 56. *De Minkuitz* v. *Udney*, 16 Ves, 355. *Barber* v. *Crawshaw*, 6 Madd. 284, unless, perhaps, it were of a description not required to be put in upon oath, see *Phillips* v. *Gibbons*, 1 Ves. & B. 184; and see Anon, 2 P. Wms. 464; 3 P. Wms. 81; but the defendant would not be allowed to demur alone, *Kenrick* v. *Clayton*, 2 Bro. C. C. 214. S. C. Dick, 685; or even to answer and demur, *Taylor* v. *Milner*, 10 Ves. 444. *Mann*

answering to some fact immaterial to the cause, and denying combination (*o*), do not amount to a compliance with the terms of such an order; and therefore, upon motion, a demurrer accompanied by such an answer has been discharged (*p*). This rule has been probably established under a notion that time is not necessary to determine whether a defendant may demur to a bill or not, and a supposition that a demurrer may be filed merely for delay. But whether a bill may be demurred to is sometimes a subject of serious and anxious consideration; and the preparation of a demurrer may require great attention, as if it extends in any point too far it must be over-ruled. Great inconvenience therefore may arise from a strict adherence to this rule. For it often happens that a defendant cannot answer any material part of the bill without over-ruling his demurrer; it being held that if a defendant answers to any part of a bill to which he has demurred he waves the benefit of the demurrer (*q*); or if he pleads to any part of

v. *King*, 18 Ves. 297, except under peculiar circumstances, and upon leave granted by the Court, on a special application for that purpose, see *Bruce* v. *Allen*, 1 Madd. R. 556. *Sherwood* v. *Clark*, 9 Pri. Ex. R. 259.

(*o*) As to the necessity of denying a general charge of combination, see ab. p. 40. The charge of combination, in order to be material, with the view of preventing a demurrer for want of equity by parties not interested, must be specific. *Smith* v. *Snow*, 3 Madd. 10.

(*p*) *Stephenton* v. *Gardiner*, 2 P. Wms. 286. 4 Vin. Abr. 442. *Lee* v. *Pascoe*, 1 Bro. C. C. 78; and see *Kenrick* v. *Clayton*, 2 Bro. C. C. 214. S. C. Dick. 685. *Lansdown* v. *Elderton*, 8 Ves. 526. *Tomkin* v. *Lethbridge*, 9 Ves. 178. 10 Ves. 446, 447, 448. 2 Ves. & B. 123.

(*q*) See *Hester* v. *Weston*, 1 Ves. 463. *Jones* v. *Earl of Strafford*, 3 P. Wms. 79. *Abraham* v. *Dodgson*, 2 Atk. 157.

a bill before demurred to the plea will over-rule the demurrer (*r*). For the plaintiff may reply to a plea or answer, and thereupon examine witnesses, and hear the cause; but the proper conclusion of a demurrer is to demand the judgment of the court whether the defendant ought to answer to so much of the bill as the demurrer extends to, or not (*s*). The condition, that the defendant shall not demur alone, ought therefore, perhaps, to be considered liberally; and it has been formerly said, that the court will not incline to discharge a demurrer if the defendant denies combination only where he cannot answer further without over-ruling his demurrer (*t*). Indeed any material answer must in many cases over-rule the demurrer; so that giving a defendant time to demur, plead, or answer, not demurring alone, is often in effect giving leave to do a thing, but clogging the permission with a condition which makes it nugatory: and though the rule was first adopted upon a reasonable ground to prevent unnecessary delay, it may, if strictly observed, contradict the maxim, that a court of equity ought not for form sake to do a great injustice (*u*). However the modern practice is according to the original strictness of the rule (*x*); and it may be be better, where the case requires it, to relax the rule

(*r*) *Dormer* v. *Fortescue*, 2 Atk. 282.

(*s*) 3 P. Wms. 80.

(*t*) See *Done* v. *Peacock*, 3 Atk. 726. See above, p. 181, note (*b*).

(*u*) 1 Vez. 247.

(*x*) *Attorney Gen.* v. *Jenner*, in Ch. 9 Nov. 1738. *Sir John Dyneley Goodere* against *Dean and Chapter of Worcester*, in Exchequer, 1777. *Lee* against *Pascoe*, in Chancery, East. 1780. 1 Bro. Ch. Ca. 77. 8 Ves. 527. 10 Ves. 447. See above, pp. 208 & 209, and notes (*o*), (*p*), & (*q*).

upon special application to the court (*x*) than to permit it to be evaded (*y*). Indeed in some cases an answer to any part of the bill may over-rule the demurrer; for if the ground of demurrer applies to the whole bill, the answering to any part is inconsistent (*z*); and therefore when the ground of demurrer was the general impropriety of the bill, and that the defendant ought not therefore to be compelled to answer it, his answer to an immaterial part, in compliance with the order for time which he had obtained, over-ruled his demurrer (*a*).

As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true (*b*); thus if a demurrer is to the whole bill the whole (*c*) is taken for true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed is con-

(*x*) And this, upon a special ground, the Court will do. See above p. 209, note (*n*).

(*y*) It seems that very little by way of answer will satisfy the terms of the order; but that the Court considers the practice in this respect to be guarded by the honour of Counsel. See *Tomkin* v. *Lethbridge*, 9 Ves. 178. 11 Ves. 73.

(*z*) *Tidd* v. *Clare*, Dick. 712.

(*a*) *Ruspini* v. *Vickery*, in Chan. 16 Jan. 1793.

(*b*) 2 Ves. & Bea. 95. 1 Madd. R. 565.

(*c*) That is, every thing necessary to support the plaintiff's case which is well charged in the bill. 1 Ves. 426, 427. 1 Ves. jun. 289. Facts on a demurrer are taken to be true; that is, facts which are well and materially alleged. Lord Hardwicke in *Butler* v. *Royal Exchange Assurance*, in Chan. 22 Nov. 1749. 1 Ves. jun. 78. 289. 3 Meriv. 503. 1 Madd. 565.

sidered as true. A demurrer is therefore always preceded by a protestation against the truth of the matters contained in the bill; a practice borrowed from the common law, and probably intended to avoid conclusion in another suit.

The admission by a demurrer of the truth of the facts stated in the bill has been considered as one reason why a defence founded on length of time, though apparent on the face of the bill, without any circumstance stated to avoid its effect, cannot generally be made by demurrer (*c*). Upon a demurrer to a bill brought to impeach transactions which had passed twenty-eight years before the bill was filed, on the ground of fraud, without any sufficient cause shown for not instituting the suit sooner, it was said by the court that the party who demurs admits every thing well pleaded, in manner and form as pleaded; and a demurrer ought therefore in a court of law to bring before the court a question of law merely; and in a court of equity, a question of law or equity merely. The demurrer therefore must be taken to admit the whole case of fraud made by the bill; and the argument to support it must be, not that a positive limitation of time has barred the suit,

(*c*) But, if the plaintiff's case be so stated in the bill as to show that his claim is barred by lapse of time, and no ground of exception, as infancy, or the like, be alleged therein, it seems that, contrary to the opinion of Lord Hardwicke, expressed in a case in which the suit was for redemption of a mortgage, after quiet possession by the mortgagee of more than twenty years, (see *Aggas* v. *Pickerell*, 3 Atk. 225; and see 2 Ves. jun. 84,) the defendant may demur. *Beckford* v. *Close*, cited 3 Bro. C. C. 644, 4 Ves. 476, ib. 479. *Foster* v. *Hodgson*, 19 Ves. 180.

for that would be a pure question of law, but that from long acquiescence it should be presumed that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had released or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be over-ruled, because the defendant has no right to avail himself by demurrer of an inference of fact, upon matter on which a jury in a court of law would collect matter of fact to decide their verdict, if submitted to them, or a court would proceed in the same manner in equity. What limitation of time will bar a suit where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law (*d*), and therefore cannot be made on a demurrer (*e*).

A demurrer must express the several causes (*f*) of demurrer (*g*); and in case the demurrer does not

(*d*) See *Cuthbert* v. *Creasy*, 6 Madd. 189.

(*e*) *Ld. Deloraine* v. *Browne*, in Chan. 13 & 14 June, 1792. 3 Bro. C. C. 633. But see p. 204, as to demurrers to bills of review. In *Tobin* v. *Beckford*, on appeal from Jamaica, 26 July 1784, a demurrer to a bill to redeem on account of length of time was allowed by the council, present *Kenyon*, M. R. after consideration.—

(*f*) See 3 Madd. 8. 1 Jac. R. 467; and see *Harrison* v. *Hogg*, 2 Ves. jun. 323.

(*g*) *Peachie* v. *Twycrosse*, Cary Rep. 113. Ord. in Cha. Ed. Bea. 77. 173.

go to the whole bill, it must clearly express the particular parts of the bill demurred to (*h*). If a demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it was generally considered that the demurrer being entire must be over-ruled (*i*). But there are instances (*k*) of allowing a demurrer in part (*l*); and a defendant may put in separate demurrers to separate and distinct parts of a bill for separate and distinct causes (*m*). For the same ground of demurrer frequently will not apply to different parts of a bill, though the whole may be liable to demurrer; and

(*h*) *Chetwynd* v. *Lindon*, 2 Ves. 451. *Devonsher* v. *Newenham*, 2 Sch. & Lefr. 199. And this must be done, not by way of exception, as by demurring to all except certain parts of the bill, but by positive definition of the parts to which he thereby seeks to avoid answering. See *Robinson* v. *Thompson*, 2 Ves. & Bea. 118. *Weatherhead* v. *Blackburn*, 2 Ves. & Bea. 121. Sed vid. *Hicks* v. *Raincock*, 1 Cox R. 40.

(*i*) 1 Ves. 248. *Earl of Suffolk* v. *Green*, 1 Atk. 450. *Todd* v. *Gee*, 17 Ves. 273. 1 Swanst. 304. 1 Jac. R. 467. But though a demurrer cannot be good in part and bad in part (8 Ves. 403; 11 Ves. 70; 17 Ves. 280), it appears that where such a mode of defence has been resorted to by several defendants jointly, it may be good as to some of them, and bad as to the others, see 8 Ves. 403, 404.

(*k*) *Rolt* v. *Lord Somerville*, 2 Eq. Ca. Ab. 759. *Radcliffe* v. *Fursman*, 2 Bro. P. C. 514, Toml. Ed.

(*l*) Although this is not now the practice, the Court will in some instances, on the argument of a demurrer, grant leave, upon over-ruling it, to the defendant to put in another less extended (*Thorpe* v. *Macauley*, 5 Madd. 218), and will, even *after* it has been over-ruled, sometimes be induced to grant a similar indulgence. *Baker* v. *Mellish*, 11 Ves. 68.

(*m*) 3 P. Wms. 149. *Roberdeau* v. *Rous*, 1 Atk. 544.

in this case one demurrer may be over-ruled upon argument, and another allowed (*n*).

If the plaintiff conceives that there is not sufficient cause apparent on his bill to support a demurrer put in to it, or that the demurrer is too extensive, or otherwise improper, he may take the judgment of the court upon it; and if he conceives that by amending his bill he can remove the ground of demurrer, he may do so before the demurrer is argued, on payment of costs, which vary according to the state of the proceedings (*o*). But after a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and therefore cannot be regularly amended (*p*). To avoid this consequence the court has sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties (*q*). Where a demurrer leaves any part of a bill untouched, the whole may be amended notwithstanding the allowance of the

(*n*) *North* v. *Earl and Countess of Strafford*, 3 P. Wms. 148.

(*o*) *Anon.* Mosely, 301. 1 Ves. jun. 448. *Anon.* 9 Ves. 221. 1 Alm. Cur. Canc. 565. 1 Harrison Chan. Pract. 39.

(*p*) See above, p. 14, note (*t*). *Lord Coningsby* v. *Sir Jos. Jekyll*, 2 P. W. 300, and note, and *Watkins* v. *Bush*, Dick, 701.

(*q*) And the Court, upon allowing a demurrer, will sometimes give the plaintiff leave to amend, see *Mayor, &c. of London* v. *Levy*, 8 Ves. 398; *Edwards* v. *Edwards*, 6 Madd. 255; and it seems probable that, even *after* allowance, the Court might be induced, under some circumstances, to set the cause on foot again, and to authorize an amendment of the bill. See 11 Ves. 72.

demurrer; for the suit in that case continues in court, the want of which circumstance seems to be the reason of the contrary practice where a demurrer to the whole of a bill has been allowed. A demurrer being frequently on matter of form is not in general a bar to a new bill; but if the court upon a demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit (*r*).

A demurrer being always upon matter apparent upon the face of the bill, and not upon any matter alleged by the defendant, it sometimes happens that a bill, which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any cause of demurrer. In this case the defendant is compelled to resort to a plea, by which he may allege matter which if it appeared on the face of the bill would be good cause of demurrer. For in many cases what is a good defence by way of plea is also good as a demurrer, if the facts appear sufficiently by the bill (*s*). And if a demurrer should be over-ruled on argument because the facts do not sufficiently appear on the face of the bill, defence may be made by plea, stating the facts necessary to bring the case truly before the court, though it has been said that the court would not permit two dilatories (*t*). And

(*r*) See the cases upon demurrers to bills of review cited above, p. 205, note (*a*).

(*s*) See Hetley 139. But see 3 Atk. 226.

(*t*) *Hudson* v. *Hudson*, in Chan. 23 April, 1734. Reported, 1 Sim. & Stu. 512. note. *Rowley* v. *Eccles*, 1 Sim. & Stu. 511.

after a plea over-ruled, it is said that a demurrer was allowed, bringing before the court the same question in substance as was agitated in arguing the plea (*u*). But after a demurrer has been over-ruled a second demurrer will not be allowed (*x*); for it would be in effect to rehear the case on the first demurrer; as on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer (*y*).

(*u*) *E. India Company* v. *Campbel.* 1 Vez. 246. But it may be doubted whether this case has not been mistaken by the reporter, and whether the question was not on exceptions to an answer. See 2 Vez. 491, 492.

(*x*) See 2 Bro. C. C. 66; and see above, p. 214, note (*l*). Where, however, a demurrer was informal in its frame, but good in substance, it was overruled, with liberty to the defendant to file another. See *Devonsher* v. *Newenham*, 2 Sch. & Lefr. 199. And, in consequence of the modern doctrine, that a defendant who submits to answer must in general answer fully, see below, Ch. 2, sect. 2, part 3, this Court, in some instances, on over-ruling a demurrer to discovery, instead of giving the defendant liberty to insist by answer that he is not bound to make the disclosure required, will give him liberty to file another less extensive. See *Thorpe* v. *Macauley*, 5 Madd. 218.

(*y*) As to demurrers *ore tenus*, see *Pyle* v. *Price*, 6 Ves. 779. 8 Ves. 408. *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245. 17 Ves. 216. *Att. Gen.* v. *Moses*, 2 Madd. R. 294. 1 Swanst. 288. *Knye* v. *Moore*, 1 Sim. & Stu. 61. *Hook* v. *Dorman*, 1 Sim. & Stu. 227.

CHAP.

CHAPTER II.

SECTION II.

PART II.

Of Pleas.

IN treating of pleas the same order may be conveniently pursued as has been already used in treating of demurrers. Pleas to original bills will therefore be first considered, and under that head the nature of pleas in general, and the principal grounds of plea to every kind of bill, will necessarily be noticed; the distinct pleas applicable peculiarly to the several other kinds of bill will be next mentioned; and in the third place the frame of pleas in general, and the manner in which their validity may be determined, will be considered. Pleas to original bills will also be considered under the two heads of pleas to relief, and pleas to discovery only, and these will necessarily involve the consideration of pleas to bills of discovery merely.

A demurrer has been mentioned to be the proper mode of defence to a bill when any objection to it is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it. When an objection to a bill is not apparent on the bill itself(*z*), if the defendant means

(*z*) See *Billing* v. *Flight*, 1 Madd. R. 230.

to take advantage of it, he ought to show to the court the matter which creates the objection, either by answer, or by plea, which has been described as a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred (*a*). The defence proper for a plea is such as reduces the cause, or some part of it, to a single point (*b*), and from thence creates a bar to the suit, or to the part to which the plea applies (*c*). It has been observed, that the end of a plea is to save to the parties the expense of an examination of witnesses at large; and that therefore it is not every good defence in equity that is good as a plea: for that where the defence consists of a variety of circumstances there is no use of a plea, as the examination must still be at large; and the effect of allowing a plea would be, that the court would give judgment on the circumstances of the case before they were made out by proof (*d*).

Pleas have been generally considered as of three sorts; to the jurisdiction of the court; to the person of the plaintiff or defendant; and in bar of the suit. As they have been usually arranged under these heads, it may be convenient to consider them in some degree with reference to that arrangement; but the order before observed in treating of demurrers may be at the same time pursued; and pleas may

(*a*) Prac. Reg. 324. Wy. Ed. 2 Sch. & Lefr. 725. 1 Madd. R. 194.

(*b*) 1 Atk. 54. 15 Ves. 82. 377.

(*c*) 2 Bligh. P. C. 614.

(*d*) *Chapman* v. *Turner*, 1 Atk. 54. S. C. 1 Harr. Chan. Prac. 356. 2 Bligh, P. C. 614.

be considered with reference to the several grounds already mentioned on which defence may be made to a bill.

The objections to the relief sought by an original bill which can be taken advantage of by way of plea, are nearly the same as those which may be the subject of demurrer; but they are rather more numerous, because a demurrer can extend to such only as may appear on the bill itself, whereas a plea proceeds on other matter. The principal are, I. That the subject of the suit is not within the jurisdiction of a court of equity; II. That some other court of equity has the proper jurisdiction; III. That the plaintiff is not entitled to sue by reason of some personal disability; IV. That the plaintiff is not the person he pretends to be, or does not sustain the character he assumes; V. That the plaintiff has no interest in the subject, or no right to institute a suit concerning it; VI. That he has no right to call on the defendant concerning it; VII. That the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear; VIII. That the defendant has not that interest in the subject which can make him liable to the demands of the plaintiff; and IX. That for some reason, founded on the substance of the case, the plaintiff is not entitled to the relief he prays. Of these the second is the plea generally termed a plea to the jurisdiction of the court; and the third, the fourth, and the seventh, are treated as pleas to the person of the plaintiff and defendant;

the others are considered as pleas in bar of the suit; X. The deficiency of a bill to answer the purposes of complete justice may also be shown by plea, which may be considered as in bar of the suit, though perhaps a temporary bar only. XI. The impropriety of unnecessarily multiplying suits may be the subject of plea, which is also in bar of the suit: but the inconvenience which may arise from confounding distinct matters in the same bill, as it must be apparent on the bill itself, unless very artfully framed, can in general only be alleged by demurrer.

Those pleas which are commonly termed pleas to the jurisdiction of the court do not dispute the rights of the plaintiff in the subject of the suit, or that they are fit objects of the cognizance of a court of equity, but simply assert that the court of chancery is not the proper court to take cognizance of those rights. Pleas to the person of the plaintiff also do not dispute the validity of the rights which are made the subject of the suit, but object to the plaintiff that he is by law disabled to sue in a court of justice, or cannot institute a suit alone; or that he is not the person he pretends to be, or does not sustain the character he assumes. Pleas in bar are commonly described as allegations of foreign matter, whereby, supposing the bill so far as it is not contradicted by the plea (*e*) to be true, yet the suit, or the part of it to which the plea extends, is barred (*f*). But this description perhaps does not comprise every kind of

(*e*) 2 Atk. 51. (*f*) Prac. Reg. 327. Wy. Ed. 1 Madd. R. 194.

plea, or does not mark the distinctions between the different kinds with sufficient accuracy.

I. The general objects of the jurisdiction of a court of equity, and the manner in which a want of jurisdiction may be alleged by demurrer, when a bill does not propose to attain any of those objects, or it is apparent on the face of it that none can be attained by it, have been already mentioned. A case which is not really such as will give a court of equity juristion cannot easily be so disguised in a bill as to avoid a demurrer; but there may be instances to the contrary; and in such cases it should seem a plea of the matter necessary to show that the court has not jurisdiction of the subject, though perhaps unavoidably in some degree a negative plea, would hold (*g*). Thus, if the jurisdiction was attempted to be founded on the loss of an instrument, where, if the defect arising from this supposed accident had not happened the courts of ordinary jurisdiction could completely decide upon the subject, perhaps a plea, showing the existence of the instrument, and that it was in the power of the plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a plaintiff by alleging a falsehood in his bill should be permitted to involve a defendant in the expense of a suit in equity, though the bill may finally be dismissed at the hearing of the cause, if the defendant answers

(*g*) See *Armitage* v. *Wadsworth*, 1 Madd. R. 189.

the case made by it, and enters into his defence at large. No authority, however, occurs to support such a plea (*h*); and as there is little disposition in the courts of equity to countenance those defences which tend to prevent the progress of a suit to a hearing in the ordinary way, whatever the expense of the proceeding may be, it would hardly be prudent to endeavour thus to put a stop to an attempt to transfer the jurisdiction of a suit from the ordinary courts to a court of equity; and indeed the guard put upon cases of this kind, by requiring the affidavit of the plaintiff of the truth of the matter which he alleges by his bill to support the jurisdiction of the court, is likely to prevent any abuse upon this head.

II. Though the subject of a suit may be within the jurisdiction of a court of equity, yet if the court of chancery is not the proper jurisdiction, the defendant may plead the matter which deprives the court of jurisdiction, and show to what court the jurisdiction belongs (*i*), and upon this ground may demand the judgment of the court whether he shall be compelled to answer the bill (*k*). Pleas of this nature arise principally where the suit is for land within a county palatine (*l*), or where the defendant

(*h*) See 1 Madd. R. 195.

(*i*) *Earl of Derby* v. *Duke of Athol*, 1 Ves. 202. *Nabob of the Carnatic* v. *E. I. Comp.* 1 Ves. jun. 371. S.C. 3 Bro. C.C. 292.

(*k*) Ch. Prac. 417. 420. 3 Atk. 264.

(*l*) Com. Dig. Chan. Plea I. 1 Chan. Prac. 420. *Edgworth* v. *Davies*, 1 Ca. in Cha. 40. Reported, upon view of precedents, that the jurisdiction of the counties palatine was allowed, between parties dwelling within the same, and for lands there, and matters local. Nels. Rep. 37. 66. See also *Willoughby* v. *Brearton*, Cary's Rep. 60. *Gerrard* v. *Stanley*, 1 Cha. Rep. 278.

claims the privileges of an university (*m*), or other particular jurisdiction (*n*).

The court of chancery being a superior court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shown to be so (*o*). It is requisite, therefore, in a plea to the jurisdiction of the court, to allege that the court has not jurisdiction of the subject, and to show by what means it is deprived of jurisdiction (*p*). It is likewise necessary to show what court has jurisdiction (*q*). If the plea does not properly set forth these particulars (*r*) it is bad in point of form (*s*). In point of substance it is necessary to entitle the particular jurisdiction to exclusive cognizance of the suit that it should be able to give complete remedy (*t*). A plea, therefore, of privilege of the university of Oxford, to a bill for a specific performance of an agreement touching lands in Middlesex, was over-ruled; for the university court could not give complete relief(*u*). And if a suit is instituted against different persons, some of

(*m*) *Temple* v. *Foster*, Cary Rep. 65. *Cotton* v. *Manering*, Cary Rep. 73. *Draper* v. *Crowther*, 2 Vent. 362. *Stephens* v. *Berry*, 1 Vern. 212.

(*n*) See *Cunningham* v. *Wegg*, 2 Bro. C. C. 241.

(*o*) 1 Vez. 204. 2 Vez. 357.

(*p*) See 3 Bro. C. C. 301. 1 Ves. jun. 388.

(*q*) *Strode* v. *Little*, 1 Vern. 59. *Earl of Derby* v. *Duke of Athol*, 1 Vez. 202. S. C. Dick. 129.

(*r*) See *Moor* v. *Somerset*, Nels. Rep. 51; and see 9 Mod. R. 95.

(*s*) *Foster* v. *Vassall*, 3 Atk. 587. And see *Nabob of Arcot* v. *East Ind. Comp.* 3 Bro. C. C. 292. S. C. 1 Ves. jun. 371.

(*t*) *Newdigate* v. *Johnson*, 2 Ca. in Cha. 170. *Wilkins* v. *Chalcroft*, 22 Vin. Abr. 10. *Green* v. *Rutherforth*, 1 Vez. 463.

(*u*) *Draper* v. *Crowther*, 2 Ventr. 362. *Stephens* v. *Berry*, 1 Vern. 212.

whom have privilege, and some not (*x*); or if one defendant is not amenable to the particular jurisdiction (*y*) a plea will not hold. If, likewise, there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the court of chancery; as upon a bill concerning a mortgage of the island of Sarke, both mortgagor and mortgagee residing in England, the court of chancery will hold jurisdiction of the cause: for a court of equity *agit in personam* (*z*). So where the court may not have jurisdiction to give relief it may yet entertain a bill for a discovery in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the King in council, where the defendant cannot be compelled to answer upon oath (*a*).

Similar to a plea to the jurisdiction is the case of a plea to an information charging an undue election of a fellow of a college in one of the universities, "that by the statutes the visitor of the college ought "to determine all controversies concerning elections "of fellows, and that such controversies ought not "to be determined elsewhere (*b*)." But the extent of the visitor's authority must be averred, and it must also be averred that he is able to do complete justice (*c*). And where there is a trust created, the

(*x*) *Lowgher* v. *Lowgher*, Cary Rep. 55. S. C. 22 Vin. Abr. 9. *Fanshaw* v. *Fanshaw*, 1 Vern. 246.

(*y*) *Grigg*'s case, Hutton, 59; and see 4 Inst. 213. *Hilton* v. *Lawson*, Cary R. 48.

(*z*) *Toller* v. *Carteret*, 2 Vern. 494. 1 Vez. 204. 3 Ves. 182. 5 Madd. 307.

(*a*) 1 Vez. 205.

(*b*) *Att. Gen.* v. *Talbot*, 3 Atk. 662. S. C. 1 Vez. 78. And see 1 Vez. 472. 474, 475. 2 Vez. 328.

(*c*) 1 Vez. 474.

visitor having no power to compel performance of the trust, relief must be had in the King's courts of general jurisdiction (*d*).

III. In respect to the person of the plaintiff it may be shown that he is disabled to sue, as being, 1, outlawed, or 2, excommunicated, or 3, a popish recusant convict, or 4, attainted in a premunire, or of treason or felony, or 5, an alien; or it may be shown, 6, that the plaintiff is incapable of instituting a suit alone. A plea of this kind is in the nature of a plea in abatement of the suit.

1. A person outlawed is disabled from suing in a court of justice, and if a bill is filed in his name the defendant may plead the outlawry, which whilst it remains in force will delay the proceeding (*e*). The record of the outlawry, or the *capias* thereupon, must be pleaded *sub pede sigilli*, and is usually annexed to the plea (*f*). A plea of outlawry, in a suit for the same duty or thing for which relief is sought

(*d*) *Green* v. *Rutherforth*, 1 Vez. 462; and see 4 Bro. C. C. 167. 2 Ves. jun. 47. 13 Ves. 533. *Ex parte Berkhamstead School*, 2 Ves. & B. 134.

(*e*) A plea of outlawry may be filed without oath, 1 Ca. in Cha. 258. *Took* v. *Took*, 2 Vern. 198, *Anon.* 2 Freem. 143; Hovend. Ed. but see *Parrot* v. *Bowden*, ib. 37; the main fact appearing upon record, Ord. in Cha. Ed. Bea. 23, 2 Ves. & Bea. 357; and a mere averment of identity being considered sufficient, 2 Vern. 199; and see 19 Ves. 83. And such a plea may be filed by a defendant who is in contempt. *Waters* v. *Chambers*, 1 Sim. & Stu. 225.

(*f*) Tothill, 54; Prac. Reg. 327. Wy. Ed.; Ord. in Cha. Ed. Bea. 27. And in a case in which the formality alluded to had been omitted, by mistake of the clerk of the outlawries, the plea was allowed to be amended, by annexing to it an office-copy of the exigent, or record of the outlawry. *Waters* v. *Mayhew*, 1 Sim. & Stu. 220.

by the bill, is insufficient according to the rule of law, and shall be disallowed of course, as put in for delay (*g*). Otherwise a plea of outlawry is always a good plea so long as the outlawry remains in force (*h*); but if that shall be reversed, the plaintiff, upon payment of costs, may sue out fresh process against the defendant, and compel him to answer the bill (*i*). Outlawry in a plaintiff executor or administrator cannot be pleaded; for he sues *in auter droit* (*k*). It is equally insufficient if alleged in disability of a person named in a bill as the next friend of an infant plaintiff (*l*), or in an information as a relator (*m*).

2. The defendant may plead that the plaintiff is excommunicated (*n*), which must be certified by the ordinary, either by letters patent containing a positive affirmation that the plaintiff stands excommunicated, and for what; or by letters testimonial, reciting, "*quod scrutatis registeriis invenitur*, &c." Either

(*g*) See *Philips* v. *Gibbons*, 1 Ves. & Bea. 184; Ord. in Cha. Ed. Bea. 175.

(*h*) Ord. in Cha. Ed. Bea. 175; 3 Bac. Abr. 761. Outlawry (3).

(*i*) Ord. in Cha. Ed. Bea. 175; and see *Peyton* v. *Ayliffe*, 2 Vern. 312.

(*k*) *Killigrew* v. *Killigrew*, 1 Vern. 184. Prac. Reg. 326. Wy. Ed.

(*l*) Prac. Reg. 327. Wy. Ed.

(*m*) There is a case, *Att. Gen.* v. *Heath*, Prec. in Cha. 13, where a plea of outlawry, in disability of the person of a relator, is said to have been allowed in the duchy-court of Lancaster. But the relator seems to have sustained the character of plaintiff as well as of relator. See 3 Bac. Abr. 762. Outlawry (3); and see also *Waller* v. *Hanger*, 2 Bulstr. 134. *Palmer*'s case, And. 30.

(*n*) And this plea may be put in without oath, if the excommunication appear upon record. Ord. in Cha. Ed. Bea. 26, and 2 Ves. & Bea. 327.

of these certificates must be *sub sigillo*, and so pleaded (*o*). Excommunication is a good plea to an executor or administrator, though they sue in *auter droit* (*p*), but not to the next friend of an infant (*q*). This, like the plea of outlawry, ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters of absolution, may, as at law, sue out fresh process, and compel the defendant to answer the bill (*r*).

3. By statute 3 Ja. I. c. 5. s. 11, every popish recusant convict is in many cases disabled to sue, in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the plea appear in the books of practice. If advantage should be attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law (*s*). This plea also ceases to be a bar if the plaintiff by conforming removes the disability (*t*).

4. A plea, that the plaintiff is disabled from suing

(*o*) Ord. in Cha. Ed. Bea. 27. Prac. Reg. 327. Wy. Ed. Tothill, 54.

(*p*) Co. Litt. 134, a. 2 Bac. Abr. 319. Excom. (D)

(*q*) Prac. Reg. 278.

(*r*) *Amers* v. *Legg*. Choice Ca. in Cha. 164. Pract. Reg. 327. Wy. Ed. It should here be mentioned, that by stat. 53 Geo. 3, c. 127, excommunication is discontinued, except in certain cases therein specified.

(*s*) 3 Bac. Ab. 780. Papists, (1). See *Lord Petre* v. *Univ. of Cambridge*, Lutwyche, 1100.

(*t*) See stat. 31 Geo. 3, c. 32, § 3; and valuable note to Co. Litt. p. 391, a. note (2). Hargr. & Butl. Ed.

being attainted, is equally rare (*u*). It would probably be likewise judged with the same strictness as if it was a plea at law (*x*).

5. There is little more to be found in the books upon the subject of a plea that the plaintiff is an alien (*y*). An alien, who is not an alien enemy, is under no disability of suing for any personal demand (*z*); and an alien enemy may sue under some circumstances (*a*). A plea has been put in to a bill filed by an alien infidel not of the Christian faith, and was attempted to be supported upon the ground that the plaintiff was upon a cross-bill incapable of being examined upon oath. The plea was over-ruled without argument (*b*).

6. If a bill is filed in the name of any person in-

(*u*) See —— v. *Davies*, 19 Ves. 81; and see *Ex parte Bullock*, 14 Ves. 452. And case on Irish statutes, *Kennedy* v. *Daly*, 1 Sch. & Lefr. 355.

(*x*) 2 Atk. 399. This kind of plea is not to be supported by oath, but can be proved by the record alone, —— v. *Davies*, 19 Ves. 81. 2 Ves. & Bea. 327.

(*y*) *Burk* v. *Brown*, 2 Atk. 397. 2 Vin. Abr. 274. Alien (I). 1 Bac. Abr. 83. Alien (D). Prac. Reg. 327. Wy. Ed. Rast. Entr. 252. *Bolt* v. *Att. Gen.* 1 Bro. P. C. 421. Toml. Ed. *Albretcht* v. *Sussman*, 2 Ves. & Bea. 323; and see *Ex parte Lee*, 13 Ves. 64, and *Ex parte Boussmaker*, 13 Ves. 71.

(*z*) *Ramkissenseat* v. *Barker*, 1 Atk. 51. As to the incapacities of aliens to take and to hold certain property, see Co. Litt. 2. b., and notes in Hargr. & Butl. Ed. In such cases, it is presumed that a plea of mere alienage, if properly framed, would be a sufficient defence. See Co. Litt. 129. (*b*); and *Burk* v. *Brown*, 2 Atk. 397.

(*a*) 3 Burr. 1741. 1 Bac. Ab. 84. Alien (D). Doug. 619. *Cornu* and *Blackburne*, and the case of *Anthon* and *Fisher*, in Doug. note 1, p. 626. But the latter case was afterwards reversed in the Exchequer Chamber, 16th Nov. 1784. And see *Evans* v. *Richardson*, 3 Meriv. 469.

(*b*) *Ramkissenseat* v. *Barker*, 1 Atk. 51.

capable *alone* of instituting a suit, as an infant, a married woman, or an idiot or lunatic, so found by inquisition, the defendant may plead the infancy, the coverture (*b*), or the inquisition of idiotcy or lunacy (*c*), in abatement of the suit.

IV. A plea, that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, and therefore is not entitled to sue as such (*d*), though a negative plea, is good in abatement of the suit; as where a plaintiff entitled himself as administrator, and the defendant pleaded that he was not administrator (*e*). And where a plaintiff entitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living (*f*), the plea was allowed. It has been made a question how far a negative plea can be good (*g*). To a bill by a person claiming as heir to a person dead, the defendant pleaded that another person was heir, and that the plaintiff was not heir to the deceased, and the plea was over-ruled (*h*), but this decision was afterwards doubted by the learned Judge himself (*i*), when pressed by the ne-

(*b*) Prac. Reg. 326. Wy. Ed.

(*c*) See case of the plaintiff being in a state of mere mental incapacity, *Wartnaby* v. *Wartnaby*, 1 Jac. R. 377.

(*d*) Prac. Reg. 326. Wy. Ed.

(*e*) *Winn* v. *Fletcher*, 1 Vern. 473; but see *Fell* v. *Lutwidge*, 2 Atk. 120. 3 Barnard. 320.

(*f*) *Ord* against *Huddleston*, Dick. 510. S. C. cited, 1 Cox R. 198.

(*g*) But that question has been set at rest. 11 Ves. 302, 305. See instances of negative pleas referred to in the next page.

(*h*) *Newman* v. *Wallis*, 2 Bro. C. C. 142; and see *Gunn* v. *Prior*, Dick. 657. S. C. 1 Cox. R. 197. Forrest. Ex. R. 88. n. *Kinnersley* v. *Simpson*, Forrest. 85. See also *Earl of Strathmore* v. *Countess of Strathmore*, 2 Jac. & W. 541.

(*i*) 3 Bro. C. C. 489. 1 Madd. R. 194. And it seems to have been established, that in such a case, a plea that the plaintiff is not heir, without showing who is heir,

cessary consequence, that any person falsely alleging a title in himself might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious to the person thus improperly brought into court; so that any person might, by alleging a title, however false, sustain a bill in equity against any person for any thing so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family, might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst purposes (*k*). To avoid this inconvenience, a defendant has in some cases been permitted to negative the plaintiff's title by answer, and thus to protect himself against the required discovery; but in other cases this has not been allowed, and the subject seems still to require further consideration (*l*).

V. Interest in the subject of the suit, or a right to

would be good, for that the defendant might not be able to prove. 16 Ves. 264, 265.

(*k*) As further examples of negative pleas, see *Drew* v. *Drew*, 2 Ves. & Bea. 159, *Sanders* v. *King*, 6 Madd. 61, and *Yorke* v. *Fry*, ibid. 65, that plaintiff is not a partner; and *Thring* v. *Edgar*, 2 Sim. & Stu. 274, and particularly at p. 280, that he is not a creditor.

(*l*) See 11 Ves. 283, 296, & 303, and the several cases there cited, with the discordant opinions of several Judges. In the case of *Gethin* v. *Gale*, cited in Ambl. 354, the Master of the Rolls, sitting for the Chancellor, 29 Oct. 1739, said, it was one thing to deny a title in the plaintiff, and another to show a title in one's self; and that the former had never been allowed as a good plea.—Mr. Capper's note. See the authorities cited in the last note, and in the notes to the next page and below, Chap. 2. sect. 2. part 3.

the thing demanded, and proper title to institute a suit concerning it, have been mentioned as essentially necessary to sustain a bill; and it has been observed, that if they are not fully shown by the bill itself the defendant may demur. But a title apparently good may be stated in a bill, and yet the plaintiff may not really have the title he states, either because he misrepresents himself, which has been considered under the last head, or because he suppresses some circumstances respecting his title, which if disclosed would show either that nothing was ever vested in him, or that the title which he had has been transferred to another; and this the defendant may show by plea in bar of the suit. As if a plaintiff claims as a purchaser of a real estate, and the defendant pleads that he was a papist, and incapable of taking by purchase (*m*); or a plaintiff claims property under a title accrued previous to conviction of himself, or of a person under whom he claims, of some offence which occasioned a forfeiture (*n*), or previous to a bankruptcy (*o*), or any other defect in the title (*p*) of the

(*m*) See however, 18 Geo. 3, c. 60, s. 2, and the 43 Geo. 3. c. 30. by which this incapacity is conditionally removed.

(*n*) 2 Atk. 399. —— v. *Davies*, 19 Ves. 81.

(*o*) *Carleton* v. *Leighton*, 3 Meriv. 667. See *Lowndes* v. *Taylor*, 1 Madd. R. 423; S. C. 2 Rose R. 365. 432. It seems a plea of the plaintiff's bankruptcy must be upon oath, *Joseph* v. *Tuckey*, 2 Cox R. 44. See instance of a plea that the plaintiff had taken the benefit of an Act for the relief of insolvent debtors, *De Minckwitz* v. *Udney*, 16 Ves. 466.

(*p*) *Quilter* v. *Mussendine*, Gilb. Ca. in Eq. 228. *Hitchins* v. *Lander*, Coop. R. 34. *Gait* v. *Osbaldeston*, 1 Russ. R. 158, in which the decision in S. C. reported 5 Madd. 428, was overruled; and see *Ocklestone* v. *Benson*, 2 Sim. & Stu. 265.

plaintiff to the matter claimed by the bill. A plea of conviction of any offence which occasions forfeiture, as manslaughter, must be pleaded with equal strictness as a plea of the same nature at common law (*q*). But if a plea goes to show that no title was ever vested in the plaintiff, though for that purpose it states an offence committed, conviction of the offence is not essential to the plea, and the same strictness is not required as in a case of forfeiture. Thus, in the Exchequer, to a bill seeking a discovery of the owners of a ship captured, and payment of ransom, the defendants pleaded that the captor was a natural-born subject, and the capture an act of piracy. Though the barons at first thought that the plea could not be supported unless the plaintiff had been convicted of piracy, and the record of the conviction had been annexed to the plea, they were finally of opinion that as the plea showed that the capture was not legal, and that therefore no title had ever been in the plaintiff, the plea was good, and they allowed it accordingly (*r*). Pleas of want of title generally extend to discovery as well as to relief (*s*).

It cannot often be necessary to make defence on this ground by way of plea; for if facts are not stated in the bill from which the court will infer a title in the plaintiff, though the bill does contain an assertion that the plaintiff has a title, the defendant may demur; the averment of title in the bill being not of a fact, but of the consequence of facts. Thus, where

(*q*) 2 Atk. 399.
(*r*) *Fall* against ——, 1st May 1782.
(*s*) Gilb. 229.

a plaintiff stated an encumbrance on a real estate, of which he was devisee, and averred that it was the debt of the testator, and prayed that it might be paid out of the testator's personal estate in ease of the real estate devised, the defendant having pleaded that the testator had done no act by which he made it his own debt, the plea was over-ruled, because, whether it was his debt or not was matter of inference from the facts stated in the bill, and therefore the proper defence was by demurrer (*t*). Accordingly the defendant afterwards demurred, and the demurrer was allowed (*u*).

VI. In treating of demurrers notice has been taken that though a plaintiff has an interest in the subject of a suit, and a right to institute a suit concerning it, yet he may have no right to call upon the defendant to answer his demands; and it has been observed, that this happens where there is a want of privity of title between the plaintiff and defendant (*x*). It would probably be difficult to frame a bill which was really liable to objection on this head so artfully as to avoid a demurrer. But if such a bill could be framed it should seem that defence might be made by plea.

VII. A plea that the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear, is mentioned as a plea which may be supported (*x*). It seems to have been

(*t*) *Tweddell* v. *Tweddell*, 25th May 1784, in Chancery.

(*u*) Same cause, 18th July 1786.

(*x*) See above p. 158.

considered as more convenient for a defendant under these circumstances to put in an answer alleging the mistake in the bill, and praying the judgment of the court whether he should be compelled further to answer the bill (*y*), but this in fact amounts to a plea, though it may not bear the title; and a plea has been considered as the proper defence (*z*).

VIII. If a defendant has not that interest in the subject of a suit which can make him liable to the demands of the plaintiff, and the bill alleging that he has or claims an interest avoids a demurrer, he may plead the matter necessary to show that he has no interest (*a*), if the case is not such that by a general disclaimer he can satisfy the suit (*b*). Thus, where a witness to a will was made a defendant to a bill brought by the heir at law to discover the circumstances attending the execution, and the bill contained a charge of pretence of interest by the defendant, though a demurrer for want of interest was over-ruled because it admitted the truth of the charge to the contrary in the bill, yet the court declared an opinion that a defence might have been made by plea (*c*).

(*x*) Prac. Reg. 326. Wy. Ed. And see *Griffith* v. *Bateman*, Finch R. 334.

(*y*) Cary Rep. 61. Prac. Reg. 327. Wy. Ed. *Att. Gen.* v. *Lord Hotham*, 1 Turn. R. 209. See below, Chap. 2. sect. 2. part 3.

(*z*) 1 Ves. jun. 292, and see ibid. p. 294, note.

(*a*) *Plummer* v. *May*, 1 Vez. 426.

(*b*) See the case of *Turner* v. *Robinson*, 1 Sim. & Stu. 3.

(*c*) *Plummer* v. *May*, 1 Vez. 426. This must have been a negative plea. And see *Cartwright* v. *Hately*, 3 Bro. C. C. 238; S. C. 1 Ves. jun. 292; 7 Ves. 289, 290; 1 Ves. & Bea. 550. *Turner* v. *Robinson*, 1 Sim. & Stu. 3.

IX. Though the subject of a suit may be within the jurisdiction of a court of equity, and the court of Chancery may have the proper jurisdiction; though the plaintiff may be under no personal disability, and may be the person he pretends to be, and have a claim of interest in the subject, and a right to call on the defendant concerning it, and the defendant may be the person he is stated to be, and may claim an interest in the subject which may make him liable to the plaintiff's demands, with respect to which circumstances pleas have been already considered, still the plaintiff, by reason of some additional circumstance, may not be entitled in the whole or in part to the relief or assistance which he prays by his bill. The objections which may be made to the whole or any part of a suit, though liable to none of the objections before considered, are principally the subject of those kinds of pleas which are commonly termed pleas in bar; and which are usually ranked under the heads of pleas of matter recorded, or as of record, in the court itself, or some other court of equity; pleas of matters of record, or matters in the nature of matters of record, in some court not a court of equity; and pleas of matters *in pais*.

Pleas in bar of matters recorded, or as of record, in the court itself, or some other court of equity, may be, 1, A decree or order of the court by which the rights of the parties have been determined (*d*), or another bill for the same cause dismissed (*e*); 2. Another suit depending in the court, or in some

(*d*) 3 Atk. 626. (*e*) *Pritman* v. *Pritman*, 1 Vern. 310. 1 Atk. 571.

other court of equity, between the same parties for the same cause (*f*). Pleas of this nature generally go both to the discovery sought and the relief prayed by the bill.

1. A decree, determining the rights of the parties, and signed and enrolled, may be pleaded to a new bill for the same matter (*g*), and this even if the party bringing the new bill was an infant at the time of the former decree (*h*): for a decree enrolled can only be altered upon a bill of review (*i*). But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar (*k*). Therefore a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem unless there is a final order of foreclosure (*l*); nor can a decree which has been made upon default of the defendant in not appearing at the hearing be pleaded without an order making the decree absolute; the terms of such a decree being always that it shall be binding on the defendant, unless on being served with a writ of subpœna for the purpose he shall show cause to the contrary (*m*). Upon a plea of this nature so much of the former bill and answer must be set

(*f*) *Foster* v. *Vassall*, 3 Atk. 587.

(*g*) *Rutland* v. *Brett*, Finch. R. 124. *Mallock* v. *Galton*, Dick. 65.

(*h*) 1 Atk. 631. *Gregory* v. *Molesworth*, 3 Atk. 626. 3 Ves. 317.

(*i*) 3 Atk. 627. See above, p. 83, *et seq.*

(*k*) See next page, notes (*o*) & (*p*).

(*l*) *Senhouse* v. *Earl*, 2 Ves. 450.

(*m*) Ord. in Cha. 198. Ed. Bea. And see *Halsey* v. *Smith*, Mos. 186. *Venemore* v. *Venemore*, Dick. 93.

forth as is necessary to show that the same point was then in issue (*k*). A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill (*l*) if the dismission was upon hearing, and was not in terms directed to be without prejudice (*m*). But an order of dismission is a bar only where the court determined that the plaintiff had no title to the relief sought by his bill; and therefore an order dismissing a bill for want of prosecution is not a bar to another bill (*n*). And a decree cannot be pleaded in bar of a new bill unless it is conclusive (*o*) of the rights of the plaintiffs in that bill, or of those under whom they claim (*p*). Therefore a decree against a mortgagor, and order of foreclosure enrolled, were not deemed a bar to a bill by intervening encumbrancers to redeem, although the mortgagee had no notice of those encumbrances: and the mortgagee having been long in possession, the account taken in the former cause was not deemed conclusive against the plaintiffs in the new bill, though under the circumstances the court, on overruling the plea and ordering the defendant to answer, limited the order by directing that the defendant

(*k*) *Child* v. *Gibson*, 2 Atk. 603. But see 1 Vern. 310.

(*l*) *Pritman* v. *Pritman*, 1 Vern. 310. *Madge* v. *Brett*, Finch. R. 46. *Connell* v. *Warren*, ib. 239. *Earl of Peterborough* v. *Germaine*, 6 Bro. P. C. 1. Toml. Ed.

(*m*) *Seymour* v. *Nosworthy*, 1 Ca. in Cha. 155. Toth. 50.

(*n*) *Brandlyn* v. *Ord*, 1 Atk. 571. 14 Ves. 232.

(*o*) See *Coysgarne* v. *Jones*, Ambl. 613. *Collins* v. *Gough*, 4 Gwill. T. C. 1294.

(*p*) See *Doyly* v. *Smith*, 2 Ca. in Cha. 119. *Godfrey* v. *Chadwell*, 2 Vern. 601. *Atkinson* v. *Turner*, 3 Barnard. 74.

should answer to charges of errors or omissions, but that the plaintiffs should not unravel the account at large before the hearing (*q*).

A decree must be signed and enrolled or it cannot be pleaded in bar of a suit (*r*), though it may be insisted upon by way of answer (*s*). But though it cannot be pleaded directly in bar of the suit for want of enrolment, it may perhaps be pleaded, to show that the bill was exhibited contrary to the usual course of the court, and ought not therefore to be proceeded upon (*t*). For if the decree appeared upon the face of the bill the defendant might demur (*u*), a decree not signed and enrolled being to be altered only upon a re-hearing (*x*), as a decree signed and enrolled can be altered only upon a bill of review (*y*).

If a bill is brought to impeach a decree on the ground of fraud used in obtaining it, which, as has been observed (*z*), may be done without the previous leave of the court, the decree may be pleaded in bar of the suit, with averments negativing the charges of fraud, supported by an answer fully denying them (*a*). Whether averments negativing the charges

(*q*) *Morrett* v. *Western*, 15 July 1710, in Ch. reported 2 Vern. 663.

(*r*) *Anon.* 3 Atk. 809. *Kinsey* v. *Kinsey*, 2 Vez. 577.

(*s*) 2 Vez. 577. And see *Charles* v. *Rowley*, 2 Bro. P. C. 485. Toml. Ed.

(*t*) See 2 Vez. 577, note. Chan. Pleas, 89.

(*u*) *Wortley* v. *Birkhead*, 3 Atk. 809. S. C. 2 Vez. 571. *Lady Granville* v. *Ramsden*, Bunbury, 56.

(*x*) 2 Vez. 598. See above, p. 90.

(*y*) *Read* v. *Hambey*, 1 Ca. in Cha. 44. S. C. 2 Freem. 179. See above, p. 237, note (*h*).

(*z*) Page 92.

(*a*) *Wichalse* v. *Short*, 3 Bro. P. C. 558. Toml. Ed. S. C. 2 Eq. Ca. Abr. 177, and 7 Vin. Abr. 398. pl. 15. 3 P. Wms.

of fraud are necessary to a plea of this description appears to have been a question much agitated in recent cases (*b*); upon which it may be observed, that without such averments, if the decree were admitted by the bill, nothing would be put in issue by the plea. The question in the cause must be, not whether such a decree had been made, but whether such a decree having been made it ought to operate to bar the plaintiff's demand. To avoid its operation the bill must allege fraud in obtaining it; and to sustain it as a bar the fact of fraud must be denied and put in issue by the plea. For upon the question, whether the decree ought to operate as a bar, the fact of fraud is the only point upon which issue can be joined between the parties; and unless the plea covers the fact of fraud it does not meet the case made by the bill; and on argument of the plea, the charge of fraud, not being denied by the plea, must be taken to be true. If the bill states the

95. Gilb. For. Rom. 58. Treatise on Frauds, c. 18, p. 220. *Butcher* v. *Cole*, at the Rolls, 26 June 1786, cited 1 Anstr. 99. See the cases of *Sidney* v. *Perry*, *Parkinson* v. *Lecras*, *Meadows* v. *Duchess of Kingston*, and *Devie* v. *Chester*, mentioned in pages 247, 254, 257, 263, 276. And see 6 Ves. 596. 2 Sch. & Lefr. 727. 5 Madd. 330. 6 Madd. 64.

(*b*) *Pope* v. *Bish*, 1 Anstr. Exch. R. 59. *Edmundson* v. *Hartley*, ib. 97. And see *Bayley* v. *Adams*, 6 Ves. jun. 586. In the cases in the Court of Exchequer it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only over-rule a plea where it applies to matter which the defendant by his plea declines to answer; demanding the judgment of the court, whether by reason of the matter stated in the plea he ought to be compelled to answer so much of the bill. See *Arnold's case*, Gilb. For. Rom. 59.

decree only as a pretence of the defendant, which it avoids by stating, that if any such decree had been made it had been obtained by fraud, the decree must be pleaded, because the fact of the decree is not admitted by the bill; and the charge of fraud must also be denied by the plea for the reasons before stated. If the bill states the decree absolutely, but charges fraud to impeach it, yet the decree must be pleaded, because the decree if not avoidable is alone the bar to the suit; and the fraud by which the bar is sought to be avoided must be met by negative averments in the plea, because without such averments the plea would admit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined upon such a plea, if the decree is admitted by the bill, the only subject upon which evidence can be given is the fact of fraud. If that should be proved, it would open the plea on the hearing of the cause; and the defendant would then be put to answer generally, and to make defence to the bill as if no such decree had been made. The object of the plea is to prevent the necessity of entering into that defence by trying first the validity of the decree. If the evidence of fraud should fail, the decree, operating as a bar, would determine the suit as far as the operation of the decree would extend.

It has also been objected, that a plea of the decree is a plea of the matter impeached by the bill; but the frame of a bill in equity necessarily produces, in

various instances, this mode of pleading (*c*). If the bill stated the title under which the plaintiff claimed, without stating the decree by which it had been affected, the defendant might have pleaded the decree alone in bar. If the bill stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and yet sought relief founded on the title concluded by it, the defendant might demur; because upon the face of the bill the title of the plaintiff would appear to be so concluded. But as in the form of pleading in equity the bill may state the title of the plaintiff, and at the same time state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree by alleging that it had been obtained by fraud; if the defendant could not take the judgment of the court upon the conclusiveness of the decree by plea upon which the matter by which that decree was impeached would alone be in issue, he must enter into the same defence (by evidence as well as by answer) as if no decree had been made; and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is therefore permitted to him to avoid entering into the general question of the plaintiff's title as not affected by the decree, by meeting the case made by the plaintiff, which can alone give him

(*c*) See 3 P. Wms. 317, where Lord Chancellor *Talbot* is stated to have interrupted the counsel, who objected to this mode of pleading, observing that it was every day's practice.

a right to call for that defence, namely, the fact of fraud in obtaining the decree. This has been permitted to be done in the only way in which it can be done, by pleading the decree with averments denying the fraud alleged; and those averments being the only matter in issue, they are necessarily of the very substance of the plea. The decree if obtained by fraud would be no bar; and nothing can be in issue on a plea but that which is contained in the plea; and every charge in the bill not negatived by the plea is taken to be true on argument of the plea. If therefore the decree merely were pleaded, on argument of the plea, the charge of fraud must be taken to be true, and the plea ought therefore to be over-ruled; but if on argument the plea were allowed, or if the plaintiff, without arguing, replied to the plea, no evidence could be given on the charges of fraud to avoid the plea, and the defendant proving his plea (*d*), that is, proving the decree and nothing more, would be entitled to have the bill dismissed at the hearing (*e*).

(*d*) Sir *Joseph Jekyll*, M. R. 3 P. Wms. 95.

(*e*) Perhaps all the difficulties which have arisen upon this subject have proceeded from want of attention to the form of pleadings in courts of equity, especially since the disuse of special replications, rejoinders, sur-rejoinders, &c. When those pleadings were allowed, the plaintiff might have stated his case, without suggesting that it had been affected by any decree; if the defendant pleaded a decree binding the right, the plaintiff might have replied, that the decree had been obtained by fraud, by which the plaintiff would have admitted that the decree was a bar, if not capable of impeachment on the ground of fraud; the defendant by rejoinder would have avoided the charge of fraud, and sustained the decree; and then the issue would have been simply on the fact of fraud.

As the averments negativing the charges of fraud are used merely to put the fact of fraud, as alleged by the bill, in issue on the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud contained in the bill fully in issue. And as the plaintiff is entitled to have the answer of the defendant upon oath to any matter in dispute between them, in aid of proof of the case made by the bill, the defendant must answer to the facts of fraud alleged in the bill so fully as to leave no doubt in the mind of the court that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established (*f*). If the answer should not be full in all material points, the court may presume that the fact of fraud may be capable of proof in the point not fully answered, and may therefore not deem the answer sufficient to support the plea as conclusive, and therefore may over-rule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. But though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer if he conceives it not to be so full to all the charges as to be free from exception; or by

(*f*) It seems to have been imagined that there was something incongruous in a plea, and answer in support of the plea. 6 Ves. 597. But this objection seems to have arisen from a supposition that the answer formed part of the defence. It is no part of the defence; but that evidence which the plaintiff has a right to require, and to use to invalidate the defence made by the plea, upon argument of the plea, before other evidence can be given.

amending his bill may require an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant; or to which he may apprehend that the answer, though full in terms, may have been in effect evasive.

As the bill must be founded on the supposition that the plaintiff's title is not concluded by the decree, and the plea on the contrary supposition, the effect of the plea is, to conclude the whole case made by the bill, so far as it may be concluded by the decree, except the question of fraud; and consequently all the questions which might have been raised, if the decree had not been made, are put by the plea, if allowed, wholly out of the cause, unless the plea should be shown to be false in fact by evidence given on the issue taken upon it, and the matter of the plea thus opened upon the hearing. It is therefore a mistake to suppose that the plea, if sustained, would not shorten the cause, or lessen expense (*g*).

As the ground of this defence by plea of a decree is that the matter has been already decided, a decree of any court of equity, in its nature final, or made so by subsequent order, may be pleaded in bar of a new suit (*h*).

(*g*) The argument which is contained in the few preceding pages of the text, and the note thereto, has been adopted and established by decided cases; but these not relating to decrees, they will be adduced hereafter in illustration of the doctrines relating to the several pleas of legal bars sought to be set aside upon equitable grounds, with reference to which they have been respectively determined. See, however here, 2 Ves. & B. 364. 6 Madd. 64, and 2 Sim. & Stu. 279.

(*h*) *Geale* v. *Wyntour*, Bunb. 211. *Wing* v. *Wing*, 10 Mod.

2. Another suit depending in the same or another court of equity for the same cause (*i*) is a good plea (*k*); except, perhaps, in the case of a suit depending in an inferior court of equity, the effect of which the defendant has avoided by going out of the jurisdiction of that court (*l*). The plea must aver that the second suit is for the same matter as the first; and therefore a plea which did not expressly aver this, though it stated matter tending to show it, was considered as bad in point of form, and over-ruled upon argument (*m*). The plea must also

102. *Anon.* Mos. 268. *Pritman* v. *Pritman*, 1 Vern. 310. *Fitzgerald* v. *Fitzgerald*, 5 Bro. P. C. 567. Toml. Ed. but, as to the authority of this particular case, except in principle, see stat. 23 Geo. 3, c. 28, and stat. 39 & 40 Geo. 3, c. 67. art. 8. See also *Pitcher* v. *Rigby*, 9 Pri. Ex. R. 79.

(*i*) Ord. in Cha. Ed. Bea. 26. 176. *Crofts* v. *Wortley*, 1 Ca. in Cha. 241. *Foster* v. *Vassall*, 3 Atk. 587. *Bell* v. *Read*, ibid. 590. *Murray* v. *Shadwell*, 17 Ves. 353.

(*k*) It seems, that the pendency of another suit for the same cause, in a court of concurrent equity jurisdiction, cannot, before a decree has been made in such other suit, be pleaded in bar, see *Houlditch* v. *Marquis of Donegall*, 1 Sim. & Stu. 491; but, that where the parties in both courts are the same, it may be pleaded for the purpose of obtaining a reference to a Master, to inquire whether the suits are for the same matter, see *Murray* v. *Shadwell*, 17 Ves. 353, and of getting a decision, upon his report of the fact, as to the validity of the plea, and consequently a determination of the question whether the plaintiff should or should not be allowed to proceed in the suit in which the plea has been filed. Barnard, 85. And see on this subject generally, *Urlin* v. ——, 1 Vern. 332. 1 Ves. 545. *Daniel* v. *Mitchell*, 3 Bro. C. C. 544. *Anon.* 1 Ves. jun. 484. 2 Ves. & B. 110. *Jackson* v. *Leaf*, 1 Jac. & W. 229.

(*l*) See *Morgan* v. ——, 1 Atk. 408. See also *Foster* v. *Vassall*, 3 Atk. 587, and *Lord Dillon* v. *Alvares*, 4 Ves. 357.

(*m*) *Devie* against *Lord*

aver that there have been proceedings in the suit, as appearance, or process requiring appearance at the least (*n*). It seems likewise regular to aver that the suit is still depending (*o*); though as a plea of this nature is not usually argued, but being clearly a good plea if true, is referred to the examination and inquiry of one of the Masters of the court as to the fact (*p*), it has been held that a positive averment that the former suit is depending is not necessary (*q*). And if the plaintiff sets down the plea to be argued, he admits the truth of the plea that a former suit for the same matter is depending, and the plea must therefore be allowed (*r*) unless it is defective in form (*s*). As the pendency of the former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the Masters, a plea of this kind is not put in upon oath (*t*).

Brownlow, in Chan. 23d July 1783, rep. Dick. 611.

(*n*) *Anon.* 1 Vern. 318. *Moor* v. *Welsh Copper Comp.* 1 Eq. Ca. Ab. 39.

(*o*) 3 Atk. 589.

(*p*) Ord. in Ch. Ed. Bea. 176, 177. 2 Ves. & Bea. 110.

(*q*) *Urlin* v. ——, 1 Vern. 332.

(*r*) 1 Vern. 332. *Anon.* 1 Ves. jun. 484. *Daniel* v. *Mitchell*, 3 Bro. C. C. 544.

(*s*) This is founded on a general order of the Court, that the plaintiff shall not be put to argue such a plea, but may obtain, in the first instance, an order of reference to a Master to inquire into the truth of it. Ord. in Cha. Ed. Bea. 176, 177. *Baker* v. *Bird*, 2 Ves. jun. 672. *Murray* v. *Shadwell*, 17 Ves. 353. 2 Ves. & Bea. 110. *Carwick* v. *Young*, 2 Swanst. 239. *Carrick* v. *Young*, 4 Madd. 437. See 3 Atk. 589, as to defects in the form of such a plea.

(*t*) 1 Vern. 332. This however can scarcely be deemed to extend to a case of a suit depending in a foreign court. And see *Foster* v. *Vassall*, 3 Atk. 587.

It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold (*u*). So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last (*x*); for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the Court has taken where the second bill has appeared to embrace the whole subject in dispute more completely than the first, has been to dismiss the first bill with costs, and to direct the defendant in the second cause to answer upon being paid the costs of a plea allowed (*y*), which puts the case on the second bill in the same situation as it would have been in if the first bill had been dismissed before filing the second. Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill, conceiving himself to be the personal representative of the intestate, and afterwards

(*u*) *Moor* v. *Welsh Copper Comp.* 1 Eq. Ca. Ab. 39.

(*x*) *Durand* v. *Hutchinson*, Mich. 1771, in Chan.

(*y*) *Crofts* v. *Wortley*, 1 Ca. in Cha. 241.

procured administration *de bonis non*, and brought another bill (*z*), the pendency of the former bill is not a good plea. The reason of this determination seems to have been, that the first bill being wholly irregular the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the Master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man coming under a decree is *quasi* a party (*a*). The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the Court for liberty to conduct the cause (*b*).

If a plaintiff sues a defendant at the same time for the same cause at common law and in equity, the defendant after answer put in (*c*) may apply to the Court that the plaintiff may make his election where he will proceed (*d*), but cannot plead the pendency of

(*z*) *Huggins* v. *York Build-Comp.* 2 Atk. 44.

(*a*) *Neve* v. *Weston*, 3 Atk. 557. 1 Sim. & Stu. 361.

(*b*) See *Powell* v. *Wallworth*, 2 Madd. R. 183. *Sims* v. *Ridge*, 3 Meriv. 458. *Edmunds* v. *Acland*, 5 Madd. 31. *Fleming* v. *Prior*, 5 Madd. 423. *Handford* v. *Storie*, 2 Sim. & Stu. 196.

(*c*) 3 P. Wms. 90. 1 Ball & B. 119. 319. *Fisher* v. *Mee*, 3 Meriv. 45. *Hogue* v. *Curtis*, 1 Jac. & W. 449. *Browne* v. *Poyntz*, 3 Madd. 24. *Coupland* v. *Bradock*, 5 Madd. 14.

(*d*) 3 P. Wms. 90. *Anon.* 1 Ves. jun. 91. 1 Ball & B. 320. *Pieters* v. *Thompson*, Coop. R. 294. But there is a distinction in the practice

the suit at common law in bar of the suit in equity (*e*), though the practice was formerly otherwise (*f*). If the plaintiff shall elect to proceed in equity, the Court will restrain his proceedings at law by injunction, and if he shall elect to proceed at law the bill will be dismissed (*g*). But if he should fail at law, this dismission of his bill will be no bar to his bringing a new bill (*h*).

Pleas in bar of matters of record, or of matters in the nature of matters of record, in some court not being a court of equity, may be 1, a fine, 2, a recovery, 3, a judgment at law, or sentence of some other court.

1. A plea of a fine and non-claim, though a legal

where the Court is unable at once to see that it is a case of election. See *Boyd* v. *Heinzelman*, 1 Ves. & B. 381. 2 Ves. & B. 110. *Mills* v. *Fry*, 3 Ves. & B. 9, (1814). —— v. ——, 2 Madd. R. 395. *Amory* v. *Brodrick*, 1 Jac. R. 530, and the cases therein cited. In the instance of a mortgagee taking the usual bond for re-payment of the mortgage-money, he is not bound to elect, but may proceed, under certain restrictions, upon his separate securities at Law and in Equity. *Schoole* v. *Sall*, 1 Sch. & Lefr. 176. But where the plaintiff sues in both jurisdictions in an individual character, and can have in the former, only a part of the relief which he can obtain in the latter; by instituting the suit in this Court, he concludes himself from proceeding at Law, and therefore of course is not entitled to the privilege of election. *Mills* v. *Fry*, 19 Ves. 277 (1815).

(*e*) 3 P. Wms. 90. And it should seem th pendency of a suit in an ecclesiastical court, for payment of a legacy, could not be pleaded to a bill for similar relief here. *Howell* v. *Waldron*, 1 Ca. in Cha. 85.

(*f*) Ord. in Cha. Ed. Bea. 177.

(*g*) 3 P. Wms. 90, note. *Mousley* v. *Basnett*, 1 Ves. & B. 382, note. *Fitzgerald* v. *Sucomb*, 2 Atk. 85.

(*h*) *Countess of Plymouth* v. *Bladon*, 2 Vern. 32.

bar, yet is equally good in equity (*i*) provided it is pleaded with proper averments (*k*). Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity; and a purchaser will not be affected with notice so as to make him a trustee for the person who had the right. For a defect upon the face of title-deeds is often the occasion of a fine being levied (*l*). And even a fine levied upon bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied (*m*). But with respect to equitable titles there is a distinction. For where the equity charges the lands only, the fine bars (*n*), but where it charges the person only in respect of the land (*o*), the fine does not bar (*p*). Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the seller, and is as much a trustee as the seller was (*r*), provided he has notice of the trust, or is a purchaser without consideration (*s*). So if the grantee of a

(*i*) *Thynne* v. *Townsend*, W. Jones, 416. *Salisbury* v. *Baggot*, 1 Ca. in Cha. 278. 2 Swanst. 610. *Watkins* v. *Stone*, 2 Sim. & Stu. 560.

(*k*) *Story* v. *Lord Windsor*, 2 Atk. 630. *Hildyard* v. *Cressy*, 3 Atk. 303. *Page* v. *Lever*, 2 Ves. jun. 450. *Butler* v. *Every*, 1 Ves. jun. 136. S. C. 3 Bro. C. C. 80. *Dobson* v. *Leadbeater*, 13 Ves. 230. The object of the averments is of course to show that it was an effectual fine, 13 Ves. 233.

(*l*) 2 Atk. 631.

(*m*) *Brereton* v. *Gamul*, 2 Atk. 240.

(*n*) *Gifford* v. *Phillips*, cited 2 Swanst. 612.

(*o*) *Earl Kenoul* v. *Grevil*, cited 2 Swanst. 611. S. C. 1 Ca. in Cha. 295.

(*p*) 1 Ca. in Cha. 278. 2 Swanst. 611; and see 2 Atk. 390. 1 Sch. & Lefr. 381.

(*r*) 2 Atk. 631. *Kennedy* v. *Daly*, 1 Sch. & Lefr. 355.

(*s*) Gilb. For. Rom. 62. *Bovy* v. *Smith*, 2 Ca. in Cha.

mortgagee levies a fine, that will not discharge the equity of redemption (*t*). But there are cases of equitable as well as of legal titles, in which a fine and non-claim will bar, notwithstanding notice at the time of levying the fine (*u*). It has been determined, however, that if a fine is levied where the legal estate is in trustees for an infant, and the trustees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, shall not be barred (*x*). But perhaps this should be understood as referring to the case of a fine levied with notice of the title of the infant (*y*). Where a title to lands is merely equitable, as in the case of an agreement to settle lands to particular uses, claim to avoid the fine must be by *subpœna* (*z*). The pendency of a suit in equity will therefore in equity prevent in many cases the running of a fine (*a*). Upon the whole, wherever a person comes in by a title opposite to the title to a trust estate (*b*), or comes in under the title to the trust, estate, for a valuable considera-

124. S. C. 1 Vern. 60, and 1 Vern. 84; on rehearing, see 1 Vern. 144, the decree was reversed: but see 1 Sch. & Lefr. 379, 380.

(*t*) 2 Atk. 631. *Contra*, 2 Freem. 21. 69; but see 1 Sch. & Lefr. 378. 380.

(*u*) 2 Atk. 631. *Hildyard* v. *Cressy*, 3 Atk. 303. *Shields* v. *Atkins*, 3 Atk. 560.

(*x*) *Allen* v. *Sayer*, 2 Vern. 368.

(*y*) *Wych* v. *E. I. Comp.* 3 P. Wms. 309. *Earl* v. *Countess of Huntingdom*, ibid. 310, note G.

(*z*) *Salisbury* v. *Baggott*, 1 Ca. in Cha. 278. S. C. 2 Freem. 21, and more accurately reported, from Lord Nottingham's MSS. 2 Swanst. 603.

(*a*) 2 Atk. 389, 390. *Pincke* v. *Thornycroft*, 1 Bro. C. C. 289. S. C. 4 Bro. P. C. 92, Toml. Ed. 1 Sch. & Lefr. 432.

(*b*) *Stoughton* v. *Onslow*, cited 2 Swanst. 615; and 1 Freem. 311.

tion, without fraud, or notice of fraud, or of the trust(*c*); a fine and non-claim may be set up as a bar to the claim of a trust (*d*). When a fine and non-claim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver that at the time the fine was levied the seller of the estate, being seised, or pretending to be seised, conveyed; but it is necessary to aver that the seller was actually seised. It is not, indeed, requisite to aver, that the seller was seised in fee; an averment that he was seised *ut de libero tenemento*, and being so seised a fine was levied, will be sufficient (*e*). A fine and non-claim may be pleaded in bar to a bill of review (*f*).

2. To a claim under an entail, a recovery duly suffered, with the deed to lead the uses of that recovery, may be pleaded, if the estate limited to the plaintiff, or under which he claims, is thereby destroyed (*g*).

3. If the judgment of a court of ordinary jurisdiction has finally determined the rights of the parties, the judgment may in general be pleaded in bar of a bill in equity (*h*). Thus where a bill was brought by a

(*c*) 1 Sch. & Lefr. 380.

(*d*) Gilb. For. Rom. 63.

(*e*) 2 Atk. 630. 2 Sch. & Lefr. 99. And see the cases cited above, p. 251, note (*k*).

(*f*) *Lingard* v. *Griffin*, 2 Vern. 189.

(*g*) *Att. Gen.* v. *Sutton*, 1 P. Wms. 754. *Salkeld* against *Salkeld*, 1763, before Lord Northington. *Brown* v. *Williamson*, Trin. 1772, before Lord Bathurst.

(*h*) See *Throckmorton* v. *Finch*, 4 Co. Inst. 86. S. C. cited also in a Tract published at end of 1 Rep. in Cha. on Jurisd. of the Court of Cha.

person claiming to be son and heir of Joscelin earl of Leicester, and alleged that the earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee, and that the plaintiff had brought a writ of right to recover the lands, but the defendant had possession of the title-deeds, and intended to set up the legal estate which was vested in the trustee, and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee, the defendant pleaded, as to the discovery of the deeds and relief, judgment in her favour in the writ of right; and averred that the title in the trustee, which the bill sought to have removed, had not been given in evidence: and the plea was allowed (*i*). In this case the bill was brought before the trial in the writ of right, and the plaintiff had proceeded to trial without the discovery and relief sought by his bill for the purposes of the trial. The plea was subsequent to the judgment. It may be doubted therefore whether the averment that the title in the trustee had not been given in evidence on the trial of the writ of right was necessary, as the judgment was a bar, as a release subsequent to the filing of the bill

Hunby v. *Johnson*, 1 Rep. in Cha. 243. *Bluck* v. *Elliot*, Finch R. 13. *Pitt* v. *Hill*, Finch R. 70. *Temple* v. *Baltinglass*, Finch R. 275. *Cornell* v. *Ward*, Finch R. 239. *Wilcox* v. *Sturt*, 1 Vern. 77. *Bissell* v. *Axtell*, 2 Vern. 47. *Penvill* v. *Luscombe* (1728) rep. 2 Jac. & W. 201. 3 Bro. C. C. 72. 1 Sch. & Lefr. 204. Ord. in Cha. 19, Ed. Bea.

(*i*) Sidney, styling himself earl of Leicester, against Perry, in Chan. 23d July 1783.

would have been; and if the plaintiff could have avoided the effect of the judgment because the title in the trustee had been given in evidence, it should seem that that fact, together with the fact of the judgment, ought to have been brought before the court by another bill in the nature of a bill for a new trial, either as a supplemental bill, or as an original bill, the former bill being dismissed (*k*).

To a bill to set aside a judgment, as obtained against conscience (*l*), the defendant has been permitted to plead the verdict and judgment in bar (*m*); but it may be doubted whether in this case the defendant might not have demurred to the bill, as there does not appear to have been any charge in the bill requiring averment to support the plea. A sentence of any (*n*), even a foreign court (*o*), may be a

(*k*) Respecting the dispute in the time of Lord Ellesmere, raised by Lord Coke, upon the question whether a Court of Equity could give relief after a judgment at Law, see 3 Blackst. Comm. p. 54. Gilb. For. Rom. 56; and the Tract on the Jurisdiction of the Court of Chancery, comprising the Order of the King (James the 1st), on the subject published at the end of 1 Rep. in Cha. Ed. 1715, and that Order at end of Cary's Reports, Ed. 1650.

(*l*) 2 Ves. jun. 135.

(*m*) *Williams* v. *Lee*, 3 Atk. 223. And see *Sewel* v. *Freeston*, 1 Ca. in Cha. 65. *Shuter* v. *Gilliard*, 2 Ca. in Cha. 250. *Armsted* v. *Parker*, Finch R. 171. *Huddlestone* v. *Asbugg*, Finch R. 171. *Anon.* 3 Rep. in Cha. 25.

(*n*) See the cases referred to page 253, note (*h*).

(*o*) See *Newland* v. *Horseman*, 1 Vern. 21. S. C. 2 Ca. in Cha. 74. *Burrows* v. *Jemineau*, Sel. Ca. in Cha. 69. S. C. Mos. 1, Dick. 48. *Gage* v. *Bulkeley*, 3 Atk. 215. S. C. 2 Ves. 556. *White* v. *Hall*, 12 Ves. 320.

proper defence by way of plea; but the Court pronouncing the sentence must at least have had full jurisdiction to determine the rights of the parties (*p*). If there is any charge of fraud, or other circumstance shown as a ground for relief, the judgment or sentence cannot be pleaded (*q*), unless the fraud, or other circumstance, the ground upon which the judgment or sentence is sought to be impeached, be denied, and thus put in issue by the plea, and the plea supported by a full answer to the charge in the bill (*r*). Upon this principle the court of Exchequer determined upon a bill brought by insurers of part of the property taken on board the Spanish ships at Omoa. The bill charged that the navy, on whose behalf, as captors, the defendants had insured, were not the real captors, or not the only captors; that the Spanish ships struck to the land-forces; and that although the court of Admiralty had condemned the ships taken as prizes to the navy, yet that condemnation had been obtained in consequence of the King's procurator-general having withdrawn a claim made on behalf of the Crown at the instance of the land-forces, and of an agreement between the sea and land-forces to make a division of the treasure; and that the sentence was therefore, as against the plaintiffs, the insurers, not conclusive. The defendants pleaded

(*p*) *Gage* v. *Bulkeley*, 2 Atk. 215.

(*q*) See 2 Ca. in Cha. 251; and see the Tract and Order referred to in last page at the end of 1 Rep. in Cha. and of Cary's Rep.; and see 2 Ves. jun. 135.

(*r*) 6 Ves. 596. As to the necessity of these averments in the plea, and the support of the plea by answer, see p. 239 *et seq.*

the sentence of the Admiralty, both to discovery of the facts stated in the bill, and to the relief prayed. The plea was in many respects informal, but the Court was of opinion that the sentence thus impeached could not be pleaded in bar to the discovery sought by the bill, and that as a bar to relief it ought to have been supported by averments negativing the grounds on which it was impeached by the bill (*s*).

A will, and probate even in the common form, in the proper ecclesiastical court, which is in the nature of a sentence (*t*), is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate (*u*). And if fraud in obtaining the will is charged that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which is competent to determine upon the question of fraud (*x*). But where the fraud practised has not gone to the whole will, but only to some particular clause, or if fraud has been practised to obtain the consent of next of kin to the probate (*y*), the courts of equity have

(*s*) *Parkinson* against *Lecras*, 23d Feb. 1781.

(*t*) See 1 Atk. 516.

(*u*) *Jauncy* v. *Sealey*, 1 Vern. 397.

(*x*) *Archer* v. *Mosse*, 2 Vern. 8. *Nelson* v. *Oldfield*, 2 Vern. 76. *Att. Gen.* v. *Ryder*, 2 Ca. in Cha. 178. *Plume* v. *Beale*, 1 P. Wms. 388. 2 P. Wms. 287. 2 Atk. 324. *Kerrick* v. *Bransby*, 7 Bro. P. C. 437. Toml. Ed. *Meadows* v. *Duchess of Kingston*, Mich. 1777, reported Ambl. 756. 5 Ves. 647. *Griffiths* v. *Hamilton*, 12 Ves. 298.

(*y*) As to the kind of relief which may be given where a probate has been obtained by fraud, see *Barnesly* v. *Powel*, 1 Vez. 284.

laid hold of these circumstances to declare the executor a trustee for the next of kin (*y*). Where there are no such circumstances the probate of the will is a clear bar to a demand of personal estate (*z*); and where a testator died in a foreign country, and left no goods in any other country, probate of his will according to the law of that country was determined to be sufficient against an administration obtained in England (*a*).

Pleas in bar of matters *in pais* only, sometimes go both to the discovery sought, and to the relief prayed by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature (which may go both to the discovery and relief sought by the bill, or by some part thereof, but which sometimes extend no farther than the relief) are principally: 1, A plea of a stated account; 2, Of an award; 3, A release; 4, Of a will or conveyance, or some instrument controlling or affecting the rights of the parties; 5, A plea of any statute which may create a bar to the plaintiff's demand, as the statute for prevention of frauds and perjuries, or the statutes for limitation of actions, which may be considered as a plea of matter *in pais*; for though the statute itself is usually set forth in the plea, yet that perhaps is unnecessary, and the sub-

(*y*) *Marriot* v. *Marriot*, in Exch. 1 Stra. 666, and argument of Ld. Ch. Baron Gilbert. Gilb. Ca. in Cha. 203. Ambl. 762, 763.

(*z*) 12 Ves. 307.

(*a*) *Jauncy* v. *Sealey*, 1 Vern. 397.

stance of the plea consists in the averment of matter necessary to bring the case within the particular statute; and therefore if those matters appeared on the face of the bill itself it may be presumed a demurrer would hold, though this has been doubted.

1. A plea of a stated account is a good bar to a bill for an account (*b*). It must show that the account was in writing, or at least it must set forth the balance (*c*). If the bill charges that the plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it the plaintiff may have an opportunity of pointing them out (*d*). If error (*e*) or fraud (*f*) are charged (*g*) they must

(*b*) *Anon.* 2 Freem. 62. 1 Vern. 180. *Dawson* v. *Dawson*, 1 Atk. 1. *Sumner* v. *Thorpe*, 2 Atk. 1. *Penvil* v. *Luscombe*, (1728) rep. 2 Jac. & W. 201. *Irvine* v. *Young*, 1 Sim. & Stu. 333.

(*c*) 2 Atk. 399.

(*d*) *Hankey* v. *Simpson*, 3 Atk. 303.

(*e*) On the subject of this Court's interference, where there is error in a settled account, see *Anon.* 2 Freem. 62. *Proud* v. *Combes*, 2 Freem. 183. S. C. 3 Rep. in Cha. 18, 1 Ca. in Cha. 55, 2 Freem. 183, Nels. 100, & 1 Eq. Ca. Ab. 12. *Wright* v. *Coxon*, 1 Ca. in Cha. 262. *Bedell* v. *Bedell*, Finch R. 5. *Dawson* v. *Dawson*, 1 Atk. 1. *Bourke* v. *Bridgeman*, 1 Barnard, 272. *Roberts* v. *Kuffin*, 2 Atk. 112. *Pit* v. *Cholmondeley*, 2 Vez. 565. *Johnson* v. *Curtis*, 3 Bro. C. C. 266. *Gray* v. *Minnethorpe*, 3 Ves. 103. *Lord Hardwicke* v. *Vernon*, 4 Ves. 411. 5 Ves. 837. *Kinsman* v. *Barker*, 14 Ves. 262.

(*f*) As to its interference where the settlement of an account has been accompanied with fraud, see *Vernon* v. *Vawdry*, 2 Atk. 119. *Newman* v. *Payne*, 2 Ves. jun. 199. *Wharton* v. *May*, 5 Ves. 27. *Beaumont* v. *Boultbee*, 5 Ves. 485. S. C. 7 Ves. 599. 11 Ves. 358. *Langstaffe* v. *Taylor*, 14 Ves. 262. *Drew* v. *Power*, 1 Sch. & Lefr. 182.

(*g*) 9 Ves. 265, 266.

be denied by the plea as well as by way of answer (*h*); and if neither error nor fraud is charged, the defendant must by the plea aver that the stated account is just and true to the best of his knowledge and belief (*i*). The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature (*k*), if the fact was such (*l*).

2. An award may be pleaded to a bill to set aside the award and open the account (*m*); and it is not only good to the merits of the case, but likewise to the discovery sought by the bill (*n*). But if fraud or partiality are charged against the arbitrators (*o*),

(*h*) Gilb. For. Rom. 56. 1 Ca. in Cha. 299. 2 Freem. 62. 6 Ves. 596. *Clarke* v. *Earl of Ormonde*, 1 Jac. R. 116. And, it seems, if the plaintiff allege that he has no counterpart of the stated account, the defendant must annex a copy thereof to his plea, *Hankey* v. *Simpson*, 3 Atk. 303. And see above, p. 239, *et seq.*

(*i*) 3 Atk. 70. 1 Eq. Ca. Ab. 39. 2 Sch. & Lefr. 727. And see *Matthews* v. *Walwyn*, 4 Ves. 118. *Middleditch* v. *Sharland*, 5 Ves. 87.

(*k*) Gilb. For. Rom. 57. *Walker* v. *Consett*, Forrest's Exch. R. 157. *Hodder* v. *Watts*, 4 Pri. Exch. R. 8. And see *Wharton* v. *May*, 5 Ves. 27.

(*l*) 2 Atk. 252. See the case of *Clarke* v. *Earl of Ormonde*, 1 Jac. R. 116.

(*m*) *Lingood* v. *Croucher*, 2 Atk. 395. *Lingood* v. *Eade*, S. C. 2 Atk. 501. *Burton* v. *Ellington*, 3 Bro. C. C. 196.

(*n*) *Tittenson* v. *Peat*, 3 Atk. 529. *Anon.* 3 Atk. 644. As to plea of an award under an agreement to refer the matters in dispute to arbitration, entered into after bill filed, see *Dryden* v. *Robinson*, 2 Sim. & Stu. 529; and see *Rowe* v. *Wood*, 1 Jac. & W. 348. S. C. 2 Bligh P. C. 595.

(*o*) As instances see *Ward* v. *Periam*, cited 2 Atk. 396. 2 Vez. 316. S. C. reported 1 Turn. R. 131, note. *Chicot* v. *Lequesne*, 2 Vez. 315. 2 Ves. jun. 135. *Reynell* v. *Luscombe*, 1 Turn. R. 135. n. *Goodman* v. *Sayers*, 2 Jac. & W. 249.

those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitrators to have been incorrupt and impartial (*q*); and any other matter stated in the bill as a ground for impeaching the award must be denied in the same manner.

3. If the plaintiff, or a person under whom he claims, has released the subject of his demand, the defendant may plead the release in bar of the bill (*r*), and this will apply to a bill praying that the release may be set aside (*s*). In a plea of a release the defendant must set out the consideration upon which the release was made (*t*). A plea of a release therefore cannot extend to a discovery of the consideration;

Auriol v. *Smith*, 1 Turn. R. 121. *Dawson* v. *Sadler*, 1 Sim. & Stu. 537.

(*q*) 2 Atk. 396. 6 Ves. 594. 596. 2 Ves. & B. 364; and see *Allardes* v. *Campbell*, reported 1 Turn. 133, note. S. C. Bunb. 265. *Rybott* v. *Barrell*, 2 Eden R. 131.

(*r*) *Bower* v. *Swadlin*, 1 Atk. 294. *Taunton* v. *Pepler*, 6 Madd. 166. *Clarke* v. *Earl of Ormonde*, 1 Jac. R. 116. And see *Roche* v. *Morgell*, 2 Sch. & Lefr. 721.

(*s*) *Pusey* v. *Desbouverie*, 3 P. Wms. 315. And with regard to this latter proposition, it may be remarked, that it is in like manner necessary that the defendant should deny the equitable circumstances charged for the purpose of impeaching the release, by averments in his plea, and by an answer to the same effect, *Lloyd* v. *Smith*, 1 Anstr. Exch. R. 258. *Freeland* v. *Johnson*, 1 Anstr. Ex. R. 276. *Walter* v. *Glanville*, 5 Bro. P. C. 555. Toml. Ed. 2 Sch. & Lefr. 727. 6 Madd. 64. 2 Sim. & Stu. 279.

(*t*) Gilb. For. Rom. 57. *Griffith* v. *Manser*, Hardr. 168. 2 Sch. & Lefr. 728; and see *Walter* v. *Glanville*, 5 Bro. P. C. 555. Toml. Ed.

and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached. Thus, to a bill stating various transactions between the defendant and the testator of the plaintiff, and imputing to those transactions fraud and unfair dealing on the part of the defendant, and impeaching accounts of the transactions delivered by the defendant to the testator on the ground of errors, omissions, unfair and false charges, and also impeaching a purchase of an estate conveyed by the testator to the defendant in consideration of part of the defendant's alleged demands, and praying a general account, and that the purchase of the estate might be set aside as fraudulently obtained, and the conveyance might stand as a security only for what was justly due from the testator's estate to the defendant; a plea of a deed of mutual release, extending to so much of the bill as sought a discovery, and prayed an account of dealings and transactions prior to and upon the day of the date of the deed of release, and all relief and discovery grounded thereupon, and stating the deed to have been founded on a general settlement of accounts on that day, and to have excepted securities then given to the defendant for the balance of those accounts which was in his favour, and averring only that the deed had been prepared and executed without any fraud or undue practice on the part of the defendant, was over-ruled. The consideration for the instrument was the general settlement of accounts; and if those accounts were liable to the imputations cast upon

them by the bill (*u*), the release was not a fair transaction, and ought not to preclude the Court from decreeing a new account. The plea therefore could not be allowed to cover a discovery tending to impeach those accounts, and the fairness of the settled accounts was not put in issue by the plea, or supported by an answer denying the imputations charged in the bill. The plea indeed was defective in many other particulars, necessary to support it against the charges in the bill; and to some parts of the case made by the bill the release did not extend (*x*). A release pleaded to a bill for an account must be under seal (*y*); a release not under seal must be pleaded as a stated account only (*z*).

4. To a bill brought upon a ground of equity by an heir at law against a devisee, to turn the devisee out of possession, the devisee may plead the will, and that it was duly executed (*a*). But in cases of this kind where the bill has also prayed a receiver, a plea extending to that part of the bill has been so far overruled, as it might be necessary for the Court in the progress of the cause to appoint a receiver (*b*). Upon a bill filed by an heir against a person claiming under

(*u*) Though an account be stated under hand and seal, yet if there appear any mistake in it the Court will relieve. See the cases cited above, 259, note (*e*).

(*x*) *Roche* v. *Morgell*, 2 Sch. & Lefr. 721.

(*y*) But it need not be signed. *Taunton* v. *Pepler*, 6 Madd. 166.

(*z*) Gilb. For. Rom. 57.

(*a*) *Anon.* 3 Atk. 17. *Anstis* v. *Dowsing*, cited 2 Vez. 361. *Meadows* v. *Duch. of Kingston*, Mich. 1777, reported Ambl. 756. 3 Meriv. 171.

(*b*) *Anon.* 3 Atk. 17, and *Meadows* v. *Duch. of Kingston*. But see 2 Vez. 362, 363.

a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit. To a bill by one partner in trade against his copartner for discovery and relief relative to the partnership transactions, a plea of the articles of partnership, by which it was agreed that all differences which might arise between the partners should be referred to arbitration, and that no suit should be instituted in law or equity until an offer should have been made to leave the matter in difference to arbitration, and that offer had been refused, has been allowed (*c*). This case has been much questioned; and it now seems to be determined that such an agreement cannot be pleaded in a bar of suit (*d*), nor will the Court compel a specific performance of the agreement (*e*). Indeed it seems impossible to maintain that such a contract should be specifically performed, or bar a suit, unless the parties had first agreed upon the previous question, what were the matters in difference, and upon the powers to be given to the arbitrators, amongst which the same means of obtaining discovery upon oath, and production of books and papers, as can be given by a court of equity might be essential to justice. The nomination of arbitrators also must be a subject on

(*c*) *Halfhide* v. *Fenning*, 2 Bro. C. C. 336. Contra, *Wellington* v. *Mackintosh*, 2 Atk. 569.

(*d*) *Satterly* v. *Robinson*, Exch. 17 Dec. 1791. *Michell* v. *Harris*, 4 Bro. C. C. 311. S. C. 2 Ves. jun. 129. *Street* v. *Rigby*, 6 Ves. jun. 815. 14 Ves. 270. *Waters* v. *Taylor*, 15 Ves. 10.

(*e*) 6 Ves. jun. 818. *Milnes* v. *Gery*, 14 Ves. 400.

which the parties must previously agree; for if either party objected to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person so objected to as a judge chosen by himself. It must also be determined that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which, if any of them involved important matter of law, they might not be deemed to be.

5. The statute for prevention of frauds and perjuries (*f*) may be pleaded in bar of a suit to which the provisions of that act apply (*g*). This form of pleading generally requires negative averments to support the defence (*h*). Thus, to a bill for discovery and execution of a trust, the statute, with an averment that there was no declaration of trust in writing, may be pleaded (*i*), though in the case cited the plea

(*f*) 29 Car. II. c. 3.

(*g*) Gilb. For. Rom. 61. *Bawdes* v. *Amhurst*, Prec. in Cha. 402. *O'Reilly* v. *Thompson*, 2 Cox R. 271. *Gunter* v. *Halsey*, Ambl. 586. *Jordan* v. *Sawkins*, 3 Bro. C. C. 388. S. C. 1 Ves. jun. 402. *Main* v. *Melbourn*, 4 Ves. 720. As to the equitable grounds upon which a case may be exempted from the operation of the Statute of Frauds, see 3 Ves. 38, note (*a*).

(*h*) *Stewart* v. *Carcless*, cited 2 Bro. C. C. 565. Dick. 42. *Moore* v. *Edwards*, 4 Ves. 23. *Bowers* v. *Cator*, 4 Ves. 91. 2 Ves. & B. 364. And where there are not equitable circumstances stated in the Bill, which might operate to prevent the relief sought by the plaintiff being barred by the Statute, but the agreement is alleged to have been in writing, and facts are charged in evidence thereof, negative averments are also requisite to the defence, *Evans* v. *Harris*, 1 Ves. & B. 361; and see *Jones* v. *Davis*, 16 Ves. 262.

(*i*) *Cottington* v. *Fletcher*, 2 Atk. 156.

was over-ruled by an answer, admitting, in effect, the trust. To a bill for a specific performance of agreements, the same statute, with an averment that there was no agreement in writing signed by the parties, has been also pleaded (*k*). It has been understood that this plea extended to the discovery of a parol agreement, as well as to the performance of it, except where the agreement had been so far performed that it might be deemed a fraud on the party seeking the benefit of it, unless it was completely carried into execution (*l*), and cases have been determined accordingly (*m*). This has of late been the subject of much discussion, and some contrariety of decision. In one case (*n*) the Court appeared to have conceived that the courts of equity in determining cases arising upon this statute had laid down two propositions founded on rules of equity, and had given a construction to the act accordingly, which amounted to this, that the act was to be construed as if there had been an express exception to the

(*k*) *Mussell* v. *Cooke*, Prec. in Chan. 533. *Child* v. *Godolphin*, cited, 2 Bro. C. C. 566. S. C. Dick. 39. *Child* v. *Comber*, 3 Swanst. 423, n. *Hawkins* v. *Holmes*, 1 P. Wms. 770. *Clerk* v. *Wright*, 1 Atk. 12.

(*l*) That this is the construction put upon acts of part performance, see 1 Sch. & Lefr. 41. 3 Meriv. 246. *Morphett* v. *Jones*, 1 Swanst. 172, and the authorities therein referred to.

(*m*) *Hollis* v. *Whiteing*, 1 Vern. 151. *Whaley* v. *Bagnal*, 1 Bro. P. C. 345. Toml. Ed. And see *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404. S. C. 2 Ves. & Bea. 153, n. *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559.

(*n*) *Whitchurch* v. *Bevis*, in Ch. 8 Feb. 1786, reported 2 Bro. C. C. 559.

extent of those rules in favour of courts of equity; and that no action was to be sustained except upon an agreement in writing, signed according to the requisition of the statute, and except upon bills in equity, where the party to be charged confessed the agreement by answer, or there was a part performance of the agreement. It was therefore determined that to the fact of the agreement the defendant must answer. But the Court, afterwards, upon a re-hearing, allowed the plea (*o*). In subsequent cases this subject was much discussed, and the question was particularly considered, whether, if the defendant admitted by answer the fact of a parol agreement, but insisted on the protection of the statute, a decree could be pronounced for performance of the agreement without any other ground than the fact of the parol agreement thus confessed. At length it seems to have been decided, that though a parol agreement be confessed by the defendant's answer, yet if he insists on the protection of the statute no decree can be made merely on the ground of that confession (*p*); and it may now, apparently, be concluded that a plea of the statute cannot in any case be a bar to a discovery of the fact of an agreement; and that as the benefit of the statute may be had if insisted on by answer, there can be no use in pleading

(*o*) *Whitchurch* v. *Bevis*, on rehearing, Hil. vac. 1789, principally on the authority of *Whaley* v. *Bagnal*, 1 Bro. P. C. 345. Toml. Ed.

(*p*) 1 Bro. C. C. 416. *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559. 4 Ves. jun. 23, 24. 6 Ves. 37. 12 Ves. 471. 15 Ves. 375.

it in bar of relief. Whether the same rule would be applied to a confession of a trust by an answer, which may be considered as a declaration of the trust in writing, signed by the party, as indeed the confession of a parol agreement by answer might also be deemed, seems to be an important question, not agitated in the cases decided with respect to other agreements, and upon which it may be very difficult to make a satisfactory distinction. In the cases in which it was formerly considered that a plea of this statute was the proper defence, it was conceived that any matter charged by the bill which might avoid the bar created by the statute must be denied, generally, by way of averment in the plea, and particularly and precisely by way of answer to support the plea. But according to one case (*q*), if any such matter were charged in the bill it became impossible to plead the statute in bar; the Court having determined that denial of the matter so charged made the plea double (*r*), and therefore informal; and it may now be doubtful whether a plea of the statute ought in any case (except perhaps the case of a trust) to extend to any discovery sought by the bill, and indeed whether it ought not to be deemed a needless and vexatious proceeding if confined to relief (*s*).

(*q*) *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404. S. C. 2 Ves. & B. 153, n.

(*r*) On the subject of double pleas, see hereafter, pp. 295, 296.

(*s*) As to the effect of insisting on the statute by answer, or by plea, and whether necessary, see *Newton* v. *Preston*, Pre. in Ch. 103. See also *Kirk* and *Webb*, Pr. in Ch. 84. And see *Rowe* v. *Teed*, 15 Ves. 372. 18 Ves. 182. *Morphett* v. *Jones*, 1 Swanst. 172.

The statute for limitation of actions (*t*) is likewise a good plea (*u*). But if the bill charges a fraud, and that the fraud was not discovered (*x*) till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud (*y*), or avers that the fraud, if any, was discovered within six years before filing the bill (*z*). And though the statute of limitations is a bar to the claim of a debt, it was formerly determined not to be a bar to a discovery when the debt became due; for if that had been set forth it would appear to the court whether the time limited by the statute was elapsed (*a*), but later decisions have been to the contrary (*b*). These decisions are stated to have been founded on a rule adopted of late years, that where a demurrer to relief would be good, the same ground of demurrer would extend to the discovery on which the relief prayed was founded; and applying this rule, origi-

(*t*) 21 Jac. I. c. 16.

(*u*) Gilb. For. Rom. 61. *Wych* v. *East India Comp.* 3 P. Wms. 309. *Lacon* v. *Lacon*, 2 Atk. 395. *Earl of Strafford* v. *Blakeway*, 6 Bro. P. C. 630. Toml. Ed. *Barber* v. *Barber*, 18 Ves. 286, and the cases therein cited.

(*x*) See 2 Sch. & Lefr. 631 and 633, and following pages, and the cases therein cited; and 2 Ball & B. 118.

(*y*) *Bicknell* v. *Gough*, 3 Atk. 558.

(*z*) *South Sea Comp.* v. *Wymondsell*, 3 P. Wms. 143. *Sutton* v. *Earl of Scarborough*, 9 Ves. 71. But according to *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404, and 2 Ves. & B. 153, n. this should be considered a double plea.

(*a*) *Mackworth* v. *Clifton*, 2 Atk. 51. 2 Sch. & Lefr. 635.

(*b*) *Sutton* v. *Earl of Scarborough*, 9 Ves. jun. 71, and other authorities there cited. And see *Baillie* v. *Sibbald*, 15 Ves. 185. *Cork* v. *Wilcock*, 5 Madd. 328.

nally confined to demurrers, to pleas also (*b*). It may be doubted whether in this extension of the rule to pleas the difference between a plea and demurrer has been sufficiently considered. A demurrer founds itself on the bill, and asserts no matter of fact the truth of which can be disputed. A plea, on the contrary, asserts a fact the truth of which is put in issue by the plea. When therefore the statute of limitations is pleaded to a demand, and the question to be tried on the issue joined upon the plea is, whether the debt became due within six years before the filing of the bill, it is denying the plaintiff the benefit of that discovery in aid of proof which is allowed in all other cases, to hold that a plea of the statute of limitations, with an averment that the cause of action, if any, occurred six years before the filing of the bill will be a bar to a discovery of the truth of that averment (*c*). In the case of money received by the defendant for the use of the plaintiff, and where the sums received, as well as the times when they were respectively received, may rest in the knowledge of the defendant only, it may amount to a complete denial of justice to hold that a plea of the statute of limitations, with such an averment, is a bar to any discovery as to the sums received, and when received, and of whom, and as to entries in books, and other papers, which discovery might enable the plaintiff to

(*b*) See the distinction taken on this subject in *James* v. *Sadgrove*, 1 Sim. & Stu. 4.

(*c*) This argument is supported by *Cork* v. *Wilcock*, 5 Madd. 328; and 1 Sim. & Stu. 6.

prove the falsehood of the plea by witnesses and production of papers, as well as by the defendant's answer. Where a particular special promise is charged to avoid the operation of the statute (*d*), the plaintiff must deny the promise charged by averment in the plea (*e*), as well as by answer to support the plea (*f*). Where the demand is of any thing executory, as a note for payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action (*g*) hath not accrued within six years, because the statute bars only as to what was actually due six years before the action brought (*h*). Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to the discovery, so far as the charge of fraud extends, for the defendant must answer to the charge of fraud (*i*), and the plea must put the fraud in issue. The statute of limitations may be pleaded to a bill to redeem a mortgage (*k*) if the mortgagee

(*d*) See *Andrews* v. *Brown*, Pre. in Cha. 385.

(*e*) *Anon.* 3 Atk. 70. But this, according to *Whitbread* v. *Brockhurst*, 1 Bro. Ch. Ca. 404, would be a double plea.

(*f*) See on this subject, *Bayley* v. *Adams*, 6 Ves. 586; 5 Madd. 330; and 1 Sim. & Stu. 6.

(*g*) 2 Strange, 1291.

(*h*) 3 Atk. 71. See above, p. 269, note (*z*). And see the case of *Hony* v. *Hony*, 1 Sim. & Stu. 568, in which the fact of an intermediate acknowledgment of the plaintiff's right having been made, defeated the plea.

(*i*) *Bicknell* v. *Gough*, 3 Atk. 558. 2 Sch. & Lef. 635.

(*k*) On the question whether the statute itself applies to a case of this kind, or whether the rule that twenty years possession by the mortgagee, subject to the usual exceptions of infancy, &c. without his doing any act which is to be regarded

has been in possession twenty years (*l*); and indeed a demurrer has been allowed in this case (*m*) where the possession has appeared upon the face of the bill (*n*), though some cases seem to be to the contrary (*o*). To a bill, on an equitable title to presentation to a living, seeking to compel the defendant to resign, plenarty for six months before the bill was filed may be pleaded in bar, the statute of Westminster the second (*p*) being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal right (*q*). But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may be in some cases a ground for the court to interfere (*r*), and consequently plenarty would not in such cases be pleadable in bar. The statute of limitations may also be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit, pro-

as an acknowledgment that the relation of debtor and creditor still subsists, has been adopted in courts of equity, in conformity with the provisions of the statute, see 1 Cox R. 149. 2 Sch. & Lefr. 630. 632. 1 Ball & B. 167. 17 Ves. 97. 99. 19 Ves. 184. 2 Jac. & W. 145. 187; and see *Blewit* v. *Thomas*, 2 Ves. jun. 669.

(*l*) *Aggas* v. *Pickerell*, 3 Atk. 225. 2 Ves. jun. 280.

(*m*) 3 P. Wms. 287, note. See also 1 Vern. 418, and *Beckford* v. *Tobin*, ab. p. 213, n. 2 Sch. & Lefr. 638. And see *Hodle* v. *Healey*, 1 Ves. & B. 536, and the cases therein cited.

(*n*) *Edsell* v. *Buchanan*, 4 Bro. C. C. 254.

(*o*) 3 Atk. 225, 226, and the authorities there cited.

(*p*) 13 Edw. I. c. 5.

(*q*) *Gardiner* v. *Griffith*, 2 P. Wms. 404. 3 Atk. 459. *Boteler* v. *Allington*, 3 Atk. 453. And see *Mutter* v. *Chanvell*, 1 Meriv. 475.

(*r*) 2 P. Wms. 405.

vided there has been no decree (*s*), for a decree being in the nature of a judgment the statute of limitations cannot be applied to it (*t*). But where the consequence of reviving proceedings to carry a decree into execution would have been to call on representatives to account for assets after a great length of time, and under peculiar circumstances of laches, a bill of revivor and supplement for those purposes was dismissed (*u*). Although suits in equity are not within the words of the statute, the courts of equity generally adopt it as a positive rule, and apply it by parity of reason to cases not within it (*x*). In general they also hold that unless the defendant claims the benefit of the statute by plea or answer he cannot insist upon it in bar of the plaintiff's demand (*y*); but notwithstanding, the courts will in cases which will allow of the exercise of discretion use the statute as a rule to guide that discretion (*z*); and will also sometimes resort to the policy of the ancient

(*s*) *Hollingshead*'s case, 1 P. Wms. 742. *Comber*'s case, 1 P. Wms. 766. 2 Sch. & Lefr. 633. 1 Ball & B. 531.

(*t*) 1 P. Wms. 744. 2 Sch. & Lefr. 633.

(*u*) *Hercy* v. *Dinwoody*, 4 Bro. C. C. 257.

(*x*) Lord Mansf. 2 Burr. 961. 2 Atk. 611. 3 Bro. C. C. 340, note. 1 Sch. & Lefr. 428.

(*y*) 1 Atk. 494.

(*z*) 1 Atk. 494. Courts of Equity it seems, in respect of legal titles and demands, are bound by the statute, 2 Sch. & Lefr. 630, 631; and see *Hony* v. *Hony*, 1 Sim. & Stu. 568; but, in respect of equitable titles and demands, are only influenced in their determination by analogy to it. 1 Sch. & Lefr. 428. 2 Sch. & Lefr. 632. 10 Ves. 466. 15 Ves. 496. 17 Ves. 97. 1 Ball & B. 119. 166. 2 Jac. & W. 163, and following pages, particularly p. 175, and 2 Jac. & W. 192.

law, which in many cases limited the demand of accruing profits to the commencement of the suit (*a*).

Any other public statute which may be a bar to the demands of the plaintiff may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute (*b*).

A particular statute may also be pleaded in the same manner. Thus, to a bill impeaching a sale of lands in the fens by the conservators under the statutes for draining the fens, the defendant pleaded the statutes, and that the sale was made by virtue of and according to those statutes, and the plea was allowed (*c*).

X. Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side (*d*). This is particularly

(*a*) On this subject see *Pulteney* v. *Warren*, 6 Ves. 73. *Pettiward* v. *Prescott*, 7 Ves. 541.

(*b*) See instances of a plea of the statute of maintenance, 32 Hen. 8, c. 9, s. 3, *Hitchins* v. *Lander*, Coop. R. 34; *Wall* v. *Stubbs*, 2 Ves. & Bea. 354; and another example of the proposition in the text, *Ockle-stone* v. *Benson*, 2 Sim. & Stu. 265. And see *De Tastet* v. *Sharpe*, 3 Madd. 51.

(*c*) *Brown* v. *Hamond*, 2 Ch. Ca. 249.

(*d*) See 2 Ves. jun. 457, 458, and the authorities there referred to; and see the case of *Gait* v. *Osbaldeston*, 5 Madd. 428. S. C. 1 Russ. R. 158. One exception has however been

the case where the defendant claims under a purchase or mortgage for valuable consideration without notice of the plaintiff's title, which he may plead in bar of the suit (*e*). Such a plea must aver that the person who conveyed or mortgaged to the defendant was seised in fee, or pretended to be seised (*f*), and was in possession (*g*), if the conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage-deed (*h*). It must aver a conveyance, and not articles merely (*i*); for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles (*k*). It must aver the consideration (*l*) and actual payment of it; a consideration secured to be paid is not sufficient (*m*). The plea must also deny notice (*n*) of the plaintiff's title or claim (*o*), previous to

made in favour of a dowress, see *Williams* v. *Lambe*, 3 Bro. C. C. 264.

(*e*) *Fitzgerald* v. *Burk*, 2 Atk. 397. *Story* v. *Lord Windsor*, 2 Atk. 630. *Bullock* v. *Sadler*, Ambl. 763. *Strode* v. *Blackburne*, 3 Ves. 222. *Wallwyn* v. *Lee*, 9 Ves. 24. 1 Ball & B. 171. 2 Ball & B. 303.

(*f*) 3 P. Wms. 281. *Story* v. *Lord Windsor*, 2 Atk. 630. 17 Ves. 250.

(*g*) *Trevanian* v. *Mosse*, 1 Vern. 246. 3 Ves. 226. 9 Ves. 32. 16 Ves. 252.

(*h*) 3 P. Wms. 281. As to the case where the purchase is of a reversion, see *Hughes* v. *Garth*, Ambl. 421. S. C. 2 Eden R. 168.

(*i*) *Fitzgerald* v. *Lord Falconbridge*, Fitzg. 207. 1 Atk. 571. 3 Atk. 377.

(*k*) 1 Atk. 571.

(*l*) 1 Ca. in Cha. 34. *Millard's* Case, 2 Freem. 43. *Brereton* v. *Gamul*, 2 Atk. 240.

(*m*) *Hardingham* v. *Nicholls*, 3 Atk. 304. *Maitland* v. *Wilson*, 3 Atk. 814.

(*n*) On the subject of notice, actual and constructive, see Sugden's Vend. & Purch. 6th Ed. 710.

(*o*) *Lady Bodmin* v. *Vandebendy*, 1 Vern. 179. *Jones* v.

the execution of the deeds and payment of the consideration (*p*); and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*q*). If particular instances of notice, or circumstances of fraud are charged, they must be denied as specially and particularly as charged in the bill (*r*). The special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency (*s*); but notice and fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud will not be

Thomas, 3 P. Wms. 243. *Kelsall* v. *Bennet*, 1 Atk. 522.

(*p*) *More* v. *Mayhow*, 1 Ca. in Cha. 34. S. C. 2 Freem. 175. 1 Eq. Ca. Ab. 38. 334. *Tourville* v. *Naish*, 3 P. Wms. 307. 1 Atk. 384. 2 Atk. 631. 3 Atk. 304.

(*q*) 1 Atk. 522. And it must not appear that the defendant, though he should claim as purchaser under a settlement executed at the time of his marriage, might have had notice of the plaintiff's title by using due diligence in the investigation of his own. *Jackson* v. *Rowe*, 2 Sim. & Stu. 472; and see *Hamilton* v. *Royse*, 2 Sch. & Lefr. 315. 13 Ves. 120. 14 Ves. 433. 6 Dow. P. C. 223, 224. 6 Madd. 59.

(*r*) *Radford* v. *Wilson*, 3 Atk. 815. 2 Vez. 450. *Jarrard* v. *Saunders*, 2 Ves. jun. 187. S. C. 4 Bro. C. C. 322.

(*s*) *Anon.* 2 Ca. in Cha. 161. *Price* v. *Price*, 1 Vern. 125. 6 Ves. 596. 14 Ves. 66. It has been lately declared, that it is not the office of the plea to deny particular facts of notice; but that it is sufficient, where such facts are alleged, to make a general denial which will include constructive as well as actual notice: yet that if circumstances be specially charged as evidence of notice, they must be denied by averments in the plea, and by an answer accompanying the same. *Pennington* v. *Beechey*, 2 Sim. & Stu. 282.

in issue (*s*). Notice or fraud thus put in issue, if proved, will effectually open the plea on the hearing of the cause.

(*s*) *Harris* v. *Ingledew*, 3 P. Wms. 94. 3 P. Wms. 244, note. Gilb. For. Rom. 58. Treat. of Frauds, c. 18, p. 220. In the case of *Meadows* v. *Duch. of Kingston*, Mich. 1777, (S.C. reported Ambl. 756.) the Chancellor seemed to be of opinion, that notice and fraud were to be denied by way of averment in the plea, in cases only where the denial made part of an equitable defence; as in a plea of purchase for valuable consideration, the denial of notice must be by way of averment in the plea, because the want of notice creates the equitable bar. But in *Devie* and *Chester*, in Chan. March 10th, 1780, a decree establishing a modus having been pleaded to a bill for tithes, in which the plaintiff stated that the defendants set up the decree as a bar to his claim, and to avoid the effect of the decree charged that it had been obtained by collusion, and stated facts tending to show collusion; the Chancellor was of opinion, that the defendants not having by averments in the plea denied the collusion, although they had done so by answer in support of the plea, the plea was bad in form, and he over-ruled it accordingly. And in *Hoare* and *Parker*, in Ch. 17th and 19th of Jan. 1785. (reported 1 Bro. C. C. 578. S. C. 1 Cox. R. 224,) the plaintiffs having brought their bill as trustees, claiming quantities of plate described in a schedule annexed to the bill, of which the use had been given by the will of admiral Stewart to his widow for her life, and after her death to his son and his issue; against the defendant, a pawn-broker, with whom the plate, or part of it, was alleged to have been pledged by the widow; and the bill having sought a discovery of the particular pieces of plate pawned, in order to found an action of trover, the defendant pleaded to so much of the bill as sought a discovery of the plate pawned, as after mentioned in the plea, and of the plate specified in the schedule annexed to the bill, that Mrs. Stewart had pledged divers articles of plate at several times stated in the plea, for sums of money specified in the plea, which sums the defendant averred were paid to Mrs. Stewart;

A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser (*t*). But notice to an agent is notice to the principal (*u*); and where a person having notice purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the purchase-money, and procured a conveyance, the person first contracting was considered from the beginning as the agent of the actual purchaser, who was therefore held affected with notice (*x*). A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration (*y*), and may be pleaded in the

and he also averred that he had no notice of the will of admiral Stewart till after the death of Mrs. Stewart; but he did not aver by his plea that he had no plate pawned with him by Mrs. Stewart besides the pieces pawned at the particular times mentioned in the plea, although he did by his answer deny that he had any other. The Chancellor was of opinion that the plea was therefore defective in point of form, as it extended to all the plate mentioned in the schedule of which a discovery was sought by the bill. See 6 Ves. 595. 597; and see p. 239, *et seq.*

(*t*) *Brandlyn* v. *Ord*, 1 Atk. 571. *Lowther* v. *Carlton*, 2 Atk. 139. S. C. 2 Atk. 242. Ca. t. Talb. 187. 2 Eq. Ca. Ab. 685. *Sweet* v. *Southcote*, 2 Bro. C. C. 66. Ambl. 313. 11 Ves. 478. 13 Ves. 120; and see *Harrison* v. *Forth*, Pre. in Cha. 51.

(*u*) *Brotherton* v. *Hatt*, 2 Vern. 574. *Le Neve* v. *Le Neve*, 3 Atk. 646. 1 Vez. 62. 2 Vez. 62. 370. 13 Ves. 120. *Mountford* v. *Scott*, 3 Madd. 34.

(*x*) *Jennings* v. *Moore*, 2 Vern. 609. S. C. on appeal, under title *Blenkarne* v. *Jennens*, 2 Bro. C. C. 278. Toml. Ed. *Coote* v. *Mammon*, 5 Bro. P.C. 355. Toml. Ed.

(*y*) 1 Atk. 190. 6 Ves 659. 18 Ves. 92. 6 Dow P. C. 209. 2 Sim. & Stu. 475.

same manner(*y*). If a settlement is made after marriage in pursuance of an agreement before marriage, the agreement as well as the settlement must be shown (*z*). A widow, defendant to a suit brought by any person claiming under her husband, to discover her title to lands of which she is in possession as her jointure, may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able, to confirm her jointure. But a plea of this nature must set forth the settlement, and the lands comprised in it, with sufficient certainty (*a*). A plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff, but a plea of bare title only, without setting forth any consideration, is not sufficient for that purpose (*b*). Upon a plea of purchase for a valuable consideration to a discovery of deeds and writings, the purchase-deed must be excepted, for it is pleaded (*c*).

A plea of purchase for a valuable consideration, without notice of the plaintiff's title to a bill to perpetuate the testimony of witnesses, has been allowed, though there are few cases in which the Court will not give that assistance to the furtherance of justice. Thus, to a bill to perpetuate the testimony of witnesses

(*y*) *Harding* v. *Hardrett*, Finch, R. 9.

(*z*) *Lord Keeper* v. *Wyld*, 1 Vern. 139.

(*a*) *Petre* v. *Petre*, 3 Atk. 511. 3 Atk. 571. 2 Vez. 450. *Leech* v. *Trollop*, 2 Vez. 662. As to the case of a dowress plaintiff, see above p. 274, note (*d*). 1 Ves. jun. 76.

(*b*) 2 Atk. 241.

(*c*) 2 Vez. 107.

to a will the defendant pleaded purchase for a valuable consideration, without notice of the will, and the plea was allowed (*c*). But in this case, as reported, there appears to have been nothing to impede the plaintiff's proceeding at law to assert his title under the will, against the defendant's possession, and there was apparently therefore no equity to support the bill (*d*).

XI. Though a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the Court which ought to prevent its interference, yet the defendant may object to the bill if it is deficient to answer the purposes of complete justice. This is usually for want of proper parties; and if the defect is not apparent on the face of the bill (*e*) the defendant may plead the matter necessary to show it (*f*). A plea of want of parties goes both to discovery and relief where relief is prayed (*g*), though the want of parties is no objection to a bill for a discovery merely (*h*). Where a sufficient reason to excuse the defect is suggested by the bill, as where a personal representative is a necessary party, and the bill states that the representation is in contest

(*c*) *Bechinall* v. *Arnold*, 1 Vern. 354.

(*d*) See also *Ross* v. *Close*, 5 Bro. P. C. 362. Toml. Ed. 2 Ves. jun. 458.

(*e*) 16 Ves. 325.

(*f*) *Hanne* v. *Stevens*, 1 Vern. 110. *Ashurst* v. *Eyre*, 2 Atk. 51. S. C. 3 Atk. 341.

(*g*) 2 Atk. 51, in *Plunket* v. *Penson*, wherein this plea is termed a plea in bar; but see 6 Ves. 594. 16 Ves. 325.

(*h*) *Sangosa* v. *E. I. Comp.* 2 Eq. Ca. Ab. 170.

in the ecclesiastical court (*i*), or where the party is resident out of the jurisdiction of the court (*k*), and the bill charges that fact, or where a bill seeks a discovery of the necessary parties (*l*), an objection for want of parties will not be allowed, unless, perhaps, the defendant should controvert the excuse made by the bill by pleading matter to show it false. Thus, in the first instance, if before the filing of the bill the contest in the ecclesiastical court was determined, and administration granted, and the defendant showed this by plea, perhaps the objection for want of parties would be in strictness good. Upon arguing a plea of this kind, the Court instead of allowing it has given the plaintiff leave to amend the bill upon payment of costs (*m*); a liberty which he may also obtain after allowance of a plea, according to the common course of the court; for the suit is not determined by allowance of a plea as it is by allowance of a demurrer to the whole of a bill (*n*).

Having thus considered all the objections to a bill which have occurred, as extending to relief, and which likewise extend to discovery wherever it is

(*i*) See 2 Atk. 51, in *Plunket* v. *Penson*.

(*k*) *Cowslad* v. *Cely*, Prec. in Cha. 83; and see *Haddock* v. *Thomlinson*, 2 Sim. & Stu. 219, and above, p. 164, note.

(*l*) See *Bowyer* v. *Covert*, 1 Vern. 95.

(*m*) *Stafford* v. *City of London*, 1 P. Wms. 428; and where the plea was defective in point of form, in not stating that additional parties were necessary, and naming them, leave was given to amend the plea. *Merrewether* v. *Mellish*, 13 Ves. 435. See 11 Ves. 369. 16 Ves. 325.

(*n*) See below, p. 304.

merely sought for the purpose of obtaining relief, and can have no other end, it remains to treat of such objections as are grounds of plea to discovery only. These are nearly the same as those which have been already mentioned as causes of demurrer to discovery. They may be, I, That the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favour; II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery only; IV. That the situation of the defendant renders it improper for a court of equity to compel a discovery.

I. If the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favour, though he falsely states a different case by his bill, so that it is not liable to a demurrer, the defendant may by plea state the matter necessary to show the truth to the court (*n*).

II. If a plaintiff by his bill states himself to have

(*n*) But if a plaintiff who is bankrupt, in a bill filed by him to obtain discovery in aid of his defence to an action, and for an account, and an injunction in the mean time, should avoid stating his bankruptcy, although this court, it seems, would not afford him relief by decreeing the payment of the balance to him, it would overrule a plea of that fact so far as to give him the discovery, and even to have the accounts taken. *Lowndes* v. *Taylor*, 1 Madd. R. 423. S. C. 2 Rose, 365. See above, p. 67, note.

an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may by plea protect himself from making the discovery, which may involve him in difficulty and expense, and perhaps may be prejudicial to him in other cases. Thus, if a plaintiff states himself to be heir or administrator of a person dead intestate, and in that character seeks a discovery from a person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative, or that the person alleged to be dead is living (*o*).

III. It has been already observed, that if a claim of interest is alleged by a bill against a person who has no interest in the subject, he cannot by demurrer protect himself from a discovery, and must resort either to a plea or disclaimer (*p*); by either of which means it should seem he may protect himself from making by answer that discovery which he may properly be required to make if called upon as a witness (*q*). In some cases however the Court has allowed a defendant to protect himself by answer, denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the

(*o*) *Ord* against *Williamson*, Trin. 1773. *Ord* v. *Huddlestone*, Dick. 510. And see *Gait* v. *Osbaldeston*, 1 Russ. 158. S. C. 5 Madd. 428.

(*p*) Page 188. And see 1 Vez. 426.

(*q*) But it does not appear to be settled that a bankrupt could by plea protect himself from discovery. See 1 Ves. & B. 550.

character of a witness; and perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill, under the pretence of an interest which he has not.

IV. The situation of a defendant may render it improper for a court of equity to compel a discovery, 1, because the discovery may subject him to pains and penalties; 2, because it will subject him to a forfeiture, or something in the nature of a forfeiture; 3, because it would betray the confidence reposed in him as a counsel, attorney, or arbitrator; 4, because he is a purchaser for a valuable consideration without notice of the plaintiff's title.

1. It has been already observed, that no person is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment (*r*). If therefore a bill requires an answer which may subject the defendant to any pains and penalties, or tends to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill, or so much thereof as the plea will cover (*s*).

Thus to a bill brought for discovery of a marriage,

(*r*) Page 194. See 2 Vez. 245. 2 Swanst. 214, 216. *Bird* v. *Hardwicke*, 1 Vern. 109. 11 Ves. 525.

(*s*) *Bird* v. *Hardwicke*, 1 Vern. 109. *Claridge* v. *Hoare*, 14 Ves. 59.

where the fact, if true, would have subjected the party to punishment in the ecclesiastical court for incest, the defendant pleaded matter to show that the marriage, if real, was incestuous, and would subject the parties to pains and penalties (*t*). And where a bill was brought against a woman claiming as widow of a person dead, alleging that before her marriage with the deceased she was married to another person, who was living at the time of her marriage with the deceased, the defendant pleaded that marriage to the discovery of the supposed first marriage, and insisted that she was not compellable to answer to the fact of the first marriage, as it would tend to show her guilty of bigamy (*u*). So to a bill for a discovery whether the defendant had become a purchaser of an estate of which the supposed seller was not in possession, the defendant pleaded the statute against selling or contracting for any pretended rights or titles (*x*). And to a bill brought by insurers for a discovery of what goods had been shipped on board a vessel, the defendant pleaded the statutes which made it penal to export wool. He was, however, directed to answer so far as to discover what goods were on board the vessel besides wool (*y*). But where the discovery sought was not of a fact which could subject the defendant to any penalty, though connected with another fact which might, as, where the question was whether the defendant had a legitimate son,

(*t*) *Brownsword* v. *Edwards*, 2 Vez. 243. 14 Ves. 65.

(*u*) 5 Bro. P. C. 102. Toml. Ed.

(*x*) *Sharp* v. *Carter*, 3 P.Wms. 375.

(*y*) *Duncalf* v. *Blake*, 1 Atk. 52.

the defendant was compelled to answer. For the discovery of that fact would not subject him to a penalty, though the discovery of his marriage with the mother of the son might, and therefore he was not compelled to discover the marriage (*z*).

2. It has been also (*a*) observed, that no person is bound to answer so as to subject himself to any forfeiture, or to any thing in the nature of a forfeiture (*b*). If this is not apparent on the bill the defence must be made by way of plea. Thus where a bill was brought to discover whether the defendant had assigned a lease, he pleaded to the discovery a proviso in the lease, making it void in case of assignment (*c*). And to a bill seeking a discovery whether a person under whom the defendant claimed was a papist, the defendant pleaded his title, and the statute of 11 & 12 William III. disabling papists (*d*). But such a plea will only bar the discovery of the fact which would occasion a forfeiture. Therefore, where a tenant for life pleaded to a bill for discovery whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture, the plea was over-ruled (*e*). So upon a bill charging the de-

(*z*) *Finch* v. *Finch*, 2 Vez. 491.

(*a*) Page 197.

(*b*) 1 Atk. 527. And see *Parkhurst* v. *Lowten*, 1 Meriv. 391.

(*c*) *Fane* v. *Atlee*, 1 Eq. Ca. Ab. 77.

(*d*) *Smith* v. *Read*, 1 Atk. 526. 3 Atk. 457. *Jones* v. *Meredith*, Com. R. 661. S. C. Bunb. 346. *Harrison* v. *Southcote*, 528. S. C. 2 Vez. 389.

(*e*) *Weaver* v. *Earl of Meath*, 2 Vez. 108.

fendant to be tenant for life, and that he had committed waste, it was determined that he might plead to the discovery of the act which would occasion the forfeiture, the waste, but that he could not plead to the discovery whether he was tenant for life or not (*f*). Upon an information by the Attorney-general on behalf of the Crown, to discover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was bound to discover whether she was herself an alien, the legal disability of an alien not being a penalty or forfeiture; and that she was also bound to discover whether her child was an alien, and where born, as she had a chattel interest in the property in question in trust, eventually, for the Crown, if her child was an alien (*g*). In all cases of forfeiture, if the plaintiff is entitled alone to the benefit of the forfeiture (*h*), and waves it by his bill, the defendant will be compelled to make the discovery required. And though the plaintiff is not entitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the Court will compel him to make it (*i*). In some cases the Legislature has expressly provided that the parties to transactions made

(*f*) 2 Vez. 109.

(*g*) *Att. Gen.* v. *Duplessis*, Parker, 144. S. C. 1 Bro. P. C. 415. *Daubigny* v. *Davallon*, Anstr. 462.

(*h*) *South Sea Comp.* v. *Bumpstead*, Mosely, 75. S. C. 1 Eq. Ca. Ab. 77.

(*i*) Mosely, 77, and the cases there cited. *African Comp.* v. *Parish*, 2 Vern. 244.

illegal by statute shall be compellable to answer bills in equity for discovery of such transactions; and in such cases a defendant cannot protect himself from making the discovery thus required by pleading the statute which may subject him to penalties in consequence of the discovery (*k*).

3. If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as counsel, attorney, or arbitrator, he may plead in bar of the discovery that his knowledge of the fact was so obtained (*l*).

4. If a defendant is a purchaser for a valuable consideration without notice of the plaintiff's title, a court of equity will not in general compel him to make any discovery which may affect his own title (*m*). Thus if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bona fide* for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy (*n*).

Pleas have been hitherto considered with reference

(*k*) *Bancroft* v. *Wentworth*, 3 Bro. C. C. 11. See, however, *Bullock* v. *Richardson*, 11 Ves. jun. 373. *Billing* v. *Flight*, 1 Madd. R. 230.

(*l*) *Bulstrode* v. *Lechmore*, 1 Ca. in Cha. 277. S. C. 2 Freem. 5; and see *Legard* v. *Foot*, Finch R. 82. *Sandford* v. *Remington*, 2 Ves. jun. 189. *Wright* v. *Mayer*, 6 Ves. 280. *Richards* v. *Jackson*, 18 Ves. 472. 1 Sch. & Lefr. 226. *Lowten* v. *Parkhurst*, 2 Swanst. 194, and *Harvey* v. *Clayton*, and other cases reported, 2 Swanst. 221, note.

(*m*) 2 Ves. jun. 458. And see above 275, *et seq.* 3 Atk. 302.

(*n*) *Perrat* v. *Ballard*, 2 Ca. in Cha. 72. *Heyman* v. *Gomeldon*, Finch R. 34. *Abery* v. *Williams*, 1 Vern. 27.

only to original bills, and of these a certiorari bill, from the nature of the proceedings upon it, will not in general admit of a plea (*o*). But the same grounds of plea will hold in many cases to the several other kinds of bills according to their respective natures; and some of them, as already observed, admit of a peculiar defence which may be urged by way of plea.

Thus if a bill of revivor is brought without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him (*p*). Or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea. Indeed it seems to have been thought that a defendant could only object to revivor by way of plea or demurrer (*q*), and there may be great convenience in thus making the objection. For if the defendant objects by answer merely, the point can only be determined by bringing the cause regularly to a hearing; but if the objection is taken by plea or demurrer, it may in general be immediately

(*o*) See however, *Cook* v. *Delebere*, 3 Ch. Rep. 66, where a plea to a certiorari bill, of a decree in the inferior court, is mentioned.

(*p*) *Harris* v. *Pollard*, 3 P. Wms. 348. S. C. 2 Eq. Ca. Abr. 2. *Huggins* v. *York Buildings Comp.* 2 Eq. Ca. Abr. 3. A person made a defendant by a bill of revivor cannot support, as a defence, a plea previously set up by the original defendant, and overruled, *Samuda* v. *Furtado*, 3 Bro. C. C. 70.

(*q*) *Harris* v. *Pollard*, 3 P. Wms. 348.

determined in a summary way. However, if a defendant objects by answer only, or does not object at all, yet if it appears to the court that the plaintiff has no title to revive the suit against the defendant, he can take no benefit from it (*r*). If a person entitled to revive a suit does not proceed in due time he may be barred by the statute for limitation of actions, which may be pleaded to a bill of revivor afterwards filed (*s*). If a supplemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact (*t*). And if a bill is amended by stating a matter arisen subsequent to the filing of the bill, and which consequently ought to have been the subject of a supplemental bill, advantage may be taken of the irregularity by way of plea, if it does not sufficiently appear on the bill to found a demurrer (*u*); but if the defendant answers he waves the objection to the irregularity, and cannot make it at the hearing (*x*).

A cross-bill differing in nothing from the first species of bills, with respect to which pleas in general have been considered, except that it is always occasioned by a former bill, it is not liable to any plea which will not hold to the first species of bills. And a cross-

(*r*) *Harris* v. *Pollard*, 3 P. Wms. 348.

(*s*) *Hollingshead*'s case, 1 P. Wms. 742. And see 2 Sch. & Lefr. 632, *et seq.*, and the cases cited, and *Earl of Egremont* v. *Hamilton*, 1 Ball & B. 516.

(*t*) See *Lewellen* v. *Mackworth*, 2 Atk. 40. *Baldwin* v. *Mackown*, 3 Atk. 817.

(*u*) See *Brown* v. *Higden*, 1 Atk. 291. *Jones* v. *Jones*, 3 Atk. 217, and above, p. 48, 49.

(*x*) *Belchier* v. *Pearson*, at the Rolls, 13th July 1782.

bill in general is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross-bill is exhibited in the name of some person alone, who is alone incapable of instituting a suit, as an infant, a feme covert, an idiot, or a lunatic (*u*).

It has been already mentioned (*x*) that a part of the constant defence to a bill of review, for error apparent on a decree, has been said to be by a plea of the decree (*y*); but that a demurrer seemed to be the proper defence, and that the books of practice gave the form of a demurrer only to such a bill (*z*). Where any matter beyond the decree, as length of time (*a*), a purchase for a valuable consideration, or any other matter, is to be offered against opening of the enrolment, that matter must be pleaded (*b*). And if a demurrer to a bill of review has been allowed, and the order allowing it is enrolled, it is an effectual bar

(*u*) See above, p. 203, note (*s*).

(*x*) Page 203.

(*y*) *Dancer* v. *Evett*, 1 Vern. 392. *Carlish* v. *Gover*, Nels. Rep. 52.

(*z*) And see *Needler* v. *Kendall*, Finch R. 468.

(*a*) *Gregor* v. *Molesworth*, 2 Ves. 109; but see above, p. 205.

(*b*) *Hartwell* v. *Townsend*, 2 Bro. P. C. 107. Toml. Ed.; and see *Gorman* v. *M'Cullock*, 5 Bro. P. C. 597. Toml. Ed. As instances in which the error alleged was not in the body of the decree see *Cranborne* v. *Dalmahoy*, 1 Cha. Rep. 231. *Smith* v. *Turner*, 1 Vern. 273; and see 2 Vez. 488, and *Bradish* v. *Gee*, Amb. 229.

to a new bill of review (*c*) on the same grounds, and may be pleaded accordingly. To a bill of review of a decree for payment of money, it has been objected by plea that according to the rule of the court (*d*) the money decreed ought to have been first paid; but the rule appears to have been dispensed with on security given (*e*); and as the bill of review would not stay process for compelling payment of the money, it may be doubted whether the objection was properly so made. A bill of review, upon the discovery of new matter, seems liable to any plea which would have avoided the effect of that matter if charged in the original bill. It seems to have been doubted whether the fact of the discovery of the matter thus alleged to support a bill of review, can be traversed by plea after the court upon evidence of the fact has given leave to bring the bill, even if the defendant could traverse the fact by positive assertion of some fact which would demonstrate that the matter was within the knowledge of the party, so that he might have had the benefit of it in the original suit. But if the fact of the discovery is in issue in the cause, it ought to be proved, to entitle the plaintiff to demand the judgment of the court on the matter alleged, as ground for reviewing the decree (*f*); and it may con-

(*c*) *Denny* v. *Filmer*, 2 Ca. in Cha. 133. S. C. 1 Vern. 135. 1 Vern. 417. *Pitt* v. *Earl of Arglass*, 1 Vern. 441. *Woots* v. *Tucker*, 2 Vern. 120.

(*d*) Ord. in Cha. Ed. Bea. 3.

(*e*) *Savile* v. *Darcy*, 2 Freem. 172. S. C. 1 Ca. in Cha. 42.

(*f*) See p. 89.

sequently be disproved by evidence on the part of the defendant. Upon a supplemental bill in nature of a bill of review of a decree not signed and enrolled, upon the alleged discovery of new matter, it has been said, that if the defendant can show that the allegation is false, he must do so by plea, and that it is too late to insist upon it by answer (*g*); but as the bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should seem that it is equally liable to traverse by answer, and by evidence, as any other fact stated in a bill. If a decree is sought to be impeached on the ground of fraud, the proper defence seems to be a plea of the decree, accompanied by a denial of the fraud charged (*h*).

If a plaintiff filing a bill to carry a decree into execution has no right to the benefit of the decree, the defendant may plead the fact, if it is not so apparent on the bill as to admit of a demurrer. Bills in the nature of bills of revivor or of supplemental

(*g*) 2 Atk. 40. The accuracy of this report seems very questionable. The supplemental bill was brought on discovery of an old settlement, found after a decree made in 1733. The cause came on upon the supplemental bill, and a rehearing of the decree complained of, 7 July 1740. The decree was affirmed, and the supplemental bill dismissed without costs, principally on the ground, that length of time, with collateral circumstances, ought to operate as a bar to the plaintiff's title under the old settlement, which was dated in 1655; the defendants claiming under a subsequent settlement made in 1694, which had been constantly acted upon by the family. MS. N. S. C. 2 Eq. Ca. Ab. 579.

(*h*) *Wichalse* v. *Short*, 3 Bro. P. C. 558, Toml. Ed. S. C. 7 Vin. Ab. 398, pl. 15. 2 Eq. Ca. Ab. 177. *Loyd* v. *Mansell*, 2 P. Wms. 73. And see p. 239, *et seq.*

bills, are liable to the same pleas as the bills of whose nature they partake.

Having thus considered some of the principal grounds upon which pleas to the several kinds of bills may be supported, it will be proper to observe some particulars with respect to, 1, the nature of pleas in general; 2, their form; 3, the manner in which they are offered to the court; and 4, the manner in which their validity is decided.

1. In pleading there must in general be the same strictness in equity as at law (*i*); at least in matter of substance. A plea in bar must follow the bill, and not evade it, or mistake the subject of it (*k*). If a plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and therefore a plea to such parts of the bill as are not answered must be over-ruled as too general (*l*). So if the parts of the bill to which the plea extends are not clearly and precisely expressed; as if the plea is general, with an exception of matters after mentioned, and is accompanied by an answer, the plea is bad. For the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered (*m*).

It is generally conceived that a plea ought not to

(*i*) 1 Vern. 114. 2 Atk. 632. 13 Ves. 233.

(*k*) *Asgill* v. *Dawson*, Bunb. 70. *Child* v. *Gibson*, 2 Atk. 603.

(*l*) *Anon.* 3 Atk. 70. *Broom* v. *Horsley*, Mosely, 40.

(*m*) *Salkeld* v. *Science*, 2 Ves. 107. *Howe* v. *Duppa*, 1 Ves. & B. 511.

contain more defences than one; and though a plea may be bad in part and not in the whole (*n*), and may accordingly be allowed in part and over-ruled in part, yet there does not appear any case in which two defences offered by a plea have been separated, and one allowed as a bar. Thus if a defendant pleads a fine and non-claim, which is a legal bar, and a purchase for a valuable consideration without notice of the plaintiff's claim, which is an equitable bar: if either should appear not to be a bar, as if the defendant by answer should admit facts amounting to notice; or if the plea in respect to either part should be informal; there seems to be no case in which the court has separated the two matters pleaded, and allowed one as a bar and disallowed the other. And as the end of a plea is to reduce the cause, or the part of it covered by a plea, to a single point (*o*); in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to be compelled to make; and the court to that end instantly decides on the validity of the defence, taking the plea, and the bill so far as it is not contradicted by the plea, to be true: a double plea is generally considered as informal and improper (*p*). For if two

(*n*) 1 Atk. 53. 451. 539. 2 Atk. 44. 284. 1 Ves. 205. *Welby* v. *Duke of Portland*, 2 Bro. P. C. 39, Toml. Ed. 1 Jac. R. 466.

(*o*) 1 Atk. 54. 1 Bro. C. C. 417. 15 Ves. 82. 1 Ves. & B. 153, note, 156-7. 1 Madd. R. 194.

(*p*) *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404. S. C. 2 Ves. & B. 153, note. *Nobkissen* v. *Hastings*, 4 Bro. C. C. 252. S. C. 2 Ves. jun. 84. *Wood* v.

matters of defence may be thus offered, the same reason will justify the making any number of defences in the same way, by which the ends intended by a plea would not be obtained; and the court would be compelled to give instant judgment on a variety of defences, with all their circumstances, as alleged by the plea, before they are made out in proof; and consequently would decide upon a complicated case which might not exist. This reasoning perhaps does not in its extent apply with equal force to the case of two several bars pleaded as several pleas, though to the same matter; and it may be said that such pleading is admitted at law, and ought therefore to be equally so in equity. But it should be considered that a plea is not the only mode of defence in equity, and that therefore there is not the same necessity as at law for admitting this kind of pleading. But though a defence offered by way of plea consist of a great variety of circumstances, yet if they all tend to one point the plea may be good (*o*). Thus a plea of title deduced from the person under whom the plaintiff claims may

Strickland, 2 Ves. & B. 150. 3 Madd. 8. 4 Madd. 245. But it has been determined, that where great inconvenience would result from obedience to this rule, the court on a previous special application will give to the defendant leave to plead double. *Gibson* v. *Whitehead*, 4 Madd. 241.

(*o*) *Cann* v. *Cann*, 1 P. Wms. 725. *Ashurst* v. *Eyres*, 3 Atk. 341. 15 Ves. 82. 377. *Leonard* v. *Leonard*, 1 Ball & B. 323. And see 2 Blackst. 1028, as to the distinction between a double plea, consisting of distinct propositions, and a single plea consisting of one connected proposition formed from multifarious circumstances.

be a good plea though consisting of a great variety of circumstances (*p*); for the title is a single point, to which the cause is reduced by the plea (*q*). It therefore seems that a plea can be allowed in part only with respect to its *extent*, the quantity of the bill covered by it; and that if any part of the *defence* made by the plea is bad, the whole must be over-ruled (*r*).

A plea must aver facts to which the plaintiff may reply (*s*), and not in the nature of a demurrer, rest on facts in the bill (*t*). The averments ought in general to be positive (*u*). In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true (*x*); and in all cases of negative averments (*y*),

(*p*) *Martin & Martin*, House of Lords, 6th March 1724-5, and *Else* v. *Doughty*, 1 P. Wms. 387, note, Mr. Cox's Ed. *Howe* v. *Duppa*, 1 Ves. & B. 511. *Gait* v. *Osbaldeston*, 1 Russ. 158. S. C. 5 Madd. 428.

(*q*) See *Doble* v. *Cridland*, 2 Bro. C. C. 274.

(*r*) As instances of a plea not being a complete defence to the bill, or to so much thereof as it purports to cover, see *Moore* v. *Hart*, 1 Vern. 110. *Salkeld* v. *Science*, 2 Vez. 107. *Potter* v. *Davy*, 3 Vin. Ab. 135. *Hoare* v. *Parker*, above, p. 277, note. *Jones* v. *Davis*, 16 Ves. 262. *Chamberlain* v. *Agar*, 2 Ves. & B. 259. *Spottiswood* v. *Stockdale*, Coop. R. 102. *Barker* v. *Ray*, 5 Madd. 64.

(*s*) 15 Ves. 377.

(*t*) *Bicknell* v. *Gough*, 3 Atk. 558. 2 Vez. 296. *Roberts* v. *Hartley*, 1 Bro. C. C. 56. 6 Ves. 594. *Billing* v. *Flight*, 1 Madd. R. 230. *Steff* v. *Andrews*, 2 Madd. R. 6. The prominent distinction between a plea and a demurrer (Ord. in Cha. 26 Ed. Bea.) here noticed, is strictly true, even of that description of plea which is termed negative (above, p. 230), for it is the affirmative of the proposition which is stated in the bill.

(*u*) 3 Atk. 590.

(*x*) 3 Atk. 70. *Burgony* v. *Machell*, Tothill, 70.

(*y*) See *Drew* v. *Drew*, 2 Ves. & B. 159.

and of averments of facts not within the immediate knowledge of the defendant (*z*), it may seem improper to require a positive assertion. Unless, however, the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it: and the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true. All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it (*a*), must be clearly and distinctly averred. Averments are likewise necessary to exclude intendments which would otherwise be made against the pleader; and the averments must be sufficient to support the plea (*b*).

If there is any charge in the bill, which is an equitable circumstance in favour of the plaintiff's case against the matter pleaded; as fraud, or notice of title; that charge must be denied by way of answer, as well as by averment in the plea (*c*). In this case the answer must be full and clear, or it will not be effectual to support the plea (*d*); for the court will intend the

(*z*) 2 Ves. & B. 162.

(*a*) Gilb. For. Rom. 58. 2 Vez. 296; and see *Carleton* v. *Leighton*, 3 Meriv. 667.

(*b*) 2 Vez. 245. 2 Sch. & Lefr. 727. 18 Ves. 182.

(*c*) See the judgment in *Bayley* v. *Adams*, 6 Ves. 594. 2 Sch. & Lefr. 727. 2 Ves. & B. 364. 5 Madd. 330. 6 Madd. 64. 2 Sim. & Stu. 279. And see above, p. 239, *et seq.* and p. 256.

(*d*) 3 Atk. 304. *Radford* v. *Wilson*, 3 Atk. 815. 3 P. Wms. 145. 5 Bro. P. C. 561, Toml. Ed.

matters so charged against the pleader, unless they are fully and clearly denied (*e*). But if they are in substance fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered (*f*). Though the court upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points. A defendant may also support his plea by an answer touching any thing not charged by the bill, as notice of a title, or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue (*g*), and the answer can only be used to support or disprove the plea (*h*). But if a plea is coupled with an answer to any part of the bill covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be over-ruled (*i*).

Where facts appeared upon an answer to an original bill, which would operate to avoid the defence made by plea to an amended bill, the answer to the original bill was read on the argument of the plea, to counterplead the plea (*k*); so it should seem if the answer to an original bill would disprove an averment in a

(*e*) 2 Atk 241. Gilb. Ca. in Eq. 185. As an example, see *Hony* v. *Hony*, 1 Sim. & Stu. 568.

(*f*) 5 Bro. P. C. 561, Toml. Ed.

(*g*) Gilb. For. Rom. 58, 59.

(*h*) See 3 Atk. 303.

(*i*) *Cottington* v. *Fletcher*, 2 Atk. 155. Gilb. For. Rom. 58.

(*k*) *Hyliard* v. *White*, in Chan. 15th March 1745.

plea to an amended bill, the court might permit it to be read for that purpose (*l*).

2. A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill. For the purpose of determining the validity of the plea, the bill, so far as it is not contradicted by the plea (*m*), is taken for true; and the protestation has probably been used to prevent the same conclusion for other purposes. The extent of the plea, that is, whether it is intended to cover the whole bill, or a part of it only, and what part in particular, is usually stated in the next place: and this, as before observed (*n*), must be clearly and distinctly shown. The matter relied upon as an objection to the jurisdiction of the court, to the person of the plaintiff or defendant, or in bar of the suit, generally follows, accompanied by such averments as are necessary to support it. The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court, whether the defendant ought to be compelled further to answer the bill, or such part as is thus pleaded to. If the plea is accompanied by an answer merely to support it, the answer is stated to be made for that purpose, not waving the plea. If the plea is to part of a bill only, and there is an answer to the rest, it is expressed to

(*l*) See the case of *Hildyard* v. *Cressy*, 3 Atk. 303.

(*m*) See *Plunket* v. *Penson*, 2 Atk. 51. 15 Ves. 377.

(*n*) Page 294.

be an answer to so much of the bill as is not before pleaded to, and is preceded by the same protestation against waver of the plea.

3. A plea(*n*) is filed like a demurrer in the proper office; and pleas in bar of matters *in pais*(*o*), must be upon oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the plaintiff(*p*), or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself(*q*), or any other court(*r*), need not be upon oath.

4. If the plaintiff conceives a plea to be defective in point of form, or substance, he may take the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined, he may also take the same proceeding. Upon argument of a plea it may either be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer. In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, are true. If, therefore, a plea is allowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of

(*n*) A plea must be signed by counsel, unless taken by commissioners. *Simes* v. *Smith*, 4 Madd. 366. See below, p. 315, as to the taking of an answer.

(*o*) Prac. Reg. 325, Wy. Ed.

(*p*) Ord. in Ch. 27. 172. Ed. Bea.

(*q*) Prac. Reg. 324, Wy. Ed.

(*r*) But if a plea of matters recorded be accompanied with averments of matters *in pais*, it must be upon oath. *Wall* v. *Stubbs*, 2 Ves. & Bea. 354. See above, pp. 226, 227, 229.

fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavoured to be supported(*s*). For if the plea is upon argument held to be good, or the plaintiff admits it to be so by replying to it(*t*), the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties(*u*). If therefore issue is thus taken upon the plea, the defendant must prove the facts it suggests(*x*). If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, and the plea extends to discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the court will order the defendant to be examined on interrogatories, to supply the defect(*y*). But if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred(*z*), even though the plea is not good either in point of form or substance. Therefore where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the plaintiff replied, it was determined that the plea, though

(*s*) Prac. Reg. 330, Wy. Ed.

(*t*) 1 Vern. 72. Prec. in Ch. 58.

(*u*) 3 P. Wms. 95. *Parker* v. *Blythmore*, Prec. in Chan. 58. See *Cooper* v. *Tragonnel*, 1 Ch. Rep. 174.

(*x*) Mos. 73. 2 Vez. 247. *Ord* v. *Huddleston*, Dick. 510.

(*y*) Nels. Rep. 119. *Astley* v. *Fountaine*, Rep. Tem. Finch 4. 2 Vez. 247. 6 Madd. 63. 2 Sim. & Stu. 278.

(*z*) See *Wichalse* v. *Short*, 3 Bro. P. C. 558.

irregular, had been admitted by the replication to be good, and that the fact of notice not being in issue, the defendant, proving what he had pleaded, was entitled to have the bill dismissed (*a*).

If upon argument the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court it may be a defence; but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question.

When a plea is ordered to stand for an answer, it is merely determined that it contains matter which may be a defence, or part of a defence; but that it is not a full defence, or it has been informally offered by way of plea, or it has not been properly supported by answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer the plea must be over-ruled, or ordered to stand for an answer only (*b*). A plea is usually ordered to stand for an answer, where it states matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded (*c*). But if a plea states

(*a*) *Harris* v. *Ingledew*, 3 P. Wms. 94, 95.

(*b*) See *Hildyard* v. *Cressy*, 3 Atk. 304.

(*c*) As examples, see *Moore* v. *Hart*, 1 Vern. 110. S. C. ibid. 201. *Kemp* v. *Kelsey*, Prec. in Cha. 544. *Salkeld* v. *Science*, 2 Vez. 107. *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404.

nothing which can be a defence it is merely overruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers (*c*), unless by the order liberty is given to except (*d*). But that liberty may be qualified, so as to protect the defendant from any particular discovery which he ought not to be compelled to make (*e*). And if a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the plea (*f*). If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea (*g*).

There are some pleas which are pleaded with such circumstances that their truth cannot be disputed; and others being pleas of matter of fact, the truth of which may be immediately ascertained by mere in-

S. C. 2 Ves. & B. 153, n. *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559. *Wood* v. *Strickland*, 2 Ves. & B. 150.

(*c*) *Coke* v. *Wilcocks*, Mos. 73. 3 P. Wms. 240. 3 Atk. 815.

(*d*) *Sellon* v. *Lewen*, 3 P. Wms. 239. *Maitland* v. *Wilson*, 3 Atk. 814. See *Dryden* v. *Robinson*, 2 Sim. & Stu. 529.

(*e*) See *Alardes* v. *Campbell*, Bunb. 265. S. C. 1 Turn. R. 133, note. *Herbert* v. *Montagu*, Finch R. 117. *Brereton* v. *Gamul*, 2 Atk. 240. *Pusey* v. *Desbouvrie*, 3 P. Wms. 315. *King* v. *Holcombe*, 4 Bro. C. C. 439. *Bayley* v. *Adams*, 6 Ves. 586.

(*f*) *Coke* v. *Wilcocks*, Mos. 73.

(*g*) 3 Atk. 304. But the plaintiff may not amend his bill as of course after a plea to part of the bill has been allowed. *Taylor* v. *Shaw*, 2 Sim. & Stu. 12.

quiry, it is usually referred to one of the masters of the court to make the inquiry. These pleas, therefore, are not usually argued (*h*). Thus pleas of outlawry or excommunication, being always pleaded *sub sigillo*, the truth of the fact pleaded is ascertained by the form of pleading, and the suit is consequently delayed until the disability shall be removed, unless the plaintiff can show that the plea is defective in form, or that it does not apply to the particular case, and for these purposes he may have the plea argued. Pleas of a former decree (*i*), or of another suit depending (*k*), are generally referred to a master to inquire into the fact; and if the master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders (*l*). But the plaintiff may except to the master's report, and bring on the matter to be argued before the court (*m*); and if he conceives the plea to be defective, in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general (*n*).

(*h*) Ord. in Ch. 175, Ed. Bea.

(*i*) *Morgan* v. *Morgan*, 1 Atk. 53.

(*k*) Ord. in Ch. 98. ed. 1739.

(*l*) See *Crofts* v. *Wortley*, 1 Ca. in Cha. 241. See above, pp. 237. 246.

(*m*) *Durrand* v. *Hutchinson*, Mich. 1771, on Exceptions.

(*n*) Ord. in Ch. 176, Ed. Bea. See *Urlin* v. ——, 1 Vern. 332. and *Foster* v. *Vassall*, 3 Atk. 587.

CHAPTER II.

SECTION II.

PART III.

Of Answers and Disclaimers; and of Demurrers, Pleas, Answers and Disclaimers, or any two or more of them, jointly.

IF a plea is over-ruled the defendant may insist on the same matter by way of answer (*a*). And whatever part of the bill is not covered by demurrer, or plea, must be defended by answer (*b*), unless the defendant disclaims. In treating of answers and disclaimers will be considered, 1, The general nature of answers; 2, Their form; 3, The manner in which their sufficiency is decided upon, and deficiency supplied; and 4, The nature and form of disclaimers.

1. It has been already (*c*) mentioned, that every plaintiff is entitled to a discovery from the defendant of the matters charged in the bill (*d*), provided they are

(*a*) 2 Ves. 492. *Earl of Suffolk* v. *Green*, 1 Atk. 450. 1 Cox R. 228.

(*b*) Prac. Reg. Wy. Ed.

(*c*) Page 9.

(*d*) Where the defendants are numerous, each, it seems, is entitled to put in a separate answer, although they should have but one common defence. *Van Saudau* v. *Moore*, 1 Russ. R. 441, on appeal. See S. C. 2 Sim. & Stu. 509.

necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree. The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense (*e*). He is also entitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity (*f*). However, if the discovery sought by a bill is matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, he is not bound to make it (*g*); and if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances of the case, he has been permitted by answer to insist that he is not obliged to make the discovery (*h*). In this case the plaintiff

(*e*) 2 Atk. 241.

(*f*) 2 Ves. 492. 6 Ves. 37, 38, Coop. R. 214.

(*g*) 15 Ves. 378; and see authorities cited above, p. 193.

(*h*) 3 P. Wms. 238. *Finch* v. *Finch*, 2 Ves. 491. *Honeywood* v. *Selwin*, 3 Atk. 276. *Paxton* v. *Douglas*, 19 Ves. 225. *Parkhurst* v. *Lowten*, 1 Meriv. 391. 1 Swanst. 192. 305. It has also been held, that a purchaser for a valuable consideration, without notice, may by answer protect himself from making discovery of facts which might defeat his enjoyment. (*Jerrard* v. *Sanders*, 2 Ves. jun. 454. S. C. 4 Bro. C. C. 322. 15 Ves. 378. 1 Ball & B. 325. And see *Lord Rancliffe* v. *Parkyns*, 6 Dow P. C. 230, but see *Ovey* v. *Leighton*, 2 Sim. & Stu. 234). It seems that in every other case, even in that of a mere witness being made a defendant, (see *Cookson* v. *Ellison*, 2 Bro. C. C. 252, *Cartwright* v. *Hately*, 3 Bro. C. C. 238, *Shepherd* v. *Roberts*, 3 Bro. C. C. 239, 7 Ves. 288, 11 Ves. 42, but see *Newman* v. *Godfrey*, 2 Bro. C. C. 332), unless perhaps he be a professional person, and the discovery be sought of matters confidentially communicated to him, (*Stratford* v. *Hogan*, 2 Ball & B. 164.) if

may except to the defendant's answer as insufficient; and upon that exception it will be determined whether the defendant is or is not obliged to make the discovery (*i*). If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea (*k*); or if it is doubtful whether as a plea it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill (*l*). Or if the defendant can offer a matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same

a person answers at all, he may be required to answer all the facts stated in the bill, from which he does not distinctly protect himself from answering by either of the other modes of defence. See *Dolder* v. *Lord Huntingfield*, 11 Ves. 283, in which the earlier cases are cited, *Faulder* v. *Stuart*, 11 Ves. 296, *Shaw* v. *Ching*, 11 Ves. 303, *Rowe* v. *Teed*, 15 Ves. 372, *Somerville* v. *Mackay*, 16 Ves. 382, *Leonard* v. *Leonard*, 1 Ball & B. 323, 3 Madd. 70, —— v. *Harrison*, 4 Madd. 252 & 1 Sim. & Stu. 6. See, however, the distinction taken below, pp. 310, 311, 312, between the cases in which the defendant by answer denies the title of the plaintiff, in respect of which the discovery is sought, and those in which he thereby denies the validity of the ground upon which that title is alleged by the plaintiff to be founded. And see below, p. 316, note (*q*).

(*i*) 2 Ves. jun. 87; and see 1 Ves. jun. 294, note.

(*k*) *Chapman* v. *Turner*, 1 Atk. 54.

(*l*) See *Norton* v. *Turvill*, 2 P. Wms. 144.

manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour, which he cannot set forth by way of plea, or of answer to support a plea as the expending a considerable sum of money in improvements, with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer than to rely on the single defence by way of plea, unless it is material to prevent disclosure of any circumstance attending his title. For a defence which, if insisted on by plea, would protect the defendant from a discovery, will not in general do so if offered by way of answer (*l*). To so much of the bill as it is necessary and material for the defendant to answer (*m*) he must speak directly, and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge (*n*). And wherever there are particular precise charges (*o*) they must be answered particularly and precisely, and not in a general manner, though the general answer may amount

(*l*) 2 Eq. Ca. Ab. 67. *Richardson* v. *Mitchell*. Sel. Ca. in Ch. 51. Above, p. 307, note (*h*).

(*m*) It seems, a mere trustee, incumbrancer, or heir, need answer so much only of the bill as applies to him. Coop. R. 215. And further, with respect to materiality of answer, see below, 316, note (*q*).

(*n*) Ord. in Ch. 28. 179. Ed. Bea. *Hind* v. *Dods*, Barnard, 258. S. C. 2 Eq. Ca. Ab. 69. *Deane* v. *Rastron*, Anstr. 64. 2 Ves. & B. 162. And see *Hall* v. *Bodily*, 1 Vern. 470.

(*o*) These, however, it seems, to the end mentioned in the text, must be specially interrogated to. See *King* v. *Marissal*, 3 Atk. 192, *Durant* v. *Durant*, 1 Cox R. 58.

to a full denial of the charges (*p*). Thus where a bill required a general account, and at the same time called upon the defendant to set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts such sums had been received, it was determined, that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient, and the plaintiff having excepted to the answer on this ground, the exception was allowed; the Court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally, that he had in the schedule set forth an account of all sums received by him (*q*).

Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes, though the defendant insists upon a modus, or upon an exemption from payment

(*p*) 2 Eq. Ca. Ab. 67. *Paxton*'s case, Sel. Ca. in Ch. 53. *Prout* v. *Underwood*, 2 Cox R. 135. 6 Ves. 792. *Wharton* v. *Wharton*, 1 Sim. & Stu. 235. And see *Amhurst* v. *King*, 2 Sim. & Stu. 183.

(*q*) *Hepburn* v. *Durand*, 20th Nov. 1779, in Chan. S. C. rep. 1 Bro. C. C. 503; but see *White* v. *Williams*, 8 Ves. 193.

of tithes, or absolutely denies the plaintiff's title (*r*), he must yet answer to the quantity of land and value of the tithes (*s*). Or if a bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt (*t*).

But where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not generally compelled to make any discovery not material to the trial of the question of title. Thus, where a testator devised his real estate to his nephew for life, with remainder to his first and other sons in tail, with reversion to his right heirs, and made his nephew executor and residuary legatee of his will, and on the death of the nephew his son entered as tenant in tail under the will; upon a bill filed by the heir at law of the testator, insisting that the son was illegitimate, that the limitations in the will were therefore spent, and the plaintiff became entitled, as heir to the real estate, and praying an account of the personal estate, and application in discharge of debts and encumbrances on the real estate, the defendants against whom the account was sought insisted on the title of the son as tenant in tail under the will, and that they were not bound to discover the personal estate until the plaintiff had established his title. Ex-

(*r*) See, however, Gilb. Ca. in Cha. 229.

(*s*) *Langham* v. ——, Hardr. 130.

(*t*) *Randal* v. *Head*, Hardr. 188. See *Sweet* v. *Young*, Ambl. 353. 11 Ves. 304.

ceptions having been taken to the answer, and allowed by the Master, on exception to his report, the exceptions to the answer were over-ruled; the Court distinguishing this case, which showed a *primâ facie* title in the defendant, the son of the nephew, from a mere denial of the plaintiff's title (*u*).

So when a bill claimed the tithe of rabbits on an alleged custom, and the defendant denied the custom, it was determined that the defendant was not bound to set forth an account of the rabbits alleged to be tithable (*x*); and a like determination was made upon a claim of wharfage, against common right, the title not having been established at law (*y*).

But where a discovery is in any degree connected with the title, it should seem that a defendant cannot protect himself by answer from making the discovery; and in the case of an account required, wholly independent of the title, the Court has declined laying down any general rule (*z*), deciding ordinarily upon the circumstances of the particular case. Thus, to a bill stating a partnership, and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant; and the Court, con-

(*u*) *Gethin* v. *Gale*, 29 Oct. 1739, in Chan. M. R. Ambl. 354, cited in *Sweet* v. *Young*. See also *Gunn* v. *Prior*, cited 11 Ves. jun. 291. S. C. Dick. 657. 1 Cox R. 197.

(*x*) *Randal* v. *Head*, Hardr. 188. S. C. 1 Eq. Ca. Ab. 35.

(*y*) *Northleigh* v. *Luscombe*, Ambl. 612.

(*z*) *Hall* v. *Noyes*, Ld. Chan. 13 March 1792.

ceiving the account sought not to be material to the title, over-ruled exceptions to the answer, for not setting forth the account (*a*). And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the Court has sometimes limited the power of excepting, so as to protect the defendant from setting forth accounts not material to the plaintiff's title, where that title has been very doubtful (*b*).

If an answer goes out of the bill to state some matter not material to the defendant's case, it will be deemed impertinent, and the matter, upon application to the court, will be expunged (*c*). So in an answer, as in a bill, if any thing scandalous is inserted the scandal will be expunged by order of the Court (*d*). But, as in a bill, nothing relevant will be deemed scandalous (*e*).

2. An answer usually begins by a reservation to

(*a*) *Jacobs* v. *Goodman*, in Exch. 16 Nov. 1791. S. C. rep. 3 Bro. C. C. 487, note; and 2 Cox R. 282. See *Hall* v. *Noyes*, 3 Bro. C. C. 483. *Marquis of Donnegal* v. *Stewart*, 3 Ves. 446. *Phelips* v. *Caney*, 4 Ves. 107. 11 Ves. 42. 293. *Webster* v. *Threlfall*, 2 Sim. & Stu. 190; but see —— v. *Harrison*, 4 Madd. 252.

(*b*) *Earl of Strafford* v. *Blakeway*, 6 Bro. P. C. 630. Toml. Ed. *King* v. *Holcombe*, 4 Bro. C. C. 439. *Bayley* v. *Adams*, 6 Ves. 586.

(*c*) *Alsager* v. *Johnson*, 4 Ves. 217. *Norway* v. *Rowe*, 1 Meriv. 347. *French* v. *Jacko*, ibid. 357, note. *Beaumont* v. *Beaumont*, 5 Madd. 51. *Parker* v. *Fairlie*, 1 Sim. & Stu. 295. 2 Sim. & Stu. 193.

(*d*) *Peck* v. *Peck*, Mosely, 45. *Smith* v. *Reynolds*, Mosely, 69 Ord. in Cha. 25. Ed. Bea. *Corbett* v. *Tottenham*, 1 Ball. & Bea. 61. *Barnes* v. *Saxby*, 3 Swanst. 232, n.

(*e*) Mosely, 70. 1 Ball & B. 61; and see *Lord St. John* v. *Lady St. John*, 11 Ves. 526.

the defendant of all advantage which may be taken by exception to the bill, a form which has probably been intended to prevent a conclusion that the defendant, having submitted to answer the bill, admitted every thing which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow, with a general denial of that combination which is usually charged in a bill (*f*). It is the universal practice to add by way of conclusion a general traverse or denial of all the matters in the bill. This is said (*g*) to have obtained when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though, perhaps, rather impertinent if the bill is otherwise fully answered, and it has been determined to be in that case unnecessary (*h*), it is still continued in practice. In the case of an infant the answer is expressed to be made by his guardian (*i*); and the general saving at the beginning, together with the denial of combination, and the traverse at the conclusion, common to all other answers, are omitted. For an infant is entitled to the benefit of every exception which can be taken to a bill,

(*f*) See above, p. 40.
(*g*) 2 P. Wms. 87.
(*h*) 2 P. Wms. 87.
(*i*) See above, p. 103.

without expressly making it; he is considered as incapable of the combination charged in the bill; and his answer cannot be excepted to for insufficiency (*h*). The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the Court to defend the suit (*i*). An answer must be signed by counsel (*k*), unless taken by commissioners in the country under the authority of a commission issued for the purpose; in which case the signature by counsel is not required (*l*), the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant, which in fact was formerly done (*m*).

3. If a plaintiff conceives an answer to be insufficient to the charges contained in the bill he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill (*n*). These exceptions must be signed by counsel (*o*), and are then delivered to the proper officer, which must be done within a limited time,

(*h*) *Copeland* v. *Wheeler*, 4 Bro. C.C. 256. *Lucas* v. *Lucas*, 13 Ves. 274. 1 Ball & Bea. 553. It has been determined also, that the answer of the attorney general cannot be excepted to. *Davison* v. *Attorney-General*, Exchequer, 30 June 1813.

(*i*) See above, p. 103.

(*k*) 2 Ves. & B. 358.

(*l*) 3 Atk. 440.

(*m*) See *Brown* v. *Bruce*, 2 Meriv. 1.

(*n*) See *Marsh* v. *Hunter*, 3 Madd. 437, and the cases there referred to, in note. *Hodgson* v. *Butterfield*, 2 Sim. & Stu. 236.

(*o*) *Candler* v. *Partington*, 6 Madd. 102. *Yates* v. *Hardy*, 1 Jac. R. 223.

according to the course of the court (*o*), though upon application further time is allowed for the purpose, within certain restrictions (*p*). If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the Masters of the court is directed to look into the bill, the answer and the exceptions, and to certify whether the answer is sufficient in the points excepted to or not (*q*). If the Master reports the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the bill in which the Master conceives the answer to be insufficient; unless by excepting to the Master's report he brings the matter before the court, and there obtains a different judgment (*r*). But if the defendant has insisted on any matter as a reason for not answering, though he does not except to the Master's report, yet he is not absolutely precluded from insisting on the same

(*o*) 3 Atk. 19. *Thomas* v. *Llewellyn*, 6 Ves. 823.

(*p*) *Anon.* 3 Atk. 19. 14 Ves. 536. *Baring* v. *Prinsep*, 1 1 Madd. 526.

(*q*) Ord. in Cha. 53. Ed. Bea. *Partridge* v. *Haycraft*, 11 Ves. 570. 11 Ves. 577. 1 Ves. & B. 333. As to the right of the Masters to exercise a discretion with regard to the materiality of interrogatories not answered, see *Agar* v. *Regent's Canal Comp.* Coop. R. 212, *Hirst* v. *Pierce*, 4 Pri. Ex. R. 339. *Scott* v. *Mackintosh*, 1 Ves. & B. 503. *Amhurst* v. *King*, 2 Sim. & Stu. 183.

(*r*) *Anon.* 3 Atk. 235. *Hornby* v. *Pemberton*, Mos. 57. *Worthington* v. *Foxhall*, 3 Barnard. 261. *Finch* v. *Finch*, 2 Vez. 491. 11 Ves. 577.

matter in a second answer (*s*), and taking the opinion of the Court whether he ought to be compelled to answer further to that point or not (*t*).

Where a defendant pleads or demurs to any part of the discovery sought by a bill, and answers likewise, if the plaintiff takes exceptions to the answer before the plea or demurrer has been argued, he admits the plea (*u*) or demurrer (*x*) to be good; for unless he admits it to be good it is impossible to determine whether the answer is sufficient or not. But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued (*y*). If a plea or demurrer is accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer is over-ruled, the plaintiff must except to the answer as insufficient (*z*). But if a plea or demurrer is filed without any answer, and is over-ruled, the plaintiff need not take exceptions, and the defendant must answer the whole bill as if no defence had been made to it (*a*).

(*s*) *Finch* v. *Finch*, 2 Vez. 491. See *Ovey* v. *Leighton*, 2 Sim. & Stu. 236.

(*t*) As to the practice in case the defendant should put in successively as many as four insufficient answers, see *Farquharson* v. *Balfour*, 1 Turn. R. 184.

(*u*) See *Darnell* v. *Reyny*, 1 Vern. 344.

(*x*) See *Boyd* v. *Mills*, 13 Ves. 85.

(*y*) 3 P. Wms. 327. Note S. See however 2 Atk. 390.

(*z*) *Cotes* v. *Turner*, Bunb. 123.

(*a*) Ibid. As to the practice with reference to the obtaining of time to answer in such a case see *Trim* v. *Baker*, 1 Sim. & Stu.

A further answer is in every respect similar to, and indeed is considered as forming part of, the first answer. So an answer to an amended bill is considered as part of the answer to the original bill (*b*). Therefore if the defendant in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer (*c*), the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent (*d*); and if upon reference to a Master such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer (*e*).

4. A defendant may disclaim all right or title to the matter in demand by the plaintiff's bill, or by any part of it (*f*). But a disclaimer cannot often be put in alone. For if the defendant has been made a party by mistake, having at the time no interest in the matter in question, yet as he may have had an interest which he may have parted with, the plaintiff may require an answer sufficient

469, S. C. on appeal, 1 Turn. R. 253, in accordance with *Jones* v. *Saxby*, mentioned 1 Swanst. 194, note (*a*), and overruling *Griffith* v. *Wood*, 1 Ves. & Bea. 541.

(*b*) 3 Atk. 303. Dick. 583. *Spurrier* v. *Fitzgerald*, 6 Ves. 548; and see *Ovey* v. *Leighton*, 2 Sim. & Stu. 234.

(*c*) *Smith* v. *Serle*, 14 Ves. 415.

(*d*) 3 Atk. 303.

(*e*) Ord. in Cha. 167. Ed. Bea. 16 Ves. 234.

(*f*) See *Archbold* v. *Borrold*, Cary R. 69. *Seton* v. *Slade*, 7 Ves. 265.

to ascertain whether that is the fact or not; and, if the defendant has had an interest which he has parted with, an answer may be also necessary to enable the plaintiff to make the proper party, instead of the defendant disclaiming. The form of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient; but the forms given in the books of practice are all of an answer and disclaimer.

If the defendant disclaims, the Court will in general dismiss the bill as against him with costs. But it has been said, that if the plaintiff shows a probable cause for exhibiting the bill, he may pray a decree against the defendant, upon the ground of the disclaimer(*h*). Where the defendant disclaims the plaintiff ought not to reply(*i*).

A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defences must clearly refer to separate and distinct parts of the bill. For the defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded(*k*); the demurrer demanding the judgment of the Court whether he shall make any answer, and the plea whether he shall make any other answer than what

(*h*) Prac. Reg. 175. Wy. Ed.
(*i*) Prac. Reg. 176. Wy. Ed.
3 Atk. 582.
(*k*) 2 Bro. Parl. Ca. 20, 21.

is contained in the plea. Nor can the defendant by answer claim what by disclaimer he has declared he has no right to(*l*). A plea(*m*) or answer(*n*) will therefore over-rule a demurrer, and an answer(*o*) a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.

(*l*) See the case of *Seton* v. *Slade*, 7 Ves. 265.

(*m*) *Dormer* v. *Fortescue*, 2 Atk. 282. 3 P. Wms. 80, 81. *Arnold's* case, Gilb. For. Rom. 59.

(*n*) *Abraham* v. *Dodgson*, 2 Atk. 157. 3 P. Wms. 81. *Sherwood* v. *Clack*, 9 Pri. Ex. R. 259.

(*o*) *Pierce* v. *Johns*, Bunb. 11. *Cottington* v. *Fletcher*, 2 Atk. 155; 3 P. Wms. 81. *Dobbyn* v. *Barker*, 5 Bro. P. C. 573, Toml. Ed. *Earl of Clanrickard* v. *Bourke*, 6 Bro. P. C. 4. Tom. Ed.; 1 Sim. & Stu. 6. *Watkins* v. *Stone*, 2 Sim. & Stu. 560.

CHAP.

CHAPTER THE THIRD.

Of REPLICATIONS and their CONSEQUENCES.

A Replication is the plaintiff's answer or reply, to the defendant's plea or answer. Formerly, if the defendant by his plea or answer offered new matter the plaintiff replied specially (*a*); otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication (*b*). If the parties were not then at issue by reason of some new matter disclosed in the rejoinder which required answer, the plaintiff might surrejoin to the rejoinder, and the defendant might in like manner ad-surrejoin, or rebut, to the surrejoinder (*c*). The inconvenience, delay, and unnecessary

(*a*) Ord. in Cha. 70, Ed. Bea.
(*b*) 2 West. Sym. Chan. 195. a. 232. b. 246. b.
(*c*) West. Symb. Cha. 195. a. Prac. Reg. 371. Wy. Ed.

length of pleading, arising from these various allegations on each side (*d*), occasioned an alteration in the practice. Special replications, with all their consequences, are now out of use (*e*), and the plaintiff is to be relieved according to the form of the bill, whatever new matters may have been introduced by the defendant's plea or answer (*f*). But if the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave (*g*) to amend the bill (*h*), and suit it to his case, as he shall be advised (*i*). To this amended bill the defendant may make such

(*d*) See Ord. in Cha. 70, Ed. Bea.

(*e*) Prac. Reg. 372. Wy. Ed. Indeed if a plaintiff is disposed to controvert a part of a case made by the defendant's answer, and to admit the rest, he may still put in a replication so far special, that it is confined to the particular matter controverted, instead of being a general denial of the truth of the whole answer; and then the defendant is put only to proof of the matter replied to.

(*f*) Prac. Reg. 372. Wy. Ed.

(*g*) See 1 Ves. jun. 448.

(*h*) And this will be permitted after replication; and leave will be granted to the plaintiff to withdraw the replication and amend the bill. See *Pott* v. *Reynolds*, 3 Atk. 565, *Pitt* v. *Watts*, 16 Ves. 126. *Cowdell* v. *Tatlock*, 3 Ves. & B. 19. *Lord Kilcourcy* v. *Ley*, 4 Madd. 212.

(*i*) As to the extent to which this liberty may be carried, see 2 Sch. & Lefr. 9. *Seeley* v. *Boehm*, 2 Madd. R. 176. *Mazzaredo* v. *Maitland*, 3 Madd. 66. As to the consequence of making an entirely new case by the amendment, see *Mavor* v. *Dry*, 2 Sim. & Stu. 113. And as to the adding or striking out a prayer for relief, see *Butterworth* v. *Bailey*, 15 Ves. 358. *Earl of Cholmondeley* v. *Lord Clinton*, 2 Ves. & B. 113. But it may be observed that the plaintiff may not amend his bill after plea to part thereof has been allowed, without leave of the Court. *Taylor* v. *Shaw*, 2 Sim. & Stu. 12.

defence as he shall think proper, whether required by the plaintiff to answer it or not (*k*).

According to the present course of the court, although rejoinders are disused, yet the plaintiff, after replication, must serve upon the defendant a subpœna requiring him to appear to rejoin, unless he will appear gratis (*l*). The effect of this process is merely to put the cause completely at issue between the parties. For now, immediately after the defendant has appeared to rejoin gratis, or after the return of a subpœna to rejoin served on the defendant, and which, by order obtained of course is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings on each side (*m*). Where by mistake a replication has not been filed, and yet witnesses have been examined, the Court has permitted the replication to be filed *nunc pro tunc* (*n*).

(*k*) The original bill is rendered nugatory by amendment, 3 Madd. 429; and if the alteration be so considerable as, according to the practice of the court, to make it necessary that a new ingrossment should be filed as of record, counsel's signature must be affixed thereto. *Kirkley* v. *Burton*, 5 Madd. 378. *Webster* v. *Threlfall*, 1 Sim. & Stu. 135. *Pitt* v. *Macklew*, 1 Sim. & Stu. 136. n.

(*l*) *Anon.* Mos. 123. 296. *Flower* v. *Herbert*, Dick. 349.

(*m*) Mosely, 296. Prac. Reg. 371. Wy. Ed. It may be noticed that leave will in some instances be given to withdraw a rejoinder and rejoin *de novo*. See *Berks* v. *Wigan*, 1 Ves. & B. 221. *Brickwood* v. *Miller*, 1 Meriv. 4.

(*n*) *Rodney* v. *Hare*, Mosely, 296.

CHAP.

CHAPTER THE FOURTH.

OF INCIDENTS TO PLEADINGS IN GENERAL.

IN the preceding chapters have been considered the nature of the pleadings used in the equitable jurisdiction of the court of chancery, and the manner in which they are brought to a termination. Before the proceedings arrive at that point the Court will frequently permit the pleadings filed to be altered, as the purposes of parties may require (*a*), except in the case of answers put in upon oath, in which the Court, for obvious reasons, will not easily suffer any change to be made (*b*).

(*a*) As to the amendment of bills, see above, pp. 55. 322; of demurrers, *Glegg* v. *Legh*, 4 Madd. 208, *Thorpe* v. *Macaulay*, 5 Madd. 218, and above, p. 214; and of pleas, *Dobson* v. *Leadbeater*, 13 Ves. 230. *Merrewether* v. *Mellish*, 13 Ves. 435. *Wood* v. *Strickland*, 2 Ves. & B. 150. *Thompson* v. *Wild*, 5 Madd. 82.

(*b*) A special application is necessary for the purpose, 4 Madd. 27, and the Court will not as formerly, (see 3 Barn. 51, 2 Eq. Ca. Ab. 60, *Wharton* v. *Wharton*, 2 Atk. 294, *Dagly* v. *Crump*, Dick. 35, *Bedford* v. *Wharton*, Dick. 84, *Patterson* v. *Slaughter*, Ambl. 292; and cases cited, 1 Ves. & B. 150, note (*a*), 10 Ves. 285, 401,) give leave to amend the answer itself, except in the case of an infant defendant, (*Savage* v. *Carroll*, 1 Ball & B. 548,) and except in cases of mere clerical error, (*Griffiths* v.

After the examination of witnesses (*c*) no part of the pleadings can be altered or added to, but under very special circumstances, or in consequence of some subsequent event, except, that if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend his bill for the special purpose of adding the necessary parties (*d*); and leave has also been given to amend the prayer, under par-

Wood, 11 Ves. 62, *Peacock* v. *Duke of Bedford*, 1 Ves. & B. 186, *White* v. *Godbold*, 1 Madd. R. 269, *Faircloth* v. *Webb*, 5 Madd. 73, but see *Ridley* v. *Obee*, Wightw. 32,) but, upon its conscience being satisfied that the defendant ought not to be concluded by the answer as upon record, (10 Ves. 401, 4 Madd. 27, and see *Tennant* v. *Wilsmore*, 2 Anstr. 362,) if the matter already brought forward be ambiguously stated, and it appear that the defendant meant to swear to it in the sense which he seeks upon his application to put upon it, (*Livesey* v. *Wilson*, 1 Ves. & B. 149,) or if it be desired to introduce new matter, and it appear that the defendant, at the time of putting in the original answer, was not aware thereof, (*Wells* v. *Wood*, 10 Ves. 401,) it will permit a supplemental answer to be filed, (*Jennings* v. *Merton College*, 8 Ves. 79, 10 Ves. 285, 19 Ves. 584, *Curling* v. *Marquis Townshend*, 19 Ves. 628, *Strange* v. *Collins*, 2 Ves. & B. 163, *Edwards* v. *M'Leay*, 2 Ves. & B. 256, 4 Madd. 407,) as a mode by which justice may be more surely administered, 19 Ves. 631.

(*c*) As to bills, see *Wright* v. *Howard*, 6 Madd. 106, and above, p. 55. Where no witness has been examined, an amendment has been permitted after publication passed. *Hastings* v. *Gregory*, in the Excheq. 19th Nov. 1782. 1 Fowl. Excheq. Pr. 127. *Sanderson* v. *Thwaites*, in Chan. Trin. 1782. With respect to answers see *Chute* v. *Lady Dacres*, 2 Freem. 172. *Mullins* v. *Simmonds*, Bunb. 186. *Kingscote* v. *Bainsby*, Dick. 485. *Tennant* v. *Wilsmore*, Anstr. 362.

(*d*) *Anon.* 2 Atk. 15. *Goodwin* v. *Goodwin*, 3 Atk. 370. 1 Prax. Alm. Cur. Canc. 546. See above, pp. 55. 322.

ticular circumstances (*e*). If any event happens which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may file a supplemental bill, or bill of revivor, as the occasion may require. And if the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery (*f*). He may also file a supplemental bill to put in issue any matter necessary to his case when he cannot obtain permission to alter his original bill by amendment; but he cannot upon such a supplemental bill examine witnesses to any matter in issue by the original bill (*g*).

If upon hearing the cause the plaintiff appears entitled to relief, but the case made by the bill is insufficient to ground a complete decree, the Court will sometimes give the plaintiff leave to file a supplemental bill, to bring the necessary matter, in addition to the case made by the original bill, before the court (*h*). If the addition of parties only is wanted (*i*), an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties; and in some cases where a matter has not been put in issue by a bill with sufficient precision, the Court has, upon hearing the cause, given the

(*e*) *Cook* v. *Martin*, 2 Atk. 2. *Harding* v. *Cox*, 3 Atk. 583. *Palk* v. *Lord Clinton*, 12 Ves. jun. 48.

(*f*) *Boeve* v. *Skipwith*, 2 Ch. Rep. 142. *Goodwin* v. *Goodwin*, 3 Atk. 371. *Usborne* v. *Baker*, 2 Madd. R. 379.

(*g*) *Bagenal* v. *Bagenal*, 6 Bro. P. C. 81. Toml. Ed.

(*h*) 3 Atk. 133.

(*i*) See above, pp. 55. 322.

plaintiff liberty to amend the bill for the purpose of making the necessary alteration (*k*).

The Court considering infants as particularly under its protection will not permit an infant plaintiff to be injured by the manner in which his bill has been framed. Therefore, where a bill filed on behalf of an infant submitted to pay off a mortgage, and upon hearing the cause the Court was of opinion that the infant was not bound to pay the mortgage, it was ordered that the bill should be amended by striking out the submission (*l*). And where a matter has not been put by the bill properly in issue, to the prejudice of the infant, the Court has generally ordered the bill to be amended (*m*).

A like indulgence has been granted to a defendant when upon hearing a cause it has appeared that he has not put in issue by his answer facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, the defendant being permitted to amend his answer by stating those facts. This has formerly been done in the Exchequer, where a modus had been set up as a defence to a bill for tithes; and it appeared from the evidence in the cause that there was probably a good ground for opposing the plaintiff's claim, though the defendant had mistaken it, and the Court per-

(*k*) *Filkin* v. *Hill*, 4 Bro. P.C. 640. Toml. Ed. As to practice in case of neglect to amend within a reasonable time, see *Cox* v. *Allingham*, 3 Madd. 393.

(*l*) 1 P. Wms. 428.

(*m*) See p. 27. *Napier* v. *Lady Effingham*, 2 P. Wms. 401. 403. And see *Bennet* v. *Lee*, 2 Atk. 529.

mitted him to amend his answer (*n*); but this has been refused in other cases. Where an answer has been prejudicial to a defendant from a mere mistake; upon evidence of the mistake an amendment has been permitted (*o*). This indulgence has been extended, after much consideration, beyond mere mistake, where by the answer an important fact was imperfectly put in issue, and no witness had been examined, the cause being heard on bill and answer (*p*). In general, however, this indulgence is confined to mere mistake or surprise (*q*). A distinction has also been made between the admission of a fact, and the admission of a consequence in law or in equity (*r*). Where a defendant after putting in an answer discovered a ground of defence to the bill of which he was not before informed, a purchase by the person under whom he claimed without notice of the plaintiff's title, which could only be used by way of defence, and could not be the ground of a bill of review, the Court allowed the answer to

(*n*) *Phillips* v. *Gwynne*, Exchequer, Easter, 1779. See also *Filkin* v. *Hill*, 4 Bro. P. C. 640. Toml. Ed. 2 Anstr. 443.

(*o*) *Countess of Gainsborough* v. *Gifford*, 2 P. Wms. 424.

(*p*) *Powell* v. *Hill*, in Chan. The cause came first before the Master of the Rolls, who made an order, giving liberty to the plaintiff to amend the bill, and to the defendant to amend the answer, to which the plaintiff might reply and go to issue. On appeal to the Chancellor the order was affirmed, 19th March 1735. MS. N. *Countess of Gainsborough* v. *Gifford*, (since reported 2 P.Wms. 424,) cited as determined on several precedents. But see *Sorrell* v. *Carpenter*, 2 P.Wms. 482.

(*q*) 2 Bro. C. C. 619. See *Chute* v. *Lady Dacres*, 2 Freem. 173.

(*r*) See *Pearce* v. *Grove*, 3 Atk. 522, and S. C. Ambl. 65, but very differently stated.

be taken off the file, and the new matter to be added, and the answer re-sworn (*s*). Where a fact which may be of advantage to a defendant has happened subsequent to his answer, it cannot with propriety be put in issue by amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill in which the fact can be put in issue be brought to a hearing with the original suit (*t*); and a bill for this purpose seems to be in the nature of a plea *puis darrein continuance* at the common law.

Sometimes, upon hearing of a cause, it has appeared that a matter properly in issue, or at least stated in the proceedings, has not been proved against parties who have admitted it by their answers, although not competent so to do for the purpose of enabling the Court to pronounce a decree. In these cases the Court has permitted the proper steps to be taken to obtain the necessary proof; and for this purpose has suffered interrogatories to be exhibited (*u*); and where the plaintiff has neglected to file a necessary replication has allowed him to supply the defect (*x*). Thus, where a bill was filed on behalf of creditors, for satisfaction out of real and personal estates devised

(*s*) *Patterson* v. *Slaughter*, Ambl. 292. As to amending an answer, and filing a supplemental answer instead of amending and reswearing the original answer, see above, p. 324, note, (*b*).

(*t*) *Hayne* v. *Hayne*, 3 Ch. Rep. 19.

(*u*) See 2 P. Wms. 463; and see 3 P. Wms. 289. *Smith* v. *Althus*, 11 Ves. 564. *Willan* v. *Willan*, 19 Ves. 590. S. C. Coop. R. 291. *Swinford* v. *Horne*, 5 Madd. 379. *Moons* v. *De Bernales*, 1 Russ. R. 301. *Abrams* v. *Winshup*, 1 Russ. R. 526.

(*x*) See above, p. 323.

to trustees for that purpose, and, subject to that charge, in strict settlement, and the answers of the tenant for life, and of the first remainder-man in tail, who was an infant, were not replied to, the Court, on hearing, directed that the plaintiff should be at liberty to reply to those answers, and exhibit interrogatories, and prove their debts against those defendants, as they had before proved them against the trustees; and reserved the consideration of the directions necessary to be given upon such new proof (*u*).

In most of these cases the indulgence given by the Court is allowed to the mistakes of parties, and with a view to save expense. But when injury may arise to others the indulgence has been more rarely granted; and so far as the pendency of a suit can affect either the parties to it, or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent only from the time of the amendment (*x*), except that where a bill seeks a discovery from a defendant, and having obtained that discovery, the bill is amended by stating the result, it should seem that the suit may, according to circumstances, be considered as pendent from the filing of the original bill, at least as to that defendant, and perhaps to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might

(*u*) *Lambert* v. *Ashcroft*, at the Rolls, 18th Feb. 1779.

(*x*) 2 Atk. 218.

include in general terms the subject of the amendment.

Though in general, with respect to the original parties, and their interests, no amendment will be permitted after the cause is at issue, and witnesses have been examined, and publication passed (*y*); yet a plaintiff has been permitted under such circumstances, to amend his bill by adding a prayer omitted by mistake (*z*). Even upon the hearing, as already noticed (*a*), the Court having the whole case before it, and being embarrassed in its decision by defects in the pleadings, has permitted amendments both of bills (*b*) and answers (*c*), under very special circumstances. Where new matter has been discovered by either plaintiff or defendant before a decree has been pronounced deciding on the rights of the parties, a supplemental or cross-bill has been permitted, to bring such matter before the court to answer the purposes of justice, instead of allowing an amend-

(*y*) *Anon.* Barn. 222. 2 Anstr. 362. And see above, p. 325, and note. It may be observed, that in such a case the plaintiff must generally apply to the Court for liberty to withdraw his replication, as well as to amend his bill. 1 Atk. 51. *Motteux* v. *Mackreth*, 1 Ves. jun. 142. 1 Turn. R. 24. See above, cases cited, p. 55, note, and pp. 322, 323, notes (*i*) & (*k*).

(*z*) *Harding* v. *Cox*, 3 Atk. 583.

(*a*) Pp. 326, 327. 329. And here it may be remarked, that an amendment of the bill will be permitted after a demurrer or a plea has been filed, but generally not, after it has been set down to be argued. *Anon.* Mos. 301. *Vernon* v. *Cue*, Dick. 358. 1 Ves. jun. 448. *Carleton* v. *L'Estrange*, 1 Turn. R. 23.

(*b*) See above, p. 55, note (*m*), 326, 327.

(*c*) See *Countess of Gainsborough* v. *Gifford*, 2 P. Wms. 424. 1 Cox R. 159. See above, p. 327.

ment of a bill or answer, where the nature of the matter discovered would admit of its being so brought before the court; and after a decree, upon a similar discovery, a bill of review, or a bill in nature of a bill of review, has been allowed for the same purpose, both those forms of proceeding being in their nature similar to amendments of bills or answers, calculated for the same purposes, and generally admitted under similar restrictions. It may however happen that by the mistake, or negligence, or ignorance of parties, their rights may be so prejudiced by their pleadings that the Court cannot permit important matter to be put in issue by any new proceeding without so much hazard of inconvenience, that it may be better that the individual should suffer an injury than that the administration of justice should be endangered by allowing such proceeding.

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