

U.S. Supreme Court

THE NEW FEDERAL EQUITY RULES

PROMULGATED BY THE UNITED STATES SUPREME
COURT AT THE OCTOBER TERM, 1912

TOGETHER WITH THE COGNATE STATUTORY
PROVISIONS AND FORMER EQUITY RULES

WITH AN INTRODUCTION, ANNOTATIONS
AND FORMS

BY

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PREFATORY NOTE

It is the purpose of this little book to conveniently present those rules for the conduct of proceedings **in equity in the national courts** which the **United States Supreme Court** has, under the direction of statute, promulgated from time to time. No amount of revision can make altogether obsolete the opinions interpreting any particular ancient rule which the revision has fallen short of abrogating altogether.

In undertaking the revision which has lately been completed, the bench for the first time in its history **invoked the aid of the bar** (of the nine Circuit Courts of Appeals), and the committee of the Supreme Court, composed of the Chief Justice, Mr. Justice Lurton and Mr. Justice Van Devanter, received and considered the recommendations of the committees from the various circuits, whose personnel is given in the succeeding pages. The high attainments of the gentlemen of the bar who have thus contributed to the revision, no less than the imprimatur of the Supreme Court, gives to the new rules an unusual interest to the student of equity jurisprudence; to the practitioner they are, like all revised rules, an added incident of his day's work, and their use and understanding a matter of immediate necessity.

The deliberation of this revision, the unusual number of lawyers responsible for it, and the representative character of those lawyers, leads to the reasonable hope that further revision will not be necessary or sought for **in the near future**.

What light the best-considered opinions on the old rules may throw upon the new, this book attempts to present compactly. Here and there are interpolated the **Orders of the English High Court of Chancery** on which particular rules are rooted, or which

have been taken over in their entirety; a matter of direction to the practitioner, who may pursue the study in the older English texts, and, it is hoped, a stimulus to the student, impelling him to keener interest in the history of equity practice.

The thanks of the annotator are due, and gratefully extended to Mr. Justice Lurton, through whose courtesy there is herein reproduced the invaluable letter of Lord Chancellor Loreburn upon the modern chancery practice in England; also to Mr. James D. Maher, of the clerk's office of the Supreme Court, for his many valuable suggestions, which have included the correction of errors existing in the first official printing of New Rules 26, 30, 32, 34 and 45.

JAMES LOVE HOPKINS.

Chemical Building, St. Louis.

December 1, 1912.

NOTE TO SECOND EDITION.

The present revision includes references to the adjudications thus far made under the new rules, while preserving the annotations under the old rules. It aims to provide a compact but comprehensive brief of all practice points developed under the present practice.

THE AUTHOR.

Chemical Building, St. Louis,

November 1, 1917.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

ORDER.

It is now here ordered by the court that the rules of practice for the courts of equity of the United States, this day adopted and established by the court, be, and the same are hereby, promulgated as such, to be in force on and after February 1, 1913.

The Chief Justice said:

"The court, in announcing the adoption of the new rules, expresses its appreciation of the interest in the subject manifested generally by the judges of the courts of the United States, and especially by the judges of the circuit courts of appeals, in appointing bar committees from their respective circuits to consider and make recommendations upon the subject. The result of the intelligent and careful labors of such committees, embodied in the reports which they made, as well as the interest shown by the entire bar, and the many individual suggestions which came to the court, greatly facilitated the performance of the duty of framing the new rules.

"The court also desires to record its appreciation of the courtesy shown by the Lord Chancellor of England in replying in writing to certain questions concerning the practical operation of English chancery rules submitted to him by Mr. Justice Lurton while he was in England for the purpose of observing such operation."¹

November 4, 1912.

¹ See *post*, p. 27.

COMMITTEES ON THE REVISION OF THE EQUITY RULES

SUPREME COURT

THE CHIEF JUSTICE.

MR. JUSTICE LURTON.

MR. JUSTICE VAN DEVANTER.

FIRST CIRCUIT.

FREDERICK P. FISH.....Boston, Mass.

JOSIAH H. BENTON.....Boston, Mass.

FELIX RACKEMANN.....Boston, Mass.

SECOND CIRCUIT.

HERBERT BARRY.....34 Nassau Street, New York.

JAMES L. BISHOP, Chairman.....32 Nassau Street, New York.

STANLEY W. DEXTER, Secretary.....71 Broadway, New York.

WALTER D. EDMONDS.....31 Nassau Street, New York.

ABRAM I. ELKUS.....170 Broadway, New York.

WALKER D. HINES.....52 William Street, New York.

ARTHUR H. MASTEN.....49 Wall Street, New York.

FRANK H. PLATT.....2 Rector Street, New York.

EDMOND E. WISE.....19 William Street, New York.

THIRD CIRCUIT.

JOSEPH C. FRALEY.....Philadelphia, Pa.

FRANK P. PRICHARD.....Philadelphia, Pa.

THOMAS PATTERSON.....Pittsburgh, Pa.

BENJAMIN NIELDS.....Wilmington, Del.

GILBERT COLLINS.....Jersey City, N. J.

ROBERT H. MCCARTER.....Newark, N. J.

FOURTH CIRCUIT.

JUNSFORD L. LEWIS.....Richmond, Va.

WILLIAM P. BYNUM.....Greensboro, N. C.

GEORGE WHITELOCK.....Baltimore, Md.

FIFTH CIRCUIT.

EDWARD T. MERRICK.....	New Orleans, La.
ALEXANDER C. KING.....	Atlanta, Ga.
HORACE STRINGFELLOW.....	Montgomery, Ala.
MARCELLUS GREENE.....	Jackson, Miss.
W. A. BLOUNT.....	Pensacola, Fla.
HORACE CHILTON.....	Dallas, Texas.

SIXTH CIRCUIT.

HENRY M. CAMPBELL.....	Detroit, Mich.
LAWRENCE MAXWELL.....	Cincinnati, Ohio.
JOHN B. SIZER.....	Chattanooga, Tenn.
EDMUND F. TRABUE.....	Louisville, Ky.

SEVENTH CIRCUIT.

JAMES G. JENKINS.....	Milwaukee, Wis.
JAMES M. GRAHAM.....	Springfield, Ill.
ROBERT S. TAYLOR.....	Ft. Wayne, Ind.
ROBERT H. PARKINSON.....	Chicago, Ill.

EIGHTH CIRCUIT.

JOEL F. VAILE.....	Denver, Colo.
FRANK B. KELLOGG.....	St. Paul, Minn.
FRANK HAGERMAN.....	Kansas City, Mo.

NINTH CIRCUIT.

ROBERT T. DEVLIN.....	Postoffice Building, San Francisco, Cal.
CURTIS H. LINDLEY.....	Mills Building, San Francisco, Cal.
GABRET W. McENERNEY.....	Flood Building, San Francisco, Cal.
W. S. GOODFELLOW.....	430 California Building, San Francisco, Cal.
JOHN H. MILLER.....	Crocker Building, San Francisco, Cal.

WHERE THESE RULES ARE TO BE FOUND IN THE REPORTS

The thirty-three rules of 1822 went into effect upon the first day of July of that year, and are reported 7 Wheat. 5, 8, 5 L. Ed. 375, 377. The equity rules promulgated in 1842 took the place of the rules of 1822, and were ninety-two in number. Peters included them in his seventeenth volume, an unofficial publication which is now quite rare, and which is a monument to the folly of not knowing when to quit; as it is not in the official set. The Act of Congress of August 26, 1842, having authorized the appointment of a reporter for the Supreme Court, Benjamin C. Howard was appointed to the position January 27, 1843, and printed the rules (1-92) in 1 How. 1. These rules are not printed as part of the first of Howard in that popular reprint of the Supreme Court reports which is cited as "L. Ed.," whose publishers, for some inscrutable reason, have placed them in the rear of the 14th of Wallace, where their citation is 20 L. Ed. 910, 920, and where the entire ninety-four rules appear, which are now displaced by the revision of 1912. The 92d rule of 1842 was superseded at the December term, 1863, by a new Rule 92 (1 Wall. vii). Rule 93 was promulgated at the October term, 1878 (97 U. S. vii), and Rule 94 at the October term, 1881 (104 U. S. ix).

CONTENTS

	Page.
Prefatory	v
Order of Supreme Court of the United States, October term, 1912.....	vii
Committees on the Revision of the Equity Rules.....	ix
Where these rules are to be found in the Reports.....	xi
Table of Former Equity Rules, 1866-1911.....	xiii

CHAPTER I.

Introductory.

Sec. 1. The distinction between law and equity.....	1
Sec. 2. Constitutional recognition of the distinction between law and equity	2
Sec. 3. Custom, practice and law.....	4
Sec. 4. Early English chancery practice.....	4
Sec. 5. The relation of English chancery practice to that of the United States	5
Sec. 6. The evolution of the practice of the High Court of Chancery of England	7
Sec. 7. The constitutional origin of Federal courts of equity.....	8
Sec. 8. The statutory authority for the Equity Rules.....	9
Sec. 9. Rules of court, generally.....	10
Sec. 10. Judicial notice of rules.....	12
Sec. 11. Construction of rules.....	12
Sec. 12. Rules of the District Courts and Circuit Courts of Appeals....	12
Sec. 13. Effect of State legislation upon the assertion of equitable rights in the Federal courts.....	13
Sec. 14. An outline of modern English chancery practice.....	16
Mr. Justice Lurton's questions to Lord Chancellor Loreburn and answers submitted.....	27
Sec. 15. The causes of the Revision of 1912.....	33

	PAGE.
The Equity Rules. Promulgated February Term, 1822.....	37
Equity Rules, 1866-1911.....	63
The New Equity Rules of 1912.....	143

FORMS.

Formal Parts of a Bill of Complaint (Rule 25).

No. 1. "The usual caption".....	259
No. 2. The introductory paragraph required by Rule 25.....	259
No. 3. The introductory paragraph (the plaintiff under disability).....	259
No. 4. The second paragraph required by Rule 25.....	260
No. 5. The third paragraph required by Rule 25.....	260
No. 6. The fourth paragraph required by Rule 25.....	260
No. 7. The final paragraph required by Rule 25.....	261

Miscellaneous.

No. 8. Motion to strike out for scandal, etc. (Substituted for the former practice as to exceptions by Rule 21).....	262
No. 9. Answer in lieu of demurrer. (Demurrers being abolished by Rule 29).....	262
No. 10. Answer in lieu of plea of laches. (Pleas being abolished by Rule 29).....	262
No. 11. Motion to strike out parts of answer, under Rule 33.....	263
No. 12. Motion for leave to file interrogatories to be answered by an officer of a corporation party, under Rule 58.....	263
No. 13. Motion for leave to file interrogatories for the discovery of facts and documents, under Rule 58.....	264
No. 14. Interrogatories, filed by leave, under Rule 58.....	264
No. 15. Demand for admission as to documents, under Rule 58.....	265
No. 16. Motion for revivor, under Rule 45.....	265
No. 17. Motion to set down for hearing, under Rule 43.....	265
No. 18. Motion for further and better statement of claim, under Rule 20.....	265
No. 19. Motion for further and better particulars, under Rule 20.....	266
No. 20. Motion to transfer to law side, under Rule 22.....	266
No. 21. Master's order to bring in account, under Rule 63.....	..
No. 22. Master's report, under Rule 66.....	..
No. 23. Petition for rehearing, under Rule 69.....	..
No. 24. Decree, under Rule 71.....	..
No. 25. Order for decree <i>pro confesso</i> , under Rule 16.....	..
No. 26. Decree <i>pro confesso</i> , under Rule 16.....	..
No. 27. Statement of testimony, under Rule 75(b).....	..

THE EQUITY RULES

CHAPTER I.

INTRODUCTORY.

Sec. 1. The distinction between law and equity.

We must look for the beginning of the demarcation between law and equity in the pages of English history. The *aequitas* of the Roman Law, the justice or natural law of the Pandects, although the latter embodies the modern idea of equity, give us no practical assistance in developing the origin of equity jurisprudence. Sir Frederick Pollock has said of equity that: "It still presents, as much as ever, a distinct historical problem; one might almost say an unique one. As matter of history no one has ever ascribed the origin of English equity to either legislation or custom. It is derived from the king's ancient power of doing justice at his discretion, and by special means in cases where the ordinary means of justice failed, a power admitted from very ancient times down to the seventeenth century."¹

"The distinction between law and equity," said Chief Justice Taney, "is recognized everywhere in the jurisprudence of the United States."² And Mr. Justice Baldwin said, "The separation of cases in law from those in equity, is a necessary incident of the common law."³ So we see that our equity jurisprudence is but a part of our splendid inheritance of the common law; and the Supreme Court has gone beyond the recognition of our indebtedness to Great Britain in this regard, and has recognized the mother country as the originator of our system of equity. "It is true that

¹ First Book of Jurisprudence, p. 243.

² United States v. King, 7 How. 846, 12 L. Ed. 934.

³ Livingston v. Story, 11 Peters 351, 394, 9 L. Ed. 746, 763.

the separation of common law from equity jurisdiction is peculiar to Great Britain; no other of the states of the Old World having adopted it."⁴

Sec. 2. Constitutional recognition of the distinction between law and equity.

Article III, § 2, subdivision 1, of the Constitution of the United States, provides that, "The judicial power shall extend to all cases of law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

Of this provision Mr. Justice Daniel said: "By the Constitution of the United States, and by the acts of Congress organizing the Federal Courts, and defining and investing the jurisdiction of these tribunals, the distinction between common law and equity jurisdiction has been explicitly declared and carefully defined and established."⁵ Chief Justice Taney twice spoke about this distinction. "The distinction between law and equity is recognized everywhere in the jurisprudence of the United States, and prevails (as this court has repeatedly decided) in the State of Louisiana, as well as in other States;"⁶ and again, "The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the Act of August 23, 1842), regulating proceedings in equity in the courts of the United States."⁷

The constitutional provision has been supplemented by statute. "The forms of mesne process and the forms and modes of proceeding in suits of equity and admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules

⁴ Mr. Justice Johnson, in *Livingston v. Moore*, 7 Peters, 469, 547, 8 L. Ed. 751, 779.

⁵ *Fenn v. Holme*, 21 How. 481, 484, 16 L. Ed. 198.

⁶ *United States v. King*, 7 How. 833, 846, 12 L. Ed. 934.

⁷ *Bennett v. Butterworth*, 11 How. 609, 674, 13 L. Ed. 859.

and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States." Section 913, Revised Statutes of the United States.

Of this section Judge Sanborn, of the Eighth Circuit, has said: "The union of legal and equitable causes of action in one suit is prohibited by § 913, Revised Statutes (United States Comp. St., 1901, p. 683), and in removal cases, when such a union is permitted in the state courts from which they come, the causes of action must be separated into distinct actions at law and suits in equity in the national courts.⁸ In the national courts legal causes of action, either on removal or in original cases, must be prosecuted in actions at law where the parties may have a trial by jury, and causes of action in equity where appeal may be made to the conscience of the chancellor.⁹ And the Federal Courts may not lawfully transform by order or amendment against the objection of a defendant an original action at law into a suit in equity, or an original suit in equity into an action at law, because such a course of action would be to subject the defendant to a wholly different system of administration of rights and remedies from that to which he was liable under the original process."¹⁰

The foregoing extract presents what would seem the sound rule. The cases to the contrary¹¹ are very slightly supported by reason or authority. It is now provided by Rule 22, Rules of 1912, that

⁸ Citing *Hurt v. Hollingsworth*, 100 U. S. 100, 103, 25 L. Ed. 569; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 651, 34 L. Ed. 295.

⁹ Citing *Buzard v. Houston*, 119 U. S. 347, 351, 30 L. Ed. 451; *Scott v. Armstrong*, 146 U. S. 499, 512, 30 L. Ed. 1059.

¹⁰ SANBORN, J., dissenting opinion, in *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed. Rep. 1, 16, 96 C. C. A. 107. Citing, *Blalock v. Equitable Life Assur. Soc.*, 73 Fed. Rep. 655, 660,

661; *Stevens v. Brooks*, 23 Wis. 196, 199; *Kavanagh v. O'Neill*, 53 Wis. 101, 10 N. W. 369, 370; *Carmichael v. Argard*, 52 Wis. 607, 9 N. W. 470, 471; *Hayward v. Hapgood*, 4 Gray (Mass.), 437; *Gray v. Brown*, 15 How. Prac. (N. Y.), 555; *Sheldon v. Adams*, 18 Abbott's Prac. (N. Y.) 405.

¹¹ *United States Bank v. Lyon County*, 48 Fed. Rep. 632, 635; *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed. Rep. 1, 16, 96 C. C. A. 107.

"if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and there proceeded with, with only such alteration in the pleadings as shall be essential."

Sec. 3. Custom, practice and law.

The evolution of law from custom is clearly traceable in many channels. Law is frequently avowedly based on custom. Practice, as Sir Frederick Pollock has pointed out, is that particular kind of custom by which a court of justice regulates the course of its own proceedings.¹² Both law and procedure, therefore, may be founded on custom, and they are most conveniently distinguished from each other as "substantive" and "adjective" law.¹³

The student who seeks to found his knowledge of the law upon an historical basis, finds his labors sadly hampered by lack of data; and in no other department of legal study is this search more difficult than in chancery practice. But it seems clear that law owes much to equity; that the purely equitable remedies of one century have become the legal remedies of the next. So that we now find the King's Bench Division in England entertaining purely equitable defenses, and the chancery division adjudicating defenses purely legal.

Sec. 4. Early English chancery practice.

When Bacon, in 1618, became Lord Chancellor, he promulgated one hundred rules, of which Lord Campbell says "they are wisely consistent, and expressed with great precision and perspicuity. They are the foundation of the practice of the court of chancery, and are still cited as authority."¹⁴ These rules of Bacon, and those of Lord Clarendon, are among those often referred to as the "ancient" rules of chancery, while those contained in the later orders, upon which our Supreme Court drew freely for our early equity rules, are styled the "more recent" rules.

That King Arthur had a chancellor; that many other chancellors lived and died before a court of chancery was called into being; that

¹² First Book of Jurisprudence, p. 12.

¹³ *Ibid.*, p. 78.

¹⁴ Campbell's Lord Chancellors, p. 114.

chancery contained two courts, one ordinary (the petty-bag side) and the other extraordinary, are the skeleton outline of chancery's early history. Which division came into being first will never be known. Blackstone says the ordinary was the more ancient; Lord Campbell says they originated at the same time; while John Sidney Smith, of the Six Clerks' Office, does not commit himself. Smith says "the ordinary * * * has been a court time out of mind; the extraordinary * * * also is a court of great antiquity."¹⁵ With this confusion as to its origin, it is evident that the early history of its practice can never be developed.

Sec. 5. The relation of English chancery practice to that of the United States.

In the rules first promulgated by the Supreme Court,¹⁶ in February term, 1822, we find the following:

"RULE XXXIII. In all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England."

Subsequently we find in the equity rules as revised in 1866 the following:

"RULE 90. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Thus, we see that the Supreme Court, by Rule 33, of 1822, contemplated the adoption, in all cases where the equity rules established by the Supreme Court, or by the Circuit Court, did not apply, of the current practice of the High Court of Chancery in England; while the later Rule 90 specifically relates to what, at the time of

¹⁵ Smith's Chancery Practice, 1st Amer. Ed., p. 2.

¹⁶ See the following Acts as statutory authority for the adoption of rules, or specific provisions as to procedure: Act

of September 29, 1789, Chap. 21, 1 Stat. L. 93; Act of May 8, 1792, Chap. 36, 1 Stat. L. 276; Act of May 19, 1828, Chap. 68, 4 Stat. L. 278; Act of Aug. 1, 1842, Chap. 109, 5 Stat. L. 499.

the adoption of the rule, was the practice of the English court.¹⁷ The later provision was wisely adopted because of the great uncertainty to which the procedure in the English court had been subjected by constant agitation for reform in procedure; and this agitation continued until it resulted in the enactment of August 5, 1873, entitled the "Supreme Court of Judicature Act," which provided for the consolidation of the Court of Chancery with the various law courts, so constituting one Supreme Court of Judicature.

As to the best sources of authority as to what the adopted English practice was, the Supreme Court thus directs us:

"Reference is made to the first edition of Daniell (published, 1837), as being, with the second edition of *Smith's Practice* (published the same year), the most authoritative work on English chancery practice in use in March, 1842, when our equity rules were adopted. Supplemented by the General Orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own rules), they exhibit that 'present practice of the High Court of Chancery in England,' which, by our 90th rule was adopted as the standard of equity practice in cases where the rules prescribed by this court, or by the Circuit Court, do not apply. The second edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English Orders of May 8, 1845; and the third edition, by the still more radical changes introduced by the Orders of April, 1850, the statute of 15th and 16th Vict., chap. 86, and the General Orders afterwards made under the authority of that statute. Of course, the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842, but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have, on that account, a value of their own, provided one is not misled by the new portions."¹⁸

¹⁷ The English chancery practice, as it existed in 1842, has been held to regulate our practice, except where provided for and controlled by statute, or the rules of the Supreme Court. *Pennsylvania v. Bridge Co.*, 13 How. 518,

563, 14 L. Ed. 249; *Griswold v. Bragg*, 48 Fed. Rep. 519.

¹⁸ MR. JUSTICE BRADLEY, in *Thomson v. Wooster*, 114 U. S. 104, 29 L. Ed. 107.

Sec. 6. The evolution of the practice of the High Court of Chancery of England.

It is fortunate that our courts have seldom had to go beyond their own rules and resort to the practice in the English court, because of the enormous difficulty of ascertaining what the practice of the English court was at any particular time. The High Court of Chancery was constantly criticized, lampooned and ridiculed because of the complexity and delays in its procedure. Charles Dickens in "Bleak House" exploited the fictitious case of Jarndyce versus Jarndyce with his matchless skill. As early as 1841 we read in the work of one of the ablest English text writers the following:

"A person ignorant of the facts, hearing the loud complaints which are constantly made of the court, and the calls which are repeatedly reiterated, both in and out of Parliament, for a reform of its abuses, would naturally imagine that the spirit of reform, which, for some years past, has pervaded nearly all the other institutions of the country, had never been led to visit the Court of Chancery, and that while attempts have been made to put to the rout the abuses, real or imaginary, of every other department of the public service, those of the Court of Chancery alone had been suffered to slumber on, in undisturbed tranquillity. Great, therefore, would be the surprise of such a person to find that so far from this being the case, there is no institution or department which, within the last thirteen or fourteen years, has undergone more alterations and modifications, in the way of reform, than this court."¹⁹

The same writer points out that during the period from the commencement of the year 1828 to 1841 the following Orders of the High Court of Chancery were issued:

3 April, 1828.	New Orders.....	81	By Lord Lyndhurst.
23 November, 1831.	Amended Orders..	9	By Lord Brougham.
26 November, 1833.	New Orders.....	36	By Lord Brougham.
21 December, 1833.		1	By Lord Brougham.
30 February, 1837.		1	By Lord Cottenham.
5 May, 1837.		16	By Lord Cottenham.
9 May, 1839.		6	By Lord Cottenham.
9 May, 1839.		6	By Lord Cottenham.
Total		156	

¹⁹ Daniell, *New Orders of the Court of Chancery*, p. XIII.

During that period twenty rules were prescribed by Sir Edward Sugden's Act, 1 W. 4, c. 36, s. 5; seven acts of Parliament were enacted which affected the process, practice or officers of the court as follows:

1st and 2d W. 4, c. 36; 2d and 3d W. 4, c. 33; Ibid., c. 111; 3d and 4th W. 4, c. 84; Ibid., c. 94; 4th and 5th W. 4, c. 82; 5th and 6th W. 4, c. 47.

And on the 26th day of August, 1841, fifty-one New Orders in Chancery were issued. This tabulation gives some idea of the persistency with which the practice of that court was complicated by reform, and forms a record which ought to be instructive on this side of the Atlantic.

The Rules of 1912 do not, like our earlier rules, refer us to the English practice. Indeed, that practice has been so completely altered during the past half century that it was thought to no longer furnish a practical basis for regulating our practice.

TWEA!

Sec. 7. The constitutional origin of Federal courts of equity.

The Supreme Court was created by the constitution itself (Art. III, § 1), in the words, "The judicial power of the United States shall be vested in one Supreme Court," the courts of inferior jurisdiction being provided for as "such inferior courts as the Congress may from time to time ordain and establish;" and as to the lower courts, the power to create them was expressly conferred upon Congress by Art. I, § 8, "to constitute tribunals inferior to the Supreme Court." With the exceptions of those cases in which original jurisdiction is conferred upon the Supreme Court by § 233, the Judicial Code,²⁰ the original jurisdiction of equity causes is vested in the district courts (§ 24, the Judicial Code).²¹

²⁰ See Hopkins' Judicial Code, p. 201; "Sec. 233. The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceed-

Not anymore, Appellate Original
ings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."

²¹ See Hopkins' Judicial Code, p. 31.

Sec. 8. The statutory authority for the Equity Rules.

The power is expressly conferred upon the Supreme Court to promulgate rules for equity practice.²²

Section 913, Revised Statutes of the United States. "The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

Section 917, Revised Statutes of the United States. "The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts."

The equity rules promulgated by the Supreme Court under the authority of these sections, when not in conflict with statutes of the United States, have the force and effect of law.²³

Chief Justice Marshall, at an early day, upheld the delegation of power to the courts to make rules in regulation of their practice against the objection that it was an unconstitutional delegation of legislative power.²⁴ To Avoid Conflict we must Seal.

²² That the circuit courts of appeals have no power to prescribe rules for the district courts, see *The Philadelphian*, 60 Fed. Rep. 423, 9 C. C. A. 54.

²³ *American Graphophone Co. v. Na-*

tional Phonograph Co., 127 Fed. Rep. 349, 350; *Stevens v. Missouri, K. & T. Ry. Co.*, 104 Fed. Rep. 934, 936.

²⁴ *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

Sec. 9. Rules of court, generally.

Rules of court may be defined to be the standing regulations of its practice which have been adopted by the court itself, or prescribed for it by a higher judicial or legislative authority. **They may not be written**; indeed, there is **much unwritten** practice known to every court. "It is not necessary," said Mr. Justice Blatchford, when district judge, "that a practice of a court to be recognized or sustained, should be embodied in a written rule. Written rules are undoubtedly preferable, but **a practice in respect to a particular matter in a court may be established without the existence of a positive written rule.**"²⁵ And Mr. Justice McLean said: "It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court."²⁶

It would be curious to examine the number of instances in which the equity rules have been deliberately disregarded by the courts for whose guidance they were promulgated. **The unwritten practice is superior to the equity rules in many cases.** For example, no lawyer could comply with the requirements of former Rules 18 or 63 unless there was, in the office of the clerk of the circuit court, an order book, in which the order taking the bill *pro confesso*, or the entry setting down exceptions for hearing, could be properly written. Yet in the Eastern Division of the Eastern District of Missouri the office of the clerk never contained an order book, and unwritten practice, over-riding the equity rules,²⁷ required the filing of a document in the case with the desired entry. This, to be sure, was no very serious matter, but it forms one of the innumerable instances of irregularity in practice which make it difficult to practice with certainty in the various circuits, their districts and divisions. The "order book" is now peremptorily required by Rule 3, Rules of 1912.

Such deviations from the practice ordained by the equity rules as that just referred to are wrong. **"A rule established by the**

²⁵ *United States v. Stevenson*, 1 Abb. U. S. 495, Fed. Case 16,395.

²⁶ *Duncan's Heirs v. United States*, 7 Peters, 435, 451, 8 L. Ed. 739, 745.

²⁷ It appears that the Western District of Tennessee had an order book, in which no entry was made for more than seven years. *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773, 774.

Supreme Court of the United States in pursuance of law," Judge Drummond said, "becomes, to all intents and purposes, of the same effect as the law itself."²⁸ The primary object of all rules is to secure uniformity in practice. They relate to the adjective, not to the substantive, law. "The rules established or altered by the Supreme Court, under legislative authority, are not rules of decision, but are merely rules of practice."²⁹

Every lawyer wishes to comply with the rules of court. The difficulty of learning what the rules, written and unwritten, are, consumes much valuable time which were better devoted to the merits of the controversies in the courts. Periodical upheavals of the rules seem inevitable. Compliance with rules must be based upon a knowledge of the rules. When the rule is clear and courts deliberately depart from it, the result is an unfair embarrassment of the bar. "The equity practice of the courts of the United States," said Mr. Justice Curtis, "is governed by the rules prescribed by this court under the authority conferred upon it by the act of Congress and is the same in all the States."³⁰ "No practice of the Circuit Court, inconsistent with those rules," said Mr. Justice Story, "can be admissible to control them."³¹ "No district court," said the late Judge Thayer, "has power to disregard their provisions."³² Yet, as illustrating the apathy of some judges in dealing with the equity rules, we might cite Judge Hammond, "except in a general way, very little attention has been paid to them, and I doubt if any case can be found in any of the courts where they have been scrupulously and exactly enforced, or where they have been even nearly followed. Besides, we mix our State and Federal practice almost indistinguishably and quite unconsciously."³³ While Judge Hammond is undoubtedly right to the extent that there is much laxity in practice, for which the responsibility rests partly with the bench and largely

²⁸ *Seymour v. Phillips & Colby Const. Co.*, 7 Biss. 460, Fed. Case 12,689; to the same effect, see *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. Rep. 349; *United States v. Barber Lumber Co.*, 169 Fed. Rep. 184.

²⁹ *The Selt*, 3 Biss. 344, Fed. Case 12-649.

³⁰ *Betts v. Lewis*, 19 How. 72, 15 L. Ed. 576.

³¹ *Bank of the United States v. White*, 8 Peters, 202, 209, 8 L. Ed. 938, 941.

³² *Northwestern Mut. Life Ins. Co. v. Keith*, 77 Fed. Rep. 374, 23 C. C. A. 196; followed in *United States v. Barber Lumber Co.*, 169 Fed. Rep. 184.

³³ *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773.

with the bar, his language must not be interpreted as an approval of such laxity. Even the United States as a party is bound by these rules and held to compliance with them.³⁴

Sec. 10. Judicial notice of rules.

The rule as to judicial notice does not extend to rules. While a Federal Court takes judicial notice of the laws of the State affecting its procedure, it does not take such notice of the rules of the State courts, and, if relied upon, such rules must be proven.³⁵

In so holding the Federal Courts are in harmony with the State courts.³⁶

The English rule is the same: "Anything required to be done by the law of the land must be noticed by another court; but a court of error cannot notice the practice of another court."³⁷

Sec. 11. Construction of rules.

Rules are grouped, according to their character, into two classifications, **mandatory and directory**. When directory, a party guilty of breach of the rules may always, in the discretion of the court, be relieved from the consequences of his breach;³⁸ while mandatory rules must be complied with strictly.³⁹

Sec. 12. Rules of the District Courts and Circuit Courts of Appeals.

The District Courts and Circuit Courts of Appeals are authorized by statute to make rules, within a prescribed range.

Section 918, Revised Statutes of the United States. "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding

³⁴ United States v. Barber Lumber Co., 169 Fed. Rep. 184.

³⁵ Randall v. New England Order of Protection, 118 Fed. Rep. 782, 784; Yarnell v. Felton, 104 Fed. Rep. 161, 162; Packet Co. v. Sickles, 19 Wall. 611, 22 L. Ed. 203.

³⁶ Crotty v. Wyatt, 3 Brad. (Ill. App.) 388, 399; Rout v. Ninde, 111 Ind. 597; Dunn v. Bozarth, 59 Neb. 244, 80 N. W. Rep. 811.

³⁷ HOLROYD, J., in Sandon v. Proctor, 7 B. & C. 800.

³⁸ Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, 886; Barget v. Robinson, 123 Fed. Rep. 282, 59 C. C. A. 260.

³⁹ Adams v. Shirk, 105 Fed. Rep. 659, 660, 44 C. C. A. 653.

section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" (4 Fed. Stat. Ann., p. 585).

Section 122, the Judicial Code (Hopkins' Judicial Code, p. 140): "Each of said Circuit Courts of Appeals * * * shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

The character and effect of rules of the District Courts promulgated by the authority of this section are illustrated in many cases.⁴⁰ So rules as to service need not conform to State laws.⁴¹

The Act of July 20, 1892, c. 209, 27 Stat. at L. 252, United States Comp. St., 1901, p. 706, relating to suing *in forma pauperis*, being confined in its terms to courts of original jurisdiction, the Circuit Courts of Appeals have no authority to promulgate like rules.⁴²

Sec. 13. Effect of State legislation upon the assertion of equitable rights in the Federal courts.

In this work we have eliminated from consideration the conformity of practice on the law side of the national courts to the practice of the State in which the court is sitting, for the dual reason that this book is confined in its scope to equity procedure, and that this adaptability of the law side to local State practice does not extend in any extent to the equity side.

The inflexible adherence of the Federal courts sitting in chancery to the uniform Federal equity practice might be illustrated at length, with profit to the reader. Let a few examples suffice:

A citizen of Virginia can maintain in the Federal courts of Missouri a demand against an executor or administrator which he could not assert were he a citizen of Missouri, and could not invoke

⁴⁰ *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 580; *Mahr v. Union Pacific R. Co.*, 140 Fed. Rep. 921, 925; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Lincoln v. Power*, 151 U. S. 436, 38 L. Ed. 224; *Shepard*

v. Adams, 168 U. S. 618, 42 L. Ed. 602.

⁴¹ *Shepard v. Adams*, 168 U. S. 618, 42 L. Ed. 602.

⁴² *In re Bradford's Petition*, 139 Fed. Rep. 518, 71 C. C. A. 334.

Federal jurisdiction.⁴³ A State statute permitting a married woman to sue in her own name does not govern the Federal Court of Equity, her bill is demurrable, and she must proceed by next friend, appointed under former Rule 27.⁴⁴ Where a Kansas statute permitted parties to file an agreed statement of facts, and a stipulation that the court take jurisdiction and render decree, without pleadings, Judge McCrary refused to entertain such an application.⁴⁵ So where a State statute gives to the owner of mere equitable title to real estate, the right to proceed in ejectment, the holder of such a title cannot proceed on the law side of the Federal Court, but must have recourse to the chancery side; "in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title."⁴⁶

But when we leave the matter of procedure and come to the enforcement of substantive equitable rights, we find that "new classes of cases may by (State) legislative action be directed to be tried in chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition."⁴⁷

A State law cannot create jurisdiction for a Federal Court; but "a State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy."⁴⁸

In the case last quoted from, a writ of prohibition to a District Court was denied, upon the ground that a liability created by a pilotage law might be enforced in the local Federal Court sitting in admiralty. In an earlier case originating in Kentucky, the Supreme Court held that a Federal Court sitting in Kentucky should, on its

⁴³ *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

⁴⁴ *Wills v. Pauly*, 51 Fed. Rep. 257.

⁴⁵ *Nickerson v. Atchison, T. & S. F. R. Co.*, 30 Fed. Rep. 85.

⁴⁶ *MR. JUSTICE MILLER*, in *Langdon v. Sherwood*, 124 U. S. 74, 31 L. Ed. 344.

⁴⁷ *MR. CHIEF JUSTICE FULLER*, in *Cates v. Allen*, 149 U. S. 451, 458, 37 L. Ed. 804, 808.

⁴⁸ *MR. JUSTICE SWAYNE*, in *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. Ed. 624, 626.

equity side, entertain a bill to remove a cloud on title, by recognizing "a new equity" created by the Kentucky Legislature, having its origin in peculiar local conditions.⁴⁹ Later, a suit to quiet title, based upon a Nebraska statute, was entertained in a Federal Court sitting in equity.⁵⁰ But the latter case goes only to the extent of entertaining jurisdiction "if the controversy is one in which a court of equity alone can afford the relief prayed for."⁵¹ Furthermore, the new remedy prescribed by State legislation must be "substantially consistent with the ordinary modes of proceeding in equity" or the Federal Court will not enforce it on the equity side.⁵² So, where a statute of Mississippi gave to a simple contract creditor, who had not reduced his claim to judgment, or resorted to any legal proceedings upon his contract, the right to maintain an action to set aside alleged fraudulent conveyances of property by his alleged debtor, as obstacles to the recovery of his contract demand, the remedy was abhorrent to the old equity rule (that equity will only aid the enforcement of a remedy at law where the debt is acknowledged or reduced to judgment) and the Federal courts declined to enforce it.⁵³

Whatever the effect of State legislation on enlarging the remedies in equity in the Federal courts, it is obvious that in no event can the States "restrict or diminish the power or jurisdiction of Federal courts of equity, because only an act of Congress can do that."⁵⁴ So a law of a State may by statute forbid the bringing of suits to enjoin the collection of taxes, but the law will not affect the jurisdiction of the Federal courts sitting in the State.⁵⁵

⁴⁹ *Clark v. Smith*, 13 Peters, 195, 10 L. Ed. 123.

⁵⁰ *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52.

⁵¹ *Frost v. Spitley*, 121 U. S. 552, 557, 30 L. Ed. 1010, 1012; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. Ed. 873.

⁵² *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. Ed. 873.

⁵³ *Cates v. Allen*, 149 U. S. 451, 37 L. Ed. 804.

⁵⁴ *Taft, J.*, in *Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350, 357, 31 C. C. A. 537.

⁵⁵ *Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350, 357, 31 C. C. A. 537.

Certain indorsements also must be made upon the writ, the first being a statement of claim: "Plaintiff's claim is for, etc."

The writ must also recite the name and residence of each plaintiff and defendant, and the name and place of business of the plaintiff's solicitor, if he employs one.

Referring to the indorsement of the claim, this may be of four kinds:

(1) General indorsement, which is a statement of the general character of the claim.

(2) An indorsement for trial without pleadings.

(3) An indorsement for an account, and

(4) A special indorsement (which is really the pleading).

The special indorsement is intended to enable the plaintiff to enter judgment in a summary manner in common law actions for liquidated claims where no substantial defense is interposed. Therefore, they call for no attention in connection with a suit in chancery.

Issuing the Writ.

The writ is prepared by the plaintiff or his solicitor and is issued in London at the Central Office, and in other parts of England at District Registries. Two copies of the writ are required; one of these must be signed by the party or his solicitor and is left at the office, the other is sealed and returned for service. The writ is marked with a file letter and number, and each paper in the case is afterwards marked with the same distinguishing letter and number. There must also be marked upon the writ the name of one of the judges of the Chancery Division, and the subsequent proceedings in the action are had before that judge or his clerk.

Service of the Writ.

The writ must be served within twelve months from its date or it may be renewed for a period of six months (O. 8). It is served either personally or by substituted service, but substituted service can be made only after an order for such service, and this applies also to service of a writ of summons or notice of a writ of summons, out of the jurisdiction. The circumstances in which service out of the jurisdiction may be made, are prescribed (O. 11; r. 1), but it is not necessary to relate them. The mode of such service, which may be personal or by publication, is also prescribed.

Appearance.

The defendant may enter his appearance by delivering to the proper officer a memorandum in writing, dated the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. This paper is also prepared in duplicate, and one copy is sealed and returned to the person entering the appearance. The defendant is also required to give notice of his appearance on the day on which it is entered, to the plaintiff's solicitor.

itor, or if the plaintiff sues in person, to the plaintiff himself. He must give an address for service of papers upon him (O. 12). Defendant may appear at any time before judgment, but if he appears after the time limited by the writ for appearance, he is not entitled to further time for delivering his defense unless the judge shall so order. In his appearance he may also require a statement of claim to be delivered. This he is entitled to unless the writ is specially indorsed.

Default in Appearance.

If the defendant fails to appear, the plaintiff must proceed as if the defendant had appeared, that is, he must prepare a statement of claim which he files in the office of the court. The court is bound to give judgment according to the pleadings alone, and does not receive evidence (O. 27; r. 11).

Summons for Directions.

If the defendant appears to the writ, the next step is for the plaintiff to take out a summons for directions (O. 30). This is a summons which asks the Master or Judge to decide how the action shall be conducted from the appearance to the trial. "Upon the hearing of the summons, the court or a judge shall so far as practicable make such order as may be just with respect to all the proceedings to be taken in the action and as to the costs thereof, and more particularly, with respect to the following matters: pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examinations of witnesses, place and mode of trial" (O. 30; r. 2).

The form of the summons is as follows:

"Let all parties concerned attend the Judge in Chambers, at the Central Office, Royal Courts of Justice, Strand, London, on — day, the — day of —, 19—, at — o'clock in the — noon, on the hearing of an application on the part of the — for an order for directions, as follows:

Pleadings: Statement of claim containing full particulars in — days.

Defense containing full particulars in — days thereafter.

Reply (if counter-claim), in — days thereafter.

Discovery:

That after defense delivered, the plaintiff and defendant file an affidavit of documents in ten days after notice requiring the same.

Place of Trial: —.

Mode of Trial: Judge and common jury. Special jury on notice by the plaintiff with notice of trial, or by defendant within four days afterward.

And that the costs of this application be costs in the cause.

Dated the ——— day of ———, 19—."

The official form for the order for directions is as follows:

"Upon hearing the solicitors on both sides, the following directions are hereby given, and it is ordered that there be pleadings in the action as follows:

Statement of claim, containing full particulars, to be delivered in ——— days from this date.

Defense, containing full particulars in ——— days from delivery of statement of claim.

Reply, if counter-claim, in ——— days after defense.

That after defense delivered, the plaintiff and defendant shall respectively, within ten days after notice, requiring affidavit of documents, answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action.

That the action be tried at ———, with a judge, and common jury. Special jury on notice by plaintiff with notice of trial, or by defendant within four days after.

Liberty to either party to apply.

That the costs of this application be costs in the cause.

Dated, the ——— day of ———, 19—."

Mr. Odgers says that "on the first application under a summons for directions no affidavit as a rule is used. The Master accepts the statements of the parties by their solicitors or counsel as to the nature of the action, the proposed line of defense and the assistance they respectively need to enable them properly to prepare for trial. And it is not only the plaintiff who asks for directions. The plaintiff takes out the summons, but at the hearing any party to whom the summons is addressed must so far as practicable apply for any order or directions as to any interlocutory matter or thing in the action which he may desire."

And the Master may give whatever direction he thinks right, though neither party has asked for it. However, on the first hearing of the summons it is not possible to think of everything that may prove necessary at a later stage of the proceedings. For instance, the plaintiff cannot be sure that interrogatories will be necessary until he has seen the defense. Hence it is provided that application for such later directions may be made subsequently by either party (O. 30; rr. 4-5; Odgers, p. 65).

If the plaintiff does not take out a summons within fourteen days from the entry of the defendant's appearance, the defendant may apply for an order dismissing the action (O. 30; r. 8).

Pleadings.

Although pleadings may be oral it may be assumed that in an equity action in the order for directions the plaintiff will be required to serve a written statement of claim which takes the place of the bill of complaint under the old procedure. The only pleading on the part of the defendant is an answer which may include a counter-claim. If it does the plaintiff must deliver his reply (O. 19, r. 2). The general rule of pleading prescribed is as follows:

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense as the case may be, but not the evidence by which they are to be proved, and shall when necessary be divided into paragraphs numbered consecutively. Dates, sums and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel or a special pleader, they shall be signed by him; and if not so settled they shall be signed by the solicitor or by the party if he sues or defends in person" (O. 19; r. 4).

It is to be observed that there is no requirement that any pleading shall be verified and none of the official forms of pleading has a verification.

It is required that the pleadings shall be delivered between the parties and marked with the date of delivery and the file number (O. 19; r. 11).

It is further provided that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matters stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered upon such terms as to costs or otherwise as may be just" (O. 19; r. 7).

The defendant is not permitted to deny generally but must deal specifically with each allegation of fact, of which he does not admit the truth except damages (O. 19; r. 17).

If a party desires to attack the validity of a contract, it is not sufficient for him merely to make a denial, he must plead the special ground of illegality (O. 19; r. 15, r. 20).

It is also required that the plaintiff or defendant must distinctly specify in his pleading any condition precedent the performance or occurrence of which is intended to be contested (O. 19; r. 14).

It is further provided that "every allegation of fact in any pleading, if not denied specially or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted except as against an infant, lunatic or person of unsound mind not so found by inquisition" (O. 19; r. 13).

The party is required in denying the allegation of fact in a previous pleading of the opposite party to do so, not evasively, but by answering the point in substance. It is also provided that no technical objection shall be raised to any pleading on the ground of any alleged fault of form (O. 19; r. 26). And also that the court or the judge may at any stage of the proceeding order to be struck out or

amended any matter and any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in any such case order the costs of the application to be paid as between solicitor and client (O. 19; r. 27).

The statement of claim must set out specifically the relief desired either simply or in the alternative and the same rule applies to a counter-claim (O. 20; r. 6).

Joinder of Causes of Action.

The plaintiff may unite in the same action several causes of action. This is subject to certain exceptions (O. 18; r. 1).

Thus an action to recover land cannot be joined with a cause of action except such as relate to the land, as for *mesne* profits, rent or injuries thereto, or a breach of contract under which it is held (O. 18; r. 2). So claims by a trustee in bankruptcy cannot, unless by special order, be joined with a claim by him in any other capacity (O. 18; r. 3). So a claim against an executor can only be joined with claims which are against him personally, provided the latter arose with reference to the estate with respect to which he is the representative (O. 18; r. 5).

The purpose was to get rid of demurrers upon the ground of misjoinder of causes of action and to substitute instead the general right to join causes of action, leaving it to the court to determine whether the several causes of action so united can be conveniently disposed of together. If it appears that they cannot, then that they should be brought in such connection or separately as he may regard as convenient (O. 18; rr. 8 and 9).

Counter-claim.

The former equity practice respecting cross-bills has been eliminated, and it is provided "that where any defendant seeks to rely upon any grounds as supporting a right to counter-claim, he shall in his statement of defense state specifically that he does so by way of counter-claim" (O. 21; r. 10). He may set up such a counter-claim against a person who is not a party to the action by adding a further title similar to the title in the statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action and shall deliver his statement of defense to such of them as are parties to the action within the period within which he is required to deliver service of a writ of summons (O. 21; r. 12), and such person must be summoned to appear by being served with a copy of the defense, and such service is regulated by the same rules as are prescribed for the service of a writ of summons (O. 21; r. 12), and such person must appear as if he had been served with a writ of summons (O. 21; r. 13).

Any person named as a party to a counter-claim may deliver a reply within the time within which he might deliver a defence if it were a statement of claim (O. 21; r. 14).

Where a defendant sets up a counter-claim, if the plaintiff or any other person named as a party to such counter-claim contends that the claim ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the court for an order excluding the counter-claim (O. 21; r. 15).

If the answer contains a counter-claim, the plaintiff may join issue (O. 19; r. 18). A joinder of issue runs simply thus: "The plaintiff joins issue with the defendant on his defense." The effect of joining issue is merely to deny. If the plaintiff wishes to set up against the counter-claim matter by way of avoidance, he must do so by reply. If the answer contains a counter-claim, a reply is in the nature of a statement of defense such as might be submitted by answer to a statement of claim (O. 21; r. 14).

Discovery of Documents.

Every party is entitled as a matter of course to an inspection of documents referred to in pleadings or affidavits (O. 31; r. 15), and he obtains this by serving notice on the other party to produce the same and permit him to take complete copies thereof. If his adversary does not comply with the notice he is debarred from putting such document in evidence unless the court is satisfied that such document relates merely to his own title, or that he has some other good reason for not complying with the notice.

As to documents which are not referred to in the pleadings, or disclosed by the proceedings or affidavits, the party who seeks an inspection thereof must satisfy the court upon affidavit that he is entitled to such inspection, and that the documents are in the possession or the power of the other party. Such an inspection will then be ordered if in the opinion of the judge it is necessary for disposing fairly of the cause (O. 31; r. 18).

Interrogatories.

It is provided by Order 31, Rule 1, that "In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of said interrogatories each of such persons is required to answer; provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose; provided also that the interrogatories which do not relate to any matters in question, in the cause or matter, shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness." But leave must be obtained to deliver interrogatories, and the particular interrogatories proposed to be delivered must be submitted to the court or judge and leave shall be given as to which of the interrogatories the court or judge considers necessary either for disposing fairly of the cause or matter or for saving costs (O. 31; r. 2).

If any person interrogated omits to answer or answers insufficiently, the party interrogating may apply to the court or the judge for an order requiring him to answer, or to answer further, as the case may be, and an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the judge may direct (O. 31; r. 11).

Trials.

The rules provide that causes or matters assigned to the Chancery Division shall be tried by a judge without a jury, unless the court or a judge shall otherwise order (O. 36; r. 3).

It is stated by Mr. Odgers that trial by jury is never allowed in the Chancery Division, and the rules do not seem to provide any method for the trial of feigned issues.

Rule 8, Order 36, provides that the court or judge may in any cause at any time, or from time to time order the different questions of fact arising therein to be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.

It is also provided that in the absence of any agreement in writing between the solicitors of all the parties, and subject to the rules, the witnesses at the trial of any action shall be examined *viva voce* in open court; but the court or a judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided, that where it appears to the court or judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit (O. 37; r. 1).

The court or a judge may, when necessary for the purposes of justice, "make any order for the examination upon oath before the court or judge or any officer of the court or any other person, and at any place, of any witness or person, and may empower any party to give such deposition in evidence on such terms, if any, as the court or a judge may direct" (O. 37; r. 5).

Under this rule the court may direct the examination of a party to the cause, and may also direct the cross-examination of an affidavit witness; and may appoint a special examiner to take evidence abroad. The official form of the order for a commission provides for the examination of witnesses *viva voce* and also upon interrogatories.

When the examination of witnesses is ordered under Rules 1 and 5 of Order 37, it must, unless the court or a judge otherwise direct, be

taken before one of the examiners of the court; and such examinations are distributed among the examiners in regular rotation (O. 37; rr. 39, 41).

When the evidence to be used on a trial is taken by affidavits by consent, the plaintiff is required to file his affidavits and deliver to the defendant or his solicitor a list thereof within 14 days after such consent has been given; and the defendant may file affidavits and deliver a list thereof to the plaintiff's solicitor within 14 days thereafter. Within 7 days thereafter, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof (O. 38; rr. 25, 26, 27, 28, 30). When either party desires the production of a deponent for cross-examination, he gives notice in writing thereof to his adversary, and unless the deponent is produced for such cross-examination the affidavit cannot be used. Such evidence must be printed. The times here specified may be enlarged by agreement between the parties or by allowance of the court or a judge.

Injunction and Receiver.

The Judicature Act provides: "A **mandamus** or an injunction may be granted, or a receiver appointed, by an interloutory order of the court in all cases in which it shall appear to the court to be **just or convenient** that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think **just**; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended **waste or trespass**, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is, or is not, **in possession under any claim of title or otherwise**, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both, or by either of the parties, are legal or **equitable**" (Judicature Act, 1873, sec. 25 [8]).

This section is not regarded as conferring any additional powers on the Court of Chancery, but simply as extending the power to grant injunctions to the High Court of Justice in all its divisions. The writ of injunction is abolished, and **injunction is granted** either by judgment or **order** (O. 50; r. 11).

It is also provided that in every case in which an application is made for the appointment of a receiver by way of **equitable** execution, the court or a judge in determining whether it is **just** or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant and to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall see fit, direct any inquiries on these or other matters before making the appointment

(O. 50; r. 15a). When a receiver is appointed, the court or judge is required to fix the days upon which he shall leave and pass his accounts (O. 50; r. 18).

Motions.

The rules require that all motions shall be on notice, except such as could be made *ex parte* before the adoption of the Judicature Act; "but the court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just; and any party affected by such order may move to set it aside" (O. 52; r. 3).

Originating Summons.

The rules provide that in certain instances, instead of resort to a formal action instituted by summons, a party may apply for what is known as an originating summons, the form of which is as follows:

"In the High Court of Justice,
Chancery Division.

In the Matter of the Trusts of
the Will of A. B.

Let ———, of ———, in the county of ———, within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of ———, of ———, in the county of ———, for an order that (state the object of the application).

Dated the ——— day of ———, 19—.

This summons was taken out by ———, of ———, solicitor for the above named ———.

The respondent may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

NOTE.—If the respondent does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the judge may think just and expedient.

Mr. Odgers remarks upon the originating summons as follows:

"There is no substantial distinction between a writ and an originating summons, except this: That the use of the latter form of document implies that the parties (or some of them) desire to have the matter discussed in chambers and not in open court. They hope in this way to arrive at a judicial decision more economically and more expeditiously, though the matter is often adjourned from chambers into court. At first (from 1875 to 1893) originating summonses could only be taken out in the Chancery Division, and there only

because no Trust
is recognized.

as to questions arising in the administration of an express trust or of the real or personal estate of a deceased person; but now by order LIVa, r. 1, 'in any division of the High Court any person claiming to be interested under a deed, will or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.' An originating summons is now defined to mean 'every summons other than a summons in a pending cause or matter.' The judge may direct such persons to be served with the summons as he may think fit, and the application must be supported by such evidence as the judge may require. The question to be determined must be clearly stated on the summons itself. Should it be necessary to refer to any facts, the parties generally agree on 'a statement of facts.' The judge, however, is not bound to determine any question of construction in chambers, if in his opinion it ought not to be determined on originating summons, but by an action commenced in the usual way, in which formal pleadings can be delivered and evidence given in open court."

Judgments.

The form of entering judgment in an equity action under the English rules requires no special statement. It is, however, provided by the Judicature Act of 1884 (Sec. 14), that where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may on such terms and conditions (if any) as may be just, provide that such conveyance, contract or other document shall be executed, and that such negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and in such case the conveyance, contract, document or other instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.

Costs.

It is further to be remarked that the imposition of costs plays an important part under the English system. Not only is the unsuccessful party subject to payment of costs, which include the fees of the solicitor for the successful party, taxable in a manner prescribed by the rules; but at every stage of the proceedings dilatory, vexatious and imprudent action, by either party, subjects him to the payment of costs, which within certain limits may be graduated so as to discourage unnecessary litigation and tend to exactness and brevity in procedure.

Mr. Justice Lurton, during the vacation of 1911, visited England with a view to studying the modern procedure in actual operation. His visit resulted in his eliciting from the Lord Chancellor the following comments, by that highest of all living authority, upon the modern English practice.

Mr. Justice Lurton submitted to the Lord Chancellor of England twelve questions in relation to equity procedure in England, to which Lord Chancellor Loreburn submitted answers, as follows:

MR. JUSTICE LURTON'S QUESTIONS TO LORD CHAN-
CELLOR LOREBURN AND ANSWERS
SUBMITTED.

1. What is the practical benefit resulting from the adoption of a single form of action in law and equity cases?

ANSWER: In former times a litigant at common law had first of all to select his form of action. He had sixty or seventy to choose from, but his success or failure entirely depended on the choice he made. If he chose trespass, and did not bring his case within the rules relating to that form of action, it availed him nothing that he clearly would have succeeded had he chosen another form of action. Such a state of things was not conducive to the proper administration of justice. On the other hand, a litigant in equity merely presented a petition stating the facts on which he relied and asking generally for such relief as he might be entitled to in equity, and the respondent was obliged to answer on oath, but both petition and answer had become enormously prolix. Further, courts of law were supposed to know nothing of and ignored equitable doctrines, and, on the other hand, the Court of Chancery was unable to grant relief in cases within the competence of the common law courts. And, once again, the Court of Chancery granted relief of a nature unknown to the common law and refused to grant relief appropriate to actions at law. The result of this was that the litigant really entitled to relief too often failed to obtain it because he instituted proceedings by an inappropriate form of action or in the wrong court, and that a litigant too often could not obtain full relief without instituting proceedings both at common law and in the Court of Chancery. A person entitled to land might fail to recover it at law because his interest was equitable, or in equity because his interest was legal, or might be unable to recover it at law without first obtaining discovery of his opponents' documents, which he could only do by suit in equity. And, again, a sufferer from nuisance might have to go to law for damages and to equity for an injunction. All this involved uncertainty, useless expense, and great delay. From time to time various mitigations of this really intolerable evil were introduced by statute, but they were partial and left the grievance in the main unredressed. At last by

the Judicature Act, 1873, a complete remedy was provided by the simple enactment that all the judges of the High Court should have jurisdiction both in law and equity. If an action is commenced at law which is really appropriate to be tried in a court accustomed to administer equity, it can be transferred and proceed as if it had been commenced in equity and *vice versa*. And in any case, if any point emerges, the judge has full jurisdiction to apply either principles as the justice of the case requires. No one has ever doubted the wisdom of this change, and its practical benefit is simply that a litigant can no longer be tossed about from one of the King's Courts to another, at great cost, and with needless delay, upon grounds which have no justification of utility or public policy. It used to be just as if a surgeon, when called in to a patient, were forbidden to give any medicine or afford any relief except it were surgical.

Corresponding to this provision for fusing the jurisdictions in law and equity another provision was made by which the pleadings of both sides were assimilated. Instead of the old technical forms of pleading, which no layman could possibly understand, and which were in use in courts of law, and instead of the infinitely prolix proceeding of bill and answer, which prevailed in equity, a new form of pleadings were set up for both sides. It is described in the statutes and rules, and amounts to this: Each party must state in writing as shortly as he can what his claim is and how it arises, or in the same way what his defense is and his reply. He must not enter upon any evidence, and must not state his case in an embarrassing way. What is required is clearness, brevity and simplicity, though in fact these virtues are not always present in the pleadings. Either party may be ordered to give further particulars in order to make things plain.

(It may be worth while for Mr. Justice Lurton and his coadjutors to consider the Scottish method of pleading, which, in my opinion, is the best. Upon that I am quite sure that the Lord President of the Court of Session would willingly give information. He is at the head of the Scottish Judiciary, and speaks with the highest authority.)

2. May a demurrer and defense upon the merits be combined in one pleading? If so, how has the pleading and practice operated?

ANSWER: Yes. A litigant may state in his defense what facts he relies upon, and at the same time may state that he contends that even if the facts be as alleged by the plaintiff, yet they furnish no cause of action. That is in effect a demurrer. There is no doubt that this practice is beneficial. It may be convenient that the question of law presented by the demurrer should be decided first, and, if decided in favour of defendant it will end the case, unless the plaintiff is allowed to amend and raise a fresh contention. It may be, and generally is, convenient first to ascertain all the facts at a trial, and then to apply the law or equity, as the case may be. Which course is to be taken is usually agreed to by the parties, but, if not agreed, the judge can direct what is to be done. We find it very useful to have as much elasticity as possible in these things, and I

am sure no one doubts that all relevant contentions both of fact and law ought to be stated in the pleadings.

3. When is a defense due after filing of plaintiff's claim; and what are the methods for obviating delay in coming to an issue?

ANSWER: The normal time is as follows: An action begins with a writ, upon which the character of the claim (*e. g.*, money lent, damages for false representation, injunction against infringement of a patent), is quite shortly indorsed.

An appearance must be entered by the defendant at the proper office within eight days.

As soon as the appearance is entered the plaintiff is now bound to issue a summons for directions. This summons deals with all the points of practice likely to arise during the proceedings, and, *e. g.*, whether there shall be pleadings, for some cases are considered so simple that pleadings can be dispensed with. Thus an action for nuisance by noise may well be tried without pleadings, the issue of fact being sufficiently apparent from the indorsement of the writ. In the normal case, however, the master will on the summons for directions order pleadings fixing the times for delivery of statement of claim and defense according to the nature of the action. This summons also deals with questions of discovery and other methods which it may or may not be possible to dispose of in advance. If it be impossible, as is often the case with discovery, the issues not being yet defined, the summons is from time to time adjourned, being restored when desirable by either side on notice, so that the cost of a separate summons on each point is avoided. Any time fixed by the master can be enlarged if the justice of the case so requires.

The plaintiff must within the time ordered by the master deliver his statement of claim, setting forth the substance of his case without prolixity, but with sufficient fullness. If he does not do this, then the defendant may apply to have the action dismissed with costs for want of prosecution.

After the statement of claim has been delivered the defendant must deliver his answer or defense within the time limited by the master.

If he does not do this within the proper time plaintiff may sign judgment in his own favour at the proper office, or obtain from a judge the appropriate relief as in an undefended action.

It will thus be seen that a litigant can always make his adversary proceed with due diligence.

It will be observed that the penalties for delay are somewhat summary and severe. This is, I think, necessary in order to defeat tactics or procrastination, but it is rendered safe by the power conferred upon judges and Masters to extend the time for any step in an action, if a good ground is made for it, and by the power to set aside any judgment signed by default whenever it is right to do so. In this way, extensions of time are usually agreed between the par-

ties, and no one ever suffers for mere oversight or even for neglect which is not wilfull. A judgment by default for some error or carelessness is always set aside on terms as to costs and as to future diligence. In practice this system works extremely well, and it is seldom that any solicitor tries to snap a judgment because he knows that he will really gain nothing by so doing. But if there is any ground for thinking that unfair procrastination is intended, a peremptory order fixing dates for this or that stage can be, and, in proper cases, will be made.

4. What are the functions of referees? And in actual practice is it usual to refer questions of fact and law not in the nature of an account to such referees?

ANSWER: There are official referees, who are permanent officers of the court, and special referees may be appointed to hear a particular case or report on any issue of fact. Speaking broadly, the court has a very wide discretion to refer to them either a case as a whole or any issue in or part of a case whenever there is an account to be taken or some prolonged technical or scientific investigation to be made, or some complicated inquiry or matter more fit for local investigation. It is not practicable to define with accuracy the boundary line beyond which a reference will not be made, but it would be wrong to refer compulsorily any matter which could be conveniently tried in court and involves serious controversy as to the main issues in a case. Judges do not in practice relieve their court of irksome cases by so referring them. It is not done unless there is a good deal of detail, and of a kind which does not require the personal attention of the judge in actually hearing the evidence. The procedure by way of appeal from an official or special referee varies according to whether the court has referred the whole action for trial or has referred a particular issue for report. In the former case, speaking generally, the referee's decision is reviewed only on some point of law. In the latter case, the court may adopt or reject the report, or remit it to the referee for further inquiry or explanation. If it appears on the report that the referee has made a mistake in law, this, of course, will be put right by the judge; but if a point of law arises, the referee can, and usually would, in his report, state his finding of the fact and how the point of law arises and how he thinks it ought to be decided. Or he might set out the true facts and say that if the point of law be decided one way, the result would be judgment for the plaintiff, and, if decided the other way, judgment for defendant, or partly for one and partly for the other, and so leave the court to pronounce what is the proper conclusion. A pure question of law would never be referred. It is only referred when it depends upon the facts, as yet unascertained, whether or not a point of law arises and how it should be determined.

5. How does the practice of hearing evidence orally in equity cases operate?

ANSWER: In answering this question a distinction must be drawn between hostile litigation and cases which ultimately turn on questions of the construction of documents or the proper mode of executing trusts or administering estates. With reference to the latter, the Rules of the Supreme Court have prescribed a special mode of procedure which is initiated by originating summons entitled in the matter of the instrument requiring to be construed, or in the matter of the trusts or of the estate requiring to be executed or administered. In this class of proceedings evidence is usually taken by affidavit, though on particular issues of fact where there is really considerable controversy, the judge will direct the issue to be tried on oral evidence as being the mode of trial by which the truth can be most surely ascertained. Where, however, the litigation is hostile or involves questions of character or breach of trust, procedure by originating summons is inapplicable, and the proceedings must be initiated in the normal way by writ of summons. Every action so instituted must, unless the parties otherwise agree, be tried orally, even though it be of such a nature that prior to the Judicature Acts it would have been within the exclusive jurisdiction of the Court of Chancery.

It is now fully recognized in England that a judge is far more likely to ascertain the truth if he sees and hears the witnesses himself, and can watch the course of the evidence, observe the demeanor of the witnesses, and form his own opinion of their intelligence, observation and credibility. In our Courts of Appeal this is universally recognized, and it is only with reluctance and upon a clear conclusion that a Court of Appeal will differ with the opinion of the judge who has had these advantages. Upon the question of comparative cost I believe the system of requiring oral evidence before the court itself is upon the whole cheaper, because the real points of difference emerge at the trial, whereas, if all the evidence is taken by affidavit or by private examination of witnesses beforehand, the counsel preparing the affidavit or examining the witnesses will not know so well what is the real field of controversy, and is apt to cover the whole ground of possible criticism or objection with each witness, so as not to be taken by surprise at the hearing.

Further, if there be any controversy as to facts, cross-examination is necessary and the examiner before whom this takes place has not the authority possessed by the judge of confining the cross-examination within proper limits, so that a great deal of time is wasted and expense incurred, which could have been avoided, had the whole evidence been taken orally in the first instance before the judge. However the matter may be as to costs, I am sure that the practice of hearing evidence orally is incomparably better in all ways for that which is the main purpose, namely, the ascertainment of truth.

6. To what extent do parties actually agree to take testimony by deposition, thus obviating oral testimony?

ANSWER: They do so largely and indeed generally in matters of formal proof, and often where they do not greatly differ upon the

facts and think their differences are not of considerable importance, or where the cost of oral evidence is out of proportion to the matter at stake. Often they dispense with proof upon particular issues altogether by agreeing upon written admissions of fact which are binding as between themselves upon the trial. I am not aware of any general practice to use depositions upon a large scale in cases where there are real and important controversies as to fact. If the witnesses, however are abroad or unable to attend their depositions are often taken by consent, and may be so taken even without consent, by order of the court.

7. Mr. Griffith, in his comment upon the rule in respect to oral evidence, predicted that the practice of taking the evidence orally in open court in equity cases would necessitate an increase in the judicial staff. Has this been verified?

ANSWER: Certainly not in my opinion. Whatever increase there has been in the judicial staff during the last thirty years has been due to the increase of commerce and population. I have never heard it suggested that it was due to the practice of taking oral evidence. I think Mr. Griffith's prophecy must be numbered among the numerous forebodings of evil which are the inevitable accompaniment in this country of any effort to obtain law reform.

8. What is the practice of obtaining a discovery or the production of books or documents in a legal action?

ANSWER: It is the same both for actions in law and in equity. Either party to the suit can obtain an order for discovery of documents relevant to the case of the adversary, but a fishing discovery,—that is to say, discovery in order to enable the applicant to fish for a cause of action when he has no materials of his own—is disallowed. It must always be a matter for decision upon the circumstances in each case whether it is a fishing application or not. There are numerous decisions illustrating the way in which this rule works. Normally each party must disclose the documents relevant to his opponent's cause which are or have been in his custody or control and make an affidavit that there are no others. He may put in a separate schedule to the affidavit, such of them as he claims to be privileged from inspection. Then his adversary can obtain inspection of such as the judge thinks are not privileged.

9. How is a case made up for appeal, and what methods are adopted for shortening the transcript.

ANSWER: The method is different for the Court of Appeal, and the House of Lords, to which an appeal from the Court of Appeal is allowed.

In the Court of Appeal, where there is a great deal of business, including many small cases, and many purely interlocutory appeals, a case is not, as a rule, formally made up at all. Copies of the pleadings and of the documents, and transcripts of the evidence, if there has been a transcript made, are furnished to each of the judges. If

there has been no transcript, then the evidence is gathered from the trial judge's notes or from the notes or recollection of counsel. Each of these pieces, viz.,—pleadings, documents and evidence,—is separate, no attempt is as a rule made to make up a case, and the material is used as it would be on a hearing in the Court of First Instance. Sometimes, of course, in heavy cases, all these materials are printed, but this is where they have been printed in the Court of First Instance for the convenience of parties.

In the House of Lords it is quite different. The proceeding commences with a petition to the King in Parliament. Then each side has to deliver a statement (called the appellant's or respondent's case), in which they recapitulate what is the nature of the dispute and the history of it in the courts below, and then state their reasons for impugning or sustaining the decision of the Court of Appeal. Following this is a print in clear type of all the pleadings, documents, and evidence, together with the judgment in the courts below, gathered together in one appendix. The parties will omit any matter which is irrelevant, or if one will not agree, the Lords, sitting in a Judicial Committee, will direct it to be done. All this is bound up in a book.

There is no doubt that the House of Lords has a great advantage in that all the materials for adjudication are presented to it in clear print and in one (or more) volumes. It helps every greatly to concentrate attention upon the material points.

At the same time it is a little expensive in the smaller cases. Notwithstanding these advantages, I should not advocate such a method being enforced in the Court of Appeal because of the multiplicity of cases there heard and the small amount at stake in many of them. But where expense is unimportant it is far the best method.

10. What should you say is the average length of a transcript in an appeal in a patent case?

ANSWER: They greatly vary, but I should think the specimen of a case actually awaiting hearing in the House of Lords, which I gave to Mr. Justice Lurton, may be taken as a fair average.

11. Can you refer me to a bill showing costs which are taxable under the reformed practice?

ANSWER: These things do not come within my cognizance, but I have asked for and will procure what is wanted.

12. Are there official stenographers or are they paid by the parties?

ANSWER: Where stenographers are employed in civil causes they are paid by the parties. There are official stenographers only in criminal cases.

(The above answers relate to cases in law and equity, but not to admiralty or probate or divorce cases. There is really not very much difference, but I have confined my answers to cases in law and equity.)

(Signed) LOREBURN.

Sec. 15. The causes of the Revision of 1912.

A comparison of the Rules of 1912 with the earlier rules, discloses the lines of departure to be drawn in the direction of simplifying the pleadings, speeding causes for hearing, and lessening the cost of taking testimony, and of appeal.

All technical forms of pleading, not prescribed by statute or the Rules of 1912, are abolished by Rule 18.

The Bill of Complaint, originally consisting of nine parts, of which five were called the principal parts, had in practice been much simplified.¹ Rule 25, Rules of 1912, now defines its contents.

Demurrers and pleas are abolished by Rule 29.

The answer has its contents defined by Rule 30.

The Replication (unless the answer asserts a set-off or counter-claim) is abolished by Rule 31.

Exceptions for scandal and impertinence in bills and answers are abolished by Rule 21.

Exceptions for insufficiency of an answer are abolished by Rule 33.

Appearance Day and Rule Day are alike abolished by omission of any mention, and by the express operation of Rule 81.

The defendant's initial pleading is made due in twenty days from the date of service (excluding the day of service) by Rules 12 and 16.

Rules 46-55, both inclusive, make drastic changes in the taking of testimony. The reasons for revising the rules in this regard were indicated by Judge Hough in his note to *Electric Vehicle Co. v. Duerr*, 172 Fed. Rep., 924.²

Appeal records are now to be made up by counsel, the testimony of the witnesses being stated only in narrative form, under Rule 75. This new practice, as those Federal lawyers who have had experience under like rules in State practice know, throws a burden of labor on counsel for which clients will have to pay. It is often far more difficult to recast the record of a witness' testimony into a fair narrative than it was to examine the witness originally.

Rules 73 as to preliminary injunctions and restraining orders is in substantial accord with settled practice, as to which the former rules were silent.

¹ *Comstock v. Herron*, 45 Fed. Rep. 660.

² See also *Fairweather v. Ritch*, 89 Fed. Rep. 529; *Dowagiac Mfg. Co. v.*

Lochren, 143 Fed. Rep. 211; *First Natl. Bank v. Abbott*, 165 Fed. Rep. 852; *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. Rep. 356, 357.

Rule 48 relates specially to the testimony of expert witnesses in patent and trademark cases, providing that opinion evidence in such cases may, on petition, be ordered to be set forth in affidavits. It is new to our practice, and is based upon the English Practice Rules (O. 37, rr. 20, 24; O. 38, rr. 25, 26, 27 and 28).

Rule 46, in providing (the trial court being authorized to pass upon the admissibility of all evidence offered as in actions at law) how exceptions may be preserved and noted for purposes of appeal, restores the practice as it existed prior to the Rules of 1842, as set forth in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed., 521.

The application of the new rules is sure to be attended with considerable inconvenience and uncertainty. It was so in England for many years after the change of procedure by the Judicature Acts. An eminent English writer said: "There are many reasons why the new system has not yet met with the success which it deserves. It has hitherto been worked mainly by men educated under the former practice. The modern system has never been so thoroughly taught to the younger generation of pleaders."¹

The demolition of the practice of the English High Court of Chancery, as it existed in 1842, has been said to start from the appointment, in 1823, of a royal commission, which three years later filed its first report embodying 188 proposed changes in the procedure. Fourteen years later (3d and 4th Vict., c. 94—1840), an act of Parliament conferred upon the Lord Chancellor, with the concurrence of the Vice-Chancellor and the Master of the Rolls, the authority to alter the rules. The 51 New Orders of August 26, 1841, resulted, Cottenham then being Lord Chancellor, and Lord Langdale, Master of the Rolls. The same Lord Chancellor made considerable alterations of the Orders in April, 1850. In the latter year a new royal commission was appointed, for the same purpose as the commission of 1823, and its reports were made two years apart, in 1852 and 1854.

Again, in 1859, a like commission was appointed, and shortly reported favoring *viva voce* testimony in the presence of the trier of the facts.

In 1869 the Judicature Commission was appointed, and its several reports of 1869 and 1872 resulted in the enactment of the Judicature Act of 1873 (36th and 37th Vict., c. 66, August 5, 1873), which went

¹ Odgers, *Principles of Pleading and Practice* (7th Ed.), p. v.

into effect November 1, 1875. By it, as is generally known, the chancery and law courts were merged into one Supreme Court of Judicature, whose divisions are:

1. Chancery Division (composed of the Lord Chancellor and six Justices of the Chancery Division).

2. King's Bench Division (composed of the Lord Chief Justice and fifteen Justices).

3. Probate, Divorce and Admiralty Division (composed of a President and one Justice).

Upon these judges the Judicature Acts of 1875, § 17; 1881, § 19, and 1890, § 3, have imposed the duty of making rules of practice and procedure for their respective courts, which must be submitted to, and may be annulled by either house of Parliament.

Under these enabling provisions, there have been promulgated 72 Orders, divided into 1,045 Rules.¹ They are all rules of the Supreme Court, and those specially relating to the Chancery Division are commingled with the rest; except that Order LV is entitled, and relates to "Chambers in the Chancery Division."

¹ The Annual Practice, 1911. Some of these rules have been abolished.

The University of Chicago
Law School
Chicago
Illinois

THE EQUITY RULES

Promulgated February Term, 1822.

7 Wheat. 5.

RULE I.

Rules shall be held monthly in the clerk's office on the first Monday in every month, for the purpose of entering all proceedings and orders which may be entered at the rules, and which are not taken or made in open court. The rules shall be held under the direction of the clerk; but either of the judges of the court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule book, and take effect accordingly.

RULE II.

All process shall be made returnable to the next succeeding term, or to any intermediate rule-day, at the election of the party praying the same, and the return of the said process "executed" shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned; and where such process shall not be executed, the clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out; and if upon such second process the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.

RULE III.

Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the clerk, during the recess of the court, upon application, to issue process to bring into court the representative of such deceased person.

RULE IV.

The plaintiff shall file his bill before or at the time of taking out the subpoena.

RULE V.

The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

RULE VI.

The day of appearance shall be the rule-day after the process is returned executed, or after the second return of a copy left if the process shall not be executed, when the process is returnable to the rules, or the rule-day next succeeding the term, where the process shall be returnable to a term of the court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the process shall be returned executed.

RULE VII.

If the defendant cannot be found, it shall be sufficient service of any decree nisi, to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the court for such time as the court shall direct.

RULE VIII.

All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

RULE IX.

Every defendant may swear to his answer before any justice or judge of the United States, or a commissioner or master, or other person appointed by the court, or judge of any court of a State or Territory, or a justice of the peace, or notary public of any State or Territory.

RULE X.

If the defendant does not file his answer within three months after the subpoena be returned executed, or after a second return of a copy left having been made at least three months, the plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases as if the answer had been filed and the cause was at issue. Provided that the court may, on cause shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the court or one of the judges thereof.

RULE XI.

No special replication to an answer shall be filed but by leave of the court, or one of the judges thereof, for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs at the discretion of the court.

RULE XII.

When a cross-bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross-bill shall be compelled to answer such cross-bill.

RULE XIII.

The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs; but the court may, for cause, order the same to be retained on payment of costs.

RULE XIV.

If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no farther or other answer shall be received but on payment of costs.

RULE XV.

If upon argument the plaintiff's exceptions shall be overruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.

RULE XVI.

Upon a second answer being adjudged insufficient, costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

RULE XVII.

Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof.

RULE XVIII.

The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the

residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

RULE XIX.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

RULE XX.

If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

Under this rule it was held that "no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary before the final decree: and, therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review." *MR. JUSTICE STORY*, in *Bank of the United States v. White*, 8 Peters, 262, 269, 8 L. Ed. 938, 941.

RULE XXI.

If the plaintiff shall not reply to, or set for hearing any plea or demurrer, before the second term of the court after filing the same, the bill may be dismissed with costs.

RULE XXII.

Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient; but if adjudged good, the defendant shall have his costs.

RULE XXIII.

The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill.

RULE XXIV.

After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

RULE XXV.

Testimony may be taken according to the acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication

shall be allowed the parties for taking their depositions; and either party at the expiration of the said six months may set the cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the court, or out of the district.

RULE XXVI.

Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the State, or by any person or persons, not exceeding three, appointed or named in the commission by order of the court, or by any judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule-day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.

RULE XXVII.

Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the court or one of the judges thereof.

RULE XXVIII.

Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which, being certified to the clerk's office by the commissioners, master, or examiner, an attachment may issue thereupon by order of the court, or of any judge thereof in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court.

RULE XXIX.

When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon as to the court shall seem equitable and right.

RULE XXX.

The courts, in their sittings, may regulate all proceedings in the office, and may set aside any dismissions, and reinstate the suits on such terms as may appear equitable.

RULE XXXI.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of court.

RULE XXXII.

The Circuit Courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.

RULE XXXIII.

In all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.

RULES OF 1842.

PRELIMINARY REGULATIONS.

I.—17 Peters, lxi.

The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning *mesne* and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

II.—17 Peters, lxi.

The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III.—17 Peters, lxi.

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

IV.—17 Peters, lxi.

All motions, rules, orders, and other proceedings made and directed at chambers or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office on the day when they are made and directed; which book shall be open at all office-hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties

for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

V.—17 Peters, lxii.

All motions and applications in the clerk's office for the issuing of *mesne* process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require an allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course, by the clerk of the court. But the same may be suspended, altered, or rescinded by any judge of the court, upon special cause shown.

VI.—17 Peters, lxii.

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to or refused, in his discretion.

PROCESS.

VII.—17 Peters, lxii.

The process of subpœna shall constitute the proper *mesne* process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

VIII.—17 Peters, lxii.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of exception, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not

been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

IX.—17 Peters, 1211.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

X.—17 Peters, 1211.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SERVICE OF PROCESS.

XI.—17 Peters, 1211.

No process of subpoena shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

XII.—17 Peters, 1211.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable: otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpoena against all the defendants.

XIII.—17 Peters, 1211.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

XIV.—17 Peters, lxiii.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

XV.—17 Peters, lxiii.

The service of all process, *mesne* and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

XVI.—17 Peters, lxiii.

Upon the return of the subpoena, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.**XVII.—17 Peters, lxiii.**

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.**XVIII.—17 Peters, lxiv.**

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule-day next succeeding that of entering his appearance; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

XIX.—17 Peters, lxxiv.

When the bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term thereof, and such a decree rendered shall be absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.**XX.—17 Peters, lxxiv.**

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of _____, A. B., of _____, and a citizen of the State of _____, brings this, his bill, against C. D., of _____, and a citizen of the State of _____, and E. F., of _____, and a citizen of the State of _____. And thereupon your orator complains and says, that," etc.

XXI.—17 Peters, lxxiv.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.

XXII.—17 Peters, lxxv.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons, who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXIII.—17 Peters, lrv.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

XXIV.—17 Peters, lrv.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XXV.—17 Peters, lrv.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.**XXVI.—17 Peters, lrv.**

Every bill shall be expressed in as brief and succinct terms as it can reasonably be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report, that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

XXVII.—17 Peters, lrv.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages, which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENTS OF BILLS.**XXVIII.—17 Peters, lxi.**

The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, (as he may do of course,) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable reference to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

XXIX.—17 Peters, lxi.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX.—17 Peters, lxi.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

DEMURRERS AND PLEAS.**XXXI.—17 Peters, lxi.**

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXXII.—17 Peters, lxi.

The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it; and he may demur to part, plead to part, and answer as to the

residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII.—17 Peters, lxvii.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

XXXIV.—17 Peters, lxvii.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

XXXV.—17 Peters, lxvii.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXVI.—17 Peters, lxvii.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXVII.—17 Peters, lxvii.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

XXXVIII.—17 Peters, lxvii.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day, when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

XXXIX.—17 Peters, lxvii.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea

protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XL.—17 Peters, lxviii.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

XLII.—17 Peters, lxviii.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories, which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,—"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

XLIII.—17 Peters, lxviii.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

XLIII.—17 Peters, lxviii.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect

answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"1. Whether," &c.

"2. Whether," &c.

XLIV.—17 Peters, lxviii.

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLV.—17 Peters, lxviii.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

XLVI.—17 Peters, lxix.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

XLVII.—17 Peters, lxix.

In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVIII.—17 Peters, lxix.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX.—17 Peters, lxix.

In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of

the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

L.—17 Peters, lxx.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

LI.—17 Peters, lxx.

In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

LII.—17 Peters, lxx.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following; (that is to say,) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objections shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

LIII.—17 Peters, lxx.

If a defendant shall, at the hearing of the cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

LIV.—17 Peters, lxx.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear

and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

LV.—17 Peters, lxx.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.—17 Peters, lxx.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representative of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LVII.—17 Peters, lxx.

Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by a change of interest in the parties,) or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

LVIII.—17 Peters, lxxi.

It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.**LIX.—17 Peters, lxxi.**

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in Chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.**LX.—17 Peters, lxxi.**

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may in his discretion require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.**LXI.—17 Peters, lxxi.**

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII.—17 Peters, lxxi.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII.—17 Peters, lxxi.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court; and shall enter, as of course, in the order-book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be

deemed sufficient: provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV.—17 Peters, lxxii.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

LXV.—17 Peters, lxxii.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

LXVI.—17 Peters, lxxii.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit: and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

LXVII.—17 Peters, lxxii.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

LXVIII.—17 Peters, lxixl.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

LXIX.—17 Peters, lxxlii.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-book, or endorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.**LXX.—17 Peters, lxxlii.**

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.**LXXI.—17 Peters, lxxlii.**

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS BILL.**LXXII.—17 Peters, lxxlii.**

Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the

cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

X REFERENCE TO AND PROCEEDINGS BEFORE MASTER.

LXXIII.—17 Peters lxxiii.

Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

LXXIV.—17 Peters, lxxiii.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

LXXV.—17 Peters, lxxiv.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

LXXVI.—17 Peters, lxxiv.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

LXXVII.—17 Peters, lxxiv.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference;

and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXVIII.—17 Peters, lxxiv.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce*, when produced in open court; if the court shall in its discretion deem it advisable.

LXXIX.—17 Peters, lxxv.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

LXXX.—17 Peters, lxxv.

All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

LXXXI.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

LXXXII.—17 Peters, lxxv.

The Circuit Courts may appoint standing masters in Chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in Chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.**LXXXIII.—17 Peters, lxxv.**

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session: or if not, then at the next sitting of the court, which shall be held thereafter by adjournment or otherwise.

LXXXIV.—17 Peters, lxxv.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

DECREES.**LXXXV.—17 Peters, lxxvi.**

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

LXXXVI.—17 Peters, lxxvi.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz." (Here insert the decree or order.)

GUARDIANS AND PROCHEIN AMIS.**LXXXVII.—17 Peters, lxxvi.**

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.

LXXXVIII.—17 Peters, lxxvi.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for; shall be signed by counsel; and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

LXXXIX.—17 Peters, lxxvi.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, *mesme* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

XC.—17 Peters, lxxvi.

In all cases, where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

XCI.—17 Peters, lxxvi.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

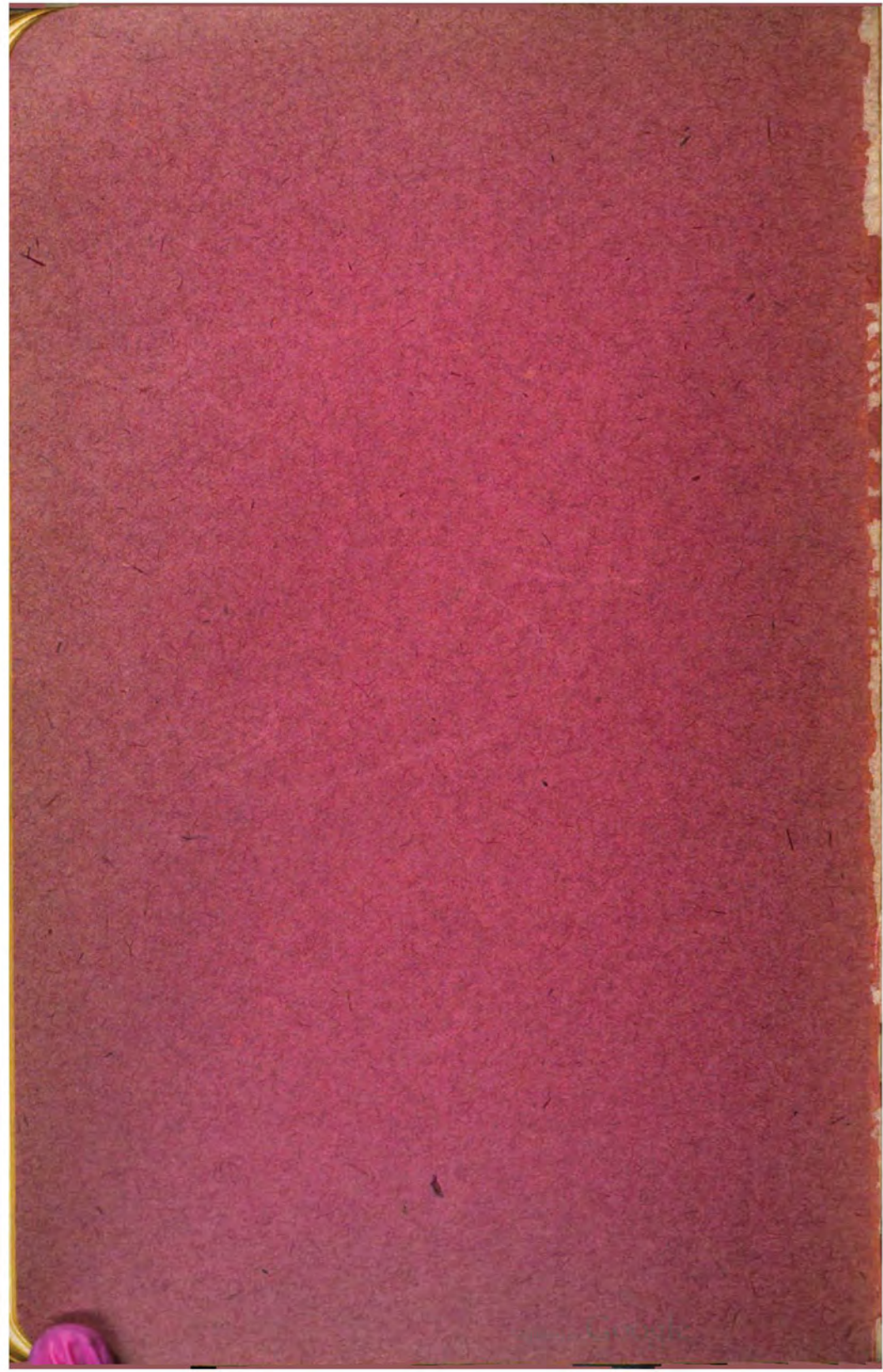
XCII.—17 Peters, lxxvi.

These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity Suits, promulgated and prescribed by this court in March, 1822, shall henceforth cease, and be of no farther force or effect. And the clerk of this court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

March, 1842.







Equity Rules 1866-1911.

EQUITY RULES 1866-1911

PRELIMINARY REGULATIONS.

Note: "circuit courts" is not "Circuit Courts"

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

Promulgated March 2, 1842, 1 How. xlii. Superseding Rule 1, Rules of 1822. See Rule 1, Rules of 1912, *post*, p. 145.

The purpose, both of the former statute, § 638, R. S. U. S., and the rule, was to validate judicial acts performed out of a regular term. That contempt proceedings may be heard in vacation was determined in *Vose v. Reed*, 1 Woods 647, Fed. Case 17,011.

Under former § 574, R. S. U. S., it has been held that "the Circuit and District Courts are * * * actually in session * * * when the court is opened by the judge for business, or business is actually transacted in court." *Baker, J., in Butler v. United States*, 87 Fed. Rep. 655, 659.

Equity Rule 1, applying only to the Circuit Courts, was rendered ineffective by the Judicial Code, in the following provisions:

Section 289. The Circuit Courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said Circuit Courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said Circuit Courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several Circuit Courts had prior to the taking effect of this Act.

Section 290. All suits and proceedings pending in said **Circuit Courts** on the date of the taking effect of this Act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the **district courts** in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the **Circuit Courts** so transferred as above provided.

To accommodate § 574, R. S. U. S., to the enlarged jurisdiction of the **district courts**, the Judicial Code provides:

Section 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Under Equity Rule 1, the clerk's office was always open for motions to suppress depositions for irregularities in their taking. *Van Hook v. Pendleton*, 2 Blatchf. 85, Fed. Case 16, 852; and the practice in the Circuit Courts has been to treat all questions of confirmation of sale as relating to final process. * * * "and as within the jurisdiction of the chancellor to determine at any time, irrespective of whether a stated term of the Circuit Court be in session." *Pardee, J., in Central Trust Co. v. Sheffield & Birmingham Coal, I. & R. Co.*, 60 Fed. Rep. 9, 15.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Promulgated March 2, 1842, 1 How. xlii. Superseding Rule 2, Rules of 1822. See Rule 2, Rules of 1912, *post*, p. 146.

The first Monday in each month thus became "Rule-Day," as a day set apart for receiving, entering, entertaining and disposing of motions, rules, orders, and other proceedings under this rule. 4 Min. Inst. 546. These days were colloquially termed "January Rules," "February Rules," etc. Rule-day has been abolished by the Rules of 1912.

3.

Any judge of the **circuit court**, as well **in vacation** as in term, may, **at chambers**, or on the rule days, at the **clerk's office**, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits in the

same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of application therefor being first given to the adverse party or his solicitor, to appear and show cause to the contrary, at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

Promulgated March 2, 1842, 1 How. xlii. Superseding Rule 3, Rules of 1822. See Rule 1, Rules of 1912, *post*, p. 145.

This rule obviously embraces only applications for interlocutory orders, etc., as specified, preparatory to the hearing of causes on their merits, made in chambers, or, on rule-days, at the clerk's office. It has no application to motions made in term and in the presence of counsel, under which circumstances no notice is necessary. *McLean v. Lafayette Bank*, 3 McLean 503, Fed. Case 8,887.

4.

All motions, rules, orders and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors without further service thereof, of all orders, rules, acts, notices, and other proceedings, entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.

Promulgated March 2, 1842, 1 How. xlii. Superseding Rule 4, Rules of 1822. See Rule 4, Rules of 1912, *post*, p. 147.

That a notice to the opposite party is necessary when the object is to obtain a paper in his possession for use in evidence, see *Bronson v. Kenssey*, 3 McLean 180, Fed. Case 1,927. That entry in the order book is notice under this rule, and that the complainant need not reply to a plea, or set it down for argument, or set a demurrer down for argument, in the absence of such notice, see *Newby*

v. Oregon Cent. R. Co., 1 Sawy. 63, Fed. Case 10,145. The frequent failure of the clerk to provide an order book, or the failure of the bar to use it during a period of several years (as noted in *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773, 774) would indicate the preference of the bar for service of notice upon opposing counsel by copy.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered, or rescinded by any judge of the court upon special cause shown.

Promulgated March 2, 1842, 1 How. xlii. Superseding Rule 5, Rules of 1822. See Rule 5, Rules of 1912, *post*, p. 147.

Blackstone defines a motion to be "an occasional application to the court by the parties or their counsel, to obtain some rule or order of court, which becomes necessary in the progress of a cause." 3 Comm. 304. This rule gives a different meaning to the term. It embraces only those matters of right and of course contemplated by the rules to be ministerially passed upon by the clerk, without the necessity of application to the court, embracing requests for the issuance of process, *mesne* and final, requests to make amendments which, under the rules, the party has the right to make, and some matters which are not, and never were, the subject matter of either motions or formal applications. The inclusion of the filing of pleadings in this rule is a patent absurdity. The party has an absolute right to file the bill, the answer, demurrer, plea or replication (if in time), and the like, and the clerk's duty is to accept and file it; in this no rule is necessary.

As to the issuance of process, a præcipe, addressed to the clerk, describing the process desired, and designating—in the case of the *subpoena ad respondendum*—when it is to be made returnable, is the usual practice in some districts. In others, a verbal request suffices, and no præcipe is required or desired by the clerk.

MOTIONS "OF COURSE" and "NOT OF COURSE."—The distinction between the classes of motions has been thus judicially drawn. "What constitutes a motion grantable of course, and a special one, is to be inferred from the 5th rule of equity. The distinction is, that a motion which requires an allowance from the judge or a notice to the opposite party is a special one; all others are grantable of course." *McAllister, J. in U. S. v. Parrott*, 1 McAll. 447, Fed. Case 15,909.

6.

All motions for rules or orders and other proceedings, which are **not grantable of course or without notice**, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the **order book**, and shall be heard at the rule day next after that on which the motion was made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, **the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.**

Promulgated March 2, 1842, 1 How. xliii. Superseding Rule 6, Rules of 1822. Motion day is now to be fixed by the various district courts, under Rule 6, Rules of 1912, *post*, p. 148.

That the motions (not of course) contemplated by this rule are such as require notice to the opposing party and allowance by the court, see *United States v. Parrott*, 1 McAll. 447, Fed. Case 15,999. **That motions are made in term and in the presence of opposing counsel are not within Rule 3**, and do not require notice, see *McLean v. Lafayette Bank*, 3 McLean 503, Fed. Case 8,887.

That notice must be given of a motion to commit for contempt, see *Gray v. Chicago, I. & N. R. Co.*, Woolw. 63, Fed. Case 5,713; *Worcester v. Truman*, 1 McLean 483, Fed. Case 18,043; following the later English practice announced by Lord Eldon in *Angerstein v. Hunt*, 6 Ves. 488, which reversed the earlier English practice as given in *Daniell*. *Fanshawe v. Tracy*, 4 Biss. 490, Fed. Case 4,643.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or especially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Promulgated March 2, 1842, 1 How. xliii. Superseding Rule 7, Rules of 1822. Now Rule 7, Rules of 1912, *post*, p. 148.

STATUTORY PROVISIONS. (JUDICIAL CODE).

Section 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before

a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

Section 52. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

Section 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All *mesne* and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division.

Section 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

Section 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear

and decide it, and to cause *mesne* or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

Section 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the Circuit Court of Appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Section 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however, That any defendant or*

defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the courts shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

"Section 790, R. S. U. S. Every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody at the time of his removal, or when the term for which he is appointed expires; and for that purpose he may retain such prisoners in his custody until his successor is appointed and duly qualified." (4 Fed. Stat. Ann. p. 162.)

"Section 948, R. S. U. S. Any **circuit** or district court may at any time, in its discretion, and upon such terms as it may deem just, **allow an amendment** of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues." (4 Fed. Stat. Ann. p. 593.)

"Section 4063, R. S. U. S. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void." (2 Fed. Stat. Ann. p. 816.)

"Section 4064, R. S. U. S. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court." (2 Fed. Stat. Ann. p. 816.)

"Section 4065, R. S. U. S. The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office." (2 Fed. Stat. Ann. p. 817.)

FUNCTION AND EFFECT.—"The sole office of the writ of subpoena is to bring the defendant into court in order that the court may acquire jurisdiction over his person." Ross, J., in *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 79 Fed. Rep. 179, 187, 24 C. C. A. 572. "A subpoena has no effect or validity outside of the territorial jurisdiction of the court from which it emanates. This is in

conformity to the cardinal principle of jurisprudence that the process of a court cannot extend beyond the territorial jurisdiction of the court, and that, unless expressly authorized by law, its process cannot be served outside of the territory over which it has jurisdiction." *Morrow, J., in United States v. American Lumber Co.*, 80 Fed. Rep. 809, 811. **A general appearance waives all question of service and is equivalent to personal service.** *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 300.

A subpoena is not required under a supplemental bill, unless new parties are brought in thereby; a rule to answer takes its place. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.*, 72 Fed. Rep. 329; *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333. **Supplemental bills are now provided for by Rules 34 and 35. Rules of 1912, *post*, pages 166, 167.**

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, or which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Promulgated March 2, 1842, 1 How. xliii. Superseding Rule 8, Rules of 1822. Now embodied in Rule 8, Rules of 1912, *post*, p. 149.

STATUTORY PROVISIONS.

"Section 985, R. S. U. S. All writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained." (3 Fed. Stat. Ann. p. 44.)

"Section 986, R. S. U. S. All writs of execution upon judgments obtained for use of the United States, in any court thereof, in one State, may run and

be executed in any other State, or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained." (3 Fed. Stat. Ann. p. 45.)

Rule 8 does not apply to a *mesne* attachment, and a special rule of the district court may adopt the law of a State giving a lien by attachment in an equity suit. *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 567, 582.

9.

When any decree or order is for the delivery or possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Promulgated March 2, 1842, 1 How. xlv. Superseding Rule 9, Rules of 1822. Now Rule 9, Rules of 1912, *post*, p. 151.

The writ of assistance may be awarded under the prayer for general relief. *Gormley v. Clark*, 134 U. S. 338, 33 L. Ed. 909. "It should not issue against any but a party to the suit in which it is sought, or his privies, or one coming into possession *pendente lite*." *Lurton, J., in Comer v. Felton*, 61 Fed. Rep. 731, 735, 10 C. C. A. 28. It is "undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession. * * * When (equity) decrees the sale of property it perfects the transaction by giving with the deed possession to the purchaser." Mr. Justice Field, in *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634; followed in *Lacassagne v. Chapins*, 144 U. S. 119, 36 L. Ed. 368.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

Promulgated March 2, 1842, 1 How. xlv. Superseding Rule 10, Rules of 1822. Now Rule 11, Rules of 1912, *post*, p. 152.

THE STATUTORY PROVISION.

Section 268, The Judicial Code.

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person

in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

This rather curious rule seems uncalled for. The power inherent in the court to enforce obedience to its orders naturally may be invoked by or against a stranger to the cause in whose favor, or against whom, the order runs.

A bidder at a foreclosure sale, not a party, has the status of being entitled to appeal from a decree denying his application for completion and confirmation of the sale. *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. 655, 17 L. Ed. 673. A purchaser at a foreclosure sale may have a right of appeal as to matters adjudicated after his bid. *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 34 L. Ed. 379. Under § 12 of the Act of Feb. 4, 1887, as amended by the Acts of March 2, 1889, and February 10, 1891, the Circuit Courts were required to aid the Interstate Commerce Commission in securing the attendance of witnesses and the production of documentary evidence. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047. In all of these classes of proceedings, and many others, we find orders being made in favor of or against persons who are not parties.

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and vested with jurisdiction over any subject, they became possessed of this power." Mr. Justice Field, in *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

SERVICE OF PROCESS.

11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Promulgated March 2, 1842, 1 How. xlv. This rule took the place of Rule 4 of 1822, q. v. Now a part of Rule 12, Rules of 1912, *post*, p. 152.

"In England suits in equity have always been instituted by preferring a bill in the style of a petition, directed to the lord chancellor or other proper person, and it is provided by statute that no process shall issue until after the suit has been so begun. (In the United States) the filing of the bill is the commencement of the suit." *Kirkpatrick, J.*, in *Humane Bit Co. v. Barnet*, 117 Fed. Rep. 316, 318; following *Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U. S. 51, 44 L. Ed. 667. Judge Gilbert gives the early history of the subpoena in equity with some detail, and points out that at an early time the suit in chancery was designated a "suit by subpoena," in *United States v. American Lumber Co.*, 85 Fed. Rep. 827, 829, 29 C. C. A. 431. But "the mere filing of a bill in equity does not give jurisdiction. Service of process is always requisite, and, until the subpoena has been served on the defendant, jurisdiction is not complete, either of the parties or of the property." *Wales, J.*, in *Wheeler v. Walton & Whann Co.*, 65 Fed. Rep. 720, 722.

12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties and shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of a husband and wife defendants, or a joint subpoena against all the defendants.

Promulgated March 2, 1842, 1 How. xlv. Now embodied in Rule 12, Rules of 1912, *post*, p. 152.

This rule took the place of Rule 2 of 1822, q. v. The defendant is entitled to service twenty days before the return day of the subpoena, and a decree *pro confesso* entered against him for failure to appear, where he has not been so served will be set aside on motion. *Treadwell v. Cleaveland*, 3 McLean 283, Fed. Case 14,155. The question of the legal sufficiency of the service may be raised by motion to set aside the return. *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 17; *Scott v. Stockholders' Oil Co.*, 122 Fed. Rep. 835.

13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Promulgated March 2, 1842, 1 How. xlv. Amended May 3, 1875, 21 Wall. v. Superseding Rule 13, Rules of 1822. Now Rule 13, Rules of 1912, *post*, p. 153.

Prior to this rule as amended, 1874, service upon the husband alone would suffice as service upon husband and wife. *O'Hara v. McConnell*, 83 U. S. 150, 23 L. Ed. 840. The adult served must be a member of the family; service upon a stranger who resides at the defendant's place of abode is not good. *Blythe v. Hinckley*, 84 Fed. Rep. 228. Equity process may be served outside the district of its issuance in cases where a Federal statute authorizes an order for extra-territorial service, as, under the Act of March 3, 1875, 18 Stat. at L. 472, c. 137. *Brown v. Pegram*, 143 Fed. Rep. 701.

The question whether a party has been properly served with process cannot be raised by demurrer. *Robinson v. National Stock Yards Co.*, 12 Fed. Rep. 361. It should be raised by motion to vacate the service. *Pacific Railroad v. Missouri Pacific R. Co.*, 3 Fed. Rep. 772.

SERVICE UPON ATTORNEY.—"Notwithstanding this rule, and Rules 14, 15 and 16, the law is well settled that in nearly all, if not in all, of the classes of proceedings of an ancillary character, service may be made, under some circumstances on the attorney of record, or on some other agent, of the defendant in such proceedings, with the same effect as though made in strict compliance with rule." Putnam, J., in *Gregory v. Pike*, 79 Fed. Rep. 520, 521, 25 C. C. A. 48. Though the suit be ancillary in its nature, if the bill is technically an original bill, process and service must respond to the rule, and service on the attorney is bad. *Ibid.* Process under a cross-bill may be served on the plaintiff's attorney. *Gregory v. Pike*, 67 Fed. Rep. 837, 15 C. C. A. 33. Before such service (upon an attorney) is attempted, it should be authorized on motion, by the court. *Pacific Railroad v. Missouri Pacific R. Co.*, 3 Fed. Rep. 772. Such a motion will be denied where the bill shows no legal or substantial merit. *Muhlenburg County v. Citizens' Nat. Bank*, 65 Fed. Rep. 527. The proper method of testing such service is by motion to vacate it. *Pacific Railroad v. Missouri Pac. R. Co.*, 3 Fed. Rep. 772.

14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

Promulgated March 2, 1842, 1 How. xlv. Formerly embodied in Rule 2, Rules of 1822, q. v. Now superseded by Rule 14, Rules of 1912, *post*, p. 153.

"An alias writ is one which is issued when a former writ has not produced its effect. The writ is so-called from the words 'as we have formerly commanded you,' being inserted after the usual commencement, 'we command you.'" *Farris v. Walter*, 2 Colo. App. 453.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Promulgated March 2, 1842, 1 How. xlv. Now Rule 15, Rules of 1912, *post*, p. 153.

Marshals belong to the executive department of the government, and are the ministerial officers through whom the judicial department executes its commands. *Cunningham v. Neagle*, 135 U. S. 1, 34 L. Ed. 55. It is the duty of the marshal to serve all process placed in his hands for service, and appearing

to be issued out of the proper court, and regular in form and purport. It does not rest with him to determine whether there was or was not occasion for issuing any subpoena or other process. *Lovering v. United States*, 117 Fed. Rep. 565, 566.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

Promulgated March 2, 1842, 1 How. xlv. Superseded by Rule 3, Rules of 1912, *post*, p. 146.

STATUTORY PROVISIONS.

"Section 948, R. S. U. S. Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues." (4 Fed. Stat. Ann. p. 693.)

"Section 954, R. S. U. S. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." (4 Fed. Stat. Ann. p. 596.)

This section was founded upon the English statute of 32 Henry VII, and has been interpreted accordingly. It was originally § 32 of the Judiciary Act of 1789. *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

Courts are disposed to be liberal in permitting officers to amend their returns on *mesme* and final process, especially where the rights of third parties are not affected. Such amendments have been permitted after the lapse of several years, and even after the officer's term has expired. *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775.

The clerk now enters all papers filed with him, in the "Equity Docket" at the time of filing. The suit is to be entered therein, apparently, when the bill is filed. Rule 3, Rules of 1912, *post*, p. 146.

APPEARANCE.

17.

The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served

with the process **twenty days before that day** otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

Promulgated March 2, 1842, 1 How. xlv. Appearance day is abolished by Rules 12 and 16, Rules of 1912, *post*, pages 152, 154.

STATUTORY PROVISION.

"Section 272, The Judicial Code (Hopkins' Judicial Code, p. 220).

In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."

A general appearance does not waive the jurisdictional objection that none of the parties is a citizen of the State in which the suit is brought. *Central Trust Co. v. Virginia T. & C. Co.*, 55 Fed. Rep. 769. But it is a waiver of all objections as to the district, within the State, in which the suit is brought. *Interior Construction & Imp. Co. v. Gibney*, 160 U. S. 217, 40 L. Ed. 401.

The party filing an intervening petition submits himself to the court's jurisdiction. *President, etc., of Bowdoin College v. Merritt*, 59 Fed. Rep. 8. Such appears to be the effect of any appearance not "confined solely to the purpose of questioning the jurisdiction over the person." Mr. Chief Justice Fuller, in *Fitzgerald & Mallore Construction Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 609.

"When a court obtains jurisdiction of a defendant is clear. It is by service of process upon him, or his voluntary appearance. The appearance of the plaintiff is always voluntary. He invokes jurisdiction by filing a petition, bill, or complaint, or it may be, jurisdiction in equity can be invoked for him, if he have a common interest with others, and some of them should sue for themselves and all others, including him." McKenna, J., in *President, etc., of Bowdoin College v. Merritt*, 59 Fed. Rep. 8.

"Both in law and equity cases this matter of a formal and preliminary appearance is everywhere disused, notwithstanding the rigid and technical enforcement of the rule that a general appearance operates as a waiver of the objection (to the jurisdiction), and that it must be taken by a general appearance for that purpose. But the fact is that appearances are rarely formally entered as such, notwithstanding our Equity Rule 17: the solicitor simply entering his name on the docket, and appearing by whatever step he may take in pleading. This, of course, is a general appearance, and waives every mere irregularity, but never any jurisdictional question: the cases showing that the Federal courts, and especially the Supreme Court, are the most exacting of all in regard to these two rules." Hammond, J., in *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 625, 637. The appearance need not be entered on a rule-day, but may be at any time within the limit assigned by this rule. *Heyman v. Uhlman*, 34 Fed. Rep. 686.

"Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty to exercise a sound discretion upon this subject, and to enlarge the time, whenever it shall appear that the purposes of justice require it. The rules prescribed by this court do not, and were not intended to deprive the courts of the United States of this well-known and necessary power." Mr. Chief Justice Taney, in *Poultney v. LaFayette*, 12 Peters 472, 475, 9 L. Ed. 1161, 1162.

"Before any proceeding can be taken by the plaintiff, on account of the failure of the defendant to file his answer, he must give the rule to answer as prescribed in the above rule of practice." *Johnson, J., in Halderman v. Halderman*, Hempst. 407, Fed. Case 5,908.

BILLS TAKEN PRO CONFESSO.

18.

Book of Life

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the Court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the Court or a Judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the Court or Judge, and undertaking to speed the cause.

Promulgated March 2, 1842, 1 How. xlv. Amended October 28, 1878, 97 U. S. viii. Rule-day has been abolished by Rule 2, Rules of 1912. Decrees *pro confesso* are now governed by Rules 16 and 17, Rules of 1912, *post*, p. 154.

"Equity Rule 18 provides that, after the order *pro confesso*, the cause shall proceed *ex parte*; but this does not mean without notice to a party who has appeared in the cause. Such party is entitled to notice, and has the right to be heard as to the form of the decree, and upon such other questions as can be

presented upon the complainant's pleadings and proofs." Wallace, J., in *Bennett v. Hoefner*, 17 Blatchf. 341, Fed. Case 1,320.

The "plea, demurrer, or answer must be filed on the rule-day next succeeding the day of entering his appearance, whether such rule-day is one day or thirty days after the entering of the appearance." Lacombe, J., in *Heyman v. Uhlman*, 34 Fed. Rep. 686.

Mr. Justice Washington thus described the early practice of our courts, as compared with that of England. "According to the practice of the English Chancery Court, a bill cannot be taken *pro confesso* after service of subpoena, and even after appearance, until all the processes of contempt to a sequestration have been exhausted; after which the bill is taken *pro confesso*, and a decree passes which is absolute in the first instance. * * * If the answer (under our early Rules), the subpoena being returned executed, be not filed within three months after the day of appearance and bill filed, then defendant is to be ruled to answer, and, failing to do so, the bill may be taken for confessed, and the matter thereof decreed immediately; but the decree is only *nisi*, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause to the contrary be shown." *Pendleton v. Evans*, 4 Wash. C. C. 336, Fed. Case 10,920. At a later day, Mr. Justice Miller said: "Rules 18 and 19 of the equity practice as now existing have modified those which are mentioned by Judge Washington (*supra*), and unless the defendant demur, plead, or answer, on or before the rule-day next succeeding his appearance, the plaintiff may enter an order in the order book that the bill be taken *pro confesso*, and the matter thereof decreed at the next succeeding term. * * *

The standing rule now (in 1876), requires defendant to plead by the next rule-day after appearance, which is the same as if a special rule were taken on him to do so." *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840.

Under the 18th Rule, "if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason." Mr. Chief Justice Fuller, in *Ohio Central R. Co. v. Central Trust Co. of N. Y.*, 133 U. S. 83, 33 L. Ed. 561.

19.

When the bill is taken *pro confesso* the Court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the Court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the Court shall direct, and submit to such other terms as the Court shall direct, for the purpose of speeding the cause.

Promulgated March 2, 1842, 1 How. xlv. Amended October 28, 1878, 97 U. S. viii. Now Rule 17, Rules of 1912, *post*, p. 153.

"It was irregular to render a decree *pro confesso* on a bill which did not show the court had jurisdiction of the suit." Caldwell, J., in *Nelson v. Eaton*, 66 Fed. Rep. 376, 377, 13 C. C. A. 523.

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of —: A. B. of —, and a citizen of the State of —, brings this his bill against C. D. of —, and a citizen of the State of —, and E. F. of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

Promulgated March 2, 1842, 1 How. xlvii. For present requisites of the bill, see Rule 25, Rules of 1912, *post*, p. 162.

"Under Rule 20 it is necessary, in the introductory part of the bill, that names of the parties defendant, with their citizenship, shall be set out." Pardee, J., in *United States v. Pratt Coal & Coke Co.*, 18 Fed. Rep. 708.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the **charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill**; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special

relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

Promulgated March 2, 1842, 1 How. xlvii. As to present requisites of the bill, *see* Rule 25, Rules of 1912, *post*, p. 162.

AS TO THE BODY OF THE BILL.—The importance of the statement, or narrative part of the bill, is recognized by all the authorities. "A bill in equity which asks for relief not itself inconsistent, but justified by the statement, or *narrative*, part of the bill, is ordinarily sufficient, nor is the complainant limited to any given theory in law, provided he does not depart from the bill itself. * * * A court of equity interprets the bill so as to save its equity when possible, and tolerates objections to its form only when taken at the outset, not at final hearing." Hand, J., in *Colgate v. James T. White & Co.*, 180 Fed. Rep. 882, 886.

HOW THE BILL IS TO BE CONSTRUED.—The foundation rule to be applied in the construction of the bill of complaint has thus been formulated by Mr. Justice Holmes: "A bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." *Swift & Co. v. United States*, 196 U. S. 375, 395, 49 L. Ed. 618, 623; followed in *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. Rep. 160, 164.

ESSENTIAL PARTS OF THE BILL.—"Originally a bill in equity consisted of nine parts, of which there were five principal parts, to-wit, the statement, the charges, the interrogatories, the prayer of relief, and the prayer of process. But all these, according to more recent authorities, may be dispensed with excepting the stating part and the prayer for relief." Sage, J., in *Comstock v. Herron*, 45 Fed. Rep. 680.

MULTIFARIOUSNESS.—The difficulty of formulating an accurate definition of multifariousness has been thus recognized by the Supreme Court of the United States: "In *Oliver v. Piatt*, 3 How. 411, 11 L. Ed. 622, we said, 'It was well observed by Lord Cottenham, in *Campbell v. Mackay*, 1 Myl. & C. 603, and the same doctrine was affirmed in this court in *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402, that it is impracticable to lay down any rule, as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and must necessarily be left, where the authorities leave it, to the sound discretion of the court.' We further said that the objection of multifariousness cannot, 'as a matter of right, be taken by the parties, except by demurrer or plea or answer, and if not so taken it is deemed to be waived;' that although the court may take the objection, it will not do so unless it deems such a course necessary or proper 'to assist in the due administration of justice.'" Mr. Justice Harlan, in *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514. "There is perhaps no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application than has attended this

relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features." *Shields v. Thomas*, 18 How. 253, 259, 15 L. Ed. 368; quoted and followed in *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478, 481. "The union of several causes of action for the same demand or relief does not constitute multifariousness." Sanborn, J., in *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. Rep. 765, 780, 75 C. C. A. 631, following *Westinghouse Air Brake Co. v. Kansas City So. Ry. Co.*, 137 Fed. Rep. 26, 32, 71 C. C. A. 1. "No bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter and settle the rights of all the parties to the suit. It is not indispensable that all the parties should have an interest in all the matters contained in the litigation. It is sufficient if each party has an interest in some essential matters involved in the suit and they are connected with the others." Sanborn, J., in *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. Rep. 765, 780, 75 C. C. A. 631, citing *Brown v. Deposit Co.*, 128 U. S. 403, 412, 32 L. Ed. 468; *Hayden v. Thompson*, 71 Fed. Rep. 60, 17 C. C. A. 592; *Kelley v. Boettcher*, 85 Fed. Rep. 55, 29 C. C. A. 14; *Curran v. Campion*, 85 Fed. 67, 70, 29 C. C. A. 26, 29.

THE PRAYER.—Under this rule Judge Sanborn has said: "Counsel suggest that the prayer of the bill fails to ask the special relief to which the complainant supposes himself entitled as required by Equity Rule 21. But the bill contains a prayer for a discovery, 'to the end that your orator may have his rights determined and adjudicated according to the facts hereinbefore set forth,' and for general relief. In view of the fact that no objection to this prayer was made in the demurrer, and that the court may lawfully grant other relief under the general prayer, although a complainant is not entitled to the specific relief he asks (*Watts v. Waddle*, 6 Pet. 389, 402, 8 L. Ed. 437; *Sage v. Central Railroad Company*, 99 U. S. 334, 25 L. Ed. 394; *London & San Francisco Bank v. Dexter, Horton & Co.*, 126 Fed. Rep. 593, 61 C. C. A. 515, 528; *Moore v. Mitchell*, 17 Fed. Cases, 692, 694 [Case No. 9,770]), there is no merit in this objection." *Wilson v. Plutus Mining Co.*, 174 Fed. Rep. 317, 320, 98 C. C. A. 189. "Under the general prayer, the court may grant any relief which is consistent with and included in the allegations of the bill." *Shelby, J.*, in *Haggart v. Wilczinski*, 143 Fed. Rep. 22, 28, 74 C. C. A. 176.

PRAYER FOR ALTERNATIVE RELIEF.—Where the complainant is in doubt as to the relief which can or should be afforded him upon the facts,—as where he may either be entitled to a decree for the restoration of property or to the enforcement of a lien upon it for the value of his interest—"he may pray for each in the alternative and the court will grant him the relief to which it deems him entitled." Sanborn, J., in *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. Rep. 765, 779, 75 C. C. A. 631.

PRAYER—BILL OF REVIEW.—A bill of review is in the nature of an original bill, and must pray for process in the same manner. In the absence of a prayer for process, the defendant not waiving process, the court is powerless to act upon it, in the modification of its former decree. *Home Street Ry. Co. v. Lincoln*, 162 Fed. Rep. 133, 138, 89 C. C. A. 133.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the Court, or that they can not be joined without ousting the jurisdiction of the Court, as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Promulgated March 2, 1842, 1 How. xlviii. These provisions are in part embodied in the Rules of 1912 as part of Rule 25, *post*, p. 162.

THE STATUTORY PROVISION as to nonjoinder or failure to serve parties.

Section 50, The Judicial Code, Hopkins' Judicial Code, p. 78. "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Re-enacting § 737, R. S. U. S. 1 Comp. Stat. p. 587, 4 Fed. Stat. Ann. p. 552, Pierce, Code, § 7373.

It was held that former § 737, R. S. U. S. did not enable a district court to make a decree in equity in the absence of an indispensable party, whose rights must necessarily be affected by such a decree. *Shields v. Barrow*, 58 U. S. (17 How.) 130, 15 L. Ed. 158; *Barney v. Baltimore*, 73 U. S. (6 Wall.) 280, 18 L. Ed. 825; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Greeley v. Lowe*, 150 U. S. 58, 39 L. Ed. 69. This section provided for a case where there are "several defendants" and "one or more" may be outside of the district. *Dick v. Foraker*, 155 U. S. 404, 411, 39 L. Ed. 201, 204.

Neither the Act of Congress nor the 47th Equity Rule enables the district court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree. *Gregory v. Swift*, 39 Fed. Rep. 708, 712; *Coiron v. Millaudon*, 19 How. 113, 15 L. Ed. 575; *Barney v. Baltimore*, 73 U. S. (6 Wall.) 280, 18 L. Ed. 825.

"NECESSARY OR PROPER PARTIES."—There are three classes of parties to a bill in equity:

"They are: (1) **Formal parties.** (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and to complete justice by adjusting all the rights involved in it. These

persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158; to the same effect see, *Gregory v. Swift*, 39 Fed. Rep. 708, 712.

"**IF THEY SHOULD COME WITHIN THE JURISDICTION.**"—This clause of Rule 22 was made ineffective by the Act of March 3, 1887, ch. 373, § 1, as corrected by Act of August 13, 1888, ch. 866, 25 Stat. at L. 434. **The jurisdiction is restricted "to the district in which one of the parties resides within the State of which he is a citizen."** And so as to corporation. *Ex parte Shaw*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Stevenson v. Fain*, 195 U. S. 165, 170, 49 L. Ed. 142, 144.

23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the Court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

Promulgated March 2, 1842, 1 How. xlviii. **The prayer for process is not required by the Rules of 1912. See Rule 25, Rules of 1912, post, p. 162.**

A bill of complaint which omits the prayer for process required by this rule is demurrable. *Goebel v. American Railway Supply Co.*, 55 Fed. Rep. 828; *United States v. Agler*, 62 Fed. Rep. 824; *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 171 Fed. Rep. 778, 780. **Where the bill contains no prayer for process the clerk is without authority to issue a subpoena thereunder.** *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 171 Fed. Rep. 778, 780. In conflict with these cases is one which holds that the omission of the prayer for process does not render the bill demurrable **where the defendants are named in the caption and in the body of the bill.** *Jennes v. Landes*, 84 Fed. Rep. 73, 74.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon

the instruction given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Promulgated March 2, 1842, 1 How. xlviii. Now embodied in Rule 24, Rules of 1912, *post*, p. 162.

A bill signed by neither the complainant nor his solicitor will be ordered from the files on motion; but afterwards, being signed, will be permitted to be filed. *Roach v. Hulings*, 5 Cranch C. C. 637, Fed. Case 11,874. This rule is obligatory in all cases—no bill is complete unless it is complied with. The signature of the attorney for the complainant should be indicated as "of Counsel," but if he signs as "Solicitor" it is proper to permit him to amend by adding to his signature the words "of counsel." *Stinson v. Hildrup*, 8 Biss. 376, Fed. Case 13,459. The practice of requiring the signature of counsel to the bill was introduced in England by Sir Thomas More, who made an order to that effect: if a bill lacked the signature, it was demurrable. *Dwight v. Humphreys*, 3 McLean 104, Fed. Case 4,216.

25.

In order to prevent the unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable cost for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Promulgated March 2, 1842, 1 How. xlix. There is no corresponding provision in the Rules of 1912.

As to clerk's fees, see § 828, R. S. U. S., 1 Comp. Stat. 635, *Pierce*, Code, § 7489, 4 Fed. Stat. Ann. 95.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise

order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Promulgated March 2, 1842, 1 How. xlix. This practice is abolished by Rule 21, Rules of 1912, *post*, p. 159, which provides for a motion to strike out, as to scandalous and impertinent matter.

"IMPERTINENCE" DEFINED.—"Impertinence consists in the introduction of any matters into a bill, answer, or other pleadings in a suit, which are not properly before the court for decision at any particular stage of the suits." Kohlfaat, J., in *Blanton v. Chalmers*, 158 Fed. Rep. 907, 909. "Impertinence consists of any allegation that is irrelevant to the material issues made or tendered." Sanborn, J., in *Kelley v. Boettcher*, 85 Fed. Rep. 55, 58, 29 C. C. A. 14. "Impertinence is described by Lord Chief Baron Gilbert to be 'where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question.' It is also said that impertinence is the introduction of any matters in a bill, answer, or other pleading in the suit which are not properly before the court for decision at any particular stage of the suit. The best test to ascertain whether matter be impertinent is to try whether the subject of the allegation be put in issue in the matter in dispute between the parties. All matter not material to the suit is regarded as impertinent." Mr. Justice Peckham, in *Harrison v. Perea*, 168 U. S. 311, 317, 42 L. Ed. 478, 480.

"SCANDAL" DEFINED.—"Scandal in a pleading in equity, consists of any unnecessary allegation which bears cruelly upon the moral character of an individual, or states anything which is contrary to good manners, or anything which it is unbecoming the dignity of the court to hear." Sanborn, J., in *Kelley v. Boettcher*, 85 Fed. Rep. 55, 58, 29 C. C. A. 14.

THE REASON AND PURPOSE OF THE RULE.—Judge Sanborn has comprehensively stated the inception and function of this rule in the following language: "The authority to control the volume and character of the pleadings and proceedings before it, and to strike from its files those that are obnoxious to its rules and practice, is necessary to the speedy and efficient administration of justice, and is one of the inherent powers of a court of chancery, which has been exercised without question since the establishment of such courts. Prolivity, tautology, scandal, and impertinence have been among the common faults of bills in equity time out of mind. Lord Keeper Bacon made an order that no bill should contain more than 15 sheets of paper; and Lord Chancellor Egerton followed with another, to the effect that no sheet should contain more than 15 lines, and an excess of the allotted quantity furnished good ground for demurrer. The Supreme Court leveled Equity Rules 26 and 27 at these evils. Those rules declare that every bill shall be expressed in as brief and succinct terms as it reasonably can be, and that, if it shall contain impertinent matter or scandalous matter not relevant to the suit, it may, on exceptions, be referred to a master, and such matter may be expunged, at the cost of the complainant, unless the court or a judge thereof shall otherwise order. These rules provide that scandalous and impertinent matter may be stricken out by a master after exceptions have been filed, but they do not abrogate nor curtail the inherent power of

the Federal courts sitting in equity to strike out rambling or tautological pleadings, and to purge their records of scandalous or impertinent matter on their own motion, regardless of the absence of exceptions. They were adopted not to limit the power, but to lighten the burdens of these courts. The authority and the duty of the Federal court to keep its records free from stain and scandal are by no means dependent on the ability or disposition of counsel for the litigants before it, but its power is plenary, and its duty imperative, whatever the action of counsel may be." *Kelley v. Boettcher*, 85 Fed. Rep. 55, 58, 29 C. C. A. 14. Judge Hammond has referred to the prolixity against which Rule 26 is directed, as to recitals of written instruments as "'stuffing' a bill with the writings in *haec verba*," saying, "While there should be no verbosity, there should be clear, explicit, and sufficient description to give the defendant notice of the subject-matter of the complainant. Rule 26 has not abrogated this requirement." *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773, 776. That prolixity, however, is ground for exceptions for impertinence, see *Chapman v. School District*, Deady 108, Fed. Case 2,607. That prolixity in answers to interrogatories is ground of exception, see *Way v. Hygienic Fleeced Underwear Co.*, 144 Fed. Rep. 870.

THE ANALOGY BETWEEN EXCEPTIONS AND DEMURRER.—As to the resemblance between exceptions and demurrers Judge Philips has said, "An exception to a bill of complaint is in some respects like a demurrer. If it go to the whole bill, and any part of it be good, the exception cannot be sustained in part and overruled in part, but the whole exception must be overruled. So, if an exception be taken to a whole paragraph, any part of which is good and sufficient, the exception must be denied as a whole." *Board of Trade v. National Board of Trade*, 154 Fed. Rep. 238, 244.

THE DIFFERENCE IN FUNCTION BETWEEN DEMURRER AND EXCEPTIONS.—A demurrer to an answer was never permitted, under the English practice or our own. *Grether v. Wright*, 75 Fed. Rep. 742, 23 C. C. A. 498.

Allegations of new matter set up by way of defense are not subject to exception. *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.*, 43 Fed. Rep. 391; *Gorham Mfg. Co. v. Weintraub*, 180 Fed. Rep. 639.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

Promulgated March 2, 1842, 1 How. xlix.

Proper practice requires that the particular matters excepted to be specified in the exceptions. It is not proper practice to restate the answer and then add, "in all which particulars the plaintiff excepts to said answer," leaving it to the court the task of ascertaining what is intended to be excepted to. *Blanton v. Chalmers*, 158 Fed. Rep. 907.

A motion to strike out scandalous or impertinent matter, under Rule 21, Rules of 1912, may under special circumstances be referred to a master under Rule 59, Rules of 1912. See *post*, pp. 155, 186.

AMENDMENT OF BILLS

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors and generally in matters of form. But if he amend in a material point (as he may do, of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant a copy shall be furnished to each defendant affected thereby.

Promulgated March 2, 1842, 1 How. 1. Superseded by Rule 19, Rules of 1912, *post*, p. 156.

See notes to Rules 29 and 32, *post*.

THE FUNCTION OF AMENDMENT.—"Where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment." *Shelby, J.*, in *Mellor v. Smither*, 114 Fed. Rep. 116, 120, 52 C. C. A. 64. "Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer." *Mr. Justice Curtis*, in *Shields v. Barrow*, 7 Howard 130, 15 L. Ed. 158.

APPELLATE REVIEW.—The granting or refusal of leave to file an amended bill or plea is a matter within the discretion of the trial court and will not be reviewed in an appellate court unless there has been a gross abuse of this discretion. *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Gormley v.*

Bunyan, 138 U. S. 623, 631, 34 L. Ed. 1086; Hicklin v. Marco, 56 Fed. Rep. 549, 552, 6 C. C. A. 10.

AMENDMENTS OF COURSE.—Rule 28 relates only to amendments of course. These may be made "in any matter whatsoever," before any copy has been taken out of the clerk's office. As a matter of right, no copy of the bill need be filed by the complainant; if the defendant orders a copy from the clerk, because he has not been served with a copy or furnished a copy, it is then "taken out of the clerk's office." As a matter of practice, the gentlemen of the bar seldom force a defendant to that expense. Courtesy demands, though the law does not, that he be furnished a copy by complainant's counsel. All the amendments contemplated by Rule 28 are those which are of course, and made before an answer, plea or demurrer has been interposed to the bill. In considering Rules 28 and 29 it becomes obvious that the right to amend grows less secure as the cause progresses. Hardin v. Boyd, 113 U. S. 756, 761, 28 L. Ed. 1141; Richmond v. Irous, 121 U. S. 27, 30 L. Ed. 846.

VERIFICATION OF AMENDMENT UNNECESSARY.—A bill in equity need not be sworn to unless it is to be used as evidence upon an application for relief in *limine*. Hughes v. Northern Pac. R. Co., 18 Fed. Rep. 110. Even when a preliminary injunction is prayed for, there is no rule requiring the bill to be verified when signed. Black v. Allen Co., 42 Fed. Rep. 622, 9 L. R. A. 433. Consequently an amendment need not be verified when filed, and a motion to strike it from the record for want of verification will not lie. Chase Elec. Const. Co. v. Columbia Const. Co., 136 Fed. Rep. 699.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof of affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Promulgated March 2, 1842, 1 How. 1. Superseded by Rule 19, Rules of 1912, *post*, p. 156.

See the Statute of Amendments, *post*, Rule 60, p. 115.

Of Rule 29, Judge Knappen has said, "It is the general rule that the granting and refusals of amendments to pleadings are within the discretion of the

court, and that this discretion will not be interfered with unless plainly abused. (Citing *United States v. Buford*, 3 Pet. 10, 12, 7 L. Ed. 586; *Smith v. Vaughan*, 10 Pet. 366, 9 L. Ed. 457; *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 602; *Chapman v. Barney*, 129 U. S. at page 681, 32 L. Ed. 800; *Stevens v. Nichols*, 157 U. S. 370, 39 L. Ed. 736; *Union Central Life Ins. Co. v. Phillips*, 102 Fed. Rep. 19, 23, 41 C. C. A. 263). Even under Equity Rule No. 29 complainant is not entitled as of right to amend his bill after demurrer has been sustained." *M'Kemy v. Supreme Lodge A. O. U. W.*, 180 Fed. Rep. 961, 967, 104 C. C. A. 117; citing *National Bank v. Carpenter*, 101 U. S. 567, 568, 25 L. Ed. 815.

The general rule is well settled that the granting or refusal of leave to amend is not reviewable on appeal "except in a case of gross abuse of discretion." Mr. Justice Lamar, in *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086, following *Mandeville v. Wilson*, 5 Cranch 15, 17, 3 L. Ed. 23, 24. Even in the case of amendment after decree. *Brown v. White*, 16 Fed. Rep. 1900.

AMENDMENT AFTER DEMURRER SUSTAINED.—The early practice was, that upon the allowance of a demurrer to a whole bill, the bill was out of court, and no subsequent proceeding could be taken in the cause. This course was relaxed by Rule 35, *post*; under which the court may, on motion, permit the bill to be amended after the demurrer has been sustained; but Rule 29 has no application to the question of the right to amend the bill after demurrer sustained. *Mercantile Natl. Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815.

EFFECT OF FILING REPLICATION UPON THE RIGHT TO AMEND.—This rule indicates that where leave to amend is sought before replication, the application may be made *ex parte* and without notice (see Rule 60, *post*); "but, after replication, or setting down for a hearing, amendments are dependent on leave of court, in the exercise of discretion." *Woolson, J.*, in *Gubbins v. Laughtenschlager*, 75 Fed. Rep. 615, 619.

NECESSITY OF AFFIDAVIT.—The motion for leave to amend, if made after replication filed, must be supported by affidavit, or it must be denied. *Beavers v. C. A. Richardson & Co.*, 118 Fed. Rep. 320.

FILING AMENDMENT WITHOUT LEAVE.—Where the rules require leave to amend, an amendment filed without leave will be stricken from the files; where circumstances warrant, the order striking from the files may be made without prejudice to the right of the party to formally apply for leave to amend. *Beavers v. C. A. Richardson & Co.*, 118 Fed. Rep. 320.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Promulgated March 2, 1842, 1 How. li. No corresponding provision exists in Rules of 1912.

This rule merely fixes a standing time-limit, the expiration of which automatically terminates and cancels an order granting leave to amend.

AFFIDAVIT AND CERTIFICATE.—A demurrer not verified by the defendant and certified by his counsel as required by this rule, must be wholly disregarded.

American Steel & Wire Co. v. Wire Drawers' Union, 90 Fed. Rep. 598. The plea of a corporation, properly verified, does not require the corporate seal to be affixed. *Fayerweather v. Hamilton College*, 103 Fed. Rep. 546. Where a demurrer is not verified and certified under this rule it is no bar to entry of a decree *pro confesso*. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. Ed. 853. A demurrer so defective may be stricken from the files on motion. *Brazoria County v. Youngstown Bridge Co.*, 80 Fed. Rep. 10, 13, 25 C. C. A. 306. The plaintiff waives the defects by setting such defective plea or demurrer down for hearing. *Goodyear v. Toby*, 8 Blatchf. 130, Fed. Case 5,585. So the want of affidavit and certificate in a plea is waived by filing a demurrer to the plea, the effect of which is to put in issue the legal effect of the plea. *Griswold v. Bacheller*, 77 Fed. Rep. 857. The objection of want of affidavit and certificate must be made in the *visi prius* court; it will not be entertained in the appellate court for the first time. *Brazoria County v. Youngstown Bridge Co.*, 80 Fed. Rep. 10, 13, 25 C. C. A. 306.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, **unless upon a certificate of counsel**, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; **that it is not interposed for delay; and, if a plea, that it is true in point of fact.**

Promulgated March 2, 1842, 1 How. li. **Demurrers and pleas are abolished** by Rule 29, Rules of 1912, *post*, p. 177.

32.

The defendant may at any time before the bill is taken for confessed, or afterward **with the leave of the Court**, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part and answer to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Promulgated March 2, 1842, 1 How. li. Superseded by Rule 29, Rules of 1912, *post*, p. 177.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the fact stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

Promulgated March 2, 1842, 1 How. li. This procedure abrogated by Rule 29, Rules of 1912, *post*, p. 177.

Compare Order XXXIV of the High Court of Chancery issued August 26, 1841: "That where the defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days *from the expiration of the time allowed to the defendant for filing such demurrer*, cause the same to be set down for argument: and where the demurrer is to part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such last mentioned demurrer, cause the same to be set down for argument."

Also compare Order XXXV: "That where the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purpose as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto."

"The complainant not having taken issue on the plea in abatement, but having set it down for argument, the truth of all statements of fact contained in the plea, material and pertinent to the issue raised by it, is thereby admitted (Kellner v. Insurance Co., 43 Fed. Rep. 623), however inconsistent with or contradictory of the allegations of the bill (United States v. Telephone Co., 29 Fed. Rep. 17, 33)." Sanford, J., in Stephens v. Smartt, 172 Fed. Rep. 466, 471.

Where a **Circuit Court** ordered that a pending motion to strike from the files should stand as a demurrer and that the certificate of affidavit required by the rules might be attached to the motion instantan, and thereupon sustained the demurrer without setting down for argument, it was said by the Circuit Court of Appeals that: "The familiar requirement of chancery practice that every demurrer must be set down for argument on a day certain, when the respective parties may be heard thereupon, cannot be summarily dispensed with." Quarles, J., in Robinson v. Chicago Rys. Co., 174 Fed. Rep. 40, 42, 98 C. C. A. 26.

The latter part of this rule has been applied to answers, in a holding that the facts pleaded in an answer can only avail the defendant so far as in law and equity they ought to avail him, even though the complainant has waived objections to the answer by failing to file exceptions to it. Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. Rep. 1, 5, 84 C. C. A. 167.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his cost in the cause up to that period unless the Court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the Court, be reasonably done; **in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly**

Promulgated March 2, 1842, 1 How. lii. The present procedure is fixed by Rule 29, Rules of 1912, *post*, p. 177.

In discussing this rule Judge Bradford has said: "Where matter presented by the plea is such that it may reasonably be considered by the solicitor filing the plea to be good, although he be mistaken and the plea is filed in good faith, and not vexatiously or for delay, costs should not be allowed under the rule to the complainant. The rule is not susceptible of any other construction; for if it should be held to mean that the court must be satisfied that the plea is good in law or fact, as the case may be, the rule could have no operation, as the plea would not be overruled." *Chisholm v. Johnson*, 84 Fed. Rep. 384, 386.

Under this rule, the defendant is entitled to answer over only where there has been but "a precursory adjudication" of the invalidity of his plea. An issue being joined, and the plea being found to be false, the defendant is not entitled to answer further. "Having put the plaintiff to the trouble and delay of an issue, the defendants cannot, after it is found against them, claim the right to file an answer." Mr. Justice Bradley, in *Kennedy v. Creaswell*, 101 U. S. 641, 644, 25 L. Ed. 1075. Followed in *Eagle Oil Co. v. Vacuum Oil Co.*, 162 Fed. Rep. 671, 673, 89 C. C. A. 463.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

Promulgated March 2, 1842, 1 How. lii. No corresponding provision exists in Rules of 1912.

FEDERAL STATUTE OF AMENDMENTS.

"Section 954, R. S. U. S. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

(This section was § 32 of the Judiciary Act of 1789, and is founded on the English statute of 32 Henry VII; *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 650, 23 L. Ed. 341.)

Rule 35 does not confer an absolute right to amend, leave to amend being discretionary with the court, and the exercise of that discretion is not reviewable. Only an abuse of discretion will be reviewed on appeal. *U. S. v. Atherton*, 102 U. S. 372, 375, 26 L. Ed. 213; *Mercantile National Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815.

Delay may be fatal to the right to amend; the motion must be made "with reasonable promptness." *Edw. P. Allis Co. v. Withlacoochee Lumber Co.*, 105 Fed. Rep. 680, 682, 44 C. C. A. 673. Where the original bill showed such delay that laches was imputed to the complainant, it was the duty of the court to allow an amendment to the bill which explained the delay. *Lant v. Manley*, 75 Fed. Rep. 627, 634, 21 C. C. A. 457. In order to obtain an appellate review of an order refusing leave to amend, it must appear what the amendment sought to be made was. *Mercantile Natl. Bank v. Carpenter*, *supra*.

PLEA.—After a plea has been argued and held sufficient in law, it is error for the court to refuse leave to reply thereto. *United States v. Dalles Military Road Co.*, 140 U. S. 599, 35 L. Ed. 565; *Zimmerman v. So Relle*, 80 Fed. Rep. 417, 25 C. C. A. 518; *McVeagh v. Denver City Waterworks Co.*, 85 Fed. Rep. 74, 29 C. C. A. 33.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Promulgated March 2, 1842, 1 How. lii. No corresponding provision exists in Rules of 1912.

Compare Order XXXVI of the High Court of Chancery (August 26, 1841): "That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to."

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Promulgated March 2, 1842, 1 How. lii. No corresponding provision exists in Rules of 1912.

Compare Order XXXVII of the High Court of Chancery (August 26, 1841): "That no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

Promulgated March 2, 1842, 1 How. lii. Abrogated by practice under Rule 29, Rules of 1912, *post*, p. 177.

Compare Order XXXIII of the High Court of Chancery (August 26, 1841): "That where a demurrer or plea to the whole bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by 21st Order, and with the same effect, unless the court shall, upon overruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, or demurrer, within the time so allowed by the court, the plaintiff, if he does not require an answer, shall, on the expiration of such time, be at liberty to file such note."

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answers to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be com-

pellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Promulgated March 2, 1842, 1 How. liii. See Rule 29, Rules of 1912, *post*, p. 177.

Compare Order XXXVIII of the High Court of Chancery (August 26, 1841): "That a defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer."

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is, hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Promulgated March 2, 1842, 1 How. liii. See Rule 58, Rules of 1912, *post*, p. 222.

Compare Order XVI of the High Court of Chancery (August 26, 1841): "That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those inter-

rogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent."

"A general interrogatory in a bill is sufficient to require the defendants to answer all the charges it contains." Sanborn, J., in *People's United States Bank v. Gilson*, 161 Fed. Rep. 286, 293, 88 C. C. A. 332. Citing *McClaskey v. Barr*, 40 Fed. Rep. 559, 561.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively, 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories, numbered respectively, 1, 2, 3, etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to 41st Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

First paragraph promulgated March 2, 1842, 1 How. liii. Second paragraph added by amendment May 6, 1872, 13 Wall. xi. Superseded by Rule 25, Rules of 1912, *post*, p. 162.

Compare Order XVII of the High Court of Chancery (August 26, 1841): "That the interrogatories contained in the interrogating part of the bill, shall be divided as conveniently as may be from each other, and numbered consecu-

tively, 1, 2, 3, &c., and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or to the effect following: that is to say,—‘The defendant, (A. B.,) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.,’ and the office copy of the bill taken by each defendant, shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.”

Where the answer under oath is not waived in the bill, the denials of the verified answer, as to all matters within the personal knowledge of the party answering, must be overcome by the evidence of two witnesses, or by one witness corroborated by circumstances which are equivalent in weight to another witness. *Godden v. Kimmell*, 99 U. S. 201, 206, 25 L. Ed. 431; *Vigel v. Hopp*, 104 U. S. 441, 26 L. Ed. 765; *Morrison v. Durr*, 122 U. S. 518, 30 L. Ed. 1225. In rare cases circumstances alone will suffice. *Clark's Executors v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386. And documentary evidence alone may satisfy the rule. *Snow v. Hazlewood*, 157 Fed. Rep. 898, 85 C. C. A. 226.

“Where the complaint waives the oath, as unsworn answer which denies material averments of the bill puts the complainant to his proof thereof, and he is entitled to relief only upon the allegations of the bill which are admitted by the answer.” *Sanborn, J., in People's U. S. Bank v. Gilson*, 161 Fed. Rep. 286, 294, 88 C. C. A. 332.

Where the bill waives the oath of the defendant, discovery will not lie. *Gorham Mfg. Co. v. Weintraub*, 180 Fed. Rep. 639.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

Promulgated March 2, 1842, 1 How. liv. Superseded by Rule 58, Rules of 1912, *post*, p. 222.

Compare Order XVIII of the High Court of Chancery (August 26, 1841): “That the note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.”

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, “To the end, therefore,” there shall hereafter be used words in the form or to the effect following: “To the end, therefore, that the said defendants

may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say—

"1. Whether, &c."

"2. Whether, &c."

Promulgated March 2, 1842, 1 How. liv. Interrogatories no longer accompany the bill. Rule 58, Rules of 1912, *post*, p. 184.

Compare Order XIX of the High Court of Chancery (August 26, 1841): "That instead of the words now in use preceding the interrogating part thereof, and beginning with the words 'To the end therefore,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore—That the said defendants may, if they can show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer; that is to say,—

1. Whether, &c.

2. Whether, &c."

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Promulgated March 2, 1842, 1 How. lv. The practice as to answering interrogatories is now controlled by Rule 58, Rules of 1912, *post*, p. 222.

The defendant may demur to the interrogatories. *Coop v. Dr. Savage Physical Development Institute*, 47 Fed. Rep. 899, 901. In declining to answer an interrogatory, or part thereof, "the reasons for refusing so to do should be distinctly stated, so that the court may be able to judge whether the refusal stands upon a sufficient ground." *J. B. McPherson, J., in Boyer v. Keller*, 113 Fed. Rep. 580. Thus, the reason for declining to answer being that the answer would disclose trade secrets, that reason should be stated. *Federal Mfg. & Printing Co. v. International Bank Note Co.*, 119 Fed. Rep. 335. For the improper evasion of

interrogatories a defendant may be mulcted in costs. *Langdon v. Goddard*, 3 Story 13, Fed. Case No. 8,081; *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82, 83. Although a corporation cannot be required to answer to a bill in equity under oath, it can be required to answer, and must answer fully. *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82; *Gamewell Fire-Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312.

45.

No special replication to answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Promulgated March 2, 1842, 1 How. lv. When reply is now necessary, see Rule 31, Rules of 1912, *post*, p. 196.

Prior to the promulgation of this rule, it was held that no special replication could be filed save by leave of the court; the reasons assigned being that it was contrary to the fundamental principles of chancery practice to permit the complainant to set up new matter necessary to his case by way of replication, that omissions in the bill cannot be supplied by averments in the replication, nor can a complainant be allowed to make out a new case in his replication. *Vattier v. Hinde*, 7 Peters 252, 274, 8 L. Ed. 675. Since the existence of Rule 45, a special replication (either to a plea or a demurrer) is irregular, and, on motion, will be stricken from the files. *Mason v. Hartford, P. & F. R. Co.*, 10 Fed. Rep. 334. Rule 45 must be construed in connection with Rule 19, *ante*; "it means that a general replication is always sufficient to put in issue every material allegation of an answer, or amended answer, unless the rules of pleading imperatively require an amendment of the bill." *Mr. Justice Harlan*, in *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 57, 42 L. Ed. 355, 380.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in answer.

Promulgated March 2, 1842, 1 How. lv. Time now limited to ten days by Rule 32, Rules of 1912, *post*, p. 198.

An answer to an amended bill is considered a part of the answer to the original bill. Therefore, if a defendant, in a further answer, or in an answer to an amended bill, repeats anything contained in a former answer, the repetition,

unless it varies the defense, in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and on reference to a master, such parts will be struck out. *Gier v. Gregg*, 4 McLean 202, Fed. Case 5,406.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the Court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the Court may, in their discretion, proceed in the cause without making such persons parties; **and in such cases the decree shall be without prejudice to the rights of the absent parties.**

Promulgated March 2, 1842, 1 How. lv. Now Rule 39, Rules of 1912, *post*, p. 204.

THE STATUTORY PROVISIONS, from the Judicial Code.—Section 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

Section 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain

jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

CLASSIFICATION OF PARTIES.—The relationship of parties to controversies has been the subject of frequent and extended consideration by the Federal courts.

A "proper" party, as distinguished from a "necessary" party (the latter being one whose presence is necessary to the determination of the controversy) is "one who has an interest in the subject-matter of the litigation, which may be conveniently settled therein." W. H. Sanborn, J., in *Kelley v. Boettcher*, 85 Fed. Rep. 55, 64, 29 C. C. A. 14.

Rule 47 was merely a declaration of the effect of the Act of Congress (§ 738, R. S. U. S.) and of the previous decisions of the Supreme Court on the subject-matter of the rule. *Shields v. Barrows*, 17 How. 130, 15 L. Ed. 158; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599.

The most usual classification of parties is as follows:

"1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the right involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete a final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Mr. Justice Curtis, in *Shields v. Barrow*, 17 Howard 130, 15 L. Ed. 158; followed in *California v. Southern Pac. Co.*, 157 U. S. 229, 249, 39 L. Ed. 683, 691.

48.

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of

the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Promulgated March 2, 1842, 1 How. lvi. Superseded by Rule 38, Rules of 1912, *post*, p. 203.

THE RULE ANNOUNCES A PRE-EXISTING RULE OF EQUITY PROCEDURE.—As early as 1820 Mr. Justice Story, on circuit, announced the doctrine which is embodied in this rule. "It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants, in the subject-matter of the bill ought to be made parties, however numerous they may be. * * * The rule, however, * * * is not without exception. * * * Where the parties are very numerous, and the court perceives that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree." *West v. Randall*, 2 Mason 181, Fed. Case 17,424.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Promulgated March 2, 1842, 1 How. lvi. Superseded by Rule 37, Rules of 1912, *post*, p. 201.

Compare Order XXX of the High Court of Chancery (August 26, 1841): "That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially inter-

ested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate (b), or rents and profits, parties to the suit. But the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

RULE IS IN AFFIRMANCE OF SETTLED PRINCIPLE.—As we have found in numerous other instances, this rule merely declares the law, and announces no new principle. "Undoubtedly, cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. They then become proper parties, and may be brought in or not, as the court in the exercise of its judicial discretion may determine." So said Mr. Chief Justice Waite, after announcing the general rule that the beneficiaries are not necessary parties to a suit by the trustee against a stranger to enforce the trust. *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843. Rule 49 applies only where the fee is vested in the trustee. *Chew v. Hyman*, 7 Fed. Rep. 7, 14.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Promulgated March 2, 1842, 1 How. lvi. Now Rule 41, Rules of 1912, *post*, p. 206.

Compare Order XXXI of the High Court of Chancery (August 26, 1841): "That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

In a suit to enforce a trust as to personal property, created by will, the personal representative of the decedent, and not his heir-at-law, is the proper complainant. *Ware v. Galveston City Co.*, 111 U. S. 170, 28 L. Ed. 393.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as **principals or sureties**, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Promulgated March 2, 1842, 1 How. lvi. Now Rule 42, Rules of 1912, *post*, p. 207.

Compare Order XXXII of the High Court of Chancery (August 26, 1841): "That in all cases in which the plaintiff has made a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

"Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other within the maxim *transit in rem judicatem*; the cause of action being changed into matter of record, which has the effect to merge the inferior remedy in the higher." Mr. Justice Clifford, in *Sessions v. Johnson*, 95 U. S. 347, 24 L. Ed. 596.

But where the contract or obligation is joint and several, the promisee or obligee may elect to sue the promisors or obligors jointly or severally. If he obtains a joint judgment he cannot afterward sue them separately, nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action. *Ibid*, and *Pirie v. Tvedt*, 115 U. S. 41, 29 L. Ed. 331.

"A defendant has no right to say that an action shall be several which a plaintiff elects to make joint." Mr. Chief Justice Waite, in *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. Ed. 63. "It is an elemental principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a nonjoinder of plaintiffs, not only by demurrer, but in arrest of judgment, under the plea of the general issue." Mr. Justice Grier, in *Farni v. Tesson*, 1 Black (66 U. S.) 309, 17 L. Ed. 67.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say), "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the Court, if it thinks fit, shall be at liberty to dismiss the bill.

Promulgated March 2, 1842, 1 How. lviii. Substantially embodied in Rule 43, Rules of 1912, *post*, p. 207.

Compare Order XXXIX of the High Court of Chancery (August 26, 1841): "That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the Registrar's Book, in the form or to the effect following; (that is to say,) 'Set down upon the defendant's objection for want of parties;' and that

where the plaintiff shall not so set down his cause, but shall proceed therewith to hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties; but the court, if it thinks fit, shall be at liberty to dismiss the bill."

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description, the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Promulgated March 2, 1842, 1 How. lvii. Substantially embodied in Rule 44, Rules of 1912, *post*, p. 208.

Compare Order XL of the High Court of Chancery (August 26, 1841): "That if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."

The old rule was that the defendant must point out by demurrer, plea or answer the person or persons who ought to be made parties. *Greenleaf v. Queen*, 1 Peters, 138, 149, 7 L. Ed. 85, 90. And it was held, under this rule, that the defendant should not be permitted, at the hearing, to urge the want of proper parties. *Segee v. Thomas*, 3 Blatchf. 11, Fed. Case 12,633.

The general principle of equity as it existed prior to this rule was thus stated in 1828.

"The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court; and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others." Mr. Justice Thompson, in *Mechanics' Bank of Alexandria v. Seton*, 1 Peters 299, 306, 7 L. Ed. 152, 155.

Necessarily, where no decree can be made which will not affect the rights of parties not before it, dismissal without prejudice is the proper disposition of the case. *Young v. Cushing*, 4 Biss. 456, Fed. Case 18,156.

NOMINAL PARTIES TO BILLS.**54.**

Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the Court shall otherwise direct.

Promulgated March 2, 1842, 1 How. lvii. Now Rule 40, Rules of 1912, *post*, p. 206.

Compare Order XXIII of the High Court of Chancery (August 26, 1841): "That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original or amended or supplemental bill, omitting the interrogating part thereof; and such bill, as against such party, shall not pray a *subpoena* to appear and answer, but shall pray such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit."

Also compare Order XXIX: "That where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill, and the costs of by adding parties; but the court, if it thinks fit, shall be at liberty to dismiss court shall otherwise direct."

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either

the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Promulgated March 2, 1842, 1 How. lviii. Superseded by Rule 73, Rules of 1912, *post*, p. 250.

This rule did not operate to prevent an injunction allowed by a district judge, under the authority of the Act of February 13, 1807, 2 Stat. at L. 418, from expiring at the commencement of the term next succeeding its allowance. *Gray v. Chicago, I. & N. R. Co.*, Woolw. 63, Fed. Case 5,713.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

Promulgated March 2, 1842, 1 How. lvii. Superseded by Rule 45, Rules of 1912, *post*, p. 208.

STATUTORY PROVISIONS RELATING TO ABATEMENT AND REVIVOR.—“Section 955, R. S. U. S. When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is pending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a

continuance of the suit until the next term of said court." (4 Fed. Stat. Ann. p. 601.

"Section 955 has no application to suits in equity." *Brown v. Fletcher*, 140 Fed. Rep. 639, 642; and see *Dillard's Admr. v. Central Va. Coal Co.*, 125 Fed. Rep. 157, 159.

"Section 956, R. S. U. S. If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." (4 Fed. Stat. Ann. p. 603.

ABATEMENT.—"In chancery practice an abatement is merely a suspension of all proceedings in a suit, which generally may be revived by bill of revivor." Swain, J., in *Brown v. Fletcher*, 140 Fed. Rep. 645.

FUNCTION OF THE RULE.—"Rule 56 is declarative, not only of the practice of the court, but of the provisions of the Statute." Billings, J., in *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216.

PRACTICE OF HIGH COURT OF CHANCERY APPLIES.—The practice of the Federal courts in equity concerning abatement and revival is regulated by the practice of the High Court of Chancery in England as it obtained in 1842, when Rule 90 was adopted. *Childs v. Ferguson*, 181 Fed. Rep. 795, 796, 104 C. C. A. 305.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, **leave to file the same may be granted by any judge of the court on any rule day**, upon proper cause shown and due notice to the other party. **And if leave is granted to file such supplemental bill**, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Promulgated March 2, 1842, 1 How. lix. Superseded by Rule 34, Rules of 1912, *post*, p. 199.

THE FUNCTION OF THE SUPPLEMENTAL BILL.—The function of the supplemental bill is to present material matters of fact occurring after the filing of the bill. *Mellor v. Smither*, 114 Fed. Rep. 110, 120, 52 C. C. A. 64. The matter should be strictly new, and not constitute a new cause of action. *Jenkins v. International Bank*, 127 U. S. 484, 32 L. Ed. 189. The supplemental bill is the proper pleading by which to advise the court of a purchase or transfer of interest *pendente lite*, and to bring the proper parties before the court. *Hoxie v. Carr*, 1 Summ. 173, Fed. Case 6,802. It cannot validate an original bill which fails to state a cause of action. "The rule is that if the original bill is

defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill formed upon matters which have subsequently taken place." *Simonton, J., in Putney v. Whitmire*, 66 Fed. Rep. 385, 388. If the original bill fails to set up a state of facts justifying the relief sought, or, in other words, fails to set up a cause of action then existing, a supplemental bill, based on facts occurring after the filing of the original bill, cannot be sustained." *Shiras, J., in New York Security & T. Co. v. Lincoln St. Ry. Co.*, 74 Fed. Rep. 67, 68. Such a bill may set forth facts entitling the plaintiff to other and more extensive relief than that sought in the original bill. *Sheffield & B. C. I. & R. Co. v. Newman*, 77 Fed. Rep. 787, 791, 23 C. C. A. 459.

SUPPLEMENTAL BILL—WHEN FILED.—It was suggested by Mr. Justice Story that a petition in the nature of a petition for a rehearing might pray for leave to file a supplemental bill to bring forward new evidence, and for a rehearing of the cause at the time when the supplemental bill should also be ready for hearing. *Jenkins v. Eldredge*, 3 Story 209, Fed. Case 7,267. A supplemental bill ought to be filed as soon as the new matter is discovered; if the party proceeds to a decree he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded upon facts in his possession before the decree was entered. *City of Omaha v. Redick*, 63 Fed. Rep. 1, 16, 11 C. C. A. 1.

PETITION FOR LEAVE TO FILE. Under this rule, leave to file the supplemental bill should be sought by petition. In this petition the petition should set forth the facts or circumstances entitling him to leave to file the supplemental bill, and he need not set forth in the petition the averments intended to be inserted in the supplemental bill. *Parkhurst v. Kinsman*, 2 Blatchf. 72, Fed. Case 10,758. Where the petition is filed after decree, for leave to file a supplemental bill in the nature of a bill of review, the petition should be supported by affidavit, and counter-affidavits may be filed. *Blandy v. Griffith*, 6 Fisher 434, Fed. Case 1,530. The practice, at least in the Southern District of New York, has always been liberal to the applicant, and leave to file the supplemental bill will be granted, even where the court has grave doubts as to the plaintiff's right to the relief prayed for in the supplemental bill. *Oregon & Transcontinental Co. v. Northern Pac. R. Co.*, 32 Fed. Rep. 428. But the granting or refusal of such leave is discretionary with the trial court, and will not be reviewed on appeal unless there has been a gross abuse of that discretion. *Sheffield & B. C. I. & R. Co. v. Newman*, 77 Fed. Rep. 787, 791, 23 C. C. A. 459. The objection that a supplemental bill was filed without leave of court should be raised by motion to dismiss, and cannot be raised by demurrer. *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299, 303.

Under circumstances which render it impossible to apply for leave under Rule 57, compliance with the rule will be excused, and the court may subsequently order the supplemental bill filed without leave, to stand. *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. Rep. 582, 614. (It would seem better practice to have entered the order granting leave, *nunc pro tunc*.) It is not necessary to give notice of a petition for leave to file, when the defendant has not yet entered his appearance. *Insurance Co. of N. A. v. Svendsen*, 74 Fed. Rep. 346, 350.

PROCEDURE UNDER THE SUPPLEMENTAL BILL.—The supplemental bill may be the basis of a preliminary injunction. *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. Rep. 582, 615. It may be demurred to, as in the case of an original bill. *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299. The process of *subpoena ad respondendum* is not necessary under the supplemental bill, except as to new parties brought in by it.

58.

It shall not be necessary in any bill or revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Promulgated March 2, 1842, 1 How. lxx. Now Rule 35, Rules of 1912, *post*, p. 200

Compare Order XLIX of the High Court of Chancery (August 26, 1841): "That it shall not be necessary, in any bill of revivor or supplemental bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it."

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court in the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

Promulgated March 2, 1842, 1 How. lxx. Superseded by Rule 36, Rules of 1912, *post*, p. 200.

STATUTORY PROVISIONS AS TO THE OATH.—"Section 268, the Judicial Code (Hopkins' Judicial Code, p. 218). The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." Re-enacting § 725, R. S. U. S., 1 Comp. Stat. 583, 4 Fed. Stat. Ann. p. 534, Pierce, Code, § 7361.

"Section 1750, R. S. U. S. Every secretary of legation and consular officer is hereby authorized, whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his legation, consulate, or commercial agency, to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States. Every

such oath, affirmation, affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto. If any person shall willfully commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with 'in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense; and any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person; and if any person shall forge any such seal or signature, or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction shall be imprisoned not exceeding three years nor less than one year, and fined in a sum not to exceed three thousand dollars, and may be charged, proceeded against, tried, convicted, and dealt with, therefor, in the district where he may be arrested or in custody." U. S. Comp. Stat. p. 1196, 2 Fed. Stat. Ann. p. 812.

"Section 1778, R. S. U. S. In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the Circuit Courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace." 4 Fed. Stat. Ann. p. 165.

This rule is of small practical consequence. The answer under oath is almost universally waived by the bill.

Where the answer under oath is not waived in the bill, the denials of the verified answer, as to all matters within the personal knowledge of the party answering, must be overcome by the evidence of two witnesses, or by one witness corroborated by circumstances which are equivalent in weight to another witness. *Godden v. Kimmell*, 99 U. S. 201, 206, 25 L. Ed. 431; *Vigel v. Hopp*, 104 U. S. 441, 26 L. Ed. 765; *Morrison v. Durr*, 122 U. S. 518, 30 L. Ed. 1225. In rare cases circumstances alone will suffice. *Clark's Executors v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688; *Bowden v. Johnson*, 107 U. S. 262, 27 L. Ed. 386. And documentary evidence alone may satisfy the rule. *Snow v. Hazlewood*, 157 Fed. Rep. 898, 85 C. C. A. 226.

The absence of verification is not ground for exception. The remedy is by motion to strike from the files. *Osgood v. A. S. Aloe Instrument Co.*, 69 Fed. Rep. 291. The answer may be verified by leave after it is filed. *Holton v. Guinn*,

65 Fed. Rep. 450. An answer by three defendants, verified by only two, is subject to be stricken from the files. *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199, Fed. Case 751. One jurat will suffice in an answer by two or more defendants. *Davis v. Davidson*, 4 McLean 136, Fed. Case 3,631. A corporation must answer under the corporate seal, otherwise as a natural person. It is usual to join an officer as a party when discovery is sought. *Continental Natl. Bank v. Heilman*, 66 Fed. Rep. 184.

There is nothing in the rules requiring a certificate by counsel to the merits of the answer, as required for demurrers and pleas. *McGorray v. O'Connor*, 87 Fed. Rep. 586, 31 C. C. A. 114.

ADVANTAGES OF WAIVING THE OATH.—"By not waiving the oath, you make the answer evidence against you to be overcome by two witnesses, or one with corroborating circumstances; and thus the evidence as thus presented is shaped and stated in a lawyer's office, when you may waive the oath, examine the witness and shape the evidence by cross-examination. Again, by making him answer under oath, you give his answers the strength of two witnesses, but examined as a witness, he is only equal to one. Again, if you have evidence outside of the defendant, who give to his answer the extraordinary force it carries by being sworn to, when without oath it simply creates an issue to be proved by the preponderance of evidence." *Sawyer, J., in Slessinger v. Buckingham*, 8 Sawy. 454, 17 Fed. Rep. 454.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the Court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, is required, by affidavit; and in every case where leave is so granted, the Court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Promulgated March 2, 1842, 1 How. lix. Now embodied in Rule 30, Rules of 1912, *post*, p. 186.

THE STATUTORY PROVISION.—Section 954, R. S. U. S., provides: "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or

reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form except those which, in case of demurrer, the party demurring specially sets down together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

This section of the revised statutes is usually referred to as "the statute of amendments" and of it Judge Hammond has said "to every court the statute of amendment grant the fullest power and discretion." *In re Glass*, 119 Fed. Rep. 509, 511. As to answers in equity causes, Equity Rule 60 may be properly regarded as supplementary to the statute of amendments, and as qualifying the exercise of the power granted by the statute. The statute itself has been held not to create the power to grant leave to amend, but merely to declare the inherent power of the Federal courts. *Comings v. The Ida Stockdale*, Fed Case 3,052.

WHEN THE ANSWER MAY BE AMENDED AS OF COURSE.—Rule 60 carefully draws the distinction between amendments of course, and amendments not of course.

AMENDMENTS NOT OF COURSE.—The general rule has been thus expressed by Judge Taft: "A material amendment of the answer changing the issues ought not to be permitted, after the evidence is closed, unless, either in the evidence already offered or in a showing upon affidavits, it is at least made to appear to the court that the defendant can probably sustain by his proof the amendments offered." *Ritchie v. McMullen*, 79 Fed. Rep. 522, 529, 25 C. C. A. 50. The general rule as to applications to amend answers was thus laid down by Mr. Justice Story: "When the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. * * * The whole matter rests in the sound discretion of the court. * * * It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy." *Smith v. Babcock*, 3 Sumn. 583, Fed. Case 13,008.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Promulgated March 2, 1842, 1 How. lx. Superseded by Rule 33, Rules of 1912, *post*, p. 199.

Proper practice requires that the particular matters excepted to be specified in the exceptions. It is not proper practice to restate the answer and then add "in all which particulars the plaintiff excepts to said answer," leaving it to the court the task of ascertaining what is intended to be excepted to. *Blanton v. Chalmers*, 158 Fed. Rep. 907.

Under this rule, if the complainant fails to except to a general denial, and files replication thereto, he is held to waive any objection to the form of answer. *McGorray v. O'Connor*, 37 Fed. Rep. 586, 588, 31 C. C. A. 114; *People's United States Bank v. Gilson*, 161 Fed. Rep. 286, 294, 88 C. C. A. 332. "A general denial or a negative pregnant in an answer in equity, while it is insufficient on exceptions, cannot be deemed an admission of the averments of the bill thus denied after replication, and no relief can be granted upon those averments in the absence of proof." *Sanborn, J., in People's U. S. Bank v. Gilson*, 161 Fed. Rep. 286, 294, 88 C. C. A. 332.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Promulgated March 2, 1842, 1 How. lx. No corresponding provision in Rules of 1912.

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, and order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Promulgated March 2, 1842, 1 How. lx. These exceptions are abolished by Rule 33, Rules of 1912, *post*, p. 199.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

Promulgated March 2, 1842, 1 How. lxi. Such exceptions are abolished by Rule 33, Rules of 1912, *post*, p. 199.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

Promulgated March 2, 1842, 1 How. lxi. The practice as to exceptions to the answer is abolished by Rule 33, Rules of 1912, *post*, p. 199.

REPLICATION AND ISSUE.**66.**

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed,

unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Promulgated March 2, 1842, 1 How. lxi. The practice as to replies is now fixed by Rule 31, Rules of 1912, *post*, p. 196.

"In the national courts the complainant in equity does not waive any substantial insufficiency of the facts set forth in a plea or answer to constitute a defense by filing a replication and taking the proofs." Sanborn, J., in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 150 Fed. Rep. 1, 5, 84 C. C. A. 167, citing *Pearce v. Rice*, 142 U. S. 28, 42, 35 L. Ed. 925; *Green v. Bogue*, 158 U. S. 478, 500, 39 L. Ed. 1061; *Soderberg v. Armstrong*, 116 Fed. Rep. 709.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding Judge of the Court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the Court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit, and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court,

to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court in term time, or to a judge in vacation, for special reasons, satisfactory to the Court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the Court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties or by leave of Court first obtained on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing, shall be paid in the first instance by the party calling the witness and shall be imposed by the Court, as part of the costs, upon such party as the Court shall adjudge should ultimately bear them.

Upon due notice given, as prescribed by previous order, the Court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing.

First paragraph promulgated March 2, 1842, 1 How. lxii; amended December Term, 1854, 17 How. vii.

Second, third, fourth, fifth, and sixth paragraphs promulgated December Term, 1861, 1 Black, 6; amended October Term, 1890, 139 U. S. 707.

Seventh paragraph promulgated December Term, 1869, 9 Wall. viii.

Eighth paragraph and the amended 67th Rule, promulgated May 2, 1892, 144 U. S. 689.

Ninth paragraph promulgated May 15, 1893, 149 U. S. 702.

The practice as to testimony is now fixed by Rules 40, *et seq.*, Rules of 1912, *post*, p. 208.

68.

Testimony may also be taken in the cause after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a com-

mission or by a new deposition taken under the acts of Congress if a court or Judge thereof shall, under all the circumstances, deem it reasonable.

Promulgated March 2, 1842, 1 How. lxii. Superseded by Rule 54, Rules of 1912, *post*, p. 216.

Compare Rule 25, Rules of 1822. This rule has been held to modify § 803, R. S. U. S., to the extent that no testimony may be taken under that section unless and until the cause is at issue. *Stevens v. Missouri, K. & T. R. Co.*, 104 Fed. Rep. 934. Rule 54, Rules of 1912, now makes the condition imperative.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing and a copy thereof entered into the order books or indorsed upon the deposition or testimony.

Promulgated March 2, 1842, 1 How. lxii. As to time within which depositions may now be taken, see Rule 47, Rules of 1912, *post*, p. 209.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.

Promulgated March 2, 1842, 1 How. lxiii. Superseded by Rule 47, Rules of 1912, *post*, p. 209.

"This rule was not originally intended for the examination of a party; and it may be questioned whether, under any circumstances, it ought to be extended to the case of a party propounding himself as a witness. But it certainly cannot legalize" testimony taken under an *ex parte* order obtained on filing the bill and before process issued, the testimony being that of the complainant and his wife. *Eslava v. Mazange's Admr.*, 1 Woods 623, Fed. Case 4,527.

FORM OF THE LAST INTERROGATION.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered and stated in substance thus: "Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Promulgated March 2, 1842, 1 How. lxiii. The present practice as to interrogatories is fixed by Rule 58, Rules of 1912, *post*, p. 222.

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

Promulgated March 2, 1842, 1 How. lxiv. Superseded by Rule 58, Rules of 1912, *post*, p. 222.

"There can be no cross-bill without an original bill. When the original controversy has been settled and dismissed, the dismissal carries with it the dismissal of the cross-bill, unless affirmative collateral relief be asked for, and the fact that an original bill has once existed, but does so no longer, can give no ground for filing a cross-bill which, would be in effect only an original bill or bill of review." *Dayton, J.*, in *Ulman v. Jaeger's Adm'r*, 155 Fed. Rep. 1011, 1015.

The cross-bill "must relate to the transactions set up in the original bill." *Wellborn, J.*, in *Newton v. Gage*, 155 Fed. Rep. 598, 609.

"A cross-bill is like an original bill, except that it must rest on what is necessary to the defense of an original bill." *Brandon Mfg. Co. v. Prime*, Fed. Case 1,810.

"A controversy between codefendants to a bill in equity cannot be a matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill," *Weaver v. Alter*, Fed. Case 17,308.

"If it be true that Vannerson and Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross-bill filed to an original bill against them both, which he could not have obtained by original bill here. In other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies *inter sese* in this court. Most clearly, if the plea is true, Vannerson had no standing in this court as a suitor by original bill. He prays no relief against Bates, Reed & Cooley. His cross-bill has no relation to the subject-matter of their suit, nor is this cross-bill in any sense a reply to allegations of the original bill. The Circuit Court of the United States is limited in its jurisdiction, and, when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted." *Vannerson v. Leverett*, 31 Fed. Rep. 377.

The function of the cross-bill has been the subject of many adjudications. "A cross-bill," says Mr. Justice Story (Eq. Plead. § 389), '*ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.' And, as illustrative of cross-bills for relief, he says (§ 392): 'It also 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 to be litigated by the proper parties and upon the proper proofs.'" *Morgan's Co. v. Texas Central Ry. Co.*, 137 U. S. 200, 34 L. Ed. 625.

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arises out of the matters charged in the original bill. The fact that a cross-bill fairly tends to accomplish either of these purposes is generally a sufficient ground for its interposition. It must seek equitable relief, but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject-matter cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject-matter. The issues raised by the cross-bill must be so clearly connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross-bill." *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. Rep. 261, 26 C. C. A. 389.

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it." *Ayres v. Carver*, 58 U. S. 591, 594, 15 L. Ed. 179.

CAN AFFIRMATIVE RELIEF BE GRANTED A RESPONDENT IN THE ABSENCE OF A CROSS-BILL?—The general rule is that no affirmative relief will be granted a respondent in a suit in equity except upon a cross-bill. *Chapin v. Walker*, 6 Fed. Rep. 794; *Corbin v. E. Taussig & Co.*, 132 Fed. Rep. 662, 666.

But there would appear to be an exception to this rule where the chancellor deduces from the testimony that equity requires an award to the respondent; in which case, in the absence of the cross-bill, the relief prayed for by the complainant may be granted upon condition that the complaint do equity. In such a case Judge Riner has said: "It is true that no affirmative relief is sought by the defendant, but, I take it, the rule is well settled that a court of equity may always condition its grant of relief to those who seek its aid by the requirement that they shall do equity to their opponents, and I think equity requires that the defendants be allowed a reasonable compensation for his services from and after the date of the contract. If counsel and the parties can agree upon this amount, the court will adopt it; if not, the case will be sent to the master for the purpose of taking proof upon that question." *Andrews v. Connolly*, 145 Fed. Rep. 43, 46.

WHEN THE CROSS-BILL MAY BE FILED.—"When a cross-bill is necessary to the complete determination of the matters already in litigation, the court may permit one to be filed at any time before the hearing. * * * The courts generally disapprove of the filing of a cross-bill after the original suit has been heard and the merits have been passed on. *Bronson v. Ry. Co.*, 67 U. S. 524, 532, 17 L. Ed. 359." *Shelby, J.*, in *Huff v. Bidwell*, 151 Fed. Rep. 563, 566, 81 C. C. A. 43. The general rule is that "there should be as little delay as possible in filing bills of this kind." Mr. Chief Justice Fuller, in *Morgan's La. & Tex. R. & S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 34 L. Ed. 625. The opinion just quoted from states that the trial court "could have directed it to be filed even at the hearing;" thus expressing the usual time limit applicable.

ANSWER AND CROSS-BILL IN A SINGLE PLEADING.—And an answer and a cross-bill may be combined in our paper or document, filed under a single cover. *United Cigarette Mach. Co. v. Wright*, 132 Fed. Rep. 195, 198. When so filed, however, the answer and the cross-bill must be distinct. *Ritchie v. McMullen*, 79 Fed. Rep. 522, 529, 25 C. C. A. 50, citing *Hubbard v. Turner*, 2 McLean 519, Fed. Case 6,819; *Morgan v. Tipton*, 3 McLean 339, Fed. Case 9,809.

CROSS-BILL, WHEN DEMURRABLE.—A cross-bill which seeks no discovery, and sets up no defense which might not as well have been taken by answer, will be held bad on demurrer. *Miller & Lux v. Rickey*, 146 Fed. Rep. 574, 578; follow-

ing *American & G. M. & I. Co. v. Marquam*, 62 Fed. Rep. 960, in which the court said, "The cross-bills present mere matters of defense. Such is not their office. Such a bill, seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed, with costs." But under extraordinary circumstances the court will retain jurisdiction under a pleading entitled as a cross-bill although the sole defendant named in it was not a party to the original suit, and although it does not "relate to any subject which was involved in that suit, or seek any relief or discovery affecting it," and a demurrer thereto will be overruled. *Lavis v. Consumers' Brewing Co.*, 106 Fed. Rep. 435, 436.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

Promulgated March 2, 1842, 1 How. lxiv. No corresponding provision exists in Rules of 1912. As to references to the master, see Rule 59, Rules of 1912, *post*, p. 237.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Promulgated March 2, 1842, 1 How. lxiv. Superseded by Rule 59, Rules of 1912, *post*, p. 237.

See Rule 29, Rules of 1822, which required the master to assign a day for hearing.

75.

Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the

master shall be at liberty to proceed *ex parte*, or in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the Court or judge the reason for any delay.

Promulgated March 2, 1842, 1 How. lxiv. Now Rule 80, Rules of 1912, *post*, p. 237.

76.

In the reports made by the master to the Court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer, shall be identified, specified and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

Promulgated March 2, 1842, 1 How. lxv. Now Rule 61, Rules of 1912, *post*, p. 238.

Compare Order XLVIII of the High Court of Chancery (August 26, 1841): "That in the reports made by the masters of the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used."

An order of reference may or may not require the master to send up the testimony. When it does not so require him, his conclusions of fact cannot be disturbed. *Sheffield & B. C. I. & R. Co. v. Gordon*, 151 U. S. 285, 293, 38 L. Ed. 164. Exceptions to his report must be definite and specific. *Ibid*.

Whenever requested by either party, the master should specify and identify the evidence in such manner as to inform the court on what state of facts his conclusions are based. *Greene v. Bishop*, 1 Cliff. 186, Fed. Case 5,763; *Kansas Loan & Trust Co. v. Electric R. L. & P. Co.*, 108 Fed. Rep. 702.

77.

The master shall regulate all the proceedings in every hearing before him upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all

matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Promulgated March 2, 1842, 1 How. lxv. Now Rule 62, Rules of 1912, *post*, p. 239.

Upon the taking of testimony before the master the rule of *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, applies; where the objection is that the testimony sought to be elicited is irrelevant and immaterial, the questions should be answered, and the relevancy and materiality be ruled on at time of hearing. *Chadeloid Chemical Co. v. Chicago Wood-Finishing Co.*, 173 Fed. Rep. 797. But where a question attempts to reach a trade secret of the defendant, the witness will not be compelled to answer. *Chadeloid Chemical Co. v. Chicago Wood-Finishing Co.*, 173 Fed. Rep. 797.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the Court shall, in its discretion, deem it advisable.

Promulgated March 2, 1842, 1 How. lxvi. Now embodied in Rule 52, Rules of 1912, *post*, p. 215.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Promulgated March 2, 1842, 1 How. lxvi. Now Rule 63, Rules of 1912, *post*, p. 240.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding, in any cause or matter, may be used before the master.

Promulgated March 2, 1842, 1 How. lxvi. Now Rule 64, Rules of 1912, *post*, p. 243.

81.

The master shall be at liberty to examine any creditor, or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

Promulgated March 2, 1842, 1 How. lxvi. Now Rule 65, Rules of 1912, *post*, p. 244.

Contests between the creditors under creditors' bills are primarily conducted before the master, and his findings are deemed *prima facie* correct. *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 773, 782. It is never necessary for him to report all the evidence taken unless required by the order of reference. *Weiss v. Haight & Freese Co.*, 148 Fed. Rep. 399.

82.

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment, and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case, shall be fixed

by the **circuit court**, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Promulgated March 2, 1842, 1 How. lxvii. Amended April 16, 1894, 152 U. S. 709. Superseded by Rule 68, Rules of 1912, *post*, p. 246.

APPOINTMENT.—Under this section the whole matter of appointment of masters, standing or special, **is left to the discretion of the court**. VanHook v. Pendleton, 2 Blatchf. 85, Fed. Case 16,852. When making an order of inspection of books and papers before trial the court may appoint a special master to see that the provisions of the order of inspection are complied with, and to see that the plaintiff does not get sight of anything not legitimately necessary for the purposes of the inspection. Motley, Green & Co. v. Detroit Steel & Spring Co., 174 Fed. Rep. 734. Agreements of counsel as to who shall be appointed, and the amount of his compensation, were vigorously condemned by Judge Jenkins in Finance Committee v. Warren, 82 Fed. Rep. 525, 528, 27 C. C. A. 472. The failure of the master to take an oath or file a bond does not invalidate his appointment. Elgutter v. Northwestern Mut. Life Ins. Co., 86 Fed. Rep. 500, 30 C. C. A. 218.

The trial court may refer the record to a master, without the consent of the parties to read and examine the evidence as taken, and report the facts to the court, provided that the court makes his findings as a result of a personal consideration of the proofs. Mastin v. Noble, 157 Fed. Rep. 506, 85 C. C. A. 98; Babcock v. DeMott, 160 Fed. Rep. 882, 885, 88 C. C. A. 64.

WHO INELIGIBLE FOR APPOINTMENT.—"Section 67, The Judicial Code (Hopkins' Judicial Code, p. 87). No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court."

Formerly § 7, Act of March 3, 1887, 24 Stat. at L. 555, as amended, 25 Stat. at L. 437, 1 Comp. Stat. p. 579, 4 Fed. Stat. Ann. p. 69. That the appointment of a person as master, upon the ground that he was appointed in violation of this section cannot be raised in a collateral attack upon a sale in which he participated, see Seaman v. Northwestern Mutual Life Ins. Co., 86 Fed. Rep. 493, 496, 30 C. C. A. 212; Elgutter v. Northwestern Mut. Life Ins. Co., 86 Fed. Rep. 500, 30 C. C. A. 218.

"Section 68, The Judicial Code (Hopkins' Judicial Code, p. 87). No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment."

This section was originally embodied in the Act of March 3, 1879, ch. 183, 4 Fed. Stat. Ann. p. 81. The failure to assign the reasons in the order of appointment has been held to be immaterial, where the court making the appointment

had determined that the special reasons did exist. *Briggs v. Neal*, 120 Fed. Rep. 224. The consent or acquiescence of the parties is a sufficient special reason under this section. *Fischer v. Hayes*, 22 Fed. Rep. 92.

COMPENSATION.—The amount of the master's compensation is preferably agreed upon by counsel. *Finance Committee v. Warren*, 82 Fed. Rep. 525, 528, 27 C. C. A. 472. The underlying principle as to the amount of compensation is stated by Judge Morris to be "that the circumstances of the service shall regulate the compensation, and that the parties who are to pay shall be charged only with a fair allowance for the service." *Pleasants v. Southern Ry. Co.*, 93 Fed. Rep. 93, 95, 35 C. C. A. 226. "The allowance of compensation to masters is so largely a matter of discretion in the judge of the court of original jurisdiction that courts of error are reluctant to disturb" the allowance. *McCormick I*, in *Brown v. King*, 62 Fed. Rep. 529, 10 C. C. A. 541. Judge Butler suggested that, the master being an aid to the court in the discharge of its judicial functions, his compensation might properly be measured by the standard of judicial salaries. *Middleton v. Bankers' & Merchants' Tel. Co.*, 32 Fed. Rep. 524.

The method of payment of the master's costs in the first instance is purely discretionary with the court, and largely determined by local practice. **Probably as equitable a mode as any is for the court to make the master an allowance from time to time and direct each party to pay one-half the amount into the registry, the court finally adjudging, in its decree upon the master's report, the ultimate liability for his costs.** In one case—a rather quaint opinion—the court held that, as defendant had to account, he should bear the entire costs of the reference in the first instance. *Urner v. Kayton*, 17 Fed. Rep. 539. Judge Severens announced that "the general rule in cases of reference is for each party to pay his own costs as the proceeding goes forward, and for the court ultimately to adjudge upon whom the payment of such costs ought equitably to be devolved." *United States Printing Co. v. American Playing Card Co.*, 81 Fed. Rep. 506. Judge Lowell announced the practice in his district to be that the plaintiff pay the costs in the first instance (*MacDonald v. Shepard*, 10 Fed. Rep. 919), and Judge Lacombe made an order as follows: "When a party calls a witness, he is to pay the expenses of taking direct and redirect examination of that witness. His adversary is to pay the expense of taking the cross and recross of the same witness. As to apportioning master's fees: When a session is taken up entirely with taking testimony, the expenses of taking which one side is to bear, the master's fees for that session are to be paid by that side. If, however, the session is taken up partly with taking testimony which one side is to pay for, and partly with taking testimony which the other side is to pay for, the master's fee for that session is properly chargeable, in equal shares, to both, irrespective of the proportionate amount of time consumed by both. Sessions consumed in whole or in part by argument may be settled for in the same way. Time consumed in consideration and decision of the questions involved and in the preparing the report, is chargeable, in equal shares, to both parties." *Brickill v. Mayor of New York*, 55 Fed. Rep. 565, 566. From all of which we see that there is no settled practice as to the payment of the master's costs in the first instance, and the matter is entirely within the control and regulation of the court. Where there is a fund in the registry of the court, the master's compensation may, of course, be paid directly from that fund. *Edgell v. Felder*, 99 Fed. Rep. 324, 39 C. C. A. 540. In certain instances a salaried basis is

adopted. *Pleasants v. Southern Ry. Co.*, 93 Fed. Rep. 93, 95, 35 C. C. A. 226.

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held hereafter, by adjournment or otherwise.

Promulgated March 2, 1842, 1 How. lxvii. Now Rule 60, Rules of 1912, *post*, p. 244.

The master's findings of fact will not be disturbed unless the court has before it all of the evidence taken by him, or at least all of the evidence which was before him relative to the particular finding or findings which are challenged. *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103, 112, 76 C. C. A. 73, 82; *Wheeler v. Abilene Natl. Bank Bldg. Co.*, 159 Fed. Rep. 391, 392, 80 C. C. A. 477; *Sheffield & B. Coal, I. & R. Co. v. Gordon*, 151 U. S. 285, 293, 38 L. Ed. 164.

The master's findings of fact must be taken *prima facie* to be correct. *McNulty v. Wiesen*, 158 Fed. Rep. 221. Every reasonable presumption is in their favor, and they are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. *Tilghman v. Proctor*, 125 U. S. 149, 31 L. Ed. 664; *Callaghan v. Myers*, 128 U. S. 666, 32 L. Ed. 547; *Crawford v. Neal*, 144 U. S. 596, 36 L. Ed. 552; *Davis v. Schwartz*, 155 U. S. 636, 39 L. Ed. 289; *Girard Ins. Co. v. Cooper*, 162 U. S. 538, 40 L. Ed. 1062; *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 158 Fed. Rep. 171.

It was argued before Judge Taft that this rule deprived the court of jurisdiction to permit the master to withdraw his report, once filed. The court held there was nothing in the 83d Rule "which prevents action of the court upon the report of the master, summary, discretionary, or otherwise." *National Folding-Box Co. v. Dayton Paper Novelty Co.*, 91 Fed. Rep. 822, 824.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

Promulgated March 2, 1842, 1 How. lxviii. Superseded by Rule 67, Rules of 1912, *post*, p. 245.

This rule requires the aid of a "standing rule" of the lower court before it can become operative. In the absence of such a rule the court cannot assess any allowance for counsel fees, to be awarded the prevailing party. *Garretson v. Clark*, 17 Blatchf. 256, Fed. Case 5,249.

Rule 67, Rules of 1912, obviates this requirement and fixes the amount of costs.

DECREEES

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before an actual enrollment thereof be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Promulgated March 2, 1842, 1 How. lxviii. Now Rule 72, Rules of 1912, *post*, p. 249.

Decrees are deemed recorded and enrolled as of the term in which they are passed. *Whiting v. Bank of the United States*, 13 Peters, 6, 13, 10 L. Ed. 33, 37; affirming 1 McLean 249, Fed. Case 17,576. Under this rule, even under conclusive proof that clerical error exists, a judge will ordinarily, after a great lapse of time, refuse to order the correction of a decree entered by another judge; and should never do so when it is not clear that the error was purely clerical and not judicial. *Hicklin v. Marco*, 64 Fed. Rep. 609. Where the decree sought to be corrected directed the sale of land not described in the bill, the motion to correct was denied, upon the ground that a bill of review offered the only safe method to correct the error. *Robinson v. Rudkins*, 28 Fed. Rep. 8.

PRACTICE OF THE ENGLISH HIGH COURT OF CHANCERY.—The English practice, at the time of the adoption of this rule, has been thus described: "If there is error in a decree or in a decretal order, or if any of the parties are dissatisfied with the judgment pronounced by such decree or order, the court has provided a remedy according to the state in which the proceedings are, at the time when the alleged grievance is sought to be remedied.

1st. Clerical mistakes or errors arising from any accidental slip or omission, may, at any time before enrollment, be corrected upon petition, without the form and expense of a rehearing. 2d. Errors not arising from slip or omission may be corrected before enrollment, either by presenting a petition for liberty to rehear the cause before the same jurisdiction pronouncing the decree; or, if the decree was pronounced by the Master of the Rolls, or the Vice Chancellor, by a petition of appeal to the Lord Chancellor; but if their decree has been enrolled, the same must be corrected by an appeal to the House of Lords. 3d. If new matter is discovered after the decree, and the decree has not been enrolled, it must be set right by a supplemental bill, in the nature of a bill of review;

and, lastly, if the decree has been enrolled, and it is sought to be corrected on discovery of new matter, or on error apparent, the remedy is by bill of review." Smith's Chancery Practice, 1st American from the 2d English Ed. Vol. 2, p. 14.

ORDER 45, (Orders of April 3, 1828, Amended November 23d, 1831): "That clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before enrollment be corrected upon petition, without the form and expense of a rehearing."

86.

In drawing up decrees or orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "**The cause came on to be heard (or to be further heard, as the case may be) at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:**" [Here insert the decree or order.]

Promulgated March 2, 1842, 1 How. lxviii. Now Rule 71, Rules of 1912, *post*, p. 249.

This rule does not prohibit recitals of fact in the decree; which "may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific." Mr. Justice Bradley, in *Putnam v. Day*, 22 Wall. 60, 22 L. Ed. 764. Judge Sage approved this practice "to prevent further question or doubt as to the respective rights and interests of the parties, and remove * * * every cloud from the title." *McClaskey v. Barr*, 48 Fed. Rep. 130, 131.

GUARDIANS AND PROCHAIN AMIS.

87.

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the Court may direct for the protection of infants and other persons.

Promulgated March 2, 1842, 1 How. lxviii. Now Rule 70, Rules of 1912, *post*, p. 249.

See Rule 27, Rules of 1822.

The disability or incompetency of parties is universally provided for in practice by some such method as this rule dictates.

INCOMPETENCY OR INCAPACITY OF THE PLAINTIFF.—Where an infant complainant is in court by an original bill, process is not required upon a cross-bill against him in the same court. *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047, 1057. It is not necessary to exhibit the guardian's authority with the bill; the court will inquire into his authority at any time. *Ibid.* The next friend for the infant must have no personal interest in the litigation, no matter how remote or indirect. *Jarvis v. Crozier*, 98 Fed. Rep. 753, 755. "The suit must be brought in the name of the infant, and not in that of the next friend." Mr. Justice Gray, in *Morgan v. Potter*, 157 U. S. 195, 39 L. Ed. 670. Admissions by a guardian *ad litem* are not binding upon the infant and a decree based solely upon them will not bind the infant. *White v. Miller*, 158 U. S. 128, 39 L. Ed. 921. The pauper's oath taken by either the next friend or the infant will not justify leave to sue as a poor person. *Roy v. Louisville, etc., R. Co.*, 34 Fed. Rep. 276. The acceptance by a next friend of a release not in conformity to the decree does not bind the infant. *Morris v. Harmer*, 7 Peters 554, 8 L. Ed. 781.

INCOMPETENCY OR INCAPACITY OF THE DEFENDANT.—It is error in the court to proceed to a decree against an incompetent or incapable defendant. *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840. A father filing an answer for his child as guardian *ad litem*, though not under appointment by the court, binds the infant defendant. *Simmons v. Baynard*, 30 Fed. Rep. 532. Whether infant defendants should be represented by a guardian *ad litem* or by a general guardian, is a matter of local practice. *Colt v. Colt*, 111 U. S. 566, 28 L. Ed. 520. A defendant present in court and not objecting when a guardian *ad litem* is appointed for him, will not be heard to collaterally attack a decree entered in the case, upon the ground that he was of age when the appointment was made. *Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105. Infant defendants are bound by a consent decree, even though prior inquiry is not made by the court as to whether it was for their benefit; and in the absence of proof of fraud, imposition, or error, the ignorance and want of business ability of the guardian, especially when able counsel participated, is no ground to invalidate the decree. *Thompson v. Maxwell Land Grant & R. Co.*, 168 U. S. 451, 462, 467, 42 L. Ed. 539, 543, 545.

EFFECT OF STATE LEGISLATION.—A State statute permitting a married woman to sue in her own name does not govern the Federal Court of Equity; her bill is demurrable, and she must proceed by next friend, appointed under Rule 87. *Wills v. Pauly*, 51 Fed. Rep. 257.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition

may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Promulgated March 2, 1842, 1 How. lxix. Now Rule 69, Rules of 1912, *post*, p. 246.

FUNCTION OF THE PETITION FOR REHEARING.—Mr. Justice Story took the position that on a rehearing no new evidence could be added, and no evidence gone into which was in the case at the original hearing, and capable of being then produced. That if proof of an exhibit had been omitted, or a document omitted to be read, such proof might be supplied, or the document read, on rehearing. *Jenkins v. Eldredge*, 3 Story 299, Fed. Case 7,267.

89.

The Circuit Court (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Rendered obsolete by the Judicial Code, which abolished the Circuit Court. Superseded by Rule 79, Rules of 1912, *post*, p. 257.

90.

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Promulgated March 2, 1842, 1 How. lxix. No corresponding provision exists in Rules of 1912.

This rule has been considered in the introduction to this work. Compare Rule 32, Rules of 1822, *ante*, under which the English practice was to control in all cases to which our rules did not apply. Rule 90 "simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the High Court of Chancery is to be applied, not as controlling, but, simply as furnishing just analogies to regulate the practice." *Sawyer, J.*, in *Lewis v. Schainwald*, 48 Fed. Rep. 492, 493. Thus, the order of argument upon a plea was decided by reference to the English practice. *Rhode Island v. Massachusetts*, 14 Peters 210, 216, 10 L. Ed. 423, 426. The English practice has been employed in regulating judicial sales. *Blackburn v. Selma R. Co.*, 3 Fed. 689, 694. Mr. Justice Woodbury

declined to follow the English practice as to granting rehearings on certificates of cause by counsel, as not adapted to local circumstances and local convenience. *Emerson v. Davies*, 1 Woodb. & M. 21, Fed. Case 4,437. The practice of appointing masters and examiners follows the English practice. *Van Hook v. Pendleton*, 2 Blatchf. 85, Fed. Case 16,852.

Under this rule, it was held that, as a matter of "local circumstance," a married woman could maintain a suit for patent infringement without joining her husband, in view of the separate property act of the State in which the suit was brought. *Lorillard v. Standard Oil Co.*, 2 Fed. Rep. 902. A motion to refer pleas to a master to take proofs, was granted on the authority of the English practice. *Emma Silver Mining Co. v. Emma Silver Mining Co.*, 1 Fed. Rep. 39, 44.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Promulgated March 2, 1842, 1 How. lxix. Now Rule 78, Rules of 1912, *post*, p. 257.

THE STATUTORY PROVISION.—Section 1, R. S. U. S. "A requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." (1 Comp. St. p. 3, 7 Fed. Stat. Ann. 134, Pierce, Code, §§ 11, 187),

"A Federal judicial officer, either by Act of Congress or as an incident to his office, has the power to administer oaths. This power, however, can only be exercised within the jurisdiction of the Federal government, and in cases where an oath is required or sanctioned by the laws of that government." *McLean, J.*, (dissenting), *United States v. Bailey*, 9 Peters 238, 260, 9 L. Ed. 113.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Promulgated April 18, 1864, 1 Wall. vii. Superseded by Rule 10, Rules of 1912, *post*, p. 151.

This rule "has not changed the essential nature of the decree for foreclosure and sale;" it is "intended to obviate the necessity of a separate action" for a

deficiency judgment. *Omaha Hotel Co. v. Kountze*, 107 U. S. 378, 27 L. Ed. 609. The word "may" in this rule is mandatory and the complainant is entitled to his deficiency judgment as a matter of right. *Northwestern Mutual Life Ins. Co. v. Keith*, 77 Fed. Rep. 374, 23 C. C. A. 196. A special prayer for a judgment for such deficiency as may be found to exist while the proper practice, is not essential, and such judgment may be entered under the prayer for general relief. *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 79 Fed. Rep. 179, 188, 24 C. C. A. 572. The case made by the bill must, however, show the amount to be due, or a judgment cannot properly be entered. *Ohio Central R. R. Co. v. Central Trust Co.*, 133 U. S. 83, 33 L. Ed. 561.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

Promulgated January 13, 1879, 97 U. S. 7, Otto vii. Now Rule 74, Rules of 1912, *post*, p. 251.

SUPERSEDEAS.—"Section 262, The Judicial Code (Hopkins' Judicial Code, p. 216). The Supreme Court and the district courts shall have power to issue writs of *scire facias*. The Supreme Court, the Circuit Courts of Appeals, and the district courts shall have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Re-enacting § 716, R. S. U. S., 1 Comp. Stat. p. 580, 4 Fed. Stat. Ann. p. 493, Pierce, Code, § 7352.

Much of the writing, judicial and extra-judicial, about *supersedeas*, is of no practical value. It may be doubted whether the above rule was wisely adopted, or added anything to the equity practice. As it is applied, it means nothing. The judge who participates in the decision and allows the appeal always had the power to interrupt or modify the operations of his decree. Should he refuse to grant *supersedeas* the application may be made to the Appellate Court. If he be a district judge, a circuit judge who did not participate in the decision has been known to grant *supersedeas*. The reason for the adoption of Rule 93 was thus given by Mr. Chief Justice Waite. "This court no doubt has the power to modify an injunction granted by a decree below in advance of a final hearing of an appeal on its merits. An application to that effect was made us at the October Term, 1878, in the case of the Sandusky Tool Co. v. Comstock, and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case, and necessarily take much time, we promulgated

the present Equity Rule 93." *Leonard v. Ozark Land Co.*, 115 U. S. 465, 29 L. Ed. 445. Section 716, R. S. U. S. authorizes the Supreme Court to issue the writ of *supersedeas*. *Hardeman v. Anderson*, 45 U. S. (4 How.) 640, 11 L. Ed. 1138; *Ex parte Milwaukee & Minn. Ry. Co.*, 5 Wall. 188, 18 L. Ed. 676; In the matter of *Claassen*, 140 U. S. 200, 35 L. Ed. 409. The power to grant a *supersedeas* is discretionary. *Timolat v. Phila. Pneumatic Tool Co.*, 130 Fed. Rep. 903, 904. In one case it was held that under § 7 of the Act of March 3, 1891, *supersedeas* was a matter of right (*Societe Anonyme v. Blount*, 51 Fed. Rep. 610); but that holding has been overruled. *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.*, 72 Fed. Rep. 545, 548, 19 C. C. A. 25; *In re Haberman Mfg. Co.*, 147 U. S. 525, 530, 37 L. Ed. 266. Being discretionary, it cannot be controlled by *mandamus*. *In re Haberman Mfg. Co.*, 147 U. S. 525, 530, 37 L. Ed. 266.

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States, jurisdiction of a case which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

Promulgated January 23, 1882, 104 U. S. ix. Now embodied in Rule 27, Rules of 1912, *post*, p. 172.

THE RULE FOLLOWS THE REQUIREMENTS OF THE ADJUDICATIONS PRIOR TO ITS PROMULGATION.—"As to the allegations of the bill, the rule requires nothing substantially new. The only really new thing required by it is that the allegations of the bill shall be verified by oath. The English and American cases preceding the promulgation of the rule established, according to the exposition in *Hawes v. Oakland*, (104 U. S. 450, 26 L. Ed. 827), a principle which rendered it necessary for a stockholder filing a bill against his own company and other parties, for relief in behalf of his company, to allege in substance all the facts required by the rule. The rule, except as to the provision requiring the verification of the bill by oath, is, in effect, merely confirmatory of what was by correct practice before required. It does not, therefore, in any manner alter or modify the rule concerning the alignment of parties stated in the Removal Cases (100 U. S. 457, 25 L. Ed. 593) and in *Barney v. Latham* (103 U. S. 205, 26 L. Ed. 514)." *Lanning, J.*, in *Groel v. United Electric Co.*, 132 Fed. Rep. 252, 257.

DOES THE RULE APPLY TO CAUSES REMOVED FROM THE STATE COURTS?—It has been expressly held that "Rule 94 has reference to suits commenced originally in the national courts, and was not intended to bar the removal of a suit in equity from a State court;"¹ and again, "Rule 94 * * * has no technical force in a case removed from a State court."² But these cases have been negated, with what appears the sounder reasoning, in some of the later cases.³

EFFECT OF FAILURE TO COMPLY WITH THE RULE.—A bill failing to comply with the rule is demurrable.⁴ It has also been held that non-compliance with the rule is jurisdictional, and the court may dismiss the bill of its own motion,⁵ or the defendants may raise the objection by answer;⁷ but the Supreme Court has expressly held the contrary, saying that the defense of non-compliance with the 94th Rule "does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain (his) bill," and the question should, therefore, be raised by demurrer.⁸

VERIFICATION.—Bills of the class specified by Rule 94 are the only bills in equity to which the affidavit is a positive requirement. "In the Federal courts, whenever a bill for an injunction is to be used as evidence either upon a motion for preliminary injunction, or in any other way, it must be verified; but there is no imperative rule requiring verification of the bill, at the time it is signed, which prays for an injunction."⁹

CREDITORS' BILLS NOT WITHIN THE RULE.—Rule 94 does not apply to a bill filed by creditors joined with stockholders.¹⁰

"RIGHTS WHICH MAY PROPERLY BE ASSERTED BY THE CORPORATION."—"The rule applies only to cases involving such rights; it does not apply to a bill to enjoin the corporation from raising money on its bonds."¹¹

PLAINTIFF'S STOCK OWNERSHIP.—The object of the rule is to prevent actions of the character under consideration being brought by persons who buy stock for the purpose of extortion by litigation—hence the required allegation "that

¹ Hanford, J., in *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. Rep. 909, 913.

² Hallett, J., in *Evans v. Union Pac. Ry. Co.*, 58 Fed. Rep. 497, 500; to the same effect see *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280, 282.

³ *Venner v. Great Northern Ry. Co.*, 153 Fed. Rep. 408, 410, 418; *Hitchings v. Cobalt Central Mines Co.*, 189 Fed. Rep. 241.

⁵ *Venner v. Great Northern Ry. Co.*, 153 Fed. Rep. 408, 418.

⁶ *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232, 242.

⁷ *Ibid*; *Bumber v. Calivada Colonization Co.*, 110 Fed. Rep. 58.

⁸ *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410, 412.

⁹ *Shipman, J.*, in *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618, 623, 9 L. R. A. 433.

¹⁰ *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. Rep. 321, 323.

¹¹ *Lee v. Union Pac. Ry. Co.*, 17 Fed. Rep. 273.

the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law." The bill must comply strictly with this requirement.¹²

NEGATING COLLUSION.—The bill and proof should preferably show the absence of collusion,¹³ but the defense of collusion requires proof.¹⁴

"EFFORTS OF THE PLAINTIFF."—This means the efforts of "the plaintiff," not of others, to secure redress in the ordinary mode.¹⁵ The effort must be earnest—not simulated.¹⁶ But the demand will be excused where the facts show that demand would have been "an idle ceremony," or that the guilty agents of the corporation should not have been entrusted with the necessary suit.¹⁷

MERE TECHNICAL COMPLIANCE WITH THE RULE INSUFFICIENT.—"It must not be understood that a mere technical compliance with the * * * rule is sufficient, and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. The court will examine the bill in its entirety, and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit."¹⁸ This is but the application of the general rule; "it is well established that, in a suit in equity between parties, in which fraud, oppression, and undue influence are charged, the court is not concluded by that which appears on the face of the papers, but may institute an inquiry into the real facts of the transaction."¹⁹

¹² Robinson v. West Virginia Loan Co., 90 Fed. Rep. 770, 772; Dimpfel v. Ohio & M. Ry. Co., 110 U. S. 209, 28 L. Ed. 121.

¹³ Detroit v. Dean, 106 U. S. 537, 27 L. Ed. 300; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. Rep. 299, 306, 33 C. C. A. 517.

¹⁴ Mills v. Chicago, 127 Fed. Rep. 731, 735.

¹⁵ Daunemeyer v. Coleman, 11 Fed. Rep. 97, 101.

¹⁶ Robinson v. West Virginia Loan Co., 90 Fed. Rep. 770, 772.

¹⁷ Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. Rep. 299, 306, 33 C. C. A. 517; Maeder v. Buffalo Bill's Wild West Co., 132 Fed. Rep. 280, 284.

¹⁸ Mr. Justice Brewer in Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 463, 47 L. Ed. 256, 259.

¹⁹ Mr. Justice Brewer, in Wagg v. Herbert, 215 U. S. 546, 551; 54 L. Ed. 321, 324.

The New Equity Rules.

THE NEW EQUITY RULES OF 1912.

RULE 1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES— ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Takes the place of former Rules 1 and 3, *ante*, pp. 65, 66.

In the Judicial Code the following provisions are found:

Section 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct and award at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the courts.

2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

This rule is a substitute for former Rule 2, *ante*, p. 66.

The Central Office of the English Supreme Court is regulated by Order 61, The Annual Practice, 1911, p. 1037.

The above rule makes no mention of rule-day, as did former Rule 2.

3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.



This is a new rule. The "Order Book" was required by the former rules; the "Equity Docket" was not required by rule, but was usually maintained as a matter of convenience. The "Equity Journal" was not known to the former rules.

4.

NOTICE OF ORDERS.

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

Compare former Rule 4, *ante*, p. 67. Under that rule, entry in the Order Book was sufficient notice to the parties except in cases where personal or other notice was specially required or directed. The provision as to mailing copies is new, and its propriety and usefulness are obvious.

This rule has no application to bankruptcy matters. In *re* Stafford, 240 Fed. Rep. 155, 157.

5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

This rule embodies the substance of former Rule 5, *ante*, p. 68. The verbal changes are largely due to the omission of the filing pro-

visions, which have been rendered obsolete by the abolition of pleas, demurrers and exceptions.

6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

A new rule, substituting motion day for "rule"-day. Compare former Rule 6, *ante*, p. 69.

7.

PROCESS, MESNE AND FINAL.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Omits the words "the exigency of" before "bill," otherwise is identical with former Rule 7, *ante*, p. 69.

8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

This is former Rule 8, changing "circuit" to "district" court (see *ante*, p. 73); to which is added the provision (taken from the

English Judicature Act of 1894, § 14), that the act required to be done may be done by a person appointed by the court. As to the discretion of the trial judge in England to order a sequestration to issue, see *Hulbert v. Cathcart* (1896), A. C. 470.

SPECIFIC RECITALS in the original decree of a court of equity calling for the writ of execution are made immaterial and unnecessary by Rule 8. *Richards v. Harrison*, 218 Fed. Rep. 134.

WRIT OF EXECUTION is the only appropriate final process for the enforcement of a money judgment embodied in a decree, under Rule 8. *Pease v. Rathbun-Jones Eng. Co.*, 228 Fed. Rep. 273, 279.

On motion to vacate an order for examination in supplementary proceedings, Rule 8 was interpreted and applied as follows:

"I do not think that the words 'by writ of execution,' or 'in the form used in the District Court in suits at common law,' are to be so narrowly interpreted as to refer only to the piece of paper itself known as the 'execution,' but are to include all the familiar incidents of that writ, the most common of which is supplementary proceedings. I am fortified in this opinion by the long practice which has, I believe, obtained in this district of granting orders in supplementary proceedings upon decrees in equity for the payment of money.

"In the case of *Byrd v. Badger*, 1 McAl. 443, Fed. Cas. No. 2266, where a motion was made to set aside an order in supplementary proceedings, Judge McAllister, sitting in the Circuit Court for the District of California, stated that these proceedings were a substitute for a creditor's bill, mentioned the fact that the statute of California providing for supplementary proceedings was analogous to that of New York, and further held that, as proceedings in aid of execution were equitable and only cognizable in the United States Court in the exercise of chancery powers, the parties must proceed by creditor's bill and could not avail themselves of the statutory remedy of supplementary proceedings. It does not appear clearly from the opinion whether the relief sought was upon a judgment recovered at law, or a decree in equity; but the language used leads me to suppose that the foundation of the right was a judgment at law. * * *

"I think it would be most unfortunate to give equity Rule 8 so narrow a construction as to make it necessary to proceed by the cumbersome remedy of a creditor's bill, and in so doing to reverse the customary practice of this court for many years." A. N. Hand, J., in *Brown v. Fletcher*, 239 Fed. Rep. 360, 362.

SPECIFIC PERFORMANCE.—"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary, whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence. *Hennessey v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules, and this practice, hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided. *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep. 674, 676, 57 C. C. A. 428, 430; *Shubert v. Woodward*, 167 Fed. Rep. 47, 54, 92 C. C. A. 509, 516." *Sanborn, J.*, in *Hess v. Bowen*, 241 Fed. Rep. 659, 662 (C. C. A. 8).

9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

This is former Rule 9, without verbal change; see *ante*, p. 74.

In England the writ of possession has been substituted for the writ of assistance. *Hall v. Hall*, 47 L. J., ch. 680; Order XLVII, *The Annual Practice*, 1911, p. 733. But the court still has power to issue the writ of assistance in certain cases. *Wyman v. Knight*, 39 C. D. 165.

10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as

is provided in rule 8 when the decree is solely for the payment of money.

This rule is a substantial re-enactment of former Rule 92, *ante*, p. 137, with the addition of the words "or the enforcement of other liens."

11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

With an immaterial verbal omission, this is former Rule 10, *ante*, p. 74.

12.

ISSUE OF SUBPOENA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

This rule is based on former Rule 12, *ante*, p. 76. The time for answer is changed, in accordance with the abolition of rule-day. Appearance-day is abolished.

PRAYER FOR PROCESS is no longer necessary in the bill; under this rule the subpoena is issued by the clerk, and no order of the court is necessary. *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

SUBPOENA—FORM OF.—Section 911, R. S., provides the form of process. The conformity act, § 914, R. S., does not override it, and the statute of a state providing that process may have no seal and may be issued and signed by an attorney for the plaintiff, has no force or effect in federal procedure. *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252. See the cases collected in *Leas & McVitty v. Merriman*, 132 Fed. Rep. 510.

13.

MANNER OF SERVING SUBPOENA.

The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

This rule is former Rule 13, with immaterial verbal changes. See *ante*, p. 76.

14.

ALIAS SUBPOENA.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made.

This rule is a paraphrase of former Rule 14, *ante*, p. 77. In altering the rule the alliterative words "*toties quoties*" have been omitted. The dead languages have almost disappeared from our nomenclature.

15.

PROCESS, BY WHOM SERVED.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case,

the person serving the process shall make affidavit thereof.

This is former Rule 15, *ante*, p. 77.

16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

A new rule, substituted for former Rule 18, *ante*, p. 80.

The expression "*pro confesso*" seems to have disappeared from English chancery practice. A default is now a default, at law or in equity. See Order XXVII (The Annual Practice, 1911, p. 380), entitled "Default of Pleading."

17.

**DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—
SETTING ASIDE DEFAULT.**

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms

as the court shall direct, for the purpose of speeding the cause.

This is substantially former Rule 19, *ante*, p. 81.

SETTING ASIDE DEFAULT—THE ENGLISH PRACTICE.—"Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit, and where an action has been set down on motion for judgment under Rule 11 of this Order, such setting down may be dealt with by the court or a judge in the same way as if judgment by default had been signed when the case was set down." Order XXVII, Rule 15. Under this provision, that the court may impose terms, and that its action is discretionary, see *Re Hartley* (1891), 2 Ch. 121. In a proper case, the court may order, as a condition to setting aside the default, that a fund in controversy be brought into court. *Richardson v. Howell*, 8 Times Rep. 445.

EFFECT OF TAKING THE BILL PRO CONFESSO.—The effect of the order was summarized in the words "a decree *pro confesso* regards the statements of the bill as confessed." *Thompson v. Wooster*, 114 U. S. 104, 29 L. Ed. 107. In that case Mr. Justice Bradley said, "that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true—a decree *pro confesso* is a decree based on such statements, assumed to be true, and * * * as binding and conclusive as any decree rendered in the most solemn manner," which can not be impeached collaterally, but only upon a bill for review or a bill to set it aside for fraud.

STATUS OF THE DEFENDANT AFTER THE ORDER AND BEFORE THE DECREE.—The order taking the bill *pro confesso* is in no sense a decree *pro confesso*, but the cases indicate that the defendant no longer has a right to be heard as to the form and scope of the decree. He is not entitled to notice of the application for the decree. *Austin v. Riley*, 55 Fed. Rep. 833, 837.

"The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he can not be heard at the final hearing." Mr. Justice Bradley in *Frow v. De La Vega*, 15 Wall. 552, 21 L. Ed. 60.

EFFECT OF DEFAULT AGAINST ONE OF SEVERAL DEFENDANTS.—Where there is a joint charge against several defendants, taking the

bill *pro confesso* against one only does not justify the entry of a decree against him until the case is tried as to his co-defendants. *Frow v. De La Vega*, 15 Wall. 552, 21 L. Ed. 60.

18.

PLEADINGS—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

New rule, based on modern English chancery practice.

The English rule is "no technical objection shall be raised to any pleading on the ground of any alleged want of form." Order XIX, Rule 26. See also Order LXX, Rules 1 and 2. "The court is not to dictate to parties how they should frame their case." *Bowen*, L. J., in *Knowles v. Roberts*, 38 C. D., p. 70.

GENERAL EFFECT.—Rule 18 abolished the technical forms of equity pleading. *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. Rep. 158.

EFFECT ON AMENDMENTS.—Where the bill sets forth matter calling for equitable relief, no matter what its deficiencies of form, the plaintiff can not be required to amend in view of Rule 18. *Williams v. Pope*, 215 Fed. Rep. 1000.

19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See former Rules 28, 29, 30 and 60, *ante*, pp. 90, *et seq.*

THE ENGLISH RULE.—"The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair

trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client." Order XIX, Rule 27. As to the discretion of the court as to amendments, in case of delay, see *Cross v. Howe*, 62 L. J. Ch. 342. That the Court of Appeal will not interfere unless a principle is involved, or "where serious injustice would result from not interfering," see *Golding v. Wharton Co.* (1876), 1 Q. B. D. 374.

EFFECT.—Technical errors in pleading are disregarded under Rule 19. *Marconi Wireless Tel. Co. v. National Electric Signaling Co.*, 206 Fed. Rep. 295. The rule gives the court a wide latitude in adjusting the pleadings to meet the requirements of the particular case. *Sheeler v. Alexander*, 211 Fed. Rep. 544. Old Rule 29 is entirely superseded by Rule 19, and allowance of amendment is now wholly in the discretion of the court. *Whitaker v. Whitaker Iron Co.*, 238 Fed. Rep. 980, 981. That a decree dismissing a bill may, on appeal, be modified by making the order of dismissal conditional upon the plaintiff's failure to amend the bill within a certain time, see *Western Union Tel. Co. v. Atlanta & W. P. R. Co.*, 238 Fed. Rep. 36—C. C. A. 5.

20.

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

This is a new rule, based upon the English rule (Order XIX, Rule 7), which reads:

"A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms as to costs and otherwise, as may be just."

The words "upon such terms" have been held to authorize an order that if proper particulars be not delivered within a time fixed in the order, the action shall stand dismissed. *Davey v. Bentinck* (1893), 1 Q. B. 185.

"The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unneces-

sary expense, and avoid allowing parties to be taken by surprise." Cotton, L. J., in *Spedding v. Fitzpatrick*, 38 C. D., p. 413.

"Sometimes particulars have been allowed in order that there might not be a surprise at the trial. Sometimes they have been allowed as limitations of the claim, to limit the extent of the evidence to be given at the trial. Under the Judicature Act particulars are really supplemental to the pleadings. They are in fact amendments of the pleadings." Vaughn Williams, L. J., in *Milbank v. Milbank* (1900), 1 Ch. 385.

PURPOSES OF THE RULE.—The purposes of this rule are to avoid surprise at the trial, and to tie down the party furnishing particulars to actual case he intends to make; and in a stockholder's suit it may be used to enable the chancellor to permit the defendants to bring in the ultimate facts, and thereon seek a speedy dismissal of the suit as vexatious. *Whitaker v. Whitaker Iron Co.*, 238 Fed. Rep. 980, 993.

EFFECT ON PLEADING.—Because of this rule the pleader should state in his original pleading the full facts on which he relies, to the end of avoiding motions for particulars. *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. Rep. 515; *Williams v. Pope*, 215 Fed. Rep. 1000.

GRANTING A MATTER OF DISCRETION.—The motion for particulars will be disposed of according to the circumstances, its disposition being a matter of discretion. *Gimbel Bros. v. Adams Express Co.*, 217 Fed. Rep. 318.

LIMITATIONS OF THE RULE.—"We can not subscribe to the proposition that a plaintiff can be compelled to attempt to forecast, with absolute accuracy, the theory of either the law or the facts which he will be finally compelled to unfold at the trial. If he was so compelled and did not accurately forecast the theories, both of law and of fact, which he finally at the trial determines to be the true ones, he would be driven to an amendment of his pleadings. It is permissible for him to so state the facts as to leave him free to evolve any theory at the trial which is supported by them. The practical conditions of the trial compel him eventually to make an election among the possible theories on which the case may be tried, but he is under no compulsion to make his election in advance of the trial." Dickinson, J., in *Gimbel Bros. v. Adams Express Co.*, 217 Fed. Rep. 318, 319.

21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

This is a new rule, abolishing the old practice as to exceptions for scandal and impertinence. See former Rules 26 and 27, *ante*, p. 87.

THE ENGLISH RULE.—“The court or a judge may at any stage of the proceedings order to be struck out or amended, any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client.” (Order XIX, Rule 27.)

The application must be made promptly or the court may decline to exercise its jurisdiction. *Cross v. Howe*, 62 L. J. Ch. 342.

It will be noted that the English rule uses the word “unnecessary” where Rule 12 refers to “redundant” matter. It is, therefore, important to note that in the English practice, if the matter is otherwise harmless, it will not be struck out merely because it is unnecessary. *Rock v. Purssell*, 84 L. T. Jo. 45.

Scandalous matter, in England, may be expunged by the court from any part of the record, and even from a bill of costs. *Re Miller*, 54 L. J. Ch. 205. “Nothing can be scandalous which is relevant.” *Cotton, L. J.*, in *Fisher v. Owen*, 8 C. D., p. 653.

Rule 21 is cited and applied in *Williams v. Pope*, 215 Fed. Rep. 1000.

22.

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

This is a new rule, inaugurating the English practice, under the Judicature Act, 1875, § 11(2). For the rules applicable to that practice, see Order XLIX, "Transfers and Consolidation." Transfer apparently originated with the Judicature Act, 1873, § 36.

ADEQUATE REMEDY AT LAW.—Because of this rule, the bill will not be dismissed upon the ground of adequate remedy at law, for in that event the case is transferred to the law side. *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 225 Fed. Rep. 769; *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 216 Fed. Rep. 382; *Corsicana Natl. Bank v. Johnson*, 218 Fed. Rep. 822, 134 C. C. A. 510.

Therefore a bill in equity will not be dismissed upon the ground that the remedy in ejectment would be adequate. *United States v. Utah Power Co.*, 208 Fed. Rep. 821.

RULE DOES NOT PERMIT TRANSFER TO EQUITY SIDE.—Under this rule the transfer of a case from the law side to the equity side of the court is not authorized. *Waldo v. Wilson*, 231 Fed. Rep. 654, 656—C. C. A. 4.

WHEN TRANSFER MAY BE MADE.—The rule may be applied at any time during the progress of the case. *Destructor Co. v. Atlanta*, 219 Fed. Rep. 996. For an illustration of transfer to the law side after the filing of a master's report, see *Friederichsen v. Renard*, 231 Fed. Rep. 882, 883—C. C. A. 8. But the Supreme Court has declined to allow a transfer to the law side on an appeal from a decree sustaining a demurrer to and dismissing a bill based upon an alleged conspiracy to defraud. *Curriden v. Middleton*, 232 U. S. 633, 58 L. Ed. 765.

DETERMINING THE NATURE OF THE SUIT.—This rule must be read in connection with Rule 23. The dominant factor is the general scope and nature of the case as made out by the bill. *Wright v. Barnard*, 233 Fed. Rep. 329, 331.

WHO MAY COMPLAIN OF REFUSAL TO TRANSFER.—Even if the ordinary remedy would be at law, a plaintiff who prays for discovery and accounting can not complain of the action of the trial court in refusing plaintiff's motion to transfer to the law side. *Gatewood v. New River Consol. C. & C. Co.*, 239 Fed. Rep. 65, 67—C. C. A. 4.

TRIAL BY JURY.—Notwithstanding this rule the court may refer an incidental and subordinate question of fact to a jury. *Vosburg Co. v. Watts*, 221 Fed. Rep. 402.

THE DISTINCTION BETWEEN LAW AND EQUITY.—This rule does not override the statute.

Section 723, R. S. "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

When there is no ground of equitable jurisdiction the case can not be retained on the equity side. *Linden Invest. Co. v. Houstain Bros. Co.*, 221 Fed. Rep. 178.

Rule 22 must be read in connection with Rule 26, and so read does not justify the joinder in a bill in equity of disconnected matters cognizable only at law. *Bucyrus Co. v. McArthur*, 219 Fed. Rep. 266.

23.

MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

This is a new rule. The analogous English rule is, "Causes or matters assigned by the principal act to the Chancery Division (by the Judicature Act, 1873, § 34), shall be tried by a judge without a jury, unless the court or a judge shall otherwise order." Order XXXVI, Rule 3.

For typical applications of this rule, see *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. Rep. 377; *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 216 Fed. Rep. 382; *American Car & Foundry Co. v. Merchants' Despatch Transp. Co.*, 216 Fed. Rep. 911; *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 225 Fed. Rep. 769.

Thus the fact that the bill incidentally seeks the recovery of a balance of salary, which is strictly a legal demand, "is immaterial on the question of jurisdiction in equity. * * * The dominant factor in determining the question of jurisdiction is to be found in the general scope and nature of the case as made by the bill, and a decision on the question of the balance of salary is but an incident of a suit properly on the equity side of the court." Accordingly a motion to transfer the case to the law side was denied. (*Bradford, J.*) *Wright v. Barnard*, 233 Fed. Rep. 329.

24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

This rule is based upon former Rule 24, *ante*, p. 86, which, however, related only to the signature of counsel to the bill. Like the English Order XIX, Rule 4, the above rule relates to all pleadings. The English rule, in part, says: "Signature of counsel shall not be necessary; but where pleadings have been settled by counsel or a special pleader, they shall be signed by him; and if not so settled, they shall be signed by the solicitor, or by the party if he sues or defends in person." The signature of counsel, as was said by James, L. J., "to which the court was in the habit of paying, as it ought to pay, and always will be warranted in paying hereafter, the greatest possible respect, is to that extent a voucher that the case is not a mere fiction." *Great Australian Co. v. Martin*, 5 C. D., p. 10.

Defendant need not sign his answer, nor must it be verified by his oath or that of anyone in his behalf. *Luten v. Camp*, 221 Fed. Rep. 424, 427; *Kinney v. Rice*, 238 Fed. Rep. 441. An answer to a bill of discovery need not be verified. *Ibid*.

25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or can not be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

A new rule, taking the place of former Rules 20, 21, 22, 23 and 24, *ante*, pp. 82, *et seq.*

That Rule 25 does not obviate compliance with §§ 4886, 4887, R. S., see *Schaum & Uhlinger v. Copley-Plaza Co.* 243 Fed. Rep. 924.

The salutation of former Rule 20 is abolished. The anticipatory matter to avoid matters expected to be pleaded by way of defense in the answer, provided for by former Rule 21, is not referred to, but obviously may still be pleaded.

The “short and simple statement of the ultimate facts” provided for in the present rule is apt to prove an uncertain guide to the bar. The paragraph embodies what has long been recognized as the fundamental rule of equity pleading in this country; but it makes no provision for those recitals of conditions precedent that have been held essential to the sufficiency of bills for patent infringement, and the like. Does the third paragraph of Rule 25 mean to dispense with such recitals? It is by no means clear. It would have been clear and unequivocal had the rule been drawn as suggested by the Bar Committee appointed by the Circuit Court of Appeals for the Sixth Circuit, which reads as follows:

“Provided that it shall be sufficient in pleading a judgment or other determination of a court, or of an officer of special jurisdiction, or a patent, or other public grant, to allege that it was duly made or issued; that in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and that it shall not

be sufficient in any case herein mentioned to deny the allegation generally, but the facts relied upon must be specifically stated.

"This rule is suggested, because it has been held on the circuit that it is not sufficient, in a bill for the infringement of a patent, to allege that the patent was duly issued, but that it is necessary to aver all the facts on which authority to issue the patent depends. The result is that bills in such cases are unnecessarily prolix."

This provision of Rule 25 has its inadequacy demonstrated by a reference to the English rule, Order XIX, Rule 14:

"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

As it has been repeatedly held that the recital of conditions precedent is not a "mere statement of evidence," and as the rule of stating ultimate facts has always obtained, it is the writer's opinion that the third paragraph of Rule 25 does not relieve the pleader of the necessity of pleading such conditions precedent, precisely as heretofore. See authorities, *infra*.

The fourth paragraph embodies the substance of former Rule 22.

The fifth paragraph makes no reference to the prayer for process of subpoena, specified in former Rule 23; the clerk is now required by Rule 12 to issue the subpoena as of course, rendering the prayer therefor unnecessary.

PARAGRAPH ONE.—Follows closely the provisions of old Rule 20 (*ante*, p. 82). See *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. Rep. 158.

PARAGRAPH TWO.—Modified from old Rule 21 (*ante*, p. 82).

PARAGRAPH THREE.—Is new.

PARAGRAPH FOUR.—Embodies partially old Rule 22 (*ante*, p. 85).

PARAGRAPH FIVE.—Partially new, and partially based upon old Rule 21 (*ante*, p. 82).

STATING THE PARTIES.—The requirement as to names, citizenship and residence is imperative as to all the parties and applies to a bill in behalf of plaintiff and "in behalf of such other creditors of and claimants against the defendants, or any of them, as may desire relief

similar to that prayed for herein and may intervene and become parties thereto." *State of Maine Lumber Co. v. Kingfield Co.*, 218 Fed. Rep. 902.

CORPORATION PARTY.—The bill should recite the corporate name, the authority by and under which it is organized, and its place of business. *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. Rep. 515.

STATING THE CAUSE OF ACTION.—Rule 25 is not mandatory of all a bill should contain, but defines what is sufficient to sustain a bill. *Pittsburg Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

MORE THAN ONE CAUSE OF ACTION.—Each cause of action should be separately stated, but cross-references may be employed to avoid repetition. *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. Rep. 515.

PLEADING EVIDENCE.—It is still improper to plead evidence. A file-wrapper and contents filed as an amendment to the bill will be stricken out on motion for that reason. *Lange v. McGuin*, 177 Fed. Rep. 219, 101 C. C. A. 389.

THE BILL FOR PATENT INFRINGEMENT.—"Everyone concedes that the patent itself is only *prima facie* proof of the patentee's right to his monopoly. To allege the patent alone, therefore, is to allege evidence, and not the 'ultimate facts' required by Rule 25. The only question that can arise is, what portions of the statute which define his right shall be regarded as provisos and what exceptions. It was well settled before the rules went into effect that the plaintiff must allege, not only that he was the first, original, and sole inventor, but also compliance with the negative requirements of the statute. *Blessing v. Copper Works (C. C.)*, 34 Fed. Rep. 753; *Coop v. Institute (C. C.)*, 47 Fed. Rep. 899; *Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. (C. C.)*, 47 Fed. Rep. 894; *Goebel v. Supply Co. (C. C.)*, 55 Fed. Rep. 827; *Hanlon v. Primrose (C. C.)*, 56 Fed. Rep. 601; *Ross v. City of Ft. Wayne (C. C.)*, 58 Fed. Rep. 404; *Hutton v. Seat Co. (C. C.)*, 60 Fed. Rep. 747; *Diamond Match Co. v. Ohio Match Co. (C. C.)*, 80 Fed. Rep. 118; *Rubber-Tire Wheel Co. v. Davie (C. C.)*, 100 Fed. Rep. 85; *Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co. (C. C.)*, 109 Fed. Rep. 330. Since the new rules went into effect, some difference of opinion has arisen. Judge Ray has held, in *Maxwell Steel Vault Co. v. National Casket Co.*,

(D. C.), 205 Fed. Rep. 515, that the old rule applies. But Judge Tuttle held the contrary, in *Zenith Carbureter Co. v. Stromberg Motor Devices Co.* (D. C.), 205 Fed. Rep. 158.

"I can not see that the new rules can have changed the pleading at all. They only incorporate what was the practice of every good pleader before. The equity bar got into verbose habits, but those habits were never proper, except for the fact that, by loading the bill with 'proper charges,' the discovery could be made more specific. It therefore was necessary to put much evidence in the bill. That requirement has been eliminated by the rule, so that the bill is now, what it always ought to have been, a mere pleading, and not a 'charge' of evidence to be answered. But the rules did not and could not change the necessity of a statement by the party having the affirmative of the 'ultimate facts' on which his right depends. Nevertheless, I hope we shall not return to the old idle verbiage, which incumbered a bill for infringement. Whether we do or not depends upon the instinct of workmanship of the bar." Learned Hand, J., in *Bayley & Sons, Inc., v. Braunstein Bros. Co.*, 237 Fed. Rep. 671. To the same effect, see *Acme Steel Goods Co. v. American Metal Fasteners Co.*, 206 Fed. Rep. 478.

After a detailed criticism of a particular bill for patent infringement, Judge Orr said: "That the foregoing may not appear hypercritical, reference is made to *McCoy v. Nelson*, 121 U. S. 484, 7 Sup. Ct. 1000, 30 L. Ed. 1017, where a bill in equity was held to be in proper form and the requisites of such bill were considered.

"It is unnecessary in this case to determine whether or not, since the new equity rules, a plaintiff may safely omit the averments of compliance with all conditions precedent to the grant of a patent, but it is well to have in mind as a suggestion from the case last cited that, if the bill avers that the patentee or plaintiff 'is the original and first inventor of a new and useful improvement and invention, * * * which are fully and particularly described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention,' a great deal of verbiage common in the bills in patent causes can be eliminated." *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950, 951.

THE PRAYER.—Rule 25 permits of inconsistent and even contradictory prayers. *Boyd v. New York R. Co.*, 220 Fed. Rep. 174.

COSTS.—Need not be prayed for. *Pittsburg Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

PROCESS.—Need not be prayed for. Rule 12 provides for it. *Pittsburg Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

THAT DEFENDANT BE REQUIRED TO ANSWER.—No longer necessary. *Pittsburg Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

VERIFICATION.—This rule eliminates the necessity for verification except where special relief pending the suit is asked, or in a petition for rehearing in a case where Rule 69, *post*, applies. *Kinney v. Rice*, 238 Fed. Rep. 441, 443; *Pittsburg Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

MOTION UNDER RULE 29.—Will lie to secure the dismissal of a bill of diffuse character, employing improper epithets and extraneous matter. *Crim v. Rice*, 232 Fed. Rep. 570, 573—C. C. A.—2.

VERIFICATION—REQUISITES OF.—“The bill prays for a preliminary injunction which is ‘special relief pending the suit’ within the meaning of Rule 25. It was, therefore, necessary that the bill should be verified by ‘the oath of the plaintiff or some one having knowledge of the facts upon which such relief is asked.’ The rule, in so providing for verification of the bill, by plain, if not necessary, implication requires verification by oath or affirmation as to the facts essential to the granting of the relief sought. If the plaintiff has not sufficient knowledge to enable him to verify such essential allegations of fact, ‘some one having knowledge’ of the essential facts is required to verify them. The plaintiff has not complied with this rule. No verification of the bill is made by her, and the oath of Clarence E. Fox, purporting to act as attorney in fact for the plaintiff, is palpably insufficient. He swears that ‘so far as the statements in said bill are within his own knowledge, they are true, and so far as they are predicated upon information from others, he believes them to be true.’ This statement is so indefinite as to be valueless. He does not aver, nor does it appear from the bill, what, if any, statements in the bill are within his knowledge, and therefore his averment that so far as the statements in the bill are within his own knowledge they are true, is wholly without weight. Nor does he, directly or indirectly, aver what statements in the bill are predicated upon information from others. The sufficiency of the verification of a bill praying special relief pending the suit does not depend upon any subsequent insistence or omission to insist upon the special relief prayed. The fact that special relief

is prayed puts the bill in the category of those which must be verified in accordance with Rule 25. The idea that the verification may be treated as sufficient or insufficient by the subsequent attitude of the plaintiff with respect to such special relief is wholly inadmissible. The bill is properly or improperly verified as filed, and whether properly or improperly filed can not be affected by matter *ex post facto*. Otherwise confusion and embarrassment would be substituted for regularity and certainty in judicial procedure. The bill must be dismissed with costs as to Wall & Ochs, Charles F. Wall, William L. Wall and J. Harry Bowers, individually and as officers of Wall & Ochs, at the expiration of twenty days from the date of the filing of this opinion, unless in the meantime it shall be properly verified in accordance with Rule 25, for which purpose leave to amend is hereby granted to the plaintiff." Bradford, J., in *Scheuerle v. Onepiece Bifocal Lens Co.*, 241 Fed. Rep. 270, 273.

26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the court may order separate trials.

A new rule, based upon the English rule:

"Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the court or a judge that any such causes of action can not be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." (Order XVIII, Rule 1.)

An illustration of the operation of this rule is found in a case in which the plaintiff alleged the infringement of twenty-three patents.

Application was made to limit the action (under Order XVIII, Rules 8 and 9, and Order XIX, Rule 27), upon which application the Court of Appeal held that plaintiff was not entitled to unite the twenty-three patents in one suit, but should be directed to select a group of his patents, not exceeding three, as being "such of the causes of action as may be conveniently disposed of together" (this being the language of Order XVIII, Rule 8). *Saccharin Corp. v. Wild* (1903), 1 Ch. 410.

DISSIMILAR ACTIONS.—In applying this rule, each cause of action must be determined to be "cognizable in equity;" a suit to enforce an equitable lien can not be joined with a suit on account arising out of other subject-matter. *Bucyrus Co. v. McArthur*, 219 Fed. Rep. 266.

Dissimilar causes of action can not be joined, which would involve various kinds of equitable relief and a number of independent accountings. *Marconi Wireless Tel. Co. v. National Electric Signalling Co.*, 206 Fed. Rep. 295.

While this rule was adopted in the interest of simplified procedure, its application must depend largely upon the circumstances of each particular case, and rest in the sound discretion of the judge. Where a number of independent patent infringers are joined as defendants in a single suit the action of the trial court in dismissing the bill as to all defendants except one will not be disturbed on appeal. *Taggart v. Bremner*, 236 Fed. Rep. 544—C. C. A. 7.

Under this rule, two mortgages may be foreclosed in a single suit. *Crawford v. Wash. N. R. Co.*, 233 Fed. Rep. 961, 963—C. C. A. 9.

DIVERSITY OF CITIZENSHIP.—Rule 26 does not permit a suit in which one cause of action involves federal jurisdiction, to extend the jurisdiction of the federal court to the parties as to another cause of action over which, in the absence of diversity of citizenship, the court has no jurisdiction. *Vose v. Roebuck Weather Strip, etc., Co.*, 210 Fed. Rep. 687.

"The plaintiff prays not only that the defendant be restrained from infringing the two patents, or either of them, but 'from using cuts, reproductions, and advertising or printed matter so similar in appearance to plaintiff's cuts or reproductions, advertising or printed matter as would be likely to deceive and confuse purchasers'; and further, that the plaintiff 'may have such other and further relief as to this court may seem meet.' This prayer is broad enough to cover not only damages and profits for patent infringement, but damages for

unfair competition. If patent infringement were not charged in the bill undoubtedly this court would lack jurisdiction owing to identity of citizenship as between parties. But it is urged that relief on the ground of unfair competition may be treated as merely incidental to the principal relief sought, namely, that for patent infringement, and that, the court having jurisdiction over the patent litigation, incidental relief may be given on the former ground. And it is further urged that on the assumption that relief can not be given in this suit on the ground of unfair competition as such the allegations of unfair competition may be treated as disclosing a deliberate and fraudulent intent accompanying the alleged infringement. While these contentions do not wholly lack judicial support, I think there is fatal vice in each of them. Patent infringement and unfair competition in trade are separate causes of action, distinct in their nature. There are essential differences between them. Patent infringement is the violation of an exclusive monopoly created by statute. No element of monopoly is necessary or involved in unfair competition. The doctrine of unfair competition does not forbid or discountenance the manufacture or sale by any one of articles belonging to the class constituting the subject of such competition. It merely prohibits a fraudulent or wrongful placing of the articles on the market in such manner or dress as to deceive or be calculated to deceive purchasers into the belief that such articles were manufactured or prepared and directly or indirectly placed on the market by persons other than those practicing such unfair competition. The essence of the doctrine is that no one is to be allowed fraudulently to palm off upon the public his goods as those of another. The establishment of unfair competition requires proofs and the application of principles radically different from those necessary to support a charge of patent infringement. What is necessary to constitute an act of infringement lacks some of the essential elements of unfair competition. In no legitimate sense can it be claimed that relief for unfair competition is incidental to relief for patent infringement. The court has no jurisdiction over an unfair competition controversy between citizens of the same state, and the coupling of the two causes of action in the bill in question is not only unsupported by principle and calculated to embarrass the orderly administration of justice, but, with respect to the charge of unfair competition, is forbidden by the jurisdictional limitation of judicial power. The conclusion thus reached is supported and required by the authorities. Rule 26 of the equity rules prescribed by the supreme court it is true, provides that 'the plaintiff may join

in one bill as many causes of action, cognizable in equity, as he may have against the defendant.' That rule recognizes that causes of action against a defendant joined in one bill may not under all circumstances be 'conveniently disposed of together,' for in such case the court 'may order separate trials.' But however that may be, it is clear that a mere rule, though prescribed by the supreme court, can not override the statutory limitation of jurisdiction imposed upon this court. In *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 259, 35 Sup. Ct. 788, 789 (59 L. Ed. 1295), the court said:

'It hardly needs statement that the jurisdiction as limited and fixed by Congress can not be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute.'

"Among the numerous cases declaring and applying the principle thus authoritatively enunciated by the Supreme Court are *Cushman v. Atlantic Fountain Pen Co.* (C. C.), 164 Fed. Rep. 94; *National Casket Co. v. New York & Brooklyn Casket Co.* (C. C.), 185 Fed. Rep. 533; *Electric Boat Co. v. Lake Torpedo Boat Co.* (D. C.), 215 Fed. Rep. 377; *Johnston v. Brass Goods Mfg. Co.* (D. C.), 201 Fed. Rep. 368; *Keasby & Mattison Co. v. Philip Cary Mfg. Co.* (C. C.), 113 Fed. Rep. 432; *King & Co. v. Inlander* (C. C.), 133 Fed. Rep. 416; *Mecky v. Grabowski* (C. C.), 177 Fed. Rep. 591; *Burt v. Smith*, 71 Fed. Rep. 161, 163; 17 C. C. A. 573.

"The position that the allegation of unfair competition is proper as a disclosure of the aggravated character of the infringement in its bearing upon the question of increased damages is equally untenable. In the first place, this contention is inconsistent with the fact that the plaintiff complains in the bill of unfair competition as such. And secondly, if under the bill as drawn increased or treble damages are recoverable it is competent for the plaintiff after interlocutory decree to establish before the master facts and circumstances justifying and requiring an allowance in the final decree of treble damages." *Bradford, J.*, in *Unit Const. Co. v. Husky Mfg. Co.*, 241 Fed. Rep. 129, 131, 132.

TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION AS AGGRAVATIONS OF PATENT INFRINGEMENT.—Although the court has no jurisdiction over questions of trademark infringement and unfair competition because of the absence of diversity of citizenship, "if defendants have aggravated the damages by unfair competition in the

sale of the very infringing articles (infringing the patent in suit) any damages thus caused may be awarded on the accounting." Mack, J., in *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 Fed. Rep. 472, 486—C. C. A. 7, following *Payson Mfg. Co. v. Ludwigs*, 206 Fed. Rep. 60, 124 C. C. A. 194.

Similarly, in a patent infringement case, "violation of a common-law trademark, by its use on the infringing article, may also be shown in aggravation of damages." Mack, J., in *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 Fed. Rep. 472, 486—C. C. A. 7.

OBJECTIONS BASED ON MULTIFARIOUSNESS.—It was settled law, long before the adoption of the new equity rules, that the objection that a bill is multifarious could not be raised for the first time upon appeal. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514. Whether Rule 26 justifies the joinder of causes of action presented by the bill, may be considered on appeal. *Miller Rubber Co. v. Behrend*, 242 Fed. Rep. 515, 517—C. C. A. 2.

27.

STOCKHOLDERS' BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

This is former Rule 94, p. 139, with the addition of the words "or the reasons for not making such effort." This addition was

made at the suggestion of the Bar Committee from the Second Circuit, and is conformable to *Delaware & Hudson Co. v. R. R. Co.*, 213 U. S. 435, 53 L. Ed. 862; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606.

“REASONS FOR NOT MAKING SUCH EFFORT.”—This provision of Rule 27 is strictly enforced, but an omission may be cured by amendment. *Russell v. Shippen Bros. Lumber Co.*, 224 Fed. Rep. 254.

“EFFORTS TO SECURE SUCH ACTION.”—It is not necessary to plead the preliminary steps mentioned in this rule when the interests of the directors are shown by the pleadings to be antagonistic to those of the corporation. *Ogden v. Gilt Edge Consol. Mines Co.*, 225 Fed. Rep. 723, 728—C. C. A. 8. “The business of a corporation, within limitations, is to be managed by its board of directors, and as these are selected by the majority of stockholders and subject to their control, it is the duty, generally stated, of a minority stockholder having a grievance—fancied or real—against the conduct of such directorate or the business policy of the majority stockholders, to seek redress, in the first instance, from such directors, or their principals, the majority stockholders. Courts of equity are not for the purpose of correcting errors in the management or business policy of a corporation, in the absence of bad faith; and to maintain a bill in equity involving such considerations the complainant, in addition to showing that the company refused to declare dividends out of net profits, must show, not only that such profits should be distributed among the stockholders, but that the company continues its refusal after having been seasonably requested to make such distribution, or that its hostility to the minority interests is so manifest that such request would be but an idle performance. This duty is not * * * required only when the minority stockholder comes within Equity Rule 27 and files a bill ‘founded on rights which may properly be asserted by the corporation.’ This duty grows out of the very relation which such a stockholder bears to his associates and the corporation. A minority stockholder is therefore required, on the fundamental equitable principal that he who seeks equity must do equity, to show that he has availed himself of his rights within the corporation, or that it would be unavailing to attempt to do so.” *Relstab, J.*, in *Wilson v. American Ice Co.*, 206 Fed. Rep. 736, 743. That the court determines from the facts in each case whether a request for action, addressed to either the stockholders or directors, would have been unavailing, see *Dana v. Morgan*, 219 Fed. Rep. 313; *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. Rep. 529, 538—C. C. A. 6; *Forbes v. Wilson*, 243 Fed. Rep. 264, 267.

VERIFICATION—PLEADING RESIDENCE AND CITIZENSHIP.—For an illustrative case as to sufficiency of the verification and allegations of "efforts" to secure action by the corporation, see *Whitaker v. Whitaker Iron Co.*, 238 Fed. Rep. 980, 981. The names, residence and citizenship of all persons in whose interest the bill is brought should be set out in the bill. *Ibid.*, at p. 990.

PURPOSE.—The purpose of this rule "is to exclude cases brought by a stockholder collusively, in order to give an apparent jurisdiction to a court which would not have it if the suit were by the corporation." *Dickinson, J.*, in *Kelly v. Dolan*, 218 Fed. Rep. 966, 970.

RULE 27 COMPARED WITH OLD RULE 94 (ante, p. 139) AND APPLIED.—"Equity Rule No. 27 is the same as former Equity Rule No. 94, with the following clause added to the original rule: 'Or the reasons for not making such effort.' The reason for the rule was twofold. In *Del. & Hudson Ry. v. Railway Co.*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, the court said:

'The purpose of Rule No. 94 hardly needs explanation. It is intended to secure the federal courts from imposition upon their jurisdiction and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of the stockholders put in peril, and a case arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercises of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or it is more accurate to say, do not apply.'

"In *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, four classes of cases are given in which, under certain circumstances, a stockholder in a corporation may sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself and in which the corporation itself is the appropriate plaintiff. Those classes are: (1) Actions, or threatened actions, by directors beyond the authority conferred upon them by their charter, or other sources of organization. (2) Fraudulent transactions by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury. (3) Where the board of directors are acting for their own interests in a manner

destructive of the corporation itself, or of its stockholders. (4) Where a majority of the stockholders are oppressively and illegally pursuing a course in the name of the corporation, in violation of the rights of the other stockholders." Booth, J., in *Heinz v. Bank of Commerce*, 237 Fed. Rep. 942, 944—C. C. A. 8.

"The right of action to restrain the enforcement of the statute as an unconstitutional deprivation of the liberty and property of the corporation was a right existing in the corporation itself, and a stockholder was not entitled to sue without showing to the satisfaction of the court that he had exhausted the means within his reach to obtain action by the corporation in conformity with his wishes. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*), 104 U. S. 450, 460, 461, 26 L. Ed. 827, 832; *Detroit v. Dean*, 106 U. S. 537, 541, 542, 27 L. Ed. 300, 302, 1 Sup. Ct. Rep. 500; *Quincy v. Steel*, 120 U. S. 241, 248, 30 L. Ed. 624, 626, 7 Sup. Ct. Rep. 520; *Doctor v. Harrington*, 196 U. S. 579, 588, 49 L. Ed. 606, 610, 25 Sup. Ct. Rep. 355. The former equity rule (Rule 94) provided not only that the bill must allege that the suit was 'not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance,' but that the bill 'must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the cause of his failure to obtain such action.' The present rule (Rule 27) adds to this provision the words, 'or the reasons for not making such effort;' and these reasons, of course, must be adequate. The rule embraces those cases where the wrong to the corporation arises from unconstitutional legislation. *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. Ed. 256, 23 Sup. Ct. Rep. 157; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 220, 47 L. Ed. 778, 781, 23 Sup. Ct. Rep. 498; *Ex parte Young*, 209 U. S. 123, 143, 53 L. Ed. 714, 722, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. Here, while it is averred that the suit is not a collusive one in order to confer a jurisdiction which would not otherwise exist, there is no allegation that the complainant has made any request that the corporation should bring the suit to prevent the alleged invasion of its rights; nor does it appear that, by reason of antagonistic control of the corporation, such a request would be futile. Although apparently the holder of a majority of its stock, the complainant does not show any effort whatever to induce the corporation to sue. He contents himself with asserting in effect that, though the directors and officers do not wish

to comply with the statute, they will do so through fear of its penalties. But this reason is palpably inadequate, inasmuch as the corporation itself would be entitled to protection against the imposition of such penalties as would virtually deny access to the courts for the protection of rights guaranteed by the Federal Constitution. *Ex parte Young*, 209 U. S. 147, 52 L. Ed. 723, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Willcox v. Consolidated Gas Co.*, 212 U. S. 53, 54, 53 L. Ed. 400, 48 L. R. A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 351, 57 L. Ed. 1507, 1511, 33 Sup. Ct. Rep. 961; *Ohio Tax Cases*, 232 U. S. 576, 587, 58 L. Ed. 738, 743, 34 Sup. Ct. Rep. 372; *Wadley Southern R. Co. v. Georgia*, decided this day (235 U. S. 651, *post*, 405, 35 Sup. Ct. Rep. 214). The allegations of the bill show no ground for dispensing with efforts to procure action by the corporation; and in this view, without discussing the merits of the case, we are of the opinion that the complainant was not entitled to the injunction sought." Mr. Justice Hughes, in *Wathen v. Jackson Oil & R. Co.*, 235 U. S. 635, 641, 59 L. Ed. 395, 397.

THE REMEDY IN EQUITY IS EXCLUSIVE.—In a recent case the question presented was whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act may sue at law to recover such damages in the right of the corporation if, after request, it refuses to institute the suit itself? To which the Supreme Court answered: "Insurmountable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure. * * * Even if the circumstances were such as to justify individual stockholders in seeking the aid of court to enforce rights of the corporation, it is clear that their remedy is not at law." Mr. Justice Brandeis, in *United Copper Securities Co. v. Amalgamated Copper Co.* (No. 208, Oct. Term, 1916), — U. S. —, 61 L. Ed. —; affirming 139 C. C. A. 15, 223 Fed. Rep. 421.

28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the

solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

A new rule, taking the place of former Rules 28 and 29, *ante*, pp. 90, *et seq.*

29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

Demurrers were abolished in the English practice by the following rule:

"No demurrer shall be allowed (Order XXV, Rule 1).

Order XXV provides, as indicated in its title, "Proceedings in Lieu of Demurrer," and of this Order the Court of Appeal has said that it "abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause

of action or defense. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order XXV, Rule 2; the other is to apply to strike out the statement of claim under Order XXV, Rule 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." *Hubback v. Wilkinson* (1899), 1 Q. B. 90, 91.

Pleas in abatement were expressly abolished in England by Order XXI, Rule 20—"No plea or defense shall be pleaded in abatement."

"SEPARATELY HEARD AND DISPOSED OF BEFORE THE TRIAL."—For an illustration of such disposition of the defense of prior adjudication under this rule, see *Sanitary Street Flushing Mach. Co. v. Studebaker Corp.*, 226 Fed. Rep. 797. That a plea in respect to an issue of patent infringement, filed under old Rule 33 (*ante*, p. 94) will be separately heard and disposed of before the trial, under new Rule 29, see *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 212 Fed. Rep. 156, 129 C. C. A. 12.

LACHES.—An issue of laches raised by the answer may "be separately heard and disposed of before the trial of the principal case." *Alexander v. Fidelity Trust Co.*, 214 Fed. Rep. 495; *Ibid*, 215 Fed. Rep. 791.

RES ADJUDICATA.—So of *res adjudicata* set up by answer. *Sanitary S. F. Mach. Co. v. Studebaker Corp.*, 226 Fed. Rep. 797.

CONSPIRACY.—A separate denial by answer of one defendant, of conspiracy to infringe, will not be tried before final hearing. *Union Sulphur Co. v. Freeport Texas Co.*, 234 Fed. Rep. 191, 193.

STATE STATUTE OF LIMITATIONS.—A motion to dismiss based upon a State statute of limitations will be denied. *Tilden v. Barber*, 227 Fed. Rep. 1010.

EFFECT OF PRAYER FOR DISCOVERY.—That a motion to dismiss will not lie against a bill for discovery in aid of an action at law, when the facts entitle plaintiff to the discovery sought, see *Pressed Steel Car Co. v. Union Pacific R. Co.*, 240 Fed. Rep. 135.

The defendant may set out in his answer that the bill can not be maintained on the ground that the discovery asked, if granted, would tend to incriminate him. *Kinney v. Rice*, 238 Fed. Rep. 441, 443.

MISJOINDER.—Motion to dismiss because of misjoinder of defendants denied, but with directions to plaintiff to amend the bill. *Swift v. Inland Nav. Co.*, 234 Fed. Rep. 375.

PRICE RESTRICTION.—For the dismissal, on motion, of a suit to enforce a price restriction agreement, see *Kellogg Toasted Corn Flake Co. v. Buck*, 208 Fed. Rep. 383.

NATURE AND OBJECTS OF THE MOTION TO DISMISS.—"A motion to dismiss under the above rule is in the nature of a general demurrer. It is well settled that it is within the sound discretion of the court sitting in equity, when promotive of justice, to decline to decide a suit on demurrer to a bill and to overrule the demurrer and require an answer, reserving to the defendant the right to claim and take by answer whatever advantage might otherwise have been secured by the demurrer. The motion to dismiss having taken the place of a demurrer, by parity of reasoning the above principle is applicable to the motion equally as it formerly was in the case of a demurrer. I am satisfied that under the circumstances disclosed in the bill the doing of even justice as between the parties is more likely to be secured by leaving the merits of the case to be disposed of after the making of answer than by now dealing with the merits as disclosed in the bill. The case is not sufficiently developed at this stage to allow the questions involved in the motion to dismiss now to be satisfactorily determined. The motion to dismiss must therefore be denied, reserving to the defendants the right to take by answer whatever advantage might otherwise have been secured by the motion." *Bradford, J.*, in *Wright v. Barnard*, 233 Fed. Rep. 329. And to the same effect see *Hyams v. Old Dominion Co.*, 204 Fed. Rep. 681; *Wilson v. American Ice Co.*, 206 Fed. Rep. 736; *Alexander v. Fidelity Trust Co.*, 215 Fed. Rep. 791; *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. Rep. 294; *Destructor Co. v. Atlanta*, 219 Fed. Rep. 996; *Fordham v. Hicks*, 224 Fed. Rep. 810.

Therefore, unless the motion discloses clearly that on the allegations of the bill it must be dismissed upon final hearing, the motion to dismiss must be denied. *Ralston Steel Car Co. v. National Dump Car Co.*, 222 Fed. Rep. 590. So a motion to dismiss for defect of parties must be disposed of solely upon the allegations of the bill,

without the aid of any allegations in the answer, or the record in other cases. *Bogert v. Southern Pac. Co.*, 211 Fed. Rep. 776.

"It only remains to inquire whether the present equity rules permit the question here raised (laches) to be disposed of on a motion to dismiss or its equivalent. The pertinent rules are that part of Rule 25 which limits the bill to 'a short and simple statement of the ultimate facts upon which the plaintiff asks relief,' and that part of Rule 29 which permits any 'point of law' which goes to the 'cause of action' as 'stated in the bill' to be 'called up and disposed of at any time before final hearing at the discretion of the court.' It is clear that these rules change only the manner of raising such questions, and neither the questions themselves nor the equitable principles by which they are to be determined." *Dickinson, J.*, in *Alexander v. Fidelity Trust Co.*, 215 Fed. Rep. 791, 794.

PRESENTING QUESTIONS OF LAW BY ANSWER; EFFECT ON FACT ALLEGATIONS OF THE ANSWER.—"There is nothing novel in embodying and presenting legal propositions in an answer, and the points thus presented may be of every degree of importance. What is new is the obligation on defendant to show all his propositions at once; whether of fact or law, and let opponent and court consider whether, in view of the facts alleged, any of the legal theories propounded can profitably be considered before testimony taken; or by taking merely such evidence as has heretofore been often adduced in support of a plea. Evidently this casts a burden upon judicial discretion hitherto unknown. Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to an answer, and never seen, nor thought he had a right to see, the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether on how sympathetically and skillfully the new procedure is administered. That early efforts will sometimes be mistakes is to be expected. This case affords opportunity and imposes necessity of considering at least two points, which are of importance to the scheme of procedure, and not merely in this litigation. (1) Where an answer asserts that the bill states no case, can any fact allegations of defendants' pleading be considered? (2) When defendants raise legal propositions going to less than complainant's whole case, what test can be suggested to guide the court in deciding whether to consider or decline the points in advance of final hearing? On the first point, it seems to me clear that, when defendant alleges that complainant shows no case at all, he can not complain if the court consider any

admission or allegation of the answer which explains or enlarges (but does not contradict) the bill of complaint.

"One who 'demurs generally' nowadays must be understood to do so, not only on what complainant shows, but also after having had his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts. Similarly, where one defendant demurs after stating his own actions or position, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of No. 1 will not be stayed by his fellow's lack of knowledge. * * * On the second query, I am of opinion that no legal point (going to less than the whole case) should be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting the other aspects of the litigation." Hough, J., in *Boyd v. New York & H. R. Co.*, 220 Fed. Rep. 174, 178, 179.

BANKRUPTCY.—A court of bankruptcy is an equity court, and therefore subject to this rule. *Pollack v. Meyer Bros. Drug Co.*, 233 Fed. Rep. 861, 864—C. C. A. 8. The effect of new Rule 29 is to abolish demurrers to petitions to bankruptcy; every defense in point of law arising upon the face of such petitions must now be raised by motion to dismiss or by answer. *In re Jones*, 209 Fed. Rep. 717.

"ANSWER SHALL BE FILED WITHIN FIVE DAYS."—This provision of the rule will be strictly enforced. *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, 205 Fed. Rep. 158.

VOLUNTARY DISMISSAL.—This rule does not touch upon the right of the plaintiff to voluntarily dismiss the bill, nor does either of the other rules. Because of the frequency with which that question is raised, the following consideration of the subject by Judge Brown, of the First Circuit, is of value.

"Upon the plaintiff's motion to discontinue his bill without prejudice on payment of costs, defendant contends that the motion should be granted only upon condition that plaintiff should stipulate that depositions of 13 witnesses taken by defendant may be used by the defendant in subsequent suits. He relies upon the following decisions from the Second Circuit: *Brush v. Condit* (C. C.), 20 Fed. Rep. 826; *American Zylonite Co. v. Celluloid Mfg. Co.* (C. C.), 32 Fed. Rep. 809; *American Steel & Wire Co. v. Mayer* (C. C.), 123 Fed. Rep. 204.

"The decisions in the First Circuit, however, are to the contrary; *Morton Trust Co. v. Keith* (C. C.), 150 Fed. Rep. 606; *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.* (C. C.), 121 Fed. Rep. 1015. In both of these cases the proofs had been completed. See also *Houghton v. Whitin Machine Works* (C. C.), 160 Fed. Rep. 227, and *Tower v. Stimpson* (C. C.), 175 Fed. Rep. 130, cases in the First Circuit, and *Connecticut & P. R. Co. v. Hendee* (C. C.), 27 Fed. Rep. 678, in the Second Circuit.

"It may be questioned, however, whether the broad statement of the right of a plaintiff to discontinue, even after the proofs are closed and all the material is ready for a judgment on the merits, can be justified on principle. So broad a right to discontinue may enable a plaintiff to avoid a decision against him, when he has found that, upon the proofs taken and completed as required by the rules of court, a decision against him upon the merits is inevitable if the case proceeds. This, it seems to me, may work a substantial prejudice to a defendant, and amount to a substantial deprivation of his right to end the matter in the tribunal before which the plaintiff has brought him.

"This is something more than subjecting him to the annoyance of subsequent litigation; it is a deprivation of his right to the fruits of the labor and expense which he has already been to in following the course prescribed by law and by the rules of court. In many cases this involves a very great expenditure of time and money, and any rule which ignores this seems unjust to a defendant.

"In *Folger v. Robert G. Shaw Co.*, Fed. Cas. No. 4899, a case in the First Circuit which deserves careful consideration, Justice Woodbury said:

"I have assumed as the guiding principle, it being the only one conceivable by me, that the precise stage in which the discontinuance should be allowed without a judgment on the merits, and as a matter of right if claimed by the prosecuting party, is any progress in the cause which has not yet furnished means to the court for a correct final decision. * * * Each party should have somewhat similar rights in respect to such a subject; and the great inquiry is: When the plaintiff must be compelled to stop to exercise this power, as a right of withdrawing, without being barred from bringing another action? That is the precise question here: When that stage must be considered as reached? The rules of practice do not seem to be entirely uniform on this point, and have become more rigid in modern times than anciently. But I

apprehend that the principle which must govern it is that before indicated, and which is that this act must be done at some period before the merits can be ascertained for a final judgment, or the plaintiff is not entitled to do it as a right. * * *

'Now it does not seem to me to be consistent with principle that a case, standing here with pleadings completed, evidence taken, and all things ready for argument and final decision, should, undecided on the merits, be abandoned by the payment of costs, without the consent of the defendant, when, after so much expense and delay, he asks a final judgment upon the merits. In such case the merits are likewise susceptible of being ascertained and settled, which is not the situation of things before pleadings are finished and evidence put in. In my view, then, a defendant, under such facts and in such a stage of the cause, has a right to object to a dismissal of the cause, or a discontinuance, unless by the judgment of the court on the merits, or perhaps a leave granted by it for a discontinuance for strong reasons.'

'The present case, however, so far as has been made to appear, has not reached the point where the material is present for a judgment on the merits; therefore, even under the narrower rules as stated by Justice Woodbury, the plaintiff may yet discontinue as matter of right.

'In the modern English practice the subject of discontinuance appears to be governed by Order XXVI of "The Rules of the Supreme Court, 1883," as a complete code. See "Yearly Practice of the Supreme Court for 1912," Mackenzie & Chitty, pp. 322 *et seq.*, 324. Under that order the right to discontinue is much restricted, and express provision is made for imposing terms as to any other action. Upon page 324 the following note appears:

'When the plaintiff in a patent action discovered after reply, in consequence of objection delivered by defendant, that he could not succeed without correcting his specification, leave to discontinue was refused, except upon the terms that the plaintiff paid all the costs and would not bring any fresh action in respect of any infringement alleged in the existing action.' *Robertson v. Purdey* (1906), 2 Ch. 615.

'It seems to be desirable that the practice in the United States courts should be regulated by a definite rule analogous to Order XXVI, and that express provision should be made approving a practice such as is said to be the practice in the Second Circuit. At present, however, I am of the opinion that, according to the practice

established in the First Circuit, and according to the weight of authority, the plaintiff's right to discontinue at the present stage of the case is not subject to the imposition of conditions other than the payment of costs.

"It does not follow that defendant will thereby be deprived in subsequent litigation of all benefit of depositions that have been taken and filed in the cause, and which, under Equity Rule 55, are 'deemed published.' The general rules of evidence as to the use of depositions taken in former causes between the same parties and their privies afford protection against the loss of testimony not procurable in subsequent litigation. *Dover v. Greenwood* (C. C.), 154 Fed. Rep. 854, *Id.* (C. C.), 177 Fed. Rep. 946, affirmed in *Greenwood v. Dover*, 194 Fed. Rep. 91, 94, 114 C. C. A. 169, as to questions of evidence, though reversed on other points; *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965.

"While this may obviate the objection urged against dismissal, that the defendant may not again be able to procure his witnesses, it may not altogether relieve him from the hardship of retaking his testimony. Against unjust, vexatious, or unconscionable renewals of a suit once dropped, a defendant may ask protection in a subsequent litigation; and it seems probable that a plaintiff, seeking relief from a court of equity, may be subject to the imposition of conditions which will protect the defendant from being unduly and unnecessarily burdened.

"The draft decree presented by the defendant presents a novel aspect of the question. The present suit is upon the Smith patent, No. 1,099,132; a subsequent suit has been brought upon the Vanderveld patent, No. 1,157,651, issued after the filing of the bill in the present case. The request is that a condition be imposed permitting the use in the later suit upon the Vanderveld patent of the depositions taken in this suit in respect to the Smith patent. An affidavit is presented to show that these patents are related as generic and specific, and that the same evidence is applicable to each.

"Even were it proper to impose conditions upon the discontinuance, it would be impractical now to go into the question of the relevancy of the testimony already taken to the issues of another case. The relevancy of former testimony must be determined in the case in which it is offered.

"Plaintiff's counsel has made a comprehensive collection of the authorities, and it may be useful to make reference to them in this opinion: *Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630; *Chicago & Alton*

R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; Pullman Co. v. Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Detroit v. Detroit City Ry. Co. (C. C.), 55 Fed. Rep. 569, 573; Electric Accumulator Co. v. Brush Electric Co. (C. C.), 44 Fed. Rep. 602; Hat-Sweat Mfg. Co. v. Waring (C. C.), 46 Fed. Rep. 87; Hershberger v. Blewett (C. C.), 55 Fed. Rep. 170; Callahan v. Hicks (C. C.), 90 Fed. Rep. 539; Small v. Peters (C. C.), 104 Fed. Rep. 401; McCabe v. Southern Ry. Co. (C. C.), 107 Fed. Rep. 213; Georgia Pine Turpentine Co. v. Bilfinger (C. C.), 129 Fed. Rep. 131; Gilmore v. Bort (C. C.), 134 Fed. Rep. 658; United States v. Reese (C. C.), 166 Fed. Rep. 347; Johnson v. Miller, 96 Fed. Rep. 271, 37 C. C. A. 471—C. C. A. 4, 1889; Ebner v. Zimmerly, 118 Fed. Rep. 818, 55 C. C. A. 430—C. C. A. 9, 1902; The Bainbridge, 199 Fed. Rep. 404, 118 C. C. A. 88—C. C. A. 9, 1912; Harding v. Corn Products Refining Co., 168 Fed. Rep. 658, 94 C. C. A. 144—C. C. A. 7. Other cases in the First Circuit are Garner v. Second National Bank, 67 Fed. Rep. 833, 16 C. C. A. 86; Gregory v. Pike, 67 Fed. Rep. 837, 15 C. C. A. 33; American Bell Telephone Co. v. Western Union, 69 Fed. Rep. 666, 16 C. C. A. 367, reversing (C. C.), 50 Fed. Rep. 662; Fenno v. Primrose, 119 Fed. Rep. 801, 56 C. C. A. 313; United States v. United Shoe Machinery Co. (D. C.), 198 Fed. Rep. 873." Brown, J., in Young v. J. Samuels & Bro. Inc., 232 Fed. Rep. 784, 785.

MOTION TO DISMISS ON GROUND THAT PATENT IN SUIT IS VOID UPON ITS FACE FOR WANT OF INVENTION.—"Such motions * * * are to be encouraged in the case of simple design patents, where the mere inspection of the patent is all that would be necessary on final hearing, and this practice saves time and expense and tends to prompt disposition of litigation, all to the benefit of litigant, court and counsel." Mayer, J., in Mallinson v. Ryan, 242 Fed. Rep. 951.

NECESSARY PARTIES.—For an application of Rule 29 to a motion to dismiss for want of parties, and denial of an injunction as to a defendant who might thereby lose rights under a contract of purchase with a stranger to the cause, see Virginia C. Mining etc., Co. v. Corrigan, 242 Fed. Rep. 809—C. C. A. 6.

COPYRIGHT.—That a bill for copyright infringement is good as against a motion to dismiss under Rule 29 based on the failure of the bill "to allege that the musical compositions involved were written for the purpose of public performances for profit," see Hubbell v. Royal Pastime Amusement Co., 242 Fed. Rep. 1002.

30.

ANSWER—CONTENTS—COUNTER-CLAIM.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

A new rule, largely based on the English practice; but so radically different from that practice that the English decisions will be of small benefit to the American practitioner. See Order XIX, Rules 2 and 3.

At common law a defendant who had a claim against the plaintiff could not assert it by way of set-off or counter-claim, save that, when sued for the purchase price of merchandise, he could set up breach of warranty, express or implied. *Street v. Blay* (1831), 2 Barn. & Ad., 456.

For reasoning why defendant's rights under Rule 30 should be as broad as plaintiff's under Rule 26, see *Paramount H. F. D. Co. v. Walter Snyder Co.*, 244 Fed. Rep. 192.

The statute of 2 Geo. II, c. 22, permitted the defendant to plead a set-off in certain cases; but in courts of law only legal liabilities could be off-set, while in courts of equity, equitable claims for liquidated amounts, created between the same parties and in the same right could be so off-set. *Cavendish v. Greaves*, 24 Beav., 163. Under the modern practice in England the defendant may acquire and set off a debt owing by the plaintiff to a stranger to the litigation. *Bennett v. White*, W. N. (1910), 167.

A set-off is still a defense to the plaintiff's claim; while a counterclaim is a cross-action, which need not have any connection, however remote, with the plaintiff's cause of action. It need not be "an action of the same nature as the original action." *Beddall v. Maitland*, 17 C. D. 181. The net result of the revised procedure in England is that a legal counterclaim may be interposed in chancery, and an equitable claim in an action at law. *Fleming v. Lee* (1901), 2 Ch. 594.

CONSIDERATION OF THE ENGLISH RULE.—Rule 30 being grounded upon Order XIX, Rules 2 and 3, the courts of the United States have frequently referred to those English rules in construing Rule 30. The text of those rules is as follows:

"2. The plaintiff shall, subject to the provisions of Order XX, and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions of Order XXI, and at such time and in such manner as therein prescribed, deliver to the plaintiff his defense, set-off, or counterclaim (if any), and the plaintiff shall, subject to the provisions of Order XXIII, and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defense, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same."

"3. A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both in the original and on the cross-claim. But the Court or a Judge may, on the application of the plaintiff before

the trial, if in the opinion of the Court or Judge such set-off or counterclaim can not be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

THE ENGLISH PRACTICE NOT LIMITED BY THE DISTINCTION BETWEEN LAW AND EQUITY OBTAINING IN THE FEDERAL COURTS.—It has been said of Order XIX, Rule 3, "It can not be regarded as having exactly the same effect with Rule 30, because it contains no requirement that the counterclaim be based on the subject-matter of the suit, like that found in Rule 30. Moreover, the modern English practice is not understood to distinguish between law and equity as the federal courts are required to do by statute (§ 723, R. S.)." Dodge, J., in *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. Rep. 103. And again, "The new equity rules having been conceived in a most liberal spirit, Rule 30 should be given its manifest meaning, so as to allow all mutual claims in equity to be set off or opposed, as is done under the English practice, where it has been given a broad and liberal construction, although it has not been extended (as its terms prohibit) to cases so incongruous as to be incapable of trial with the original suit. Such an exception may also properly be applied under Rule 30, since the rule relates only to equitable causes of action. If it would be inequitable to subject the plaintiff to the defense of an incongruous cross action, the court would decline jurisdiction." Sanborn, J., in *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. Rep. 91.

"SHORT AND SIMPLE TERMS."—This provision should be enforced according to its terms. *Coulston v. H. Franke Steel Range Co.*, 221 Fed. Rep. 669; *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. Rep. 950.

COUNTERCLAIM

1. DEFINED.—"The word 'counterclaim,' as used in Rule 31 and the preceding Rule 30, must be taken to be a general and comprehensive term including all counter demands (*Boothe v. Armstrong*, 76 Conn. 530, 57 Atl. Rep. 173), which might be the subject of an independent suit in equity, so as to enable the court to pronounce final judgment in the same suit both on the bill of complaint and the answer." Thomas, J., in *Goodno v. Hotchkiss*, 230 Fed. Rep. 514, 518.

2. WHAT COUNTERCLAIMS MUST BE PLEADED OR ABANDONED.—Any counterclaim "arising out of the transaction which is the sub-

ject-matter of the suit" must be set up by answer or deemed abandoned, this provision of the rule being mandatory. *Marconi Wireless Tel. Co. v. National Electric Signalling Co.*, 206 Fed. Rep. 295; *Portland Wood Pipe Co. v. Slick Bros. Const. Co.*, 222 Fed. Rep. 528; *Knupp v. Bell*, 243 Fed. Rep. 157, 161—C. C. A.—4.

3. THE LIBERAL CONSTRUCTION OF THE RULE.—As to the character of cause of action that may be counterclaimed under Rule 30 the cases are in keen conflict. The broad construction of some of the cases is predicated upon the distinction between mandatory and permissive portions of the rule—"the answer *must* state * * * any counterclaim arising out of the transaction which is the subject-matter of the suit"—"may without cross-bill set out any set-off or counterclaim * * * which might be the subject of an independent suit in equity" against the plaintiff. A clear-cut analysis of the rule by Judge Chatfield, based on this feature of the language employed, leads to his conclusion that "rule 30 seems to be intended to prevent useless litigation and to serve the convenience of parties by providing for the inclusion of as many causes of action (which the court of equity can entertain within its statutory jurisdiction) as could properly be disposed of in one litigation, by cross suits, and which could be included in the necessary injunction orders and by a complete accounting in one decree. Within reasonable limits of convenience, a charge of infringement of one patent right, with counterclaims alleging infringement of three other patent rights related to the same subject-matter, and involving complications only to the extent of considering a larger number of claims, followed by a decree directing specific orders of injunction, as the case may be, and with a complete accounting as to the causes of action, seems to the court to be, when properly used, within the intent and letter of rule 30. Such a suit could be tested only by the doctrine of convenience and possibility of handling suggested by the provision in rule 26." Under the former practice, a cross-bill was for discovery or to give "full and complete relief to all parties as to the matters charged in the original bill." *Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.* (C. C.), 46 Fed. Rep. 851, citing *Story's Eq. Pl.* § 389, and numerous cases. This ruling was followed in *Stuart v. Hayden*, 72 Fed. Rep. 402, 18 C. C. A. 618 (affirmed 169 U. S. 14, 18 Sup. Ct. 274, 42 L. Ed. 639), and in *Jackson v. Simmons*, 98 Fed. Rep. 768, at page 774, 39 C. C. A. 514, and is correct in stating the scope of a "cross-bill" under the old rules. The new rule 30 not only thus does away with a cross-bill, but says that "without cross-bill" any claim

which could be the subject of an independent equity suit shall be set out in the answer with the same effect as a "cross-suit," so as to allow a "final judgment" on the "original" and "cross-claims." Here we have a deliberate use of new terms covering any "independent suit in equity," to have the result of a "cross-suit," and yet to be pleaded "without cross-bill" (which is seemingly recognized as the old way of pleading). In the case of the Terry Steam Turbine Co., 204 Fed. Rep. 103, the court seems to hold that the permissive way of pleading is no broader than the mandatory. If so, it is impossible to give any purposeful meaning to the greater part of the paragraph. However, to go to the other extreme, and hold that all causes of action in equity between the parties and within the court's jurisdiction can be brought in and tried, is evidently not practicable, although the rule seems to be broad enough for this construction. Some restriction should be adopted (under rule 79, 198 Fed. xli, 115 C. C. A. xli) for general limitation, and in each case the court must ultimately determine what issues can be properly disposed of in "a final judgment" in the suit, and order severance accordingly. *Marconi Wireless Tel. Co. v. National E. S. Co.*, 206 Fed. Rep. 295, 301.

In a later case it has been said, "the distinction made in the rule between a 'counterclaim arising out of the transaction' forming the basis of the original suit and one 'which might be the subject of an independent suit,' brought by the defendant against the plaintiff, is the primary and influential distinction between what could be set up by a cross bill and what could not. The provision that the claims arising out of such transaction must be set up in the answer is intended to put an end in one suit to all the controversies that arise out of such subject-matter, legal (see rule 23) or equitable; and the provision that the independent equitable causes of action may be so set up is intended to permit the defendant to litigate in the same suit all independent causes of action, of an equitable nature, to the same extent as the complainant might in the first instance under rule 26. In the presence of such manifest intent, to adhere to the technical meaning of the term 'cross bill' is to attribute to the framers of the rule a meaning in irreconcilable conflict with the context. Each term is perhaps unfortunate, both as to words and position, but it is clear from the context that it is to be understood as a synonym of 'cross suit' and 'cross claim.' Therefore the limitation upon what counterclaim may be set up is not that it must have arisen out of the transaction which is the basis of the original bill, that character of counterclaim having been already completely covered by the preceding

clause, but that the subject-matter thereof be such as 'might be the subject of an independent suit in equity' against the plaintiff." *Rellstab, J.*, in *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. Rep. 377.

For other cases expressing the broad view of Rule 30, see *Salt's Textile Mfg. Co. v. Tingue Mfg. Co.*, 208 Fed. Rep. 156; *United States Expansion Bolt Co. v. H. G. Kroncke Hdw. Co.*, 216 Fed. Rep. 186.

For the application of this liberal doctrine to a charge of unfair competition counterclaimed in a suit for patent infringement, see *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. Rep. 419.

4. THE NARROW INTERPRETATION OF THE RULE.—The cases which restrict the counterclaim to such matter as arises out of the transaction which is the subject-matter of the suit, reach this result by ignoring the text of the rule in favor of the convenience of the court. The argument for narrow and restricted application of the rule has been well summed up by Judge Geiger as follows, "It may be conceded that the new rules as a whole aim to simplify proceedings, and, as is evident, have features of modern codes of civil procedure in which distinctions between actions at law and proceedings in equity are abolished. The new rule No. 26, permitting joinder by complainants of any number of causes of action cognizable in equity in one bill, subject only to convenience of trial, is cited as evidencing adoption of not only the letter but the spirit of many of the Codes. But the construction claimed for rule 30 (and in support whereof the liberality of rule 26 is cited) brings us far beyond any effort made in code provisions respecting the scope of answers in equitable actions. Now, if the scope of rule 30 may be ascertained by a reference to other rules, it seems to me that rule 31 relating to replies and the formation of an issue, is significant. If it were intended by rules 26 and 30 to enlarge the scope of equitable procedure by permitting answers to incorporate causes of action not related nor germane to the subject of the bill, then rule 31 would naturally have the necessary provisions to enable a plaintiff to obtain such affirmative relief as, were the counterclaiming defendant proceeding by original bill, the complainant could obtain, formerly by cross bill, now by counterclaim. For example, in the case already referred to, a citizen of Illinois, suing a citizen of Wisconsin, upon a cause of action for foreclosure, the latter might, under the broad construction claimed for rule 30, set up by counterclaim a cause of action for specific per-

formance of a contract wholly unrelated to the subject-matter of the bill. Must the plaintiff, because of the limitations of rule 31 forego, for instance, his right to relief by way of reformation which he could formerly have asserted through cross-bill? Is there any way whereby a plaintiff through a "reply" to such counterclaim can obtain affirmative relief? It would seem not; the effect of the rule is plainly to determine the point when and how an issue for trial upon the merits is created.

Thus, if rule 30 be given the broad construction permitting a defendant in effect to file an original bill by way of counterclaim, we would have a system whereunder the defendant could answer fully all of complainant's original causes of action, but complainant could in no event assert his right to affirmative relief upon a defendant's original cause of action, set out by way of counterclaim. If the rules be considered in the light of the former practice which was foundationed upon the principle that complainant's bill determines the *scope* of the *exercise of jurisdiction*, there appears to be no reason for giving to rule 30 any larger office than that requisite to bring about the change so obviously indicated; i. e., that of incorporating in an answer: (1) The matters formerly included in answers proper; (2) matters formerly the subject of auxiliary or cross-remedies through cross-bills. *Adamson v. Shaler*, 208 Fed. Rep. 566, 567. In an attempt to reconcile these views with those of Judge Chatfield in *Marconi Wireless Tel. Co. v. National E. S. Co.*, 206 Fed. Rep. 295, *supra*, it has been said: "A close reading of the Marconi Case will, I believe, justify the conclusion that no very great difference of opinion does in reality exist between these judges in regard to the rule when it comes to an application of it to the same or a similar state of facts. It will be noticed that Judge Chatfield, in the Marconi Case, permitted the plea of set-off and counterclaim to stand; but it will be further noticed that the subject-matter of that case was that of the infringement of patents, and that the judge merely allowed the parties therein to set off, one against the other, their respective claims as to such infringements, though the patents were issued as of different dates. It seems to me that, even if the pleading in that particular case did not relate to the same transaction, it was so closely connected with the subject of the action which was the basis of the plaintiff's case, as to be inseparable from it, and to be permitted under the practice in Connecticut." *Thomas, J.*, in *Sydney v. Mugford Printing Co.*, 214 Fed. Rep. 841.

It may be remarked that the frequent references to State codes which occur in some of these cases do not seem warranted or helpful.

The following are cases holding that the counterclaim must arise out of the transaction which is the subject-matter of the suit: *Klander-Weldon Dyeing Mach. Co. v. Giles*, 212 Fed. Rep. 452; *Williams Patent C. & P. Co. v. Kinsey Mfg. Co.*, 205 Fed. Rep. 375; *Terry Steam Turbine Co. v. Sturtevant Co.*, 204 Fed. Rep. 103; *Klauder-Weldon Dyeing Mach. Co. v. Giles*, 212 Fed. Rep. 452; *Adamson v. Shaler*, 208 Fed. Rep. 556; *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. Rep. 347; *Sydney v. Mugford Printing & Eng. Co.*, 214 Fed. Rep. 841; *Christensen v. Westinghouse Traction Brake Co.*, 235 Fed. Rep. 898. The cases are collected in *Ohio Brass Co. v. Hartman Elec. Mfg. Co.*, 243 Fed. Rep. 629.

CROSS-BILL TO BRING IN NEW PARTIES.—In a suit by the United States on behalf of the Creek Indians to cancel conveyances of allotted lands (said conveyances being alleged to have been made in violation of restrictions upon alienation imposed by Act of June 30, 1902, 32 Stat. 500, c. 1323), it was held that Rule 30 would not justify a cross-bill to bring in as parties strangers to the bill, alleged in the cross-bill to be asserting claims of title to the land in question adverse to the defendant. *United States v. Woods*, 223 Fed. Rep. 316 (C. C. A.—8).

NECESSARY ALLEGATIONS IN COUNTERCLAIM FOR PATENT INFRINGEMENT.—A counterclaim charging patent infringement may properly be filed under Rule 30 though the plaintiff is not an inhabitant of, and has no established place of business in the district, and has not infringed within the district, those objections to the jurisdiction being waived by the filing of the bill. *United States E. Bolt Co. v. H. G. Kroncke Hdw. Co.*, 234 Fed. Rep. 868, 871 (C. C. A.—7). The contrary was held in *McGill v. Sorensen*, 209 Fed. Rep. 876.

COUNTERCLAIM—JURISDICTION.—When a counterclaim charging patent infringement fails upon the facts, the court has no jurisdiction to entertain a charge of unfair competition embodied in the answer, unless the necessary diversity of citizenship and amount in controversy are present. *United States E. Bolte Co. v. H. G. Kroncke Hdw. Co.*, 234 Fed. Rep. 868, 871 (C. C. A.—7). The apparent confusion in the cases on the subject of acquiring jurisdiction over other causes of action, because of the presence of jurisdiction as to one cause of action has been clarified by Judge Kohlsaat as follows:

“It is said in *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, where a suit had been brought against a Missouri corporation by a West Virginia corporation in the Eastern judicial district of Missouri to restrain infringement of a

trade-mark and for unfair competition, in which suit the trade-mark was not upheld:

“The opposite parties to the suit are citizens of different states; and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition.”

“In *Ludwigs Mfg. Co. v. Ludwigs*, 206 Fed. Rep. 64, 124 C. C. A. 194, this court held, in a case brought for infringement of a patent and for unfair competition, by one citizen of Illinois against another citizen of Illinois, that, having sustained the patent and infringement thereof, it would entertain the charges of unfair competition, ‘which, though in one aspect arising from fraud in trade, in a fairer aspect are aggravations of the infringement.’ Inasmuch, however, as, in the present case, the infringement is not sustained, there are no damages to be aggravated. There are a number of cases which hold that the charge as to which there is jurisdiction being found by the court to be not sustained, whether because of invalidity of the patent or want of infringement, the court can not adjudicate other charges jurisdiction over which depended alone upon the jurisdiction acquired through the main or original charge of the bill. *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 667, 21 Sup. Ct. 270, 45 L. Ed. 365; *Leschen Rope Co. v. Braderick*, 201 U. S. 166, 172, 26 Sup. Ct. 425, 50 L. Ed. 710; *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. Rep. 42, 90 C. C. A. 1; *Burt v. Smith*, 71 Fed. Rep. 163, 17 C. C. A. 573; *Sprigg v. Fisher* (D. C.), 222 Fed. Rep. 964; *Bernstein v. Danwitz* (C. C.), 190 Fed. Rep. 604; *Mecky v. Grabowski*, *supra*; *Cushman v. Atlantis Fountain Pen Co.* (C. C.), 164 Fed. Rep. 95. To the same effect are *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145, and *Schiebel Toy & Novelty Co. v. Clark*, 217 Fed. Rep. 760, 133 C. C. A. 490, in which latter case it is explained that the records disclose that in both *Globe Wernicke Co. v. Macey Co.*, 119 Fed. Rep. 696, 56 C. C. A. 304, and *Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. Rep. 603, 128 C. C. A. 203, L. R. A. 1915F, 1107, decided in the Sixth Circuit, diversity of citizenship existed.

“The case of *Siler v. L. & N. R. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753, is cited in support of the jurisdiction of the District Court herein. The bill in that case attacked the validity of an act of the Legislature of Kentucky as in violation of section 1 of the Fourteenth Amendment and on other grounds, among which was

the charge that it violated the federal Constitution by reason of the enormous fines and penalties therein provided for a violation of any of the provisions of the act. The bill also charged that the order of the commission created by the act was invalid as violating the federal Constitution if it was authorized by the statute, and also that it was unauthorized by the statute, the latter a local question. In its desire to avoid the decision of a constitutional question, the court proceeded to investigate this last question, holding that it had jurisdiction so to do as had the circuit court because of the jurisdiction upon the other allegations of the bill, and, finding that the commission had exceeded its authority, affirmed the decision of the circuit court. But while the grounds of attack both on the order and the statute were separate and distinct, the subject-matter over which the federal court had jurisdiction, their alleged invalidity was a single one. And as that charge of invalidity was held to have been based, in good faith, on a violation of the federal Constitution, the case holds only that under such circumstances the court may determine the question of its validity as well on other grounds—grounds which, if they alone had been alleged, would not have brought the controversy within the jurisdiction of the federal courts. We do not deem this case on the facts presented authority for the proposition contended for in the present case, especially in view of the other decisions of the Supreme Court above referred to. The counterclaims herein are distinct and independent causes of action, not merely separate grounds for a single cause of action, and that of unfair competition may not be dealt with by the federal court in the absence of diversity of citizenship. Appellees cite Foster's Federal Practice (4th Ed.), vol. 1, p. 193, where it is said:

'After a federal court has acquired jurisdiction, through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same state, and there is no other ground of federal jurisdiction.'

"An examination of the authorities cited by the author for the text shows that in every one of them reference is made to some special facts—such as the death of a party and substitution of an administrator, or other change in parties, which facts would not oust jurisdiction; or where the res is in the federal court, as a judgment or decree attacked, or property in regard to which suit is brought, or some situation exists in which suit would not be effective outside the particu-

lar federal court whose jurisdiction would be involved. The excerpt is not, nor was it intended by the author to be, an argument in support of the jurisdiction of the federal courts in cases such as those here presented." *United States E. Bolt Co. v. H. G. Kroneke Hdw. Co.*, 234 Fed. Rep. 868, 874 (C. C. A.—7). Compare *Cleveland Eng. Co. v. Galion D. M. Truck Co.*, 243 Fed. Rep. 405, 407.

COUNTERCLAIM IN SUIT FOR COPYRIGHT INFRINGEMENT.—Under Rule 30 the defendant charged with copyright infringement may by counterclaim enjoin plaintiff relating to the copyright. *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 612.

LEGAL DEMAND NOT SUBJECT OF COUNTERCLAIM.—A claim maintainable only at law can not be counterclaimed in an equity suit in view of the language of the rule, "which might be the subject of an independent suit in equity." *Motion Picture Patents Co. v. Eclair Film Co.*, 208 Fed. Rep. 416.

31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

The replication was formerly provided for by Rule 45, *ante*, p. 102. The above rule is new and largely based on the English practice. Order XXIII, Rule 1, provides that "except in admiralty

actions no reply shall be delivered unless the same be ordered." The word "reply" includes a defense to a counter-claim; but it is used in another sense in Order XXI, Rule 14: "Any person named in a defense as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defense if it were a statement of claim."

It will be noted that the English rule is peremptory, while the above rule merely does not require a reply. In the English practice a plaintiff against whom a counter-claim is directed can not reply without an order of a Master (Order XXIII, Rule 2), while the above rule puts him in default if he fails to reply.

It may be here noted that the expression *pro confesso* has disappeared altogether from the nomenclature of modern English chancery practice.

HISTORICAL.—"Prior to 1842 special replications in equity had fallen into disuse, and they were not permitted, save by leave of the court in extraordinary cases. It was always required that new matter, or matter in response to allegations in the answer, should be set up by amendments to the bill, and could not be supplied by averments in the replication. *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130; *Wilson v. Stolly*, 4 McLean 272, Fed. Cas. No. 17,839; *Coleman v. Martin*, 6 Blatch. 291, Fed. Cas. No. 2,986; *Vattier v. Hinde*, 7 Pet. 252, 274, 8 L. Ed. 675; *Story's Equity Pleadings*, §§ 676, 679, 878; *Mitford & Tyler, Pleadings and Practice in Equity*, 413; *Swift's Digest* (Ed. 1822), vol. 2, p. 245.

"In 1842 the Supreme Court promulgated equity rule 45 (see *Dewhurst's Rules of Practice in United States Courts* [2d Ed.] p. 394), providing that 'no special replication to any answer shall be filed,' and that if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill he may have leave to amend the same, with or without the payment of costs, as the court or a judge thereof may in his discretion direct. This rule was construed by the Supreme Court as meaning that:

'A general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill.' *Mr. Justice Harlan in Southern Pacific Railroad v. United States*, 168 U. S. 1, 57, 18 Sup. Ct. 18, 30, 42 L. Ed. 355.

"And in *Mason, Adm'r, etc., v. Hartford, Providence & Fishkill R. Co.* (C. C.), 10 Fed. Rep. 334, a special replication to a plea and

demurrer was stricken from the files by Judge Colt in accordance with the rule.

"Rule 31 of the New Equity Rules promulgated by the Supreme Court in 1912, which is new and largely based on the English practice, has done away with *all* replications to answers by providing that:

'Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff.'

"The only difference between this rule and the English rule upon which it is based is that the latter is peremptory in all cases, while the former merely does not require a reply."

Thomas, J., in *Goodno v. Hotchkiss*, 230 Fed. Rep. 514, 517.

REPLY, WHEN NECESSARY.—A reply to new and affirmative matter pleaded by way of confession and avoidance is not necessary. *Shera v. Merchants' Life Ins. Co.*, 237 Fed. Rep. 484, 486. No reply is necessary unless the answer asserts a set-off or counterclaim. *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. Rep. 377.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

A new rule.

In the English practice a defendant can never amend his defense save by obtaining leave so to do (Order XXVIII, Rule 1), but the leave to amend is liberally given, even as to admissions, if made through mistake and inadvertence. "I shall always hold that leave

to amend should be given when there is a slip." Pearson, J., in *Clarke v. Yorke*, 31 W. R. 63.

33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter.

A new rule, superseding former Rules 61, 63, 64, *ante*, pp. 116, 117, 118.

The motion to strike out was long since substituted for exceptions in the English practice. It is now prescribed by the following rule:

"The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defense being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just." (Order XXV, Rule 4.)

This rule has abolished the former practice of submission on bill and answer. *Shera v. Merchants' Life Ins. Co.*, 237 Fed. Rep. 484, 485.

For applications of Rule 33, see *Marconi Wireless Tel. Co. v. National E. S. Co.*, 206 Fed. Rep. 295, 301; *Sydney v. Mugford Printing Co.*, 214 Fed. Rep. 841.

34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made,

including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof.

This is a new rule, superseding former Rule 57, *ante*, p. 111.

For the similar procedure, as to defenses, in the English practice, see Order XXIV, "Matters Arising Pending the Action." The failure to specifically provide for bringing matter of a supplemental character into the statement of claim, is due to the breadth of Order XX, Rule 4: "Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

As indicated by the next Rule (35), the supplemental bill is retained in our practice. It appears to be obsolete in England, a second writ and motion to consolidate being necessary to a recovery on a cause of action arising after writ issued. Odgers, Pleading, 7th ed., p. 194.

It is within the discretion of the court to permit a proper counterclaim to be set up by an amended answer. *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. Rep. 103.

35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

This is former Rule 58, *ante*, p. 113.

For the English practice as to revivor, see Order XVII, "Change of Parties by Death, etc."

36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice

or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

A new rule. For the former rule as to the verification of answers, see Rule 59, *ante*, p. 113.

37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

A new rule, merely declarative of settled law. *Kardo Co. v. Adams*, 231 Fed. Rep. 950, 958 (C. C. A.—6.)

As to suits by trustees, concerning real estate, see former Rule 49, *ante*, p. 105.

The portion of the rule relating to intervention was suggested by the Bar Committee of the Circuit Court of Appeals of the Eighth Circuit.

Under the English rule the court or judge may strike out or add parties at any stage of the proceedings, "either upon or without the application of either party." (Order XVI, Rule 11.)

INTERVENTION.—In an action for alleged injury to the plaintiff's business, a third party who is neither a necessary or proper party to the suit will not be given leave to intervene for the purpose of asserting a claim of patent infringement against the plaintiff as a counterclaim under Rule 30. *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. Rep. 347.

For an illustration of intervention by the maker of the alleged infringing article sold by the defendant, under Rule 37, see *Baldwin v. Abercrombie & Fitch Co.*, 228 Fed. Rep. 895, 898 (C. C. A.—2).

APPELLATE REVIEW.—It is error for the trial court of its own motion to inquire into the capacity of the plaintiff to sue, and so dismiss the bill. *Kardo Co. v. Adams*, 231 Fed. Rep. 950, 959 (C. C. A.—6.)

Rule 37 does not justify a trial court in ordering new parties to be brought in unless they are necessary or proper parties. *Ex p. Equitable Trust Co.*, 231 Fed. Rep. 571, 592 (C. C. A.—9.)

LICENSEES AS PARTIES.—Lessor and lessee of a motion picture film may be joined as plaintiffs. *Baumont Co. v. Hatch*, 208 Fed. Rep. 378. But an exclusive licensee to produce a play "upon the stage by a company of players" has no such interest in the copyright as to justify making it a party plaintiff with the copyright owner in a bill to restrain infringement by a motion picture play. *Tully v. Triangle Film Corp.*, 229 Fed. Rep. 297.

GENERAL RULE AS TO INTERVENTION.—"The federal courts from an early period of their history have steadily held that, where the real merits of the cause can be determined without affecting the interests of absent persons, though proper parties, the cause may proceed without them." Intervention must be "in subordination to the propriety of the main proceeding." *Speer, J., in Jennings v. Smith*, 242 Fed. Rep. 561, 564.

38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

A new rule, in affirmance of an old principle of equity; adapted from New York Code, § 448. The English rule is as follows:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." (Order XVI, Rule 9.)

"Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent." Lord Macnaghten, in *Bedford v. Ellis* (1901), A. C. 1, 8.

Compare former Rule 48, *ante*, p. 104.

Rule 38 was promulgated on the recommendation of the Bar Committee of the Circuit Court of Appeals of the Second Circuit; the committee advising the omission of the last sentence of former Rule 48, "for the reason that in every true 'class suit' the decree is necessarily binding upon all parties included in the decree." Citing: *Coann v. Atlanta Factory Co.*, 14 Fed. Rep. 4; *American Steel Co. v. Wire Drawers' Union*, 90 Fed. Rep. 598.

"This rule accords with the principle, laid down by Pomeroy, permitting such a suit—

'where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.' "

Bradford, J., in *Chew v. First Presb. Church*, 237 Fed. Rep. 219, 241. To the same effect, see *Merchants' & Manuf. Traffic Assn. v. United States*, 231 Fed. Rep. 292, 295.

"QUESTION OF COMMON OR GENERAL INTEREST."—The Acts of the several States against the use of trading-stamps are of this character, and retail merchants may join as parties plaintiff in a bill to restrain the enforcement of such an act as being unconstitutional. *Little v. Tanner*, 208 Fed. Rep. 605, 608; *Tanner v. Little*, 240 U. S. 369, 380; 60 L. Ed. 691.

"When the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in court by representation." *Woods, J.*, in *Hill v. Eagle Glass & Mfg. Co.*, 219 Fed. Rep. 719, 721 (C. C. A.—4).

THE RIGHT TO SUE AS REPRESENTATIVE OF A CLASS.—A plaintiff has no standing as a representative of a class, unless personal injury to himself is threatened. He "can not succeed because some one else may be hurt." *Raich v. Truax*, 219 Fed. Rep. 273, 283 (C. C. A.—9); quoting and applying *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169.

The power of the court in determining the right of a telephone subscriber to intervene as representative of a class in a pending proceeding to enjoin the enforcement of a municipal ordinance fixing telephone rates, has been held discretionary in *In re Engelhard & Sons Co.*, 231 U. S. 646, 58 L. Ed. 416.

39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

The substance of former Rule 47, *ante*, p. 103. The verbal changes were made at the suggestion of the Bar Committee of the

Circuit Court of Appeals of the Second Circuit, whose recommendation was as follows:

"This is probably covered by Section 50 of the Judicial Code and Section 737 of the Revised Statutes.

The words 'necessary or' preceding the words 'proper parties' in the original rule are omitted. This is believed to conduce to a more intelligible and accurate use of the terms employed, since a party who is necessary to the suit in the ordinary acceptation of the term must, of course, be joined. By reason of the inclusion of the word 'necessary' in the former rule, the court adopted a new classification and used the term 'indispensable parties' to describe those who ordinarily would be termed 'necessary parties.' *Shields v. Barrows*, 17 Howard 139, 15 L. Ed. 158; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Waterman v. Canal Co.*, 215 U. S. 33, 54 L. Ed. 80; *Rogers v. Penobscot Manufacturing Company*, 154 Fed. Rep. 606. It is believed that by amending the rule in this manner this artificial classification may be dispensed with."

The above recommendation was erroneous, in that § 737, Revised Statutes of the United States, was expressly repealed by § 297, The Judicial Code. Therefore, the only statutory provision now in effect is in The Judicial Code, § 50, which is the same in terms as former Section 737, and is as follows:

SECTION 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit. This section and Rule 39 are considered jointly in *Lowenthal v. Georgia C. & P. R. Co.*, 233 Fed. Rep. 1010, 1015.

EFFECT OF THE RULE.—"The three plaintiffs who brought the suit could have maintained it without the administrator. The interest of the latter, though like, was severable from theirs, and his presence was not essential to the relief they sought in their own behalf. He was a proper party, but not an indispensable one, within the long-

settled meaning of those terms. *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 54 L. Ed. 80; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657. Where a person whose presence in a suit is proper, but not indispensable, can not be made a party without ousting the jurisdiction of the trial court, it may in its discretion proceed in his absence, and the decree shall be without prejudice to his rights. The 39th equity rule to that effect is declaratory of the settled practice at the time of its adoption." *Hook, J.*, in *Thomas v. Anderson*, 223 Fed. Rep. 41, 43 (C. C. A.—8.)

40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

This is the language of former Rule 54, *ante*, p. 109. As to this rule the Bar Committee of the Circuit Court of Appeals for the Second Circuit recommended that the clause as to costs be dispensed with, "since the costs are at all times in the discretion of the court."

A prayer that defendant be required to answer is now unnecessary except as to nominal parties, and under Rule 40. *Pittsburg Water Heater Co. v. Beler Water H. Co.*, 222 Fed. Rep. 950.

41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plain-

tiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

The language of former Rule 50, *ante*, p. 106.

42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

The language of former Rule 51, *ante*, p. 106.

43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

This is a new rule, based upon the English practice.

"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner." (Order XVI, Rule 12.)

44.

DEFECT OF PARTIES—TARDY OBJECTION.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

This rule embodies the substance of former Rule 53, *ante*, p. 108.

45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

This rule is new, embodying an old principle. What is "a proper case" is to be determined by the application of the maxim "*Actio personalis moritur cum persona*."

46.

**TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—
RULINGS ON OBJECTIONS TO EVIDENCE.**

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so

much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

A new rule, abolishing the practice of former Rule 67, *ante*, p. 119, and adopting the English practice of oral testimony in open court save where special cause exists for taking the testimony otherwise. For the English practice, see Order XXXVII, Rules 5 to 25, both inclusive.

By empowering the trial court to pass upon the admissibility of the evidence, and providing for appellate review of questions of evidence, the rule restores the practice as it existed prior to 1842, as explained in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

This rule applies in bankruptcy proceedings. *Re C. W. Bartleson Co.*, 243 Fed. Rep. 1001.

THE PURPOSE OF THE RULE.—“I see no reason for departing in this case from the spirit and letter of the new equity rules promulgated by the Supreme Court, the wisdom of which can not be seriously questioned. The judges are generally quite opposed to such departures. When witnesses are present in court, objections can be made and rulings had by the court, and much better justice administered, than when the evidence is taken out of court before an examiner, without power to rule on the questions presented.” *Ray, J.*, in *North v. Herrick*, 203 Fed. Rep. 591, 592.

47.

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order

of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

A new rule, supplementary to Rule 46, next preceding.

THIS RULE DOES NOT VARY OR LIMIT § 863, REVISED STATUTES.—That depositions taken under § 863, Revised Statutes, need not be taken by leave of court or within the time limited by Rule 47, see *Iowa Washing Mach. Co. v. Montgomery, Ward & Co.*, 227 Fed. Rep. at p. 1007 (D. C., S. Dist. N. Y., Mayer, J., Hough, A. N. Hand, Learned Hand, JJ., concurring), overruling *Victor Talking Mach. Co. v. Sonora Phonograph Corp.*, 221 Fed. Rep. 676, 678. Judge Van Fleet has refused to follow the New York case in *Block v. Wonder Mfg. Co.*, no opinion filed (N. Dist. Cal.), and the practice is unsettled. See *Block v. Arrowsmith Mfg. Co.*, 243 Fed. Rep. 775.

This rule applies in bankruptcy proceedings. *Re C. W. Bartleson Co.*, 243 Fed. Rep. 1001.

48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES.

In a case involving the validity or scope of a patent or trademark, the District Court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance

with such direction, his affidavit shall not be used as evidence in the cause.

A new rule, supplementary to the two rules next preceding.

The provisions as to affidavits in the English practice are to be found in Order XXXVII, Rules 20 and 24; Order XXXVIII, Rules 25, 26, 27 and 28.

It is not clear why Rule 48 should distinguish between opinion witnesses in patent or trademark cases, and other cases. No such distinction obtains in England, where the rule is that: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted" (Order XXXVIII, Rule 3).

It is particularly obscure why trademark cases should be specified in the rule, as practically no opinion witnesses are employed in such cases, in view of the repeated rulings that the best tests of resemblance (the point upon which expert testimony was formerly occasionally introduced) are proof of actual instances of substitution, and visual inspection by the court.

IS THIS RULE IN CONTRAVENTION OF STATUTE?—In Section 917 it is enacted that the Supreme Court shall have power "to prescribe * * * in any manner *not inconsistent with any law of the United States* * * * the modes * * * of taking and obtaining evidence." So, also, in § 913, Revised Statutes of the United States, it is provided that the forms and modes of proceeding in suits of equity are subject to regulation by the Supreme Court by rules prescribed not inconsistent with the laws of the United States. See *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274. In the Judiciary Act of 1789, 1 Stat. at L. 88, Section 30, it was provided that the mode of proof by oral testimony and examinations of witnesses in open court should be the same in all the courts of the United States, as well in the trial of causes in equity as of actions at common law; and this provision remained in force until the adoption of the Revised Statutes, of which Section 862 repealed it. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

It is provided by Section 862 that "the mode of proof in causes of equity * * * shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." As to such special provisions as are thereby excepted from the power of the Supreme Court to make rules, that court has said "when the

statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States." Mr. Chief Justice Waite, in *Whitford v. County of Clark*, 119 U. S. 522, 30 L. Ed. 500.

Section 863 contains the following provision: "The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm." Of Section 863 Mr. Justice Miller has said, "No one can examine these provisions for procuring testimony to be used in the courts of the United States, and have any reasonable doubt that, so far as they apply, they were intended to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted." *Ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117; followed in *Hanks Dental Assn. v. International Tooth Crown Co.*, 194 U. S. 303, 48 L. Ed. 989.

We see, therefore, that Section 863 does not distinguish between classes of witnesses. The question therefore arises whether the Supreme Court has any authority to withdraw from the operation of Section 863 opinion witnesses as a class. Does the promulgation of Rule 48 have the effect of depriving a party litigant of the absolute right to take the testimony of an expert or opinion witness, where that witness resides at a greater distance from the place of trial than one hundred miles, or the other statutory causes for taking his deposition under Section 863 exist? Have the district courts authority by a local rule to require a notice to take depositions under Section 863 to specify whether the witnesses are expert or fact witnesses? Conceding the validity of the rule as to witnesses resident within the 100-mile radius from the place of trial, it is difficult to see how a district court may on petition make an order in the terms of Rule 48 which will be of any force as against a party who may see fit to use the testimony of an expert witness under circumstances entitling that party to take the testimony of his witness under Section

863. It then seems that Rule 48 must be construed to mean that a party may, under its provisions, offer his own expert testimony in affidavit form; not that he can deprive the opposite party of the right to take expert testimony by deposition under Section 863.

INSPECTION IN PATENT CASES.—“Where the answer sets up the existence of some concrete thing which may be made the subject of an exhibit as a publication, drawing, photograph, or device, which is claimed to be an anticipation of the patented device, and which is proposed to be made the subject of expert testimony, the plaintiff may fairly ask to have it submitted in advance to the inspection of expert witnesses for the plaintiff. If a request for opportunity to make this inspection be denied, or if what is offered in evidence differs from what was submitted for inspection, the present rules furnish the means of preventing a plaintiff from being taken by surprise. Rule 48 would furnish all the information which could fairly be asked, and there would seldom be occasion to resort to it.” Dickinson, J., in *Todd v. Whitaker*, 217 Fed. Rep. 319, 320.

MOTION FOR EXPERT AFFIDAVITS.—A motion that the expert testimony for both sides in a patent case be embodied and filed in affidavit form was granted in *P. M. Co. v. Ajax Rail Anchor Co.*, 216 Fed. Rep. 634.

49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

A new rule, based upon provisions of former Rule 67, *ante*, p. 119.

50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand, and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

A new rule, based upon similar provisions of former Rule 67, *ante*, p. 119.

51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

A new rule, containing some of the provisions of former Rule 67, *ante*, p. 119. The provisions that argument and debate shall be omitted from the transcript was made imperative by the abuse of the old rule.

THE PURPOSE OF THE RULE.—"Reports are frequently returned to the court in which the notes of the proceedings before masters, examiners, and other officers are needlessly increased by many pages of statement, argument, and debate of counsel. While rule 51 does not specifically refer to proceedings before a master, the first paragraph, in relation to the form of objections to evidence, may be well taken to apply to any proceedings in which testimony is taken. No useful purpose is served by causing the record to be incumbered in this manner, and the line should be drawn between the statement of reasons for objections and the unnecessary and voluminous statement, argument, and debate which have no proper place in the record." Thompson, J., in *Rollman Mfg. Co. v. Universal Hdw. Works*, 229 Fed. Rep. 579, 581.

52.

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER OR EXAMINER.

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment

may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

A new rule embracing part of former Rule 67, *ante*, p. 119.

53.

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

A new rule; a paraphrase of a paragraph in former Rule 67, *ante*, p. 119.

54.

DEPOSITION UNDER REV. STAT. §§ 863, 865, 866, 867—CROSS-EXAMINATION.

After a cause is at issue, depositions may be taken as provided by Sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

Substantially former Rule 68, *ante*, p. 121.

STATUTORY PROVISIONS.—Section 863, Revised Statutes of the United States. “The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.”

Section 863 always applied to equity as well as common-law causes. *Stegner v. Blake*, 36 Fed. Rep., 183, 184. Depositions may be taken under Section 863 outside the district in which the case is to be tried (*Patapsco Ins. Co. v. Southgate*, 5 Peters, 604, 616, 8 L. Ed., 243, 248), and outside the circuit containing that district. *Thum v. Andrews*, 53 Fed. Rep., 84, 85. No order of court is necessary under Section 863. “The right to take (the deposition) upon notice merely, in the manner prescribed, is given absolutely to the party by Act of Congress.” *Lacombe, J., in Henning v. Boyle*, 112 Fed. Rep., 397.

“There are two general methods for taking depositions to be used on the trial of law cases provided for in the Revised Statutes; the one being the mode pointed out in Section 863, and the other in Section 866. When taken under the provisions of the former section, a commission to the officer is not sued out from the court in which the cause is pending, but the party desiring to take the testimony gives notice to the opposite party or his attorney of the time and place when and where the testimony is to be taken, and selects as the commissioner any one of the parties named in the section. When depositions are thus taken, no opportunity is afforded to the opposite party to be heard upon the matter of the selection of the commissioner. Hence it is required of the party taking the deposition that he shall select a disinterested commissioner, and the statute requires the party selected to certify that he is not of counsel for either party, nor interested in the event of the suit. If, however, the depositions are not taken under Section 863, but under the authority granted in Section 866, then, by the express terms of the latter section, the provisions of Sections 863, 864 and 865 are not applicable thereto. Section 866 provides for the court granting a *dedimus*, and in so doing it is presumed that the court will select a proper person to act as the commissioner, and the parties can be heard upon the question of the appointment before the commission issues. The authority conferred by Section 866 is the granting a *dedimus* to take depositions according to common usage. In *McLennan v. Railroad Co.*, 22 Fed. Rep., 198, it was held:

“When, however, the facts are such in a given case that, under the provisions of statutes of the United States, the right to take the testimony of witnesses by deposition exists, then, as to the mere mode of procuring the deposition, parties may follow, at their election, either the provisions of the state law or of the Act of Congress.”

“In other words, if the right to take depositions existed, then the party desiring to take the same might do so under the provisions of Section 863, or according to common usage, which, in an action at law, would be deemed to be in accordance with the mode provided for by the statutes of the state.” *Shiras, J.*, in *Giles v. Paxson*, 36 Fed. Rep., 882, 883.

“Reasonable notice” depends upon the particular circumstances of the case. *American Exchange National Bank v. First Natl. Bank*, 82 Fed. Rep., 961, 27 C. C. A., 274. That to be used upon the trial, depositions taken in a case removed from a state court before its removal must comply with Section 863, see *Texas & P. R. Co. v.*

Wilder, 92 Fed. Rep., 953, 35 C. C. A., 105. As to naming the officer in the notice, see *Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086.

Section 865, Revised Statutes of the United States. "Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

As to the requisites of the officer's certificate, see *Sage v. Tauszky*, Fed. Case 12,214; *Jones v. Knowles*, 1 Cranch C. C. 523, Fed. Case 7,474; *Bussard v. Catalino*, 2 Cranch C. C. 421, Fed. Case 2,228; *Egbert v. Citizens' Ins. Co.*, 7 Fed. Rep. 47; *United States v. Julian*, 162 U. S. 324, 40 L. Ed. 984. As to sealing, see *Re Thomas*, 35 Fed. Rep. 337.

Section 866, Revised Statutes of the United States. "In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of Sections 863, 864 and 865 shall not apply to any deposition to be taken under the authority of this section."

For the circumstances under which a *dedimus* under Section 866 should be awarded, see *Zych v. American Car & Foundry Co.*, 127 Fed. Rep. 723, 727; and see note to § 863, Revised Statutes of the United States, above.

"The method of taking deposition by commission is cumbersome and unsatisfactory, and not resorted to when the convenient method of taking proof prescribed by § 863, Revised Statutes of the United States, is available." *Lacombe, J.*, in *Henning v. Boyle*, 112 Fed. Rep. 397. "The words 'common usage' in regard to a suit in equity

refer to the practice in courts of equity." Blatchford, C. J., in *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1.

Section 867, Revised Statutes of the United States. "Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof."

"The provision is intended to permit the courts of the United States to admit in evidence testimony perpetuated according to the laws of the State, and in no wise relates to testimony perpetuated by direction of a circuit court in pursuance of the statutes of the United States under which this bill is filed." Benedict, J., in *New York & Balto. Co. v. New York Co.*, 9 Fed. Rep. 578, 579.

55.

DEPOSITION DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

A new rule abolishing the order of publication required by former Rule 69, *ante*, p. 122.

56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

A new rule.

As Rule 47 allows a total of 110 days for depositions after the cause is at issue, this rule may be construed to mean that no case can go on the trial calendar until that time has elapsed.

SUFFICIENCY OF SHOWING IN MOTION UNDER THIS RULE.—"While these papers do not set forth in detail entirely satisfactory reasons, showing inability to produce upon the trial the witnesses named, or others who would testify in the same way upon the same matters, nor just what evidence each witness will give with respect to the issues in the case, and while therefore the rule is not yet fully met, in the way that the usual application to examine a particular witness would be required to be presented, nevertheless it would appear that the motion should be granted to the extent of allowing the plaintiff to obtain the depositions, in the form of direct examination, and to give opportunity at the same hearing for cross-examination of any of the witness named, in Providence and Boston, whose actual presence at the trial shall not be of any benefit at the hearing of the case. In such a matter as the present, there would seem to be no necessity for requiring strict compliance with the rule, nor in preventing the preparation of depositions for submission upon the trial, when all questions and objections as to the materiality and relevancy of the testimony, and as to the competency of using a deposition instead of requiring the actual presence of the witnesses to give oral testimony, can be raised. All such rights will be preserved to the defendant, who may attend the taking of the depositions without prejudice thereto.

"The further objection that the case is not on the calendar is insufficient, in view of the fact that substantially, by stipulation, the court has withheld restoration of the case to the calendar until the preliminary motions are out of the way, and until one party or the other applies for such restoration within the 12-month period under which the case can be restored to the calendar for trial.

"If the case had been stricken from the trial calendar, upon an actual default of the party now applying for relief, and if that default had occurred through any neglect other than inadvertence, then an order relieving the default and restoring the case to some definite status would be required. Neither party should raise such a question with respect to the present application, and the case should be restored (by one side or the other) to the calendar for prompt trial, but in the meantime the depositions desired may well be prepared." Chatfield, J., in *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 217 Fed. Rep. 175, 176.

57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed, on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

A new rule.

The former rules were silent as to continuances.

Rule 57 does not mean that after hearing the case may be dropped from the calendar at the end of the term and before the court has made a final decree. *Davis v. Virginia R. & P. Co.*, 229 Fed. Rep. 633, 638 (C. C. A.—4).

58.

DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing

for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party, and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party, if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession

of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

A new rule adopting the English practice of Order XXXI, "Discovery and Inspection."

PURPOSE OF INTERROGATORIES.—"Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts." Baker, J., in *Bronk v. Charles H. Scott Co.*, 211 Fed. Rep. 338, 128 C. C. A. 17 (C. C. A.—7). Quoted in *Luten v. Camp*, 221 Fed. Rep. 424, 427.

INTERROGATORIES AND ANSWERS NOT PART OF THE PLEADINGS.—"Under rule 58 the interrogatories are no part of the pleadings. If they were to be so considered, so also would answers to the interrogatories. And if the defendant filed interrogatories, the plaintiff's answers would become part of the pleadings. Such a result would be clearly repugnant to rule 31. for, under that rule, unless the answer asserts a set-off or counterclaim, the pleadings are confined to the bill and answer." Thompson, J., in *Luten v. Camp*, 221 Fed. Rep. 424, 427.

HOW RULE 58 CHANGED THE PROCEDURE AS TO DISCOVERY.—"Prior to the adoption of this rule it was well settled that a complainant was entitled to a discovery of such facts and documents only as would aid in the maintenance of his own title or cause of action, and not

to matters that related exclusively to the defendant's title or ground of defense; and that interrogatories which went beyond this and sought a disclosure of the defendant's title or claim, having no relation to the complainant's title or cause of action, were inquisitorial and unwarranted. *Kelley v. Boettcher* (8th Cir.), 85 Fed. 55, 60, 29 C. C. A. 14; *McClaskey v. Barr* (C. C.), 40 Fed. 559, and authorities therein cited; 2 Street's Fed. Eq. Pract. s. 1872, p. 1126. This rule did not, however, defeat the complainant's right to discovery in the case where the matter in question happened to pertain both to the complainant's title or cause of action and to the defendant's title or ground of defense. 2 Street's Fed. Eq. Pract., *supra*.

"After careful consideration I think it clear that the 58th Equity Rule was intended merely to change the procedure in reference to obtaining discovery and to extend this right to a defendant as well as to a plaintiff, and was not intended to change the long established rule in reference to the subject matter of such discovery or to extend such right in favor of either party beyond the matters relating to his own ground of action or defense, respectively, and enable him to obtain discovery in reference to matters relating solely to the ground of action or defense of the other party. In other words, under this rule the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case; and the defendant's correlative right of discovery, only to facts and matters material to his defense; and neither is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other; although, as theretofore, the right of such discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party. This construction of the rule is, I think, emphasized by the fact that the plaintiff is given the right to file interrogatories at any time after his bill is filed, although the answer may not have yet been filed, and at a time when the interrogatories can relate only to his own cause of action; while, on the other hand, the defendant is given no right to file interrogatories until after his answer has been filed, thus indicating that the discovery to which he is entitled is to relate to the ground of defense set forth in the answer, and not to the plaintiff's cause of action, as to which the interrogatories might have been filed before the answer, if such right had been contemplated by the rule. Furthermore, the concluding phrase in the language of the rule as

above quoted, providing that the court or judge may make such orders as may be appropriate to enforce answers to interrogatories or the production of documents 'in the possession of either party and containing evidence material to the cause of action or defense of his adversary,' clearly shows, from its grammatical construction, that the matters as to which a discovery may be obtained must be material to the cause of action or defense of the interrogating party, the 'adversary' clearly referred to in the rule.

"This construction of the rule furthermore finds strong support, by analogy, in the fact that under state statutes authorizing the examination of parties before trial at the instance of the adverse party, operating as a substitute for discovery in equity, such examination will not be permitted to enable the examining party—

'to ascertain the evidence on which the opposite party bases his cause of action or defense, or to ascertain the names of his witnesses, or for the purpose of aiding the party in the preparation of his case for trial.' 14 Cyc. 342, and cases cited in notes 37, 38 and 39.

"So under statutes providing for the production of books or papers of the adverse party, production will not be permitted to enable a party—

'to ascertain the evidence on which his opponent's action or claim rests, unless the claim is made that they are forgeries and the inspection is sought to enable the party to prove that fact.' 14 Cyc. 371, and cases cited in notes 59 and 60. 'But where the books or documents are material to the case of the applicant, it is no objection to their production or inspection that they relate also to the case of his adversary.' 14 Cyc. 371, and cases cited in note 6.

"This construction of the rule is not, as I view it, in conflict with the decisions in *Luten v. Camp* (D. C.), 221 Fed. Rep. 424, and *Blast Furnace Co. v. Worth Bros. Co.* (D. C.), 221 Fed. Rep. 430, in which the discovery allowed related directly to facts and documents within the knowledge or possession of the interrogated party, which were material to the ground of action or defense of the interrogating party. And taking this view of the rule I can not agree in the correctness of the doctrine which may apparently be implied from the opinions in *Bronk v. Scott Co.* (7th Circ.), 211 Fed. Rep. 338, 128 C. C. A. 17, and *P. M. Co. v. Anchor Co.* (D. C.), 216 Fed. Rep. 634, to the effect that under this rule either party may require discovery as to the nature of his adversary's case, the claims which he makes in regard thereto and the facts supporting it. These cases apparently proceed, in part at least, upon the implied theory that the object of the rule is to

enable either party to obtain a more definite statement of the other's case and greater particularity as to the claims upon which he intends to rely; whereas I am constrained to conclude from the language of the rule itself that it was not intended to serve as a provision for requiring further particulars, which is covered by the 20th Equity Rule, but to accomplish the very different purpose of enabling either party to obtain discovery of facts and documents material to his own case which are within the knowledge or in the possession of the adverse party.

"It is furthermore clear that to the extent that discovery may be granted as to material matters of fact, it must be limited to an inquiry as to the material facts, and does not extend to a disclosure of evidence or of facts which merely tend to prove the material facts. *P. M. Co. v. Anchor Co.*, *supra* (D. C.), 216 Fed. Rep. at page 636; *Luten v. Camp*, *supra* (D. C.), 221 Fed. Rep. at page 428." Sanford, J., in *J. H. Day Co. v. Mountain City Mill Co.*, 225 Fed. Rep. 622, 624.

HOW PRAYER FOR A PENALTY AFFECTS THE PLAINTIFF'S RIGHT TO PROPOUND INTERROGATORIES.—"The plaintiff has filed interrogatories, the substance of the principal interrogatories being: First, an inquiry whether the defendant has practiced the process of the patent in suit; and, second, an inquiry what were the steps of the process practiced by A. H. Bliss & Co., alleged in the answer to be a prior user, and when and where such process was practiced, and by what persons, together with their names and present addresses.

"In support of the application the plaintiff cites *P. M. Co. v. Ajax Rail Anchor Co.* (D. C.), 216 Fed. Rep. 634; *Luten v. Camp* (D. C.), 221 Fed. Rep. 424; *Blast Furnace Appliance Co. v. Worth Bros. Co.* (D. C.), 221 Fed. Rep. 430.

"In cases cited it is said that equity rule 58 adopts the English practice of order XXXI, 'Discovery and Inspection,' of the Rules of the Supreme Court of 1883. Referring to the Yearly Practice for 1912, by Mackenzie and Chitty, vol 1, p. 370, it appears that the provision for interrogatories was not intended to give any right to discovery that did not exist before, or take away any previously existing right to protection on any ground of privilege, and that the principles previously existing in the Court of Chancery are now binding in the English courts. It also seems that the purpose was to enable a party to establish his case rather than to seek information as to the evidence or witnesses of the other party.

"The question of the right to propose interrogatories in an action to subject a party to a forfeiture or to penalties is considered on pages 379, 380, 393, of the Yearly Practice above cited.

"In *Jones v. Jones*, 22 Q. B. D. 425 (1889), a claim for treble damages under a statute was held a penal action. Lord Coleridge observing:

"'Treble damages' can not possibly be compensation to the person grieved, and are plainly inflicted on the offender as a punishment. In other words, they are a penalty.'

"It was held that the plaintiff was not entitled to an affidavit of documents, and the principle was applied that the liability of a defendant to file such affidavit depends upon whether the action in which the application is made is or is not a penal action.

"In *Hobbs & Co. v. Hudson*, 25 Q. B. D. 232 (1890), an appeal case before Lord Esher, M. R., and Lindley and Lopes, L. JJ., it was held that an action brought under a statute for double the value of goods fraudulently removed by a tenant is a penal action, and that the plaintiff is not entitled to administer interrogatories to the defendant. The case of *Jones v. Jones*, *supra*, was expressly approved.

"As was said in *Boyd v. United States*, 116 U. S. 631, 6 Sup. Ct. 533, 29 L. Ed. 746:

'Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property.'

"The imposition of threefold damages is, in substance, punitive, and I am of the opinion that, at least without an express waiver of any claim for such damages, a plaintiff can not compel a defendant to give information which might amount to a confession of infringement, and thus expose him to a liability not to make compensation alone, but to pay exemplary damages, provided by statute as a punishment for willful infringement. This is, in substance, a penalty. See, also, *In re Ashland Emery & Corundum Co. (D. C.)*, 229 Fed. Rep. 829.

"The interrogatory as to the prior use does not relate to, nor tend to establish, the plaintiff's case, but relates to the defense, and to the defendant's evidence and witnesses. This also is not permissible under the English practice, under order XXXI. See *Yearly Practice*, above cited, pp. 373, 374; *Carpenter v. Winn*, 221 U. S. 533, 540, 31 Sup. Ct. 683, 55 L. Ed. 842; *J. H. Day Co. v. Mountain City Mill Co. (D. C.)*, 225 Fed. Rep. 622.

"I am of the opinion that rule 58, like order XXXI, was not intended to change the substantive rules of equity as to discovery, but merely to alter procedure, and that, as the interrogatories seek for discovery to which the plaintiff is not entitled under the established principles of equity, the motion to strike out should be granted." *Brown, J.*, in *F. Speidel Co. v. N. Barstow Co.*, 232 Fed. Rep. 617, 618.

NATURE AND NUMBER OF INTERROGATORIES.—“Rule 58 was not intended to be used to impose unreasonable burdens upon parties, or to require of parties opinions either as to the reading of drawings or as to the functions of particular parts of the machinery. It provides ‘for the discovery, by the opposite party or parties, of facts and documents material to the support or defense of the cause.’ Plainly it is intended to aid a party in making out his case, where the ascertainment of facts in support or defense of the cause is *difficult*. We have used the word ‘difficult,’ because we have recognized that there is a line of cases holding to the doctrine that discovery will not be permitted if the facts can be otherwise procured. We do not believe that that is a correct expression of the law, because a party should not be put to unnecessary labor or difficulty in making out his case. Yet he should not impose a burden upon the opposite party in requiring the latter to make discovery, if the knowledge of the facts can be procured otherwise with ease. Knowledge of the apparatus and method of the opposite party can be procured with ease by inspection. If there be identity of the plaintiffs’ and defendant’s apparatus and methods, such identity can be easily ascertained, and be the subject of parol testimony by those who have made such inspection.

“The best evidence on the question of infringement is the comparison of the devices of the patents. Sec 3 Robinson on Patents, § 1041. In *Colgate v. Compagnie Française du Télégraphe de Paris à N. Y.* (C. C.), 23 Fed. Rep. 82, is a well-considered opinion by Judge Wallace upon the subject of discovery. It is unnecessary to state the nature of the case in detail, but this quotation is helpful:

‘A consideration peculiar to a bill of discovery like the present, in which the complainant seeks a discovery concerning the infringement of a patent, should be adverted to. Courts of equity in patent causes sometimes exercise the power of granting to a complainant an inspection of alleged infringing devices as incidental to ordinary discovery. *Vidi v. Smith*, 3 El. & Bl. 969; *Morgan v. Seward*, 1 Webst. Pat. Cas. 169; *Russel v. Cowley*, Id. 468; *Shaw v. Bank of England*, 22 Law. J. Exch. 26.’

“The case has been cited with approval, though not with respect to the particular quotation we have made, by the Supreme Court in *Carpenter v. Winn*, 221 U. S. 533-539, 31 Sup. Ct. 683, 55 L. Ed. 842.

“While the case last cited had under consideration the question whether section 724 of the Revised Statutes (Comp. St. 1913, § 1469), relating to the production of books and writings in the trial of

actions at law, and held that the purpose of the section was to provide a substitute for a bill of discovery, in aid of a legal action, yet the opinion contains observations upon the nature generally of a bill of discovery. On page 540 of 221 U. S., on page 685 of 31 Sup. Ct. (55 L. Ed. 842), appears the following language:

'A bill of discovery can not be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a "fishing bill," and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: "Nor has a party a right to any discovery except of fact and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party." Story, Eq. Juris. § 1490; *Kettlewell v. Barstow*, 7 Ch. App. Cas. 686, 694.'

"While the language used was evidently intended to relate solely to bills of discovery in aid of actions of law, yet we see no reason why it should not be equally applicable to bills for relief and discovery, where discovery is merely incidental to the relief sought." Orr, J., in *Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 Fed. Rep. 833, 836.

"It is still only discovery in equity as formerly understood which is obtainable." Dodge, J., in *Wolcott v. National Elec. Sig. Co.*, 235 Fed. Rep. 224, 228, following *F. Speidel Co. v. Barstow Co.*, 232 Fed. Rep. 617, and *J. H. Day Co. v. Mountain City Mill Co.*, 225 Fed. Rep. 622, 623.

"Since the adoption of this rule it has been held: (1) That 'the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case, and the defendant's correlative right of discovery, only to facts and matters material to his defense, and neither is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other, although, as theretofore, the right of such discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party'; and (2) that 'to the extent that discovery may be granted as to material matters of fact it must be

limited to inquiry as to the material facts, and does not extend to a disclosure of evidence or of facts which merely tend to prove material facts' (*J. H. Day Co. v. Mountain City Mill Co.* [D. C.], 225 Fed. Rep. 622; *Luten v. Camp* [D. C.], 221 Fed. Rep. 424; *P. M. Co. v. Ajax Rail Anchor Co.* [D. C.], 216 Fed. Rep. 634); that a disclosure of the 'ultimate facts only' can be required (*Wolcott v. National Electric Signaling Co.* [D. C.], 235 Fed. Rep. 224, 228); and that, inasmuch as the plaintiff's right does not extend to the discovery of the manner in which or the evidence by means of which the defendant's case is to be established (*Wolcott v. National Electric Signaling Co.* [D. C.], 235 Fed. Rep. 224; *Sunset Tel., etc., Co. v. City of Eureka* [C. C.], 122 Fed. Rep. 960; *Hooton v. Dalby* [1907], 2 K. B. 18; 1 *Daniell's Ch. Pr.* 579), he is also precluded from ascertaining the names of the witnesses by whom his adversary proposes to prove his case (*Knapp v. Harvery* [1911], 2 K. B. 725).

"It is also held that, as the right to discovery, in aid of an action at law, depends upon the necessity therefor in the administration of justice, a plaintiff can not require discovery of facts of which he has equal knowledge or equal means of knowledge with the defendant. *Wolcott v. National Electric Signaling Co.* (D. C.) (June 7, 1916), 235 Fed. Rep. 224; *Reynolds v. Fiber Co.*, 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535; *Baker v. Biddle*, Fed. Cas. No. 764.

"An interrogatory filed under this rule should embrace a single question, and be so framed that it may be clearly seen what the interrogated party is called upon to answer, and, if this is not done, the court, in its discretion, should direct that it be not answered. If the interrogatory is so framed, the court can readily determine whether it should or should not be answered, without unnecessary delay or trouble. It is not justified in ordering a party to answer interrogatories not so framed, and thereby require him to take upon himself the burden of being in contempt if he fails to answer fully." *Bingham, J.*, in *Kinney v. Rice*, 238 Fed. Rep. 444, 445.

"The jurisdiction of this court to entertain a bill in equity for discovery has certainly not disappeared for all purposes. It is true that its chief reason went when the disability of parties as witnesses was removed, but the jurisdiction once existing did not fail for that, *Carpenter v. Winn*, 221 U. S. 533, 539, 31 Sup. Ct. 683, 55 L. Ed. 842; *Kelley v. Boettcher*, 85 Fed. Rep. 55, 66, 29 C. C. A. 14; *Indianapolis Gas Co. v. Indianapolis* (C. C.), 90 Fed. Rep. 196, 197; *General Film Co. v. Sampliner*, 232 Fed. Rep. 95, 97, 146 C. C. A. 287. For example,

the jurisdiction will be still exercised even in aid of an action at law, if the plaintiff can not without it find out whom he should sue. *Brown v. McDonald*, 133 Fed. Rep. 897, 67 C. C. A. 59, 68 L. R. A. 462; *Kurtz v. Brown*, 152 Fed. Rep. 372, 81 C. C. A. 498, 11 Ann. Cas. 576. Yet the jurisdiction will not be exercised, if the legal remedies are sufficient; like any other equitable remedy, it is exceptional, and the plaintiff must bring himself within the exception. *Rindskopf v. Platto* (C. C.), 29 Fed. Rep. 130; *Safford v. Ensign Mfg. Co.*, 120 Fed. Rep. 480, 56 C. C. A. 630; *Heath v. Erie Railway*, 9 Blatch. 316, 320, Fed. Cas. No. 6307; *Scotten v. Rosenblum* (D. C.), 231 Fed. Rep. 357. The dicta in *Ex parte Boyd*, 105 U. S. 647, 657, 26 L. Ed. 1200, and *Brown v. Swann*, 10 Pet. 497, 501, 9 L. Ed. 508, accord with these decisions, and *United States v. Bitter Root Development Co.*, 200 U. S. 451, 475, 479, 26 Sup. Ct. 318, 50 L. Ed. 550, may be taken as a decision that the plaintiff in the bill must show that he needs more than what the modern statutory procedure gives him. *Colgate v. Compagnie Francaise* (C. C.), 23 Fed. Rep. 82, does, it is true, use some language seeming to indicate, not only that the jurisdiction of equity remains, but that it will be exercised without regard to any changes in legal procedure; yet I think that the actual decision must rest rather on the propriety of allowing the plaintiff to inspect the alleged infringement, or, since it was submerged, to have an adequate description of it. As such it rests rather upon the embarrassments under which a plaintiff labors in preparing his case if he has no definite knowledge of the supposed infringement.

"The law, therefore, while it has rendered the bill in most cases obsolete, has in fact left it as a useful instrument for just those fundamental purposes for which it was originally devised. In those cases in which subpoena and subpoena *duces tecum* against his adversary will give a party all that injustice he may need, obviously, the bill will not lie. The principle of judicial parsimony will remove the occasion for most bills. If, however, the cause is of such a character that the plaintiff can not adequately present his case by subpoena and especially if he needs a preliminary inspection of documents (*Carpenter v. Winn*, *supra*, 221 U. S. 539, 31 Sup. Ct. 683, 55 L. Ed. 842), then there is every reason to assert so ancient a source of equitable jurisdiction." Learned Hand, J., in *Pressed Steel Car Co. v. Union Pacific R. Co.*, 240 Fed. Rep. 135, 136.

"The tendency of the District Court of this district is to be liberal as to interrogatories, all to the end that time and expense shall be saved to the litigants, and that when the case comes on for trial the

case shall come down to the real issues as clearly and speedily as may be. In a case like this, the defendant should furnish plaintiff with a true specimen of the device alleged by plaintiff to infringe, and also state in accurate detail the process employed; but interrogatories ordinarily should not be in the language of the claims, nor should a defendant be required to state the names of his experts or others from whom the information is obtained for his answers to the interrogatories.

"Guided by these rules, it will be found that the practice will be simple, and that a large number of interrogatories will not be necessary. Putting the matter colloquially, it is as if plaintiff said:

'Here is your infringing device. If you say that because of chemical changes it may not now be a true specimen, then produce your true specimen and explain in full detail how you make it.'

"When a defendant complies, by frankly answering such a question, such is all that plaintiff is entitled to and can fairly expect." Mayer, J., in *A. B. Dick Co. v. Underwood Typewriter Co.*, 235 Fed. Rep. 300, 304.

See also *Batdorf v. Sattley Coin Handling Mach. Co.*, 238 Fed. Rep. 925, 928; "Interrogatories calling for facts or documents tending to definitely advise the defense of the act or acts and device or devices complained of I consider proper." Tuttle, J.

A defendant can not be required by interrogatories to admit or deny infringement as a legal conclusion. *Rodman Chem. Co. v. E. F. Houghton Co.*, 233 Fed. Rep. 470. But any material inquiry may be made whose effect may be to narrow the field of controversy at the trial. *Ibid.*

INTERROGATORIES ADDRESSED TO A CORPORATION.—The filing of interrogatories against a corporation is not a matter of course or of strict right, and leave to do so is discretionary with the court. *Union Sulphur Co. v. Freeport Texas Co.*, 234 Fed. Rep. 194, 197.

INTERROGATORIES, ILLUSTRATIVE CASES.—For specific applications of Rule 58 to specific interrogatories, see *Bronk v. Scott Co.*, 211 Fed. Rep. 338, 128 C. C. A. 17 (7th Circuit); *Dupont v. Dupont*, 234 Fed. Rep. 459; *Blast Furnace App. Co. v. Worth Bros. Co.*, 221 Fed. Rep. 430; *J. H. Day Co. v. Mountain City Mill Co.*, 225 Fed. Rep. 622; *Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 Fed. Rep. 833; *Gannert v. Burke & James, Inc.*, 231 Fed. Rep. 998; *F. Speidel Co. v. Barstow Co.*, 232 Fed. Rep. 617; *Rodman Chem. Co. v. Houghton Co.*, 233 Fed. Rep. 470; *Union Sulphur Co. v. Freeport Texas Co.*,

234 Fed. Rep. 194; *Batdorf v. Sattley Coin Handling Co.*, 238 Fed. Rep. 925.

WAIVER OF OATH TO ANSWER NOT A BAR TO RIGHT OF PLAINTIFF TO PROPOUND INTERROGATORIES.—The fact that the bill waives an oath to the answer, although it formerly operated as a waiver of discovery, no longer has that effect, and it does not relieve the defendant of its obligation to answer proper interrogatories. *Luten v. Camp*, 221 Fed. Rep. 424, 428.

NATURE OF FACTS REACHED BY INTERROGATORIES.—"In regard to the interrogatories which were filed under rule 58 of the equity rules either party has a right to require the other to answer questions relating to material matters. This rule was in substance taken from order 31 of the English equity rules of practice, which has been in force for a considerable time, and has been construed and applied in very many English cases. It is well settled by these decisions that the disclosure of evidence is not required. The nature of the case and the facts supporting it may be required to be stated. Mere evidence or facts tending to prove the nature of the case, or the facts upon which it is based, are quite generally held not proper to be inquired into. *Marriott v. Chamberlain*, 17 Q. B. D. 154; *Horton v. Dalby*, 2 K. B. 18." *Sanborn, J.*, in *P. M. Co. v. Ajax Rail Anchor Co.*, 216 Fed. Rep. 634, 636.

Interrogatories calling for a comparison between sets of drawings are not proper because calling for opinion evidence "merely evidentiary in character." *Luten v. Camp*, 221 Fed. Rep. 424, 429, following *Todd v. Whitaker*, 217 Fed. Rep. 319; *Bonney Supply Co. v. Heltzel*, 243 Fed. Rep. 399, 404.

PROPER PRACTICE IN A BILL OF DISCOVERY.—"Before the new rules, and under the old course of equity, the necessity of a plea to a bill arose from the rule that, if the defendant once consented to answer, he must answer fully, and that therefore in his answer he must respond to all the charges of evidence contained in the bill. This has now been changed by the abolition of pleas (rule 29), and by the provisions that discovery shall be by interrogatories, to which specific objections may be taken (rule 58), and that the pleadings shall contain no evidence, but the 'ultimate facts.' As a result, the proper practice in a bill of discovery is now as follows: The plaintiff will plead those facts which entitle him to a discovery from the defendant, and will annex such interrogatories as he wishes the defendant to answer. If the defendant does not dispute the plain-

tiff's right to some discovery, but objects to some or all of the actual interrogatories annexed to the bill, he will make those objections under rule 58, and bring them on for hearing before the judge. He is not subject to the rule that, by answering one, he must answer all. If, on the other hand, he disputes the plaintiff's right to any discovery, he will plead in an answer such facts as he deems apposite, and obtain from the court, under rule 58, an enlargement of his time to answer the interrogatories until the plaintiff's right to discovery is established.

"The latter course the defendant here has undertaken, and the question therefore arises whether his answer shows that the plaintiff is not entitled to any discovery. Equity might have held that the plaintiff's right to discovery in aid of an action at law depended only upon the existence of an issue to which the defendant's testimony would be relevant. Langdell, *Equity Pleading*, § 168. That would have been the more rational theory, but it was not the one actually adopted. Instead, equity required the plaintiff in such a bill to set forth his case upon the merits, and it allowed the defendant, not only to demur, so raising the validity of the plaintiff's action at law (Langdell, § 176), but even to plead facts which would defeat that action. of course, consistently it should have allowed the plea to be traversed and the cause to go to a hearing. Moreover, after negative pleas to bills for relief became allowable, they should have been allowed to bills for discovery as well. However, there is no instance of a negative plea to a bill for discovery, nor any of a hearing or decree upon such a bill. The probable reason of this failure of consistency was the absurdity of trying out upon the evidence the merits of the controversy upon the merely ancillary inquiry as to whether a defendant should be obliged to give any testimony at all. With a fortunate disregard of principle, the courts merely allowed some affirmative defenses, and apparently never tried out the truth even of these. These defenses are somewhat arbitrarily stated in the books (e. g., Mitford & Tyler, *Pleadings & Practice in Equity*, § 2, pt. 2, p. 368), and seem for the most part to be facts going to the jurisdiction, to the plaintiff's title, to the statute of limitations, or to the defense of purchaser for value. The defendant wishes to extend the principle, and assumes that any good defense to the action at law may be pleaded to the bill. The result is so preposterous, however, and the whole theory so contrary to desirable results, that affirmative defenses to such bills must be confined with the most narrow and technical rigidity to such as the precedents have recognized. It is quite enough for the disposal

of this case to observe that none of the conventional defenses are contained in this answer. It follows that the answer is bad, and will be struck out, and an order to that effect will pass.

"The former opinion, directing the defendant to answer the first, second, third, fourth, fifth and seventh interrogatories, would therefore be followed by an order, were it not for the fact that, as respects the fifth and seventh interrogatories, I had overlooked some important considerations. I assumed that these called upon the defendant to make answers relevant to the controversy, but that was an error. Instead of requiring the defendant to answer whether it had drawings or specifications of cars built in accordance with any of the devices covered by the plaintiff's patents, these two interrogatories require it generally to answer whether it has built any cars of any kind during the period in question. Such an inquiry is much wider than is relevant to the dispute between the parties, and, if it were followed by an order for production under rule 58, would require the defendant to produce all its drawings and specifications for the mere purpose of a roving inspection. The plaintiff may ask whether the defendant has built any cars containing any of the devices of any or all of the patents owned by it during the period of the contract. This it may ask with as much specification and detail as it pleases; the minuteness of the questioning will measure the success with which the plaintiff searches the defendant's conscience.

"If the defendant can be brought to acknowledge the possession of any documents which appear to be pertinent to the issues, it will be required to produce them, but not until it does. Any other rule would enable the plaintiff to fish among all the documents which the defendant may have for the purpose of picking out those on which it chooses to sue. Such a course is wholly unauthorized, not only under the old practice (Langdell, §§ 204, 205), but equally under rule 58, which requires a party to produce only those documents which contain evidence material to the case or defense of his adversary.

"The plaintiff will have leave to frame and keep reframing interrogatories till it has extracted from the defendant all the information which it possesses. Much the most convenient way would be for the parties to agree upon a master and allow the plaintiff an oral examination. This, however, I can not compel; but the same result may probably be obtained, though it must be confessed with the maximum of expense in time and labor, by allowing interrogatories to be renewed as often as justice requires. If that does not serve, the plaintiff must

rely upon such rights as he will have at the trial under Revised Statutes, § 724 (Comp. St. 1916, § 1469)." Learned Hand, J., in *Pressed Steel Car Co. v. Union Pacific R. Co.*, 241 Fed. Rep. 964, 966.

59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

This rule applies in bankruptcy proceedings. *Re C. W. Bartleson Co.*, 243 Fed. Rep. 1001.

A new rule. The first sentence is entirely new. The remainder retains the provisions of former Rule 74, *ante*, p. 126.

60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party

or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

This is former Rule 75, *ante*, p. 126.

Compare Rule 29, Rules of 1822. The action of a master in declining to continue a hearing is not reversible error unless a clear abuse of discretion. *Third Nat'l Bank v. National Bank*, 86 Fed. Rep. 852, 856, 30 C. C. A. 436. So as to his action in reopening the case for further testimony, even after his draft report is prepared. *Central Trust Co. v. Richmond & D. R. Co.*, 69 Fed. Rep. 761.

So, also, of his refusal to reopen the case after the testimony has been closed. *Central Trust Co. v. Marietta & N. G. R. Co.*, 75 Fed. Rep. 41.

61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

This is former Rule 76, *ante*, p. 127.

62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

This is former Rule 77, *ante*, p. 127.

It is of historical interest to note that as late as 1856 a party could not testify in his own behalf, even before a master and under the operation of this rule. *Foote v. Silsby*, 3 Blatchf. 507, Fed Case 4920.

The master may take testimony outside the district of his appointment. *Consolidated Fastener Co. v. Columbian Co.*, 85 Fed. Rep. 54. He may so act beyond the limits of the United States. *Bates Refrigerating Co. v. Gillette*, 28 Fed. Rep. 673, 675.

He may entirely ignore testimony offered before him directed to a matter which has been adjudicated by the court in an interlocutory decree. *Deitch v. Staub*, 115 Fed. Rep. 309, 317, 53 C. C. A. 137. He is but an arm of the court, and at all times subject to its direction. In case of extreme hardship the court may review his rulings pending the accounting. *Welling v. La Bau*, 32 Fed. Rep. 293, 295. But the orderly and usual course is to deny all such applications, and to consider such questions only on exceptions to his report. *Ibid*, and *Lull v. Clark*, 20 Fed. Rep. 454.

"Intermediate the commencement and termination of the proceedings before the master, the court ought not to give directions respecting the course of the procedure." Geiger, J., in *Beckwith v. Malleable Iron Range Co.*, 207 Fed. Rep. 848, 850. Rule 62 is consistent with Rule 63, and the account provided for by the latter should be required. *Ibid.*

63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

This is former Rule 79, *ante*, p. 129, with immaterial verbal alteration.

Under former Rule 79, it was held: "The old mode of taking accounts before the master, by tediously proving every item, has been abrogated, and the sixty-first rule of the English chancery practice, adopted in 1828, requires the accounting party to state his account in the form of debit and credit, which, being verified by the affidavit of the party, stands as a basis for the account, in which the other party must show error by proof before the master. The seventy-ninth equity rule of this court is almost an exact copy of the sixty-first English rule." Hammond J., in *Pulliam v. Pulliam*, 10 Fed. Rep. 23, 31.

THE RULE CONSTRUED.—"When the right of a plaintiff to an accounting is found, Rule 63 gives ample authority to require the defendant to file such account, and sufficiently designates its form and what it shall contain. In form it must be a debtor and creditor statement. The rule indicates that it shall be on the basis of a cash statement of moneys received and disbursed. The analogue of an account stated by a sales agent or other fiduciary will afford a guide to what is required. If the account is accepted by the plaintiff, the profits have been ascertained, and this inquiry is at an end. If the statement is not acceptable, the case of a hearing upon exceptions to

the account of any trustee supplies the required guide. The account, as stated by the defendants, is one thing. The evidence from which the master finds the facts upon which to base an account stated by him is another thing. Care should be taken to keep the distinction clear. The first should be a financial statement in cash account form simply. It should not be a list of possible witnesses, nor a statement of evidence, by which the items of the account may be vouched. The parties may call witnesses or offer evidence bearing upon accounting facts. Subpoenas may issue and include the usual *duces tecum* clauses. The production of books and papers may be compelled. Rules 62 and 63 and the ordinary rules which pertain to such matters apply. If a defendant objects to account, or a witness is asked to testify, or to produce books or papers, and objection is made, the question raised should be passed upon by the master. If the order of the master is met by a refusal to comply, the refusal may be certified to the court, or the opposite party may ask the master to find the facts and to state an account against the defendants from all the evidence before him. In making such orders, care should, of course, always be taken to preserve to each party all his rights. Under the guise of requiring an account, or eliciting facts through testimony and evidence, neither party should be required to disclose the course of his dealings, so that a rival or competitor may injure him or gain an unfair advantage. The test is always: Is the requirement relevant to the decision of the cause? Almost everything in such cases must in the first instance be left to the discretion of the trial judge, or of the master acting in that capacity." Dickinson, J., in *Cushman & Denison Mfg. Co. v. Grammes*, 225 Fed. Rep. 883, 887.

"It may be observed that rule 63, formerly rule 79, is identical in language with the sixty-first rule of the English chancery practice which was in existence in 1842, when the equity rules which were in force in this country prior to the adoption of the recent new rules were adopted. The English rules, or 'new orders' as they were called, were adopted in 1828 and worked many changes in the then English chancery practice, not the least of which was respecting the taking of accounts before masters. It had been the custom to require each and every item in the accounting to be proven under proceedings involving tedious interrogation and examination of items of account, whether admitted or disputed. The change wrought by the new rule is commented upon by Mr. Smith in his work on Chancery Prac-

tice, vol. 2, p. 114, referred to by the Supreme Court of the United States in *Thompson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105, as 'the most authoritative work on English Chancery Practice in use in March, 1842, when our equity rules were adopted.' The author says:

'The 61 N. O. (new orders) directs all parties accounting before the master to bring in their accounts in the form of debtor and creditor. This account is prepared as an affidavit; the body of the affidavit containing a verification of the accuracy of the schedules, in which are contained the details of the account. This affidavit is a substitution for an examination, which was the manner of accounting before the new orders. By the alteration, interrogatories and the certificates allowing them are saved, together with the excess of expense of an examination beyond that incurred in preparing an affidavit. If the party does not bring in the account within the time fixed, he is proceeded against in the same manner as a party not putting in his examination.

'When the account is brought in, if any of the parties are dissatisfied with it, they are at liberty to examine the accounting party upon interrogatories, or as the master shall direct. 61 N. O. The manner of exhibiting these interrogatories will be explained in treating on that subject. In disputed accounts, this examination becomes so much of course that I believe it is found, in such cases, that it is cheapest and best to exhibit interrogatories in the first instance.

'The debtor and creditor account when sworn to is left in the master's office, and a warrant on leaving the same is taken out and served on the clerks in court of the opposite parties, who take copies of the same. As the debtor and creditor account, whether exhibited, annexed, or scheduled to the affidavit, is sworn to, the master can not proceed upon that document, as it would be improper for him to alter or vary it.'

'It therefore seems that one of the purposes of the new English rule was to eliminate the evils of the former practice and to furnish a definite basis for the proceedings before the master. That is, the rule is framed upon the theory that at the outset the accounting party will, obediently to the decree, bring in a statement of account embodying upon the one side the items with which he is properly chargeable and upon the other the items claimed to be allowed, just as any one, conceding that a relation of debtor and creditor exists between himself and another, will bring in a statement of

what he conceives to be items of debit and items of credit. In this way the opportunity is at once afforded of ascertaining the real issues between the parties before the master upon the accounting; it is the means of limiting the trial before the master to disputed items. That this is the purpose of the rule is clearly indicated by its language, conferring upon the adversary the right to proceed as therein directed, in case he is not satisfied with the account." Geiger, J., in *Beckwith v. Malleable Iron Range Co.*, 207 Fed. Rep. 848, 851.

THE STATEMENT OF ACCOUNT IN PATENT CASES.—"The proper practice under the rule requires the accounting party in a patent infringing accounting at the outset merely to file such account in debtor and creditor form as, in the light of the principles and express directions of the decree, will exhibit the matters which are the subject of the accounting, namely, on the one hand the sums chargeable, the manufacture and sales, the amounts received, and the like, all in such detail as would be required in an account thereof rendered for any other purpose; and on the other hand, in detail, the items of credit or offset, such as cost of material, manufacturing cost, and the like, to the end that the statement as a whole will be an account showing gains and profits, and such as will furnish a basis for further proceeding in case the adversary is not satisfied therewith. I know of no reason why an accounting party in a patent suit should be called upon, in advance, to make detailed calculations to furnish statements whose effect is or will be evidentiary only." *Ibid.*

THE NATURE OF THE EXAMINATION.—A defendant called by the plaintiff for examination under this rule is under cross-examination. *Cushman & Denison Mfg. Co. v. L. F. Grammes & Sons*, 234 Fed. Rep. 949, 951.

64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

This is the language of former Rule 80, *ante*, p. 129.

This rule does not mean that the former evidence is to be considered by the master unless called to his attention. *Bell v. United States Stamping Co.*, 32 Fed. Rep. 549, 551.

65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming into claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

This is former Rule 81, *ante*, p. 129.

66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

This rule is based upon former Rule 83, *ante*, p. 132; "Equity Docket," is substituted for "Order Book," and the time limit for exceptions is reduced from one month to twenty days.

EXCEPTIONS TO DRAFT REPORT DO NOT COMPLY WITH RULE 66.—"In order to comply with the terms of Rule 66, the exceptions to the report, not the draft report, should be filed within the 20 days succeeding the filing of the report as actually made by the master, and these exceptions are to the report as made, not to the draft report. * * * The reason of the rule is apparent. It prevents delay, gives a reasonable time, and informs the opposing party of the objections to the report. The exceptions raise the issue." Ray, J., in *Decker v. Smith*, 225 Fed. Rep. 776, 777.

APPLICATION TO BANKRUPTCY PROCEEDINGS.—While Rule 66 explicitly refers to masters in chancery, it applies to a referee or special master in bankruptcy, and exceptions to the reports of such officers must be filed within the twenty days limited by the rule. In *re Pierce*, 210 Fed. Rep. 389.

EXCEPTIONS MUST BE DEFINITE AND SPECIFIC.—In *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200, the court cited and followed *Wilkes v. Rogers*, 6 Johns. 566, as to the rule that the party excepting must point out specific errors, and said that exceptions "must state, article by article, those parts of the report which are intended to be excepted to." In a later case it was said "cases are referred to a master, not on account of his presumed superior wisdom, but to economize the time and labor of the court," and if exceptions "are so general as to require a rehearing of the entire case, there is really nothing saved by a reference." Mr. Justice Brown in *Sheffield & Birmingham R. Co. v. Gordon*, 151 U. S. 285, 291, 38 L. Ed. 164, 166.

Exceptions which are vague and general are condemned; they "must point out specifically the errors upon which the party relies." Lurton, J., in *Columbus, S. & H. R. Co. Appeals*, 109 Fed. Rep. 177, 219 (C. C. A.—6).

67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every excep-

tion overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

This rule is based upon former Rule 84, *ante*, p. 132; the former rule left the cost item to be fixed by standing rule of the Circuit Court.

68.

APPOINTMENT AND COMPENSATION OF MASTERS.

The District Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

This rule is based upon former Rule 82, *ante*, p. 129.

As to who are ineligible to be appointed as masters, see the Judicial Code, §§ 67, 68.

69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person.

No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

This rule is former Rule 88, *ante*, p. 136; with the reference to the Circuit Court of Appeals added.

FUNCTION OF THE PETITION FOR REHEARING.—Clerical mistakes are cured by the application of former Rule 85, now Rule 72, Rules of 1912. Therefore, their rectification does not require a petition for rehearing. The application for rehearing in equity is the equivalent of the motion for a new trial in actions at law, and whether based upon newly discovered evidence or alleged errors in matters of law, it will be disposed of as a motion for a new trial. *Giant Powder Co. v. California Powder Co.*, 5 Fed. Rep. 197, 201.

FORMAL REQUISITES OF THE PETITION.—When based upon newly discovered evidence, "the application should disclose the new testimony, the names of the witnesses, and the character of any documentary evidence; that it has come to light since the hearing, and was not known, and could not by reasonable diligence have been ascertained for use at the hearing; that it is not cumulative." *Jenkins, J., in McLeod v. New Albany*, 66 Fed. Rep. 378, 381, 13 C. C. A. 525. It must be signed by counsel, verified by an oath, and the oath should not be taken by a notary who is also of counsel in the cause. *Allis v. Stowell*, 85 Fed. Rep. 481.

TIME OF FILING.—"A petition for rehearing cannot be filed after the term at which the judgment was rendered." Mr. Chief Justice Waite in *Brooks v. Railroad Co.*, 102 U. S. 107, 26 L. Ed. 91. If petitions for rehearing cannot properly be directed against an interlocutory decree (*Campbell Printing Press Co. v. Marden*, 70 Fed. Rep. 339), and as all final decrees of a district court are appealable, the last sentence of this rule possibly has been preserved in this revision through oversight. It is meaningless (as to final decrees) as it stands, for the district court "cannot grant a rehearing after the term at which the final decree was rendered." Mr. Chief Justice Waite in *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267. As an example of a motion for rehearing filed and granted at the succeeding term, see *Newman v. Moody*, 19 Fed. Rep. 858. The fact that the Supreme Court has retained the provision as to the "next term"

indicates that it relates, as Justice Blatchford held, to decrees which are not appealable because they are not final. *Wooster v. Handy*, 21 Fed. Rep. 51.

PRACTICE AS TO FILING THE PETITION.—Mr. Justice Field recommended the filing of the petition, and obtaining an order to show cause; and a hearing upon the petition and the defendant's answer thereto. *Giant Powder Co. v. California Powder Co.*, 5 Fed. Rep. 197, 201. Twelve years later the Supreme Court reviewed the case in which leave of court to file the petition was first obtained (*Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350), and this would appear to be the better practice.

EFFECT OF FILING THE PETITION.—Where the petition is filed in time, the time limit for appeal or writ of error does not begin to run until the application is disposed of. *Aspen Mining Co. v. Billings*, 150 U. S. 31, 36, 37 L. Ed. 986, 988.

An appeal taken before the application for rehearing is disposed of is a nullity. *Voorhees v. Noye Mfg. Co.*, 151 U. S. 135, 38 L. Ed. 101.

PROCEDURE UNDER THE RULE.—"Inasmuch as rehearings are granted only upon such grounds as would authorize a new trial in an action at law, that is, for newly discovered evidence, or errors of law apparent upon the record, it would seem to be a proper course of procedure in the filing of a petition for a rehearing where only an interlocutory decree has been entered, and there has been no appeal taken to the Circuit Court of Appeals, for the party seeking a rehearing to file its petition with the clerk of the court, and if he relies upon newly discovered evidence, he should set forth this evidence in the bill as far as possible in the petition for rehearing, and, in any event, in affidavits filed with the petition for rehearing and accompanying it. After filing this petition for a rehearing and the affidavits, he should then obtain an order upon the adverse party to show cause at some later date why his prayer for a rehearing should not be granted. The adverse party may then answer the petition for a rehearing, and upon the petition and answer the application may be heard. If the application for a rehearing is granted, then the petitioning party would be required to file either a supplemental bill or answer, as the case might be, in order that the hearing might be had on the original bill and answer and on the supplemental pleadings." Day, J., in *Sheeler v. Alexander*, 211 Fed. Rep. 544, 547. For an application of this rule see *Kinney v. Rice*, 238 Fed. Rep. 441, 443.

70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

This is former Rule 87, *ante*, p. 134.

71.

FORM OF DECREE.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

This is former Rule 86, *ante*, p. 134.

72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREEES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court

or a judge thereof, upon petition, without the form or expense of a rehearing.

This is former Rule 85, *ante*, p. 133.

73.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

This is a new rule, embodying principles long established and enforced by the national courts of equity. *Cathey v. Norfolk & W. R. Co.*, 228 Fed. Rep. 26, 29 (C. C. A.—4). It was adopted at the

suggestion of the Bar Committee of the Circuit Court of Appeals of the Ninth Circuit.

Under the rule "a court of equity is without power to issue an injunction (preliminary) unless there is a properly verified bill upon which to base the same." Pritchard, J., in *Cathey v. Norfolk & W. R. Co.*, 228 Fed. Rep. 26, 29 (C. C. A.—4).

For an example of an *ex parte* restraining order to prohibit the transfer of a patent to an innocent third party for value, in violation of an agreement with plaintiff, see *Thullen v. Triumph Elec. Co.*, 212 Fed. Rep. 143, 128 C. C. A. 655.

Notice to a resident agent for non-resident principals is sufficient for the purpose of a preliminary injunction where the agent is actually in control of the property to which water is being wrongfully diverted, and has personally directed the diversion. *Veitia v. Fortuna Estates*, 240 Fed. Rep. 256, 259 (C. C. A.—1).

74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

This is former Rule 93, *ante*, p. 138, with the words "or restoring" added.

75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the

record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *praecipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *praecipe* under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule, and shall be covered by the directions which the court or judge may give on the subject.

This rule is entirely new, and imposes a new burden on the bar in the preparations of appeal records. The difficulty of fairly reducing testimony to narrative form will probably impose an expense for counsel fees upon litigants which will more than counterbalance any saving of transcript and printing costs upon appeal.

As to the record of evidence on appeal to the English Court of Appeal, see Order LVIII, Rule 11; affidavits used in evidence below, "a copy of the judge's notes, or such other materials as the court may deem expedient," are employed. On the appeal, due weight is given to the fact that the court below as to conflicting testimony, saw the witnesses and considered their demeanor and manner. *Montgomerie & Co. v. Wallace-James* (1904), A. C. 75.

APPLICATION OF THE RULE.—"The railroad companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission. * * * This most commendable practice not only saved the expense of printing many volumes of testimony. * * * The practice is also in compliance with the spirit of the new equity rules (75-77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports, the elimination of all reduplications in written and oral testimony, and a condensation into narrative form of what is material to the then issue before the court." Mr. Justice Lamar, in *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 10, 59 L. Ed. 1177, 1180.

CERTIFICATE IN DEPORTATION APPEAL.—In an appeal from an order of deportation the record is properly presented by a certificate of evidence under Rule 75 rather than a common-law bill of exceptions. *Wong Keow v. United States*, 215 Fed. Rep. 95 (C. C. A.—7).

RECORD—SETTLING STATEMENT OF FACTS—REMEDY FOR VIOLATION OF RULE.—"Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to 'become a part of the record for the purposes of the appeal.' Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term; but where appeals are required within thirty days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and although no order was entered carrying the subject-matter over until the next term.

"The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of citation does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal so that we think a statement of evidence so approved and filed can not, for that reason alone, be stricken from the record.

"Instances occur where rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while,

to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in *Pittsburgh, etc., R. Co. v. Glinn*, 208 Fed. Rep. 989, 126 C. C. A. 77; and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general equity rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in rule 76 to 'any kindred rule' quite clearly applies to rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by rule 76, might, in a proper case, be imposed upon the offending solicitors." *Per curiam, In re General Equity Rule 75*, 222 Fed. Rep. 884 (C. C. A.—6).

VARIOUS RULINGS AS TO APPEAL RECORDS.—A so-called "bill of exceptions" may be treated on appeal as the statement of the evidence prescribed by Rule 75. *L. A. Westermann Co. v. Dispatch Printing Co.*; 233 Fed. Rep. 609, 612 (C. C. A.—6).

Dickinson, J., declined to approve a transcript in which the notes of the testimony were reproduced in full, unless the Supreme Court, to which the case was appealed, should give leave to omit the statement in narrative form required by Rule 75. *United States v. Motion Picture Patents Co.*, 230 Fed. Rep. 541.

76.

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS —CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than

one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

Entirely new, and supplemental to Rule 75.

"Costs * * * may be imposed upon offending solicitors." The practice thus introduced is purely English. The following is a somewhat similar English rule:

"Where upon the trial of any cause or matter it appears that the same can not conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court or judge shall think fit to award." Order LXV, Rule 5.

ANY KINDRED RULE.—"Any kindred rule" applies to rule 75 so as to enable an appellate court to impose costs on solicitors including evidence in full on the return to an appeal. *In re* General Equity Rule 75, 222 Fed. Rep. 884. For the spirit of the rule see *Louisville R. Co. v. U. S.*, 238 U. S. 1, 59 L. Ed. 1177.

77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or the judge thereof, may prepare and sign a statement of the case showing

how the questions arose and were decided in the District Court, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the Appellate Court. Such statement, when filed in the office of the clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the Appellate Court as the record on appeal.

A new rule, admirably adapted to the concise presentation of an issue of law.

78.

AFFIRMATION IN LIEU OF OATH.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

This is former Rule 91, *ante*, p. 137.

79.

ADDITIONAL RULES BY DISTRICT COURT.

With the concurrence of a majority of the circuit judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

A new rule, based upon former Rule 89, *ante*, p. 136, which made a like provision for local rules for the Circuit Courts.

80.

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

A new rule.

The English rule is as follows: "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding can not be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the office shall next be open." (Order LXIV, Rule 3.)

81.

THESE RULES EFFECTIVE FEBRUARY 1, 1913**—OLD RULES ABROGATED.**

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which can not be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

A new rule.

Exceptions filed under the old rules and pending when the new rules came into effect were treated as a motion to strike out, in accordance with Rule 81. *Williams Pat. Crusher & Pulverizer Co. v. Kinsey Mfg. Co.*, 205 Fed. Rep. 375.

Judge Ray has said that "the wisdom of the new rules can not be seriously questioned," and that the judges are generally quite opposed to departing from the letter and spirit of the rules. *North v. Herrick*, 203 Fed. Rep. 591, 592.

FORMS.

FORMAL PARTS OF A BILL OF COMPLAINT.

(Rule 25.)

No. 1. "The usual caption."

In the District Court of the United States, for the Eastern District of Missouri, Eastern Division.

John Doe,	}	In Equity. No. 999.
Plaintiff, ¹		
v.		
Richard Roe,	}	
Defendant,		

To the Honorable Judges of the District Court of the United States, in and for the Eastern Division of the Eastern District of Missouri: ²

No. 2. The introductory paragraph required by Rule 25.

John Doe, a citizen of the State of Illinois, and a resident of the City of Chicago, in the County of Cook and State of Illinois, brings this his bill against Richard Roe, a citizen of the State of Missouri and a resident of the City of St. Louis, in the State of Missouri, and in the Eastern Division of the Eastern District of Missouri.

And for his cause of action, plaintiff states:

No. 3. The introductory paragraph (the plaintiff under disability).

John Doe, a citizen of the State of Illinois, and a resident of the City of Chicago in the County of Cook and State of Illinois, an

¹ As Rule 25 uses the words "Plaintiff" and "Defendant," the stricter terms "Complainant" and "Respondent" may be considered as obsolete.

² The address, or salutation, is not specified, but is not prohibited, by Rule 25, and as a matter of taste it will be retained by the majority of pleaders.

infant under the age of twenty-one years, by William Doe, his next friend, brings this, his bill, against Richard Roe, a citizen of the State of Missouri and a resident of the City of St. Louis, in the State of Missouri, and in the Eastern Division of the Eastern District of Missouri.

And for his cause of action, plaintiff states:

No. 4. The second paragraph required by Rule 25.

That this suit is between citizens of different States. That the amount in controversy herein exceeds the sum of \$3,000.00,⁴ exclusive of interest and costs.

No. 5. The third paragraph required by Rule 25.

That plaintiff is the sole and exclusive owner of the trade-mark for cutlery, consisting of the word "Atlas," that said mark was first applied by him to cutlery on the first day of February, 1906, and has ever since been so used, continuously, by him; and that it has at all times been applied to the merchandise by being stamped or engraved in the metal parts of plaintiff's cutlery. That on the 1st day of September, 1912, in this district, the defendant began to infringe said trade-mark by applying the said word "Atlas" to cutlery, without the license or consent of plaintiff, and has continued and is continuing so to do, unto the time of the filing of this bill. That by said wrongful acts defendant has passed off his goods as plaintiff's, and has diverted unto himself trade and profits which plaintiff would otherwise have received; and has sold goods of inferior quality to that of plaintiff's, whereby the reputation of plaintiff's goods bearing said trade-mark has been greatly damaged.

No. 6. The fourth paragraph required by Rule 25.

Plaintiff states as to the said obligor, Roger Doe, above named, that he is not made a party hereto because he is not within the jurisdiction of this Honorable Court (or, because he cannot be made a party hereto without ousting the jurisdiction of this Honorable Court).

⁴ See § 24, The Judicial Code.

No. 7. The final paragraph required by Rule 25.

Wherefore, plaintiff prays that an account be taken of the profits realized by the defendant in the premises; that defendant, his agent, servants and employes be enjoined during the pendency of this suit, as well as on final hearing, from making, keeping on hand for sale, advertising or offering for sale, or in any manner dealing in any cutlery bearing the word "Ajax" and not made by plaintiff, and that plaintiff have and recover of defendant his costs herein.⁵

⁵ The prayer for general relief, as well as the prayer for subpoena *ad respondendum*, appear to be abolished by the rule. But as the subpoena is to issue "upon the application of the plaintiff" (Rule 12) there can be no objec-

tion retaining it; and no reason appears why a court of equity will refuse to grant proper relief because of its not being specially prayed for.

As to the signatures to the bill, see Form No. 8.

MISCELLANEOUS FORMS.

No. 8. Motion to strike out for scandal, etc. (Substituted for the former practice as to exceptions by Rule 21.)

Now comes the plaintiff, and moves to strike out the following parts of the bill of complaint herein, to-wit: lines 28 to 31, both inclusive, of page 2, and lines 11 to 17, both inclusive, of page 5.

The ground of this motion is that said specified parts of the bill of complaint are scandalous (or redundant, or impertinent, as the case may be).

A. B.,
Solicitor * for Defendant.

No. 9. Answer in lieu of demurrer. (Demurrers being abolished by Rule 29.)

And further answering, defendant says that the bill of complaint herein fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein; and, particularly, that the patent in suit is void upon its face for want of invention.

No. 10. Answer in lieu of plea of laches. (Pleas being abolished by Rule 29.)

And further answering, defendant says:

That the plaintiff frequently visited the factory of the defendant and there saw the machines now alleged to infringe his said letters patent, beginning with the year 1900; that he has at all times since the year 1900 had full knowledge of the manufacture and use and sale by the defendant of the said machines, which have at all times since the year 1900 been of the same construction. That having

* Rule 24 requires only the signature of one or more solicitors of record. The term "counsel," while used in the caption of Rule 24, is apparently no longer to be used as in the former practice.

such full knowledge of this defendant's acts, the plaintiff has at no time prior to the filing of his bill of complaint herein threatened suit or brought suit for infringement against this defendant or against any of the users of or dealers in defendant's machines; but, on the contrary, plaintiff has with full knowledge acquiesced in and permitted and failed to object to the continuous manufacture and sale of defendant's machines, and that he is guilty of laches of a duration of ten years or more prior to the filing of the bill of complaint herein.

No. 11. Motion to strike out parts of answer, under Rule 33.

(In lieu of exceptions for insufficiency.)

Now this day comes the plaintiff and moves the court that all of that portion of the answer of the defendant which relates to the affirmative defense (or set-off, or counterclaim) therein set up, being that portion of the answer beginning with line 7 on page 2, thereof, and extending to and including line 24 on page 2 thereof, be stricken out, for the reason that the allegations therein contained fail to set forth matter sufficient to disentitle plaintiff to the relief sought in the bill (or, fail to set forth facts entitling the defendant to maintain his said set-off, or counter-claim, as the case may be; or, that such allegations are insufficient in law to entitle the defendant to the relief sought by, or to maintain the affirmative defense set up in his answer).⁷

No. 12. Motion for leave to file interrogatories to be answered by an officer of a corporation party, under Rule 58.

Now this day comes the plaintiff, and moves the court that he be granted leave under Equity Rule 58, to file the interrogatories herein which are herewith exhibited to the court, said interrogatories to be answered by Hugo Doe, the general manager and an

⁷ Under the former practice, exceptions to the answer could only raise the question of the sufficiency of the answer as to facts. *Barrett v. Twin City Power Co.*, 111 Fed. Rep. 45. If you wished to test the sufficiency of the answer as to questions of law, it had to be done by setting the case down for

hearing on bill and answer, which forced the plaintiff to admit that the facts pleaded were true. *Stokes v. Farnsworth*, 99 Fed. Rep. 836. Rule 33 substitutes a practice whereby the sufficiency of the answer, both as to facts and law, or as to either, can be raised by motion.

officer of the defendant, Nemo Manufacturing Company, a corporation. The reason for propounding said interrogatories to said officer is that the facts thereby sought to be elicited are peculiarly within his knowledge and that the data and measurements referred to in said interrogatories are as the plaintiff is informed and believes, largely matters of record in record books of said corporation which are kept and maintained in the office of and under the custody of said general manager.

No. 13. Motion for leave to file interrogatories for the discovery of facts and documents, under Rule 58.

Now this day comes the defendant, within twenty-one days after the joinder of issue, and prays leave to file here the written interrogatories exhibited to the court herewith, for the discovery by the plaintiffs of facts and documents material to the defense of this defendant herein. That said facts and documents relate to the set-off pleaded in the paragraphs numbered 8, 9 and 10 in the answer. That, as indicated by the note at the foot of said interrogatories, the plaintiff, A. B., if this motion is granted by this honorable court, will be required to answer interrogatories numbered 1 to 13, both inclusive, while the plaintiff, C. D., will be required to answer those numbered 7 to 19, both inclusive.

No. 14. Interrogatories, filed by leave, under Rule 58.

Now comes the plaintiff, and having obtained leave of court to file the same, submits the following interrogatories to the defendants, A. B. and C. D., to be answered by them respectively as indicated by the note at the foot hereof:

1. Have you, or either of you, made, or used, or sold, a grinding machine constructed in accordance with the drawing hereto attached; if so, state when and where, and how many machines so constructed you have made, or used, or sold?

2. Name the persons to whom you have sold said machines, and give their addresses, and the date of each sale.

Etc., etc.

NOTE.—Of the foregoing interrogatories, the defendant A. B. is required to answer those numbered 1, 2, 7 and

9; the defendant C. D. is required to answer each and all of said interrogatories.

No. 15. Demand for admission as to documents, under Rule 58.

To the defendant, A. B., or his Solicitor:

The plaintiff hereby submits to you the letter, and contract, and blue print hereto attached, and demands that you advise him in writing, within five days after the service of this notice, whether or not you admit that said letter was written by the defendant, whether said contract was signed by him, and whether said blue print was made from the tracing by him prepared and submitted to plaintiff on or about the 2d day of January, 1913. In the event that you refuse or neglect to admit the execution of said letter and contract, and the genuineness of said blue print, within the time specified, the plaintiff will move to tax against the defendant the costs attendant upon proving the same at the trial.

No. 16. Motion for revivor, under Rule 45.

Now this day comes the plaintiff and respectfully represents, that the original defendant herein, H. S., departed this life on the 3rd day of December, 1912, and that thereafter, and on the 2nd day of January, 1913, one W. S. was by the Probate Court of the County of X—, granted letters of administration upon the estate of the said H. S. Wherefore, plaintiff prays that this cause be revived, and proceed as against the said W. S. as administrator of the estate of the said H. S., and that this honorable court make all such orders in the premises as may be necessary.

No. 17. Motion to set down for hearing, under Rule 43.

Now this day comes the plaintiff, and moves that this cause be set down for hearing under the provisions of Equity Rule 43, upon the question of want of parties only; for the reason that the defendant, by his answer, has suggested that the bill of complaint herein is defective for want of parties, and plaintiff prays the inquiry of the court upon that objection only, before proceeding to final hearing herein.

No. 18. Motion for further and better statement of claim, under Rule 20.

Now this day comes the defendant and moves that the plaintiff be ordered to file herein a further and better statement of the

nature of his claim, the ground of this motion being that the claim as set forth in the bill of complaint herein is so vague and indefinite that the defendant cannot intelligently prepare his defense or answer thereto. And that such costs be imposed in the premises as may be just.

No. 19. Motion for further and better particulars, under Rule 20.

Now comes the plaintiff and moves that the defendant be ordered to file herein further and better particulars as to the matter of the counter-claim asserted in paragraphs 10 and 11 of his answer; for the reason that the averments thereof are so vague and indefinite that plaintiff cannot intelligently reply thereto or prepare his defense thereto. And plaintiff moves that such order as to costs may be made herein as may be just.

No. 20. Motion to transfer to law side, under Rule 22.

Now comes the defendant and moves that this cause be transferred to the law side of this court, and there proceeded with, for the following reasons:

That the patent in suit expired five days after the filing of the bill herein. That said bill prays for an injunction, for an account, and for damages. That the patent having expired, injunctive relief cannot be awarded herein. That as no injunction can be granted, there can be no accounting, as accountings in equity are incidental to injunctive relief. That the only remedy of the plaintiff herein based upon the alleged infringement of his patent is by way of damages, and cognizable only at law.

Wherefore defendant moves that this cause be ordered transferred to the law side of this court, that the plaintiff be ordered to amend his bill accordingly, and that such other orders, as to costs or otherwise, may be made as to the court seem proper.

No. 21. Master's order to bring in account, under Rule 63.

The plaintiff by its attorney, A. B., Esquire, having made application therefor, it is hereby ordered that the defendants bring in and file with the Master, within ten days from the date hereof, their account in the form of debtor and creditor showing all transactions had by the defendants in cigars packed by defendants in the red cans heretofore used by defendants, and exhibited with the bill as "bill exhibit defendant's package" and referred to in the restraining order and final decree in this cause.

No. 22. Master's report, under Rule 66.

To the Honorable Judges of the District Court of the United States, for the — District of —, — Division:

Pursuant to the order of —, 191—, referring this cause to the undersigned as Master, I respectfully report as follows: (State facts.)

The Master therefore recommends judgment for the plaintiff, A. B., and against the defendant, C. D., in the sum of —.

No. 23. Petition for rehearing, under Rule 69.

The defendant, Richard Doe, respectfully represents to the court that being aggrieved by the decree entered in this cause on the — day of —, 19—, by which this defendant was (state substance of matter decreed) he is now advised, and has since the entry of said decree first learned of the following facts (recite newly discovered evidence); wherefore this defendant prays that a rehearing be granted herein.

No. 24. Decree, under Rule 71. (Introductory paragraph set forth in the rule; then as follows.)

That the defendants C. D. and E. F., their agents, servants and employees and each of them be and they are hereby forever and perpetually¹ enjoined and restrained from (specify things enjoined).

No. 25. Order for decree pro confesso, under Rule 74.

The defendant C. D. having been duly served with the subpoena herein, on the — day of —, 19—, as appears from the return —

¹ If *in limine*, substitute for "forever and perpetually," "until the further order of the court."

now on file herein, and having failed to file an answer herein within the twenty days' time limited therefor by Equity Rule 12; on motion of E. F., attorney for plaintiff, it is now ordered and decreed that the bill be taken as confessed as to the said defendant C. D.

No. 26. Decree pro confesso, under Rule 16.

Now this day, it appearing to the court that heretofore and on the —— day of ——, 19—, an order taking the bill as confessed as against the defendant C. D., was duly entered herein for failure to answer within the time limited therefor by Equity Rule 12, and that said defendant has not moved to set aside said order; more than thirty days having elapsed since the entry of said order, it is now deemed absolute. The court doth therefore order, adjudge and decree as follows:

No. 27. Statement of testimony, under Rule 75(b).

The following is plaintiff-appellant's condensed statement in narrative form of the testimony introduced upon the trial made in pursuance of Equity Rule 75(b) and lodged in the clerk's office for the examination of defendant as provided by said rule.

INDEX

	RULE	PAGE
Abatement, defenses formerly presentable by, to be made in answer	29	177
Absence of persons who would be proper parties.....	39	204
Account, matters of, reference to master.....	59	237
to be identified but not stated in master's report.....	61	238
forms of, before master.....	63	240
Action at law, erroneously begun as suit in equity transfer.....	22	159
joinder of, causes of.....	26	168
to be prosecuted in name of real party in interest.....	37	201
Additional rules, by district court.....	79	257
Adjective law, practice as.....	..	4
Administrator as party.....	37	201
Admissibility of evidence offered to be passed on by court.....	46	208
Admission of execution, etc., of documents, etc.....	58	222
Advancement of causes, notice of interlocutory orders, etc.....	6	148
Affidavit, plaintiff's, of noncompliance with decree, attachment to issue	8	149
to be made of service of process by person appointed therefor..	15	153
of expert witnesses in patent and trade-mark cases, provisions as to	48	210
required on application for continuance.....	57	222
to be identified but not stated in master's report.....	61	238
previously used in court, etc., may be used before master.....	64	243
on application for preliminary injunction.....	73	250
Affirmation in lieu of oath.....	78	257
Agreed statement, record on appeal.....	77	256
Alternative defenses may be stated in answer.....	30	186
Amended bill, answer to.....	32	193
Amendments generally	19	155
permitted of any process, pleading, record, etc.....	19	156
of bill as of course	28	176
not after defendant's pleading filed, except, etc.....	28	176
on suggestion of defect of parties.....	43	207
of pleadings on substitution of parties.....	45	208
Answer, subpoena, proper process to compel.....	7	148
time for	12	152
to be filed within time named in subpoena.....	16	154
enlarging time for filing.....	17	154
when to be filed, on motion set aside decree <i>pro confesso</i>	17	154
exceptions to, for scandal and impertinence, shall not obtain..	21	159
defenses to be presented in.....	29	177
to be filed if motion to dismiss denied.....	29	177

Answer—Continued.	RULE.	PAGE.
if not filed, decree <i>pro confesso</i> entered.....	29	177
defenses formerly presentable by plea in bar or abatement to be made in.....	29	177
what to contain.....	30	186
amendment of, by leave, on reasonable notice.....	30	186
Answer, to omit statement of evidence.....	30	186
to avoid general denial of averments of bill.....	30	186
to specifically admit, or deny, or explain facts upon which plaintiff relies	30	186
contents, counter-claim	30	186
to state counter-claims.....	30	186
may state defenses in alternative.....	30	186
cause at issue on filing of, unless, etc.....	31	196
to amended bill.....	32	198
new or supplemental, to be filed to amended bill.....	32	198
exceptions for insufficiency of, abolished.....	33	199
if insufficient may be amended or matter stricken out.....	33	199
when defect of parties suggested, proceedings on.....	43	207
may be stricken out for failure to answer interrogatories or produce documents	58	222
to be identified but not stated in master's report.....	61	238
Appeal, injunction pending.....	74	251
record on, differences as to.....	75	251
reduction and preparation.....	75	251
costs—correction of omissions.....	76	255
agreed statement	77	256
Appearance, filed with clerk to be noted in equity docket.....	3	146
subpoena proper process to compel.....	7	148
Appellant, to notify opposing party or solicitors, etc.....	75	251
to file <i>praecipe</i> indicating portion of record on appeal.....	75	251
to condense evidence, etc.....	75	251
Appellate court not to reverse decree unless.....	46	208
court may direct further steps as justice may require.....	46	208
Appellee to file <i>praecipe</i> indicating additional portions of record on appeal	75	251
Appointment and fees of stenographers.....	50	214
compensation of masters.....	68	246
Assistance, writ of, when to issue.....	7	148
on refusal to obey decree for delivery of possession.....	9	151
Attachment, provisions as to.....	7	148
for noncompliance with decree.....	8	149
not to be discharged unless upon full compliance with decree, etc.	8	149
may issue for failure to answer interrogatories or produce documents	58	222
Attendance of witnesses before commissioner, master, or examiner..	52	215
Averments of bill, if not denied, deemed confessed, except, etc.....	30	186
Bacon, Lord Chancellor, rules of.....	..	4

	RULE	PAGE
Bill, subpoena proper mesne process to compel appearance and		
answer to	7	148
when filed, clerk to issue subpoena	12	152
may be taken <i>pro confesso</i> if answer not filed, etc.	12	152
exceptions to, for scandal and impertinence, shall not obtain..	21	159
Bill, to be signed by solicitors	24	162
of complaint, contents	25	162
stockholder's	27	172
stockholder's, what to contain	27	172
amendment of, as of course	28	176
amended, answer to	32	198
supplemental, what necessary in	35	200
of revivor and supplemental bills, what necessary in	35	200
may be dismissed for failure to answer interrogatories or produce documents	58	222
verification of, on application for preliminary injunction, etc..	73	250
Bond on order suspending, etc., injunction pending appeal	74	251
Books, clerk to keep equity docket, order book, equity journal....	3	146
papers, etc., production of, required by master	62	239
Calendar, trial, case goes on, when	56	220
Cause of action, pleading		165
Cause, speeding, provision as to, on motion set aside decree <i>pro confesso</i>	17	154
Causes, advancement, conduct and hearing of, notice of interlocutory orders for	6	148
of action, joinder of	26	168
frivolous, imposition of costs on exceptions to master's report..	67	245
Certificate, signature of solicitor to pleading to be considered	24	162
Chambers, awarding process, commissions, orders, rules, etc., by judge at	1	145
Charge to be identified but not stated in master's report	61	238
Circuit Court of Appeals, if appeal lies to, rehearing not granted after term	69	246
Circuit judge may dispense with motion day if public interest permits	6	148
Citizenship, name and residence of each party to be stated in bill..	25	162
Claim, further and better statement of nature of, may be ordered..	20	157
Claimants before master, examinable by him	65	244
Class, representatives of, may sue or defend	38	203
Clerical mistakes in orders and decrees, correction of	72	249
Clerk, duties of	2	146
to keep equity docket	3	146
order book	3	146
equity journal	3	146
motions grantable of course by	5	147
to grant as of course, motions and applications not requiring order of court or judge	5	147
to issue writ of assistance on refusal to obey decree for delivery of possession	9	151

Clerk—Continued.

	RULE.	PAGE.
to issue subpoena when bill filed, and not before.....	12	152
of court, verification of pleadings before.....	36	200
to send copies of interrogatories to solicitors of record.....	58	222
Clerk, office of, awarding of process, commissions, orders, rules, etc.,		
by judge at.....	1	145
when open.....	2	146
master to return report into.....	66	244
temporary restraining orders to be filed in.....	73	250
statement as to appeal to be filed in.....	75	251
Commissioner, attendance of witnesses before.....	52	214
Commissions, award of, by judge at chambers, etc.....	1	145
Committees on revision.....	..	vi
Compensation and appointment of masters.....	68	246
of master to be fixed by court.....	68	246
Competency, etc., of questions asked before examiner not to be		
decided by him.....	51	214
Computation of time—Sundays and holidays.....	80	258
Conduct of causes, notice of interlocutory orders for.....	6	148
Constitution, distinction between law and equity in.....		2
Competent for noncompliance with mandatory order, etc.....	8	149
Continuances, provisions as to.....	57	222
Copy of <i>præcipe</i> indicating portions of record on appeal.....	75	251
service of, indicating, etc.....	75	251
Corporate officer to sign interrogatories under oath.....	58	222
Corporation, how impleaded.....	..	165
Corporation, when interrogatories to be answered by officer of.....	58	222
stockholder's bill against.....	27	172
Correction of clerical mistakes in orders and decrees.....	72	249
omissions in transcript on appeal.....	76	255
Costs, payment of, and full compliance with decree before a dis-		
charge of attachment.....	8	149
of plaintiff to be paid before court will set aside decree <i>pro</i>		
<i>confesso</i> , etc.	17	154
terms as to, when further and particular statement in pleading		
required.....	20	157
to nominal parties.....	40	206
stenographer's fees to be taxed as.....	50	214
of incompetent, etc., depositions to be dealt with by court.....	51	214
on continuances, provisions as to.....	57	222
proving execution or genuineness of document, etc.....	58	222
reference to master.....	59	237
exception to master's report.....	67	245
may be imposed upon offending solicitors.....	76	255
imposition of, for infraction of rule as to record on appeal....	76	255
Costs, English practice regarding.....	..	26
Counsel, signature of.....	24	162
to give notice of taking testimony before examiner, etc.....	53	216
consent of, to continuances, provisions as to.....	57	222
to sign petition for rehearing.....	69	246

	RULE	PAGE
Counter-claim, to be stated in answer.....	30	186
to be replied to.....	31	196
in default of reply to, decree <i>pro confesso</i> entered.....	31	196
in English practice.....	..	21
Court, on motion or own initiative, may order redundant impertinent or scandalous matter stricken out.....	21	159
testimony usually to be taken in, at trial.....	46	208
to deal with costs of incompetent, etc., depositions.....	51	214
contempt of, by witness refusing to appear before commissioner, master or examiner.....	52	215
may appoint standing masters in chancery.....	68	246
provisions as to approval by, of appellant's statement, etc., on appeal.....	75	251
district, additional rules by.....	79	257
Court of Appeal (England), appeals to.....	..	32
Creditor making claim before master examinable by him.....	65	244
Cross bill—counter-claim to be stated in answer, and not by.....	30	186
Cross-examination of expert witnesses in patent and trade-mark cases.....	48	210
witness where no notice of deposition given.....	54	216
Custom, as basis of law and practice.....	..	4
Damage, averments in bill as to.....	30	186
to be shown on application for preliminary injunction.....	73	250
Death of party, revivor.....	45	208
Decrees of court to be entered in equity journal.....	3	146
process to issue to compel obedience to.....	7	148
compelling obedience to, writ of sequestration.....	8	149
discharge of attachment upon compliance with.....	8	149
for specific performance, provision as to.....	8	149
for performance of specific act, attachment when.....	8	149
solely for payment of money, writ of execution on.....	8	149
final, enforcement of.....	8	149
for delivery of possession, writ of assistance on refusal to obey..	9	151
for deficiency in foreclosures, etc.....	10	151
<i>pro confesso</i> on default in answer.....	16	154
when may be set aside.....	17	154
to be followed by final decree.....	17	154
final, following decree <i>pro confesso</i>	17	154
<i>pro confesso</i> entered, if answer not filed, etc.....	29	177
in default of reply to counter-claim.....	31	196
not to be reversed unless material prejudice would result.....	46	208
form of.....	71	249
shall not recite pleadings.....	71	249
correction of clerical mistakes in.....	72	249
final, appeals from in injunction suits.....	74	251
to be sent up with agreed statement on appeal.....	77	256
Deeds, etc., decree for delivering up, attachment in.....	8	149

	RULE	PAGE
Default to answer, bill taken <i>pro confesso</i>	16	154
of reply to counter-claim, decree <i>pro confesso</i>	31	196
in answer to amended bill, proceedings on.....	32	198
Defect, court to disregard in proceeding not affecting substantial rights	19	156
of parties resisting objection.....	43	207
tardy objection to.....	44	208
Defendant, subpoena proper process to compel appearance and answer of	7	148
if not found, writ of sequestration proper process to issue, etc..	7	148
to take notice of certain decrees.....	8	149
Defendant, required to file answer on or before 20th day after service of subpoena.....	12	152
service of subpoena to be upon.....	13	152
to answer within time named in subpoena.....	16	154
person refusing to join as plaintiff or defendant may be made defendant	37	201
time within which to take deposition for.....	47	209
Defense, further and better statement of nature of, may be ordered..	20	157
how presented	29	177
what to be heard separately and disposed of before trial, etc...	29	177
testing sufficiency of.....	33	199
Deficiency in foreclosures, etc., decree for.....	10	151
Definitions—		
"Alias writ"		77
"Cross-bill"		123
"impertinence"		88
"motions"		68
"motions of course".....		68
"motions not of course".....		68
"multifariousness"		83
"necessary or proper parties".....	85,	104
"scandal"		88
Delay, signature of solicitor to pleadings certificate that pleadings not interposed for.....	24	162
master to certify reason for any to court.....	60	237
imposition of costs for, on exceptions to master's report.....	67	245
Delivery of possession, writ of assistance to enforce.....	7	148
Demands, joint and several.....	42	207
Demurrers abolished	29	177
Depositions to be taken in exceptional instances.....	47	209
time within which to be taken.....	47	209
taken before examiners, etc.....	49	213
expense of taking to be advanced by party calling witnesses....	50	214
court to deal with costs of incompetent, etc.....	51	214
under R. S. 863, 865, 866, 867—cross-examination	54	216
deemed published when filed.....	55	220
on expiration of time for, case goes on trial calendar.....	56	220
to be identified but not set forth in master's report.....	61	238

Depositions— <i>Continued.</i>	RULE	PAGE
may be taken by master.....	62	239
etc., former may be used before master.....	64	243
previously used in court may be used before master.....	64	243
Differences concerning directions as to contents of record on appeal, provisions as to.....	75	251
Disability of any party to be stated in bill.....	25	162
Discovery, in English practice.....	..	22
Discovery, interrogatories for, when to be filed.....	58	222
Dismiss, motion to, setting down for hearing.....	29	177
Dismissal of causes continued, if not reinstated.....	57	222
Dismissal, voluntary	..	181
Distinction between law and equity.....	..	1
District courts, always open for certain purposes.....	1	145
to establish times and places when motions may be made and disposed of	6	148
additional rules by.....	79	257
District judge, may make, direct and award process, commissions, orders, rules, etc.....	1	145
Documents, inspection and production of.....	58	222
court may enforce inspection and production of.....	58	222
interrogatories for discovery of, when to be filed.....	58	222
execution or genuineness of, call for admission of.....	58	222
identified but not set forth in master's report.....	61	238
production of, required by master.....	62	239
previously used in court may be used before master.....	64	243
Dwelling house, service of subpoena by leaving copy at.....	13	153
English practice, effect on ours.....	..	5
evolution of	..	7, 35
outline of	..	16
Equity Docket, clerk to keep.....	3	146
index of	3	146
noting of order in, not notice.....	4	147
day of return of master's report to be entered in.....	60	244
Equity Journal, clerk to keep.....	3	146
index of	3	146
Equity and Law distinguished.....	..	1
Equity, suit in, action at law erroneously begun as—transfer.....	22	159
matters ordinarily determinable at law when arising in, to be disposed of therein.....	23	161
Error or defect in proceedings, court to disregard when not affect- ing substantial rights.....	19	156
Evidence, mere statement of, to be omitted from bill.....	25	162
admissibility of, to be passed on by court.....	46	208
offered and excluded, proceedings on.....	46	208
affidavits of expert witnesses in patent and trade-mark cases, when not to be used as.....	48	210
taken before examiners to be returned to court.....	49	213
taken before examiners, provisions as to.....	51	214
objections to, taken before examiner, etc.....	51	214

	RULE.	PAGE.
Evidence, court or judge may enforce answers to interrogatories and production of documents containing.....	58	222
master may direct mode of proving matters before him.....	62	239
before master on examination to be taken down.....	65	244
how to be stated in record.....	75	251
<i>Ex parte</i> , cause to be proceeded with after decree <i>pro confesso</i>	16	154
Examination to be identified but not stated in master's report	61	238
Examiners, evidence taken before, to be returned to court.....	49	213
provisions as to.....	51	214
not to decide on competency, materiality or relevancy of questions	51	214
attendance of witnesses before.....	52	215
notice of taking testimony before, etc.....	53	216
cross-examination of witness before.....	54	216
Exceptions for insufficiency of answer abolished.....	33	199
to evidence offered and excluded, provisions as to.....	46	208
to master's report.....	66	244
costs on	67	245
Execution, writ of, provisions as to.....	8	149
admission of, of documents, etc.....	58	222
Executor as party.....	37	201
Expert witnesses, testimony of, in patent and trade-mark cases....	48	210
Facts, ultimate statement of, upon which relief asked, to be stated in bill	25	162
insufficiency of, as defense how presented.....	29	177
material, may be alleged in supplemental pleading.....	34	199
not to be stated in master's report.....	61	238
Fees, of stenographer.....	50	214
File number, each suit and all papers, processes, etc., to be marked with, and noted on equity docket.....	3	146
Filing of bill, effect of.....	..	75
Filing of deposition deemed publication.....	55	220
Final hearing, points of law may be disposed of before.....	29	177
Final process, issue and return of.....	1	145
to be served by marshal, deputy, etc.....	15	153
Foreclosure of mortgages, etc., decree for balance due.....	10	151
Form of account before master.....	63	240
decree	71	249
Former depositions, etc., may be used before master.....	64	243
Forms, technical, of pleadings abrogated.....	18	156
alternative—prayer for specific relief may be in.....	25	162
Forms, bill of complaint, etc. (see table, p. xvi).....	..	259
Genuineness of documents, admission of, etc.....	58	222
Guardian as party.....	37	201
may sue for infants.....	70	249
<i>ad litem</i> , may be appointed by court or judge, etc.....	70	249
Hearing on merits—making and directing interlocutory motions, orders, rules, etc., preparatory to.....	1	145
of causes, notice of interlocutory orders for.....	6	148

Hearing—Continued.

	RULE.	PAGE.
final, points of law may be disposed of before.....	29	177
on exceptions to report of master.....	66	244
Heirs as party to suits to execute trusts of will.....	41	206
History of Equity Practice.....	..	4, 7, 35
of subpoena in equity.....	..	75
Holidays, legal, clerk's office not open.....	2	146
computation of time.....	80	258
House of Lords, appeals to, records in.....	..	32
Impertinence, scandal, exceptions to bills, answers, etc., for, shall not obtain	21	159
Incompetents, suits by or against.....	70	249
Indices of equity docket, order book and equity journal, clerk to keep	3	146
Infants, nothing to be taken against as confessed.....	30	186
nominal parties in suits not against.....	40	206
may sue by guardian or by <i>prochein ami</i>	70	249
guardians <i>ad litem</i> may be appointed to defend suits against....	70	249
Injunction, for specific performance, provision as to.....	8	149
preliminary and temporary restraining orders.....	73	250
pending appeal	74	251
Insufficiency of fact, defense of, how presented.....	29	177
Interlocutory, motions, orders, rules, etc., making and directing....	1	145
Interrogatories, in English practice.....	..	22
Interrogatories, written, practice as to, to be followed in case of refusal of witness before master, examiner, etc.....	52	215
when to be filed.....	58	222
when to be answered, etc.....	58	222
court may enforce answers to.....	58	222
to be answered separately and fully, in writing, under oath, and signed	58	222
objections to, provisions as to.....	58	222
copies to be sent by clerk to solicitors of record.....	58	222
examination of accounting party before master on.....	63	240
claimants before master examinable on.....	65	244
Interstate Commerce Commission, aided by courts.....	..	75
Intervention, when allowed.....	37	201
Issue, of subpoena.....	12	152
cause at, upon filing of answer, except, etc.....	31	196
Joinder of causes of action.....	26	168
parties, provision as to.....	37	201
Joint and several demands.....	42	207
Judge, district, may make, direct and award process, commissions, orders, rules, etc.....	1	145
in chambers, orders by, to be entered in order book....	3	146
may suspend, alter or rescind motion granted as of course by clerk	5	147
on notice, if any, may make interlocutory orders, etc.....	6	148
verification of pleadings before.....	36	200

Judicial Code (see also Revised Statutes of the United States)—		
Section 9	66,	145
Section 30	85	
Section 50	103,	205
Section 51	69	
Section 52	70	
Section 53	70	
Section 54	70	
Section 55	70	
Section 56	71	
Section 57	71,	103
Section 67	130,	246
Section 67	130,	246
Section 262	138	
Section 268	74,	113
Section 272	79	
Section 289	65	
Section 290	66	
Section 297	205	
Jurisdiction, ground on which depends to be stated in bill.....	25	162
Justice, convenient administration of, joinder of causes of action to promote	26	168
Land, decree for conveyance of, attachment in.....	8	149
Law, action erroneously begun as suit in equity—transfer.....	22	159
matters ordinarily determinable at, when arising in suit in equity, to be disposed of therein.....	23	161
points of, may be disposed of before final hearing.....	29	177
Letter, call for admission of genuineness of, etc.....	58	222
Loreburn, Lord Chancellor, on the modern English practice.....	27	
Loss, immediate and irreparable to be shown on application for temporary restraining order.....	73	250
Lunatic, nothing to be taken against as confessed.....	30	186
Lurton, Mr. Justice, examines English practice.....	26	
Marshal, deputy, etc., to serve all process, except.....	15	153
duties of	77	
Master, attendance of witnesses before.....	52	215
reference to, exceptional not usual.....	59	237
proceedings before	60	237
duties of	60	237
may proceed as <i>ex parte</i> when.....	60	237
may adjourn examination, etc., when.....	60	237
to proceed with reasonable diligence.....	60	237
reports of—documents to be identified but not set forth.....	61	238
powers of	62	239
Master, to regulate all proceedings before him.....	62	239
may require production of all books, papers, etc.....	62	239
form of accounts before.....	63	240
former depositions, etc., may be used before.....	64	243

<i>Master—Continued.</i>	RULE.	PAGE.
claimants before, examinable by him.....	65	244
appointment and compensation of.....	68	246
entitled to attachment for his compensation, when.....	68	246
not to retain report as security for compensation.....	68	246
<i>pro hac vice</i> , in particular cases, may be appointed by court...	68	246
in chancery, standing, may be appointed by the court.....	68	246
Master's report, return of—exceptions—hearing.....	68	244
costs on exception to.....	67	245
not to be recited in decree or order.....	71	249
Material supplemental matter may be set forth in amended pleadings	19	156
Materiality of questions not to be decided by examiner.....	51	214
Matter, further and better particulars of, in any pleading may be ordered	20	157
new or affirmative, in answer, deemed denied by plaintiff.....	31	196
Matters ordinarily determinable at law, when arising in suit in equity, to be disposed of therein.....	23	161
Merits, hearing on—making and directing interlocutory motions, orders, rules, etc., preparatory to.....	1	145
Mesne process, issuing and returning.....	1	145
subpoena shall constitute proper.....	7	148
to be served by marshal, deputy, etc.....	15	153
Misjoinder, defense of, how presented.....	29	177
Mistakes, clerical, correction of, in orders and decrees.....	72	249
Money, payment of, final process to execute decree for.....	8	149
Mortgages, foreclosure of, decree for balance due.....	10	151
Motions, interlocutory, making and directing.....	1	145
when may be made.....	1	145
etc., grantable of course, received and disposed of by clerk....	2	146
grantable of course by clerk.....	5	147
for mesne process grantable of course by clerk.....	5	147
and applications not requiring order of court or judge grantable of course by clerk.....	5	147
grantable of course by clerk may be suspended, etc., by judge..	5	147
requiring notice and hearing, times and places for.....	6	148
to enlarge time for filing answer.....	17	154
will not be granted unless payment of costs, etc.....	17	154
to strike out, to test sufficiency of answer.....	33	199
Motions to strike out, etc., forms of.....	..	262
Motion day	6	148
may be dispensed with by senior circuit judge.....	6	148
Motion to dismiss, defenses to be presented in.....	29	177
Names of plaintiff and defendant to be stated in bill.....	25	162
Nominal parties	40	206
<i>Non est inventus</i> , return of, issuance of writ of sequestration.....	8	148
Nonjoinder, defense of, how presented.....	20	177
Notary public, verification of pleadings before.....	36	200

Notice, reasonable, to parties, of process, commissions, orders, rules, etc.	1	145
of orders	4	147
order without prior, to be mailed by clerk to party, etc.	4	147
of interlocutory orders, etc.	6	148
defendant to take of certain decrees.	8	149
of motion to dismiss.	20	177
reasonable, of amendment of answer, by leave, etc.	30	186
reasonable, of filing supplemental pleading.	34	199
to be given to parties to be substituted.	45	208
reasonable, of motion to enforce answers, etc.	58	222
of taking testimony before examiner, etc.	53	216
to parties or solicitors of proceedings before master.	60	237
no preliminary injunction granted without.	73	250
Oath, may be made by plaintiff if special relief asked.	25	162
stockholder's bill to be verified by.	27	172
interrogatories to be signed under.	58	222
petition for rehearing to be verified by.	69	246
affirmation in lieu of.	78	257
Objections, to defect of parties.	43	207
tardy, to defect of parties.	44	208
to evidence taken before examiner, provisions as to.	51	214
to be noted by examiner, etc.	51	214
Officers before whom pleadings verified.	36	200
Old rules abrogated.	81	258
Omissions, etc., in orders and decrees may be corrected without rehearing	72	249
of portions of record on appeal.	75	251
correction of, in record on appeal.	76	255
Order promulgating rules of 1912.	v	
Orders, when may be made.	1	145
award of, by judge at chambers, etc.	1	145
interlocutory, making and directing.	1	145
grantable of course, received and disposed of by clerk.	2	146
filed with clerk to be noted in equity docket.	3	146
of court to be entered in equity journal.	3	146
made or passed by clerk, or judge in chambers, to be entered in order book.	3	146
made without notice, to be mailed by clerk.	4	147
noting of, in equity docket or entered in order book, not notice to parties.	4	147
interlocutory, notice of.	6	148
process to issue to compel obedience to.	7	148
mandatory, for specific performance, provision as to.	8	149
for delivery of possession, writ of assistance on refusal to obey	9	151
in favor person not party, how enforced.	11	152
against person not party, how enforced.	11	152
that bill be taken <i>pro confesso</i> on default.	16	154

	RULE	PAGE
Orders, shall not recite pleadings.....	71	249
correction of clerical mistakes in.....	72	249
temporary restraining, and preliminary injunctions.....	73	250
Justice or Judge may make order suspending, etc., injunction pending appeal	74	251
Order book, clerk to keep	3	146
to contain all orders made or passed by judge in chambers or by clerk	3	146
index of, clerk to keep.....	3	146
entry of order in, not notice.....	4	147
Papers and orders filed with clerk, etc., to be noted in equity docket	3	146
production of, required by master.....	62	239
Particulars, how and when ordered.....	20	157
Parties, noting or entry of order not notice to.....	4	147
persons not made	25	162
generally—intervention	37	201
joinder of	37	201
proper, absence of persons who would be.....	39	204
nominal, appearance of	40	206
in cases of joint and several demands.....	42	207
defect of, resisting objection	43	207
defect of, tardy objection, proceedings on.....	44	208
to give notice of taking testimony before examiner, etc.....	53	216
clerk to send copies of interrogatories to if there be no record solicitor	58	222
notice to, of proceedings before master.....	60	237
failing to appear before master	60	237
may be examined on oath by master.....	62	239
accounting before master, how to bring in accounts.....	63	240
to examine accounting party <i>viva voce</i> or upon interrogatory...	63	240
time for filing exceptions to master's report by.....	66	244
to verify petition for rehearing by oath.....	69	246
to be given notice of preliminary injunctions, etc.....	73	250
Party, when order made in absence of, clerk to mail copy.....	4	147
heir as, to execute trusts of will.....	41	206
death of, revivor	45	208
procuring reference to master, payment of costs by.....	59	237
Patent cases, testimony of expert witnesses in.....	48	210
Persons not parties, process on behalf of and against.....	11	152
Person appointed to serve process to make affidavit thereof.....	15	153
Persons not made parties to bill.....	25	162
Person, <i>non compos</i> , nothing to be taken against as confessed.....	30	186
Persons joining as parties.....	37	201
who would be proper parties, absence of.....	39	204
Person making claim before master examinable by him.....	65	244
Petition for rehearing	69	246
Plaintiff entitled to subpoena as of course when bill filed.....	12	152
time within which to take deposition for.....	47	209

Plea in bar, defenses formerly presentable by to be made in answer	29	177
Pleadings, filing of	1	145
technical forms abrogated	18	156
court may permit any to be amended	19	156
further and particular statement in, may be required	20	157
further and better particulars of matter stated in any may be ordered	20	157
Pleadings, alteration in, on transfer of action at law erroneously begun as suit in equity	22	159
to be signed by solicitors	24	162
when bill may be amended as of course	28	176
demurrers and pleas abolished	29	177
supplemental, permitted when	34	199
officers before whom verified	36	200
filing, or amendment of, on substitution of parties	45	208
Pleas abolished	29	177
Possession, delivery of, writ of assistance to enforce	7	148
on refusal to obey decree for	9	151
Powers of master	62	239
Practice, additional rules for, by district court	79	257
<i>Praecipe</i> , filing indicating portions of record on appeal	75	251
Prayer for special relief to be stated in bill	25	162
Precedence given to hearing in cases of temporary restraining orders	73	250
Prejudice, unless material, will result appellate court not to reverse decree	46	208
Preliminary injunctions and temporary restraining orders	73	250
Preparation and reduction of record on appeal	75	251
—costs—corrections of omissions	76	255
<i>Pro confesso</i> , taking bills, motion for, grantable of course by clerk	5	147
bill may be taken when answer not filed, etc.	12	152
decree on default in answer	16	154
to be followed by final decree	17	154
entered if answer not filed	29	177
Proceedings before master, speeding of	60	237
powers in	62	239
Process, mesne and final, issuing and returning	1	145
award of, by judge at chambers, etc.	1	145
issuing and return of	1	145
issued and returns thereon to be noted in equity docket	3	146
for taking bills <i>pro confesso</i> grantable of course by clerk	2	147
mesne or final, to enforce and execute decrees grantable of course by clerk	5	147
mesne and final, defined	7	148
in behalf of and against persons not parties	11	152
by whom served	15	153
mesne and final to be served by marshal, deputy, etc.	15	153

Process—Continued.	RULE.	PAGE.
may be served by person appointed therefor.....	15	153
court may permit any process to be amended.....	19	156
additional rules as to, by district court.....	79	257
<i>Prochein ami</i> may sue for infants.....	70	249
Production of books, papers, etc., may be required by master.....	62	239
Publications of deposition, when filed.....	55	220
Questions, competency, materiality, or relevancy of, not to be decided by examiner	51	214
Reasonable notice, what is	..	218
Record, court may permit any record to be amended.....	19	156
how evidence to be stated in.....	75	251
appellant's statement as to record on appeal to become part of—	75	251
on appeal indicating portions of.....	75	251
additional portions, how indicated	75	251
reduction and preparation	75	251
difference as to	75	251
reduction and preparation—costs—correction of omis- sions	76	255
agreed statement	77	256
Reduction and preparation of record on appeal.....	75	251
costs—corrections of omissions	76	255
Reference to master—exceptional, not usual.....	69	237
Rehearing, petition for, provisions as to	69	246
correction of clerical mistakes in orders and decrees with- out	72	249
time for filing	..	247
Reinstatement of causes, continued	57	222
Relevancy of questions not to be decided by examiner, etc.....	51	214
Relief, special, prayer for, to be stated in bill.....	25	162
to be verified by oath of plaintiff, etc.....	25	162
Reply—when required—when cause at issue.....	31	196
none required unless answer asserts set-off or counter- claim	31	196
Report, master's, to court	60	237
documents to be identified but not set forth.....	61	238
of master, exceptions, hearing	66	244
costs on exceptions to	67	245
not to be recited in decree or order.....	71	249
Reports (U. S.), where rules found in.....	..	viii
Representatives of class may sue or defend.....	38	203
Residence and citizenship of each party to be stated in bill.....	25	162
Restraining orders, temporary, and preliminary injunctions.....	73	250
Returns on process to be entered on equity docket.....	3	146
Return of subpoena not executed.....	14	153
of master's report—exceptions—hearing	66	244
Revised Statutes of the United States (see also "Judicial Code").		
Section 1.....		137
Section 574.....		65

Revised Statutes of the United States—Continued.	RULE	PAGE
Section 723.....		161
Section 737.....		205
Section 790.....		72
Section 802.....		211
Section 803.....	210,	212
Section 805.....		219
Section 806.....		219
Section 807.....		220
Section 913.....		211
Section 917.....		211
Section 948.....		72, 78
Section 954.....	78, 96,	115
Section 955.....	72, 78,	110
Section 956.....		111
Section 985.....		73
Section 986.....		73
Section 1750.....		113
Section 1778.....		114
Section 4063.....		72
Section 4064.....		72
Section 4065.....		72
Revision, causes of.....	..	33
Revivor, bills of, what necessary in.....	35	200
on death of party	45	208
Rights, substantial, court to disregard error or defect in proceed- ings which does not affect	19	156
Rules when they may be awarded.....	1	145
interlocutory, making and directing	1	145
award of by judge at chambers, etc.....	1	145
grantable of course, received and disposed of by clerk.....	2	146
additional, by district court	79	257
when effective	81	258
old, abrogated	81	258
where found in the reports	..	viii
table of, as changed by new rules.....	..	ix
of 1822	..	37
of 1842	..	43
of 1866-1911	..	63
of 1912	..	143
Sale, amount due above proceeds of decree for.....	10	151
Scandal and impertinence	21	159
Scandalous matter, signature of solicitor, certificate that none inserted in pleading	54	162
Sequestration, writ of, proper process if defendant not found.....	7	148
against estate of delinquent.....	8	149
person other than disobedient party to comply with man- datory order for specific performance	8	149
Service of subpoena by delivery of copy, etc.....	13	153

	RULE	PAGE
Set-off to be stated in answer.....	30	186
replied to	31	196
Signatures, pleadings to be signed by solicitors of record.....	24	162
Solicitors, noting or entry of order not notice to.....	4	147
of record to sign every pleading.....	24	162
to be furnished copy of amended bill.....	28	176
clerk to send copies of interrogatories to.....	58	222
notice to, of proceedings before master.....	60	237
offending, imposition of costs on.....	76	255
to file <i>praecipe</i> indicating portions of record on appeal.....	75	251
Specific performance, by some other person than disobedient party	8	149
Standing masters in chancery, courts may appoint.....	68	246
Statement, further and particular in pleading may be required.....	20	157
agreed as to record on appeal.....	77	256
Stenographer—appointment—fees	50	214
Stenographer, in English practice	..	33
Stockholder's bill	27	172
Subpœna shall constitute proper mesne process, etc.....	7	148
issue of, time for answer.....	12	152
to issue when bail filed and not before.....	12	152
to contain names of parties	12	152
when returnable	12	152
memorandum at bottom thereof	12	152
joint, against more than one defendant.....	12	152
separately, for each defendant when against more than one....	12	152
effect of	..	72
manner of serving	13	153
not executed, provision as to.....	14	153
alias	14	153
Substitution of proper parties by revivor.....	45	208
Sufficiency of defense, how tested.....	33	199
Suits, papers filed, process issued, etc., to be noted on equity docket	3	146
to execute trusts of will—heir as party.....	41	206
by or against incompetents	70	249
Summons, in English practice.....	..	25
Supplemental pleading, when may be filed.....	34	199
Supreme Court, if appeal lies to, rehearing not granted after term	69	246
Sundays, clerk's office not open.....	2	146
and holidays—computation of time	80	258
Temporary restraining orders and preliminary injunctions.....	73	250
Term, awarding process, commissions, orders, rules, etc., by judge at chambers, etc., in.....	1	145
orders, decrees, etc., of court to be entered in equity journal....	3	146
rehearing not granted after, if appeal lies.....	69	246

	RULE	PAGE.
Testimony, usually to be taken in open court at trial.....	46	208
of expert witnesses in patent and trade-mark cases.....	48	210
may be taken down by stenographer.....	50	214
to be signed by witness.....	51	214
of witnesses before examiner to be read to him.....	51	214
contempt of court for refusal of witness to give testimony before commissioner, examiner, etc.....	52	215
notice of taking before master or examiner.....	53	216
no further by deposition to be taken after case goes on trial calendar, except, etc.....	56	220
how stated in record on appeal.....	75	251
Testing sufficiency of defense.....	33	199
Time, enlargement of, for full compliance with decree.....	8	149
to file answer.....	16	154
on expiration of, for depositions, case on trial calendar.....	56	220
computation of—Sundays and holidays.....	80	258
Trade-mark cases, testimony of expert witnesses in.....	48	210
Transcript, cost of, to be advanced by party ordering.....	50	214
of evidence before examiner not to include argument.....	51	214
on appeal, indicating portions of.....	75	251
supplemental correction of, omissions by.....	76	255
Transfer of action at law erroneously begun as suit in equity.....	22	159
Trial, testimony usually taken in open court, rulings on ob- jections to evidence.....	46	208
calendar, on expiration of time for depositions case goes on....	56	220
Trials, English practice.....	..	23
Trials, separate—court may order separate trials of joint actions.....	26	168
Trustee as party.....	37	201
Uncertainty of rules of 1912.....	..	35
Vacation, awarding process, commissions, orders, rules, etc., by judge at chambers in.....	1	145
Value, averments in bill other than of, if not denied, deemed confessed.....	30	186
Verification, bill to be verified by oath if special relief asked.....	25	162
of pleadings, officers before whom taken.....	36	200
petition for rehearing to be verified by oath, etc.....	69	246
Vica voce, master may examine persons before him.....	65	244
Vouchers, production of, required by master.....	62	239
Will, execution of trusts of—heir as party.....	41	206
Witnesses, testimony usually to be taken in open court.....	46	208
depositions of, may be taken when.....	47	209
testimony of expert in patent and trade-mark cases.....	48	210
before examiners, etc., cross-examination of, etc.....	49	213
testimony of, to be read to.....	51	214
to be signed by.....	51	214
refusing to sign testimony.....	50	214
expense of taking deposition of, to be advanced by party calling.....	50	214

Witnesses—*Continued.*

	RULE	PAGE
attendance of before commissioner, etc.....	52	215
refusing to appear before commissioner, master or examiner...	52	215
compensation of for attendance before commissioner, master or examiner	52	215
may be examined orally before court, or cross-examined be- fore examiner, etc., when no notice of deposition given	54	216
testimony of, by deposition, after case goes on trial calendar...	56	220
may be examined on oath by master.....	62	239
testimony of, how stated in record on appeal.....	75	251
Writing, call for admission of execution or genuineness of.....	58	222
Writings, production of required by master.....	62	239
Writ of assistance	9	151

1-304
Hart. 5/2/18