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Citation: 40 Law Bull. St. U. Iowa 1 1899-1901

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THE LAW BULLETIN  
OF  
THE STATE UNIVERSITY  
OF IOWA

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NUMBER FORTY

APRIL 1901

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OUTLINE OF EQUITY PLEADING.

[The following matter in the nature of an outline of equity procedure, is intended as a guide to the student in studying the subject of equity procedure, and is designed only to make him familiar with the principal pleadings and their form, and does not purport to cover the subject, except in a very general way. The short time at present available for the subject renders a more detailed consideration impracticable.]

**EQUITY POWER OF THE FEDERAL COURTS.**

The equity procedure in the federal courts furnishes the best modern example of the system of pleading in equity as developed in the practice of the High Court of Chancery in England. The practice of the English chancery court is the basis of all chancery practice in the United States, but the modern reformed procedure now adopted in a majority of the states, has greatly modified the method of pleading and practice by abolishing all forms of action and consolidating

the law and equity courts. In the federal courts the distinction between the two systems is maintained in its general outline at least, and for that reason, the federal practice will be the basis of this outline. In England the courts have been consolidated and equitable and legal rights may be determined in the same action.

36 and 37 Vict. Ch. 66, Sec. 24, 25.

The Constitution, Art. III, Sec. II, provides that the judicial power shall extend to all cases in law and equity, and then enumerates the scope of the jurisdiction.

In pursuance of the power conferred by the constitution, Congress has distributed the judicial power among the several courts, all of which have some jurisdiction in equity.

I Foster's Fed. Prac., Sec. 13.

The Circuit Court is the court of original jurisdiction in the great bulk of equity litigation.

U. S. Rev. St., § 688.

I Foster's Fed. Prac., Sec. 15, et seq.

Congress has authorized the Supreme Court to adopt suitable rules for the regulation of the practice in equity matters, and the Circuit Court is likewise authorized to adopt rules of practice not inconsistent with the rules of the Supreme Court. Under this authority, the Supreme Court has adopted a series of rules, which form the basis of practice.

II Foster's Fed. Prac., app. p. 1253.

II Garland & Ralston Fed. Prac., 777.

Shiras Eq. Prac., 85.

III Desty's Fed. Prac., 1711.

These rules are based upon the English chancery practice, and provide that in all cases where the rules formulated by the Supreme or Circuit Courts 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 applicable, not as positive rules, but as furnishing just analogies to regulate the practice.

Rule 90.

**ORIGIN OF EQUITY PROCEDURE.**

The origin of equity procedure cannot be traced to any one source. In methods of taking evidence, of trial and rules as to the form of answer, it has strong analogies in the procedure of the Ecclesiastical Courts, whose practice was based on the civil law. In the matter of pleas and demurrers, the practice is analagous to that at law. The whole system is a growth, the result of court rules and precedents, and was not adopted bodily from any previously existing system.

Langdell Eq. Plead., Sec. 36-52.

Story Eq. Plead., Sec. 14.

I Spence Eq. Jur., \*367, et seq.

I Pomeroy Eq. Jur., Sec. I, II.

Shipman Eq. Pl., 7-8.

**Parties.**

The rule as to parties, when the question of capacity is involved, is in general the same as at law; therefore persons laboring under the disabilities of coverture, infancy or lunacy must appear by their legal guardian or next friend.

Rule 87.

As to who must or may be joined as parties to a suit, the rule is much broader in equity than at law, as it is a principle of equity to settle all interests in the subject matter of the suit in the one proceeding if that is possible, and this result is possible if all the interested parties are before the court, as the court has the power to so modify and mould its final decrees, as to protect all parties to the proceeding as their interests appear. A court of law does not have such power, but must give judgment for plaintiff or defendant, as the verdict stands without conditions.

*General Rule.*

All persons materially interested, either legally or beneficially, in the subject matter of a suit, are to

be made parties to it, either as complainants or as defendants, however numerous they may be, so that there may be a complete decree that shall bind them all.

Story Eq. Pl., Sec. 72.

I Foster Fed. Prac., Sec. 42.

Shipman Eq. Pl., 13.

Parties covered by the above rule are divided into two classes:

Necessary parties.

Proper but not indispensable parties.

Necessary parties include all persons who have such an interest in the subject matter of the suit that a satisfactory decree cannot be enforced without directly affecting their rights.

Shipman Eq. Pl., 19.

I Foster Fed. Prac., Sec. 53.

If these parties cannot be joined, the bill will be dismissed.

Shiras Eq. Prac., p. 16, and cases cited.

Proper parties include all those persons whose relation to the controversy is purely formal, and may be joined or not at the election of the complainant, and all other persons not indispensable to a decree, who would be necessary, if it were possible or convenient to join them.

These exceptions are covered by the equity rules,—thus parties otherwise necessary need not be joined if not indispensable, when beyond the jurisdiction of the court; when incompetent to be made parties; or whose joinder would oust the court of its jurisdiction.

Rule 47.

And further, when the parties are numerous on either side, all need not be joined if inconvenient to do so, and enough are joined to represent the adverse interests.

Rule 48.

And again, beneficiaries need not be joined if the trustees

are competent to protect the interests involved, and the same is true where executors or administrators are parties.

Rules 49, 50.

Where the proceeding is on a demand joint and several, the complainant may at his election sue all or any of the obligors.

Rule 51.

Parties with inconsistent and conflicting interests cannot be joined as complainants; there must be a common title or a common interest in the relief sought.

I Foster Fed. Prac., Sec. 44.  
Shipman Eq. Pl., 49 et seq.

And the same rule applies as to parties co-defendants.

Citations supra.

### THE BILL.

The first step in an equity suit is the filing of the complainant's first pleading, called the Bill, and corresponds to the declaration or petition in a law proceeding.

I Foster Fed. Prac., 63.

It is less formal than the common law declaration, but corresponds closely in form to the petition under the code procedure in this state, that is, words of art are not essential.

Under the earlier practice the bill was divided into nine parts, namely: (1) Direction or address. (2) Introduction. (3) Stating part. (4) Common confederacy clause. (5) Charging part. (6) Jurisdiction clause. (7) Interrogating part. (8) Prayer for relief. (9) Prayer for process.

I Foster Fed. Prac., Sec. 65.  
Lang. Eq. Pl., Sec. 55.  
Barton's Suit in Eq., 51.

The common confederacy clause, charging part, and jurisdiction clause were never essential and the equity rules provide in terms to that effect.

Rule 21.

For modern form of Bill see

II Foster Fed. Prac., 1101.

*Introductory Part.*

The introductory part of the bill contains the address to the court, and names of the parties—complainant and defendant; the general form of introduction is indicated by Rule 20.

*Stating Part.*

The stating part is the most important part of the bill, as here the complainant must set out the facts on which he relies for relief.

The form of statement is not technical.

The bill should set forth: (1) The right, title, or claim of the complainant with accuracy and clearness. (2) The injury or grievance committed or threatened by the defendant. Only the ultimate material facts on which complainant's right is founded should be stated, unless the complainant desires to have the defendant answer in detail.

Story Eq. Pl., 252, 1263.

Documents should not be set out *in haec verba*, but the substance should be stated so far as is necessary, to make clear the matter of the bill.

Story Eq. Pl., Sec. 241-242, 255.

I Foster Fed. Prac., Sec. 67.

Rule 26.

All matter not material to the complainant's case is improper and deemed impertinent, and will be struck out on proper application.

The same rule applies to scandalous matter.

Rule 26.

Citations *supra*.

The complainant is at liberty to include the substance of what formerly constituted the charging part of the bill in the stating part, and thereby anticipate any defense or excuse of the defendant, and deny or avoid the same by counter averments.

Rule 21.

When parties apparently necessary or proper are not joined the bill should aver the reason for non-joinder.

Rule 22.

I Gar. & Ral. Fed. Prac., Sec. 225.

*Interrogating Part.*

The interrogating part of the bill sets out matters covered by the stating part on which specific and detailed answers are desired. Its purpose is discovery, but since the modification of the rules of evidence, compelling the adverse party to testify, it has lost most of its former importance.

Shiras Eq. Prac., XVI.  
I Foster Fed. Prac., Sec. 82.

Specific interrogatories are no longer required, but the defendant must answer the general statements in the bill.

Rule 40.

When special interrogatories are used, the form of arrangement is provided for by rule.

Rule 41.

*Prayer for Relief.*

In the prayer of the bill, the plaintiff should ask the special relief to which he deems himself entitled, and also for general relief. If an injunction, or a writ *ne exeat*, or any other special order, pending the suit, is required, it should also be specially asked for.

Rule 21.

Under the prayer for general relief the court may grant such relief as is not inconsistent with the special prayer.

I Foster Fed. Prac., Sec. 83.  
I Gar. & Ral. Fed. Prac., Sec. 224.

In the prayer for relief it is usual to state all offers and waivers by the complainant, that is, an offer to give up any rights or to waive any defenses which the court may deem necessary in order to equitably adjust the rights of the parties to the bill. Offers and waivers may also be set out in the stating part of the bill.

Shipman Eq. Pl., 230.  
I Foster Fed. Prac., Sec. 84.

**Subpoena.**

The subpoena is the proper *mesne* process in all

suits in equity and issues as of course, provided the bill is on file; its office is to advise the defendant of the pendency of the suit and to summon him to appear thereto.

Rules 7, 11-16.  
 II Foster Fed. Prac, app. 1254, form IV.  
 I Gar. & Ral. Fed. Prac., Sec. 216-218.  
 I Foster Fed. Prac., Sec. 90-98.  
 Shiras Eq. Prac., XXII-XXIX.  
 Barton's Suit in Eq., Chap. II.

### The Appearance.

After service of the subpoena, the defendant must submit himself to the jurisdiction of the court, and this submission is known as the appearance. The method of appearance is usually by a written order directing the clerk to enter the appearance. This order may be signed by the defendant or his attorney. The appearance must be made on or before the day set for the return of the subpoena.

The appearance may be general or special. A general appearance is for all purposes of the suit and is a waiver of all irregularities in the service of the subpoena. A special appearance is for the purpose of objecting to the form of service or the jurisdiction of the court.

A defendant not served may enter an appearance.

Rule 17.  
 I Foster Fed. Prac., Sec. 99-102.  
 I Gar. & Ral. Fed. Prac., Sec. 219.  
 Citations supra.

### Bill Pro Confesso.

If the defendant fails to appear or fails to plead within the time provided by the rules, the complainant may have an order as of course, taking the bill as confessed. The effect is similar to a default judgment at law. The decree *pro confesso* must be followed by a final decree and an *ex parte* hearing is had on the allegations in the bill. The complainant is bound to establish his case to the satisfaction of the court. The court has power to set aside a *pro confesso* decree and allow the defendant to

appear and plead at any time during the term at which the decree was entered. If the complainant requires discovery from the defendant in order to perfect his relief, the defendant will be compelled to answer, under the usual penalties of the court.

Under the English practice, the defendant may appear on terms after the bill has been taken as confessed for the purpose of being heard as to the form of the final decree.

A decree *pro confesso* cannot be taken against a person laboring under a disability, unless a guardian *ad litem* has been appointed.

Rules 12, 18, 19.  
 I Foster Fed. Prac., Sec. 103, 104.  
 I Gar. & Ral. Fed. Prac., Sec. 22.  
 Shiras Eq. Prac., XXX.

#### **Disclaimer.**

If the defendant appears and desires to renounce all rights in the property which the complainant claims by his bill, he may file a disclaimer formally renouncing his rights. A disclaimer is only proper where the complainant's claim is general. If the bill sets out specific facts and connects the defendant therewith, the defendant is bound to answer as to these facts. If the defendant simply desires to deny liability under the facts alleged in the bill, a disclaimer is improper.

Shipman Eq. Pl., 353.  
 I Foster Fed. Prac., Sec. 155.  
 Barton's Suit in Eq., 98.

#### **Exceptions.**

If the defendant desires to object to the substance or the form of allegation in the complainant's bill, he must do so by exceptions. Exceptions are in writing, pointing out the defective parts and stating the character of the defect.

The defects reached by this method are usually that the bill contains impertinent or scandalous matter. Matter is impertinent which is wholly irrelevant and unnecessary,

and thus tends to make the record improperly expensive and voluminous. Matter is scandalous which is impertinent, and in addition thereto is libellous or defamatory in its character.

Rules 26, 27.  
 Shipman Eq. Pl., 348, et seq.  
 I Foster Fed. Prac., Sec. 68.  
 Story Eq. Pl., Sec. 266, 863.

### Demurrers.

If the bill is defective, either because of a want of equity, i. e., failure to state a cause of action cognizable in equity, or because of some error in the form of statement, the objection should be taken by demurrer. The demurrer is derived from the common law procedure, and in general the same considerations govern its application as at law.

Rules 31-38.  
 I Foster Fed. Prac., Sec. 105 et seq.  
 Shipman Eq. Pl., 358 et seq.  
 Barton's Suit in Eq., 100 et seq.  
 Story Eq. Pl., Sec. 441 et seq.

As to form of demurrer,

II Foster Fed. Prac., app. form VI.  
 II Gar. & Ral. Fed. Prac., 971, form 47.  
 Shipman Eq. Pl., 364.  
 IV Desty Fed. Prac. 500, form 344.

Demurrers are either general or special. A general demurrer is directed to the whole bill, and raises a question of whether or not the complainant has stated a cause for relief. A special demurrer is directed to some particular defect in the bill and must point out the alleged defect and the grounds of demurrer thereto. It is the better practice to point out the specific grounds in all demurrers.

The demurrer may be to a part or the whole of the bill, and may be incorporated with the plea or answer, if directed to different and distinct parts of the bill.

The following objections of substance should be taken by demurrer, when the defect is shown on the face of the bill: (1) Cause not cognizable in equity. (2) Cause not

cognizable in federal courts. (3) Parties incompetent. (4) Complainant has no interest in the suit. (5) Defendant is answerable to another. (6) Defendant has no interest in the subject matter. (7) Complainant not entitled to the relief asked. (8) The bill shows that the whole subject matter in controversy is not involved. (9) Parties necessary to complete relief are not joined. (10) Parties complainant have inconsistent claims and cannot be relieved in the same action. (11) Complainant's claim is forfeited by statute of limitations, or laches, or fraud. (12) The amount involved is too small for the court to take jurisdiction. (13) The bill is multifarious, in that it joins two or more distinct and unconnected causes of action, each of which might be the foundation of a separate bill, or that the complainants do not have a joint or common interest in the relief asked, or that defendant's liability is not joint, or susceptible of adjudication in a joint action. (14) Another suit pending involving the same cause of action.

Citations supra.  
 Shipman Eq. Pl., 387 et seq.  
 I Foster Fed. Prac., Sec. 71 et seq.

Defects of form should be taken by demurrer, as where the bill fails to state complainant's residence or ignores the provisions of rule 20.

Citations supra.  
 I Foster Fed. Prac., Sec. 108.

Demurrer is the proper way of avoiding discovery where the discovery would involve pain, penalty, or forfeiture to defendant, or is immaterial to the suit, or involves a disclosure of either professional or state secrets, or when the discovery sought pertains solely to defendant's title.

Citations supra.  
 Shipman Eq. Pl., 400.  
 I Foster Fed. Prac., Sec. 109.

The plaintiff must set the demurrer down for a hearing,

otherwise it is taken as sufficient and the bill is dismissed.

Rules 33, 34, 38.

I Foster Fed. Prac., Sec. 120, 123.

*Demurrer ore tenus.*

At the hearing on a demurrer, the defendant may orally assign other grounds for demurrer than those set out in his formal demurrer. This oral demurrer is called demurrer *ore tenus*. It must not extend beyond the demurrer on file; for example, a general demurrer cannot be made *ore tenus*, a special demurrer being already on file.

I Foster Fed. Prac., Sec. 116.

Shipman Eq. Pl., 372.

When the demurrer is irregular in form or filed at the wrong time, the complainant's remedy is a motion to take it from the files.

I Foster Fed. Prac., Sec. 119.

### **Pleas.**

Like the demurrer, the plea is also derived from the procedure at common law. Its purpose and effect is substantially the same as in proceedings at law. It is designed to raise an issue of fact, which if determined in the defendant's favor, will operate as a bar to the complainant's right and do away with the necessity of an answer and discovery. Pleas are of two kinds, first, the so-called pure plea, by which the defendant sets up some extraneous fact, as a defense to the bill by way of confession and avoidance; and secondly, the negative or anomalous plea, which denies some material fact in the bill.

Rules 31-38.

I Foster Fed. Prac., Sec. 124-143.

Story Eq. Pl., Sec. 647-837.

Shipman Eq. Pl., 408-485.

Barton's Suit in Equity, 109.

Shiras Eq. Prac., XXXVIII.

As to form of pleas:

II Foster Fed. Prac., app. form VII.

II Gar. & Ral. Fed. Prac., 973, form 52.

IV Desty Fed. Prac., 516, form 366.

Barton's Suit in Eq., 109.

Shiras Eq. Prac., 128.

The same objections that could have been taken by

demurrer may be taken by plea, and the plea is the proper method of taking such objections when the defect does not appear on the face of the bill.

If the complainant in his bill has anticipated the defenses that the defendant might have incorporated in his plea, the defendant is compelled to answer as to the facts.

Citations *supra*.

The defendant must also answer if the complainant charges that the facts on which his claim rests are within the peculiar knowledge of the defendant, or in cases where defendant is charged with fraud.

Citations *supra*.

The plea must raise but one issue of fact; if more than one is raised it is bad for duplicity.

If the complainant deems the plea bad in law, he must set it down for a hearing, and if it is adjudged good must take issue upon it.

Rule 33.

### **Answer.**

The answer is the last formal pleading of the defendant. Its office is two-fold, to give the discovery and meet the affirmative allegations of the complainant's bill, and to set out any matter of defense that defendant may have.

The answer is usually under oath of the defendant and signed by counsel. Any defense which could have been taken by demurrer or plea may be taken by answer, and the defendant is not bound to answer except to the extent that an answer would have been necessary if a plea had been used.

Rules 39-46, 59-65.  
 I Foster Fed. Prac., Sec. 144-155.  
 Shipman Eq. Pl., 486-522.  
 Story Eq. Pl., Sec. 845-876.  
 Barton's Suit in Eq., 111-116.  
 Shiras Eq. Prac., XXXIX-XLII.

As to form:

II Foster Fed. Prac., app. form VIII.

II Gar. & Ral. Fed. Prac., 963, form 41.  
Barton's Suit it Eq., 112.  
Shiras Eq, Pl., 130.  
Shipman Eq. Pl., 487.

The defendant in his answer must avoid all arguments and legal conclusions, scandalous and impertinent matter, and answer fully and positively to all matters in the bill. If the facts are not within his personal knowledge he must answer to the best of his knowledge and belief. Facts not specifically admitted or denied must be proven. The safest plan is to deny all matter not expressly admitted. The complainant is not compelled to file special interrogatories, and if the oath is waived the answer is not evidence in the defendant's favor, except on motions to dissolve orders, etc., or unless the cause is set down for hearing on the bill and answer alone. When, however, the answer is responsive to the bill, and under oath, it is evidence in defendant's favor, and the testimony of at least two witnesses is required to overcome it.

Citations supra.

The defendant is not required to answer scandalous or impertinent matter, or when disclosures would involve a penalty, a breach of professional confidence, a disclosure of defendant's own title, or when the defendant is ignorant of the facts or might have protected himself by a plea in bar or a demurrer.

If the defendant intends to offer evidence that may take the complainant by surprise, it should be set out in the answer, or its nature indicated.

If the answer is defective, in the opinion of the complainant, the objection is taken by exceptions.

The complainant must set the exceptions down for hearing, otherwise they are taken as abandoned and the answer deemed sufficient.

Rule 63.

If the exceptions are sustained the defendant must file a full and complete answer, and if he fails to do so the

complainant may take the bill as confessed, to the extent the answer is insufficient, or he may have an attachment against the defendant to compel answer, when it is necessary to complete complainant's relief.

Rule 64.

If the defendant has failed to incorporate any matter in his answer that should have been contained therein, he may do so, by a supplemental answer, before the sufficiency of his answer has been passed upon.

#### **Replication.**

If the exceptions are overruled or the defendant files an amended answer, the complainant may set the cause down for hearing on the bill and answer. In such a case all matters well pleaded in the answer are deemed true as matters of fact, and the cause is heard upon allegations of fact contained in the bill and not denied in the answer, taken in connection with the facts averred in the answer.

Shiras Eq. Pl., LII.

I Foster Fed. Prac., Sec. 157.

When the bill and answer are not thus set down, the plaintiff must within the time provided by the rules file the general replication, and the cause is then deemed at issue without further pleadings.

Rule 66.

The general replication admits the sufficiency of the answer as regards discovery but not as a defense to the bill, and it denies every allegation not directly responsive to the bill.

Shipman Eq. Pl., 524.

I Foster Fed. Prac., Sec. 158.

As to form,

Shipman Eq. Pl., 526.

I Foster Fed. Prac., Sec. 159.

II Foster Fed. Prac., app. form X.

II Gar. & Ral. Fed. Prac., 978, form 58.

Shiras Eq. Prac., 131.

#### **Amendments.**

In the matter of amendments the practice is very liberal.

The whole matter rests within the sound discretion of the court, and there is no stage of the cause when a pleader who is free from laches and bad faith cannot amend.

As to the nature of the amendment, the pleader will never be allowed to set out a new case or change the basis of his bill under the guise of an amendment.

Before the defendant has filed his pleadings, the complainant may amend his bill as of course. After the defendant has pleaded the complainant may amend on paying costs. After the replication, he may amend on special notice to the defendant, and affidavits filed, showing that his purpose is not to delay the cause, and that his application is made in good faith. Even after the hearing of the cause, amendments are allowed for the purpose of conforming the pleadings to the case which the complainant intended to present, and did present on the evidence.

After pleadings are filed or the parties are at issue, the court is very reluctant to allow amendment, and the party seeking such a privilege must clearly exonerate himself from his apparent laches, and submit to such conditions as the court may see fit to impose.

Rules 28, 29.

Shipman Eq. Pl., 99 et seq.

I Foster Fed. Prac., Sec. 160-168.

Whenever a demurrer or plea is sustained, the complainant is bound to amend on pain of having the bill dismissed. The complainant must recover on the allegations in the bill, hence if the defendant by way of plea introduces new matter, that bars the case as stated in the bill, the complainant cannot, as at law, meet the plea by a reply in the nature of a confession and avoidance—such a proceeding would be a fatal departure, but he must amend his bill in such a way that it will stand against the plea.

Rules 35, 45, 46.

Amendments to the answer may be made at the various

stages of the cause, on the same terms as amendments to the bill.

Rule 60.  
Citations *supra*.

When the answer has been sworn to, the defendant will not be allowed to amend unless he can show clearly that the omission in the pleading is due to mistake or accident.

I Foster Fed. Prac., Sec. 160.

The practice is to apply for leave to amend in writing, setting out the reasons therefor and the changes sought to be made.

I Foster Fed. Prac., Sec. 168.

### **Evidence.**

If the cause is not set down for hearing on the bill and answer alone, the next step in the proceeding is the taking of evidence to sustain the bill and the defenses set up in the answer. The complainant is bound to sustain by evidence every material affirmative allegation in the bill not expressly admitted in the answer. For this purpose the statements in the answer that are responsive to the bill are received as evidence.

Shipman Eq. Pl., 133.

### *Documents.*

The rules as to the production and introduction of documentary evidence are substantially the same as at law.

U. S. Rev. St., Sec. 882.  
I Foster Fed. Prac., 268.

### *Witnesses.*

In the method of summoning witnesses the practice is also in accordance with the rules prevailing in law actions.

U. S. Rev. St., Sec. 829.

### *Other Evidence.*

In the manner of taking testimony and its presentation

to the court, the practice in equity is distinctive. It is largely regulated by the rules of the Supreme Court.

U. S. Rev. St., Sec. 862.

After the cause is at issue, three months is allowed in which to take testimony, but the court may in its discretion extend the time.

Testimony may be taken in three ways when the witnesses are within the jurisdiction of the court:

(1) Commissions to take testimony. A commission to take testimony is granted as of course by the court or the clerk on ten days notice to the adverse party. The applicant files a list of interrogatories to be propounded to the witness. The adverse party may file cross interrogatories; if he does not do so within the time limited, the commission issues *ex parte*, and a commissioner is appointed whose duty it is to submit the interrogatories and cross interrogatories to the witnesses, take down their answers to the same and return the depositions authenticated by the signature of the commissioner, to the clerk of the court. The testimony is taken privately by the commissioner and the parties to the cause do not have the right to inspect it until after publication. Publication is made by order of the court, on notice to the parties after the depositions are filed, or may pass at any time on the consent of all parties filed in the clerk's office.

Rules 67, 69.

I Foster Fed. Prac., Sec. 283.

Shiras Eq. Prac., LVI.

(2) 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 the witnesses are examined before an examiner appointed by the court. This examination is in the presence of the parties and their counsel, and the witnesses are subjected to examination and cross examination after the manner of the practice observed in an action at law. It is the duty of the examiner to fix a

time for the examination; to reduce the testimony to writing, or at the request of either party have the evidence taken by a stenographer appointed by the court or selected by the parties; to procure the signature of the witness to the deposition, or if he refuses to sign to note the reason of such refusal; to note any objections to the questions made by counsel, but he has no power to pass on such objections. The depositions are deposited with the clerk, under the certificate of the examiner. The examiner has the power to compel the attendance of witnesses under the usual penalties.

Rule 67.

I Foster Fed. Prac., Sec. 284.

Shiras Eq. Prac., LV.

(3) Upon due notice given as prescribed above, the court may, in its discretion, allow all or any specific part of the evidence to be adduced orally in open court, on the final hearing. If so adduced it must be reduced to writing in order to be available as a part of the record on appeal.

Rule 67.

I Foster Fed. Prac., Sec. 284.

Shiras Eq. Prac., LX.

When the witness is beyond the jurisdiction of the court, his evidence may be taken (1) *de bene esse* as provided by statute; (2) under a *dedemus potestatem*; (3) by letters rogatory.

(1) *De bene esse.*

The statutes provide fully as to the magistrates and officers before whom the depositions may be taken, and the manner of authenticating and forwarding the same to the court. The equity rules provide that unless notice is given to the adverse party by the party taking testimony under this act, the former shall be entitled on application to

cross examine the witness by commission or new deposition under the acts of Congress.

U. S. Rev. St., §§ 863, 864, 865.  
I Foster Fed. Prac., Sec. 286, 287.  
Rule 68.

(2) *Dedemus Potestatem.*

The revised statutes provide that in order to prevent a failure or delay of justice any court of the United States may grant a *dedemus potestatem* to take depositions according to common usage. This statute applies even though the witness is within the jurisdiction, if special reasons for the application are shown to the satisfaction of the court.

By common usage is meant the practice in courts of equity generally. The practice in the state where taken is regarded as common usage.

U. S. Rev. St., § 866.  
I Foster Fed. Prac., Sec. 288, 289.  
Shiras Eq. Prac., LVIII.

(3) *Letters Rogatory.*

When the witness resides within a foreign jurisdiction, his testimony can only be taken by letters rogatory. The letters consist of a writ issued by the court, setting out the pendency of the cause, the names of the foreign witnesses, and a request that the court cause the depositions to be taken in furtherance of justice. The writ is accompanied by interrogatories and cross interrogatories. The writ also offers to do a like service in a similar case for the court to which the writ is directed. The practice rests on comity. The methods of returning depositions thus taken is provided for by statute.

U. S. Rev. St., § 875.  
U. S. Rev. St., §§ 4071-4074.  
19 St. at L., § 241.  
I Foster Fed. Prac., Sec. 290.

*Evidence when the Cause is not at Issue.*

After the bill is filed, but before answer, the complainant

may on proper application based upon affidavits showing either that the witness is aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, have a commission issue to take testimony of such witness *de bene esse*, upon giving due notice to the adverse party as to the time and place of taking the testimony. These proceedings are in the nature of a bill to perpetuate testimony.

Rule 70.  
U. S. Rev. St., § 863.

If either party objects to the depositions, his remedy is by motion to suppress them, stating grounds therefor.

I Foster Fed. Prac., Sec. 289.

#### References to a Master.

Whenever in the progress of the cause it becomes necessary to investigate questions of fact, the court may lessen its labors by referring the questions to a Master in Chancery, who is an officer of the court, for his investigation and opinion. Reference is discretionary with the court, but is usually had when either an account is to be taken, or a title is to be investigated; or questions of the infringement of copy or patent rights, or cases involving the examination of a large number of witnesses, or the performance of ministerial duties, as the sale of property, or questions of impertinence or scandal in pleadings are to be determined.

I Foster Fed. Prac., Sec. 307.  
Shipman Eq. Pl., 109 et seq.  
Shiras Eq. Prac., LXI-LXVIII.

The order of reference must set out clearly the matter referred in terms, and the master's powers are limited by the terms of the reference.

The master has power to regulate the proceedings before him, to summon witnesses, and to take testimony.

The findings of the master are in the form of a

written report, accompanied by the evidence submitted at the hearing before him.

I Foster Fed. Prac., Sec. 314.  
Shipman Eq. Pl., 109 et seq.  
Rules 73-82.

If the parties to the cause object to the findings of the master, such objections must be taken by written exceptions filed within the time fixed by rule.

The practice is to submit the exceptions to the master before he files his report, in order that he may modify his findings if he deems the exceptions well taken.

Rules 83, 84.  
I Foster Fed. Prac., Sec. 315.

#### **Issues at Law.**

If the legal rights of the complainant have not been determined in an action at law before he files his bill in equity, the court may permit him to proceed at law to establish his legal rights, the cause in equity standing over until the action at law is determined. The modern practice is to wait until the hearing of the cause, then if the evidence is conflicting, or the point at issue is intricate, the court may direct an issue to be framed in such a way as to raise the point in controversy and the issue is tried on the law side of the court with a jury. The issue may be raised by an agreed statement of facts formulated by the parties or by the court. No judgment enters on the verdict.

The court has full power to decide all matters of law and fact arising in a cause, and the direction of an issue rests entirely within the discretion of the court. The verdict on an issue is advisory merely, and may be disregarded. Issues are only directed on matters that are at issue in the pleadings and on which evidence has been submitted.

I Foster Fed. Prac., Sec. 301 et seq.  
Shipman Eq. Pl., 112 et seq.

In patent cases the court is empowered by statute to summon a jury.

18 U. S. St. at L., Ch. 77.

**The Decree.**

After the hearing, the decision of the court being made known, the parties in whose favor it is given, draw up a final decree setting out the conclusions of the court and the directions necessary to carry it into effect.

I Foster Fed. Prac., Sec. 317-325.  
 Shipman Eq. Pl., 145 et seq.  
 Shiras Eq. Prac., LXXXV-LXXXVII.  
 Rule 86.

*Enforcement of Decree.*

The decree of the court may be enforced in three ways, depending upon the nature of the relief, or the situation of the parties. The usual method is by process against the disobedient party for contempt.

If the person against whom the decree is made is beyond the jurisdiction of the court, the court may by process of sequestration direct that the property of the party be taken possession of by the officer named in the process and held until the decree is complied with. If the decree concerns property within the jurisdiction of the court, the successful party may be put into possession by a writ of assistance.

If the decree involves the payment of money, as incident to the equitable relief, satisfaction may be had by execution as at law.

Rules 8, 9, 10, 92.  
 Shipman Eq. Pl., 158 et seq.  
 I Foster Fed. Prac., Sec. 339-349.  
 Shiras Eq. Prac., CXIV-CXXI.

**Cross Bills.**

If the court finds against the complainant, the bill is dismissed. The defendant is not entitled to affirmative relief on the answer; if he desires to have such relief his remedy is by cross bill. The cross bill must in form observe the rules laid down as to bills, and its substance must be based on matter embraced in the original bill.

A common example of when a cross bill is proper, is

where the complainant declares on a formal instrument and the defense is a legal one, namely, fraud, on this defense alone, the bill would be dismissed. If the defendant desires to have the instrument surrendered and cancelled, he must file a cross bill praying such relief.

Cross bills were formerly resorted to for purposes of discovery, but since the adverse party is now compelled to testify in all cases, it is seldom resorted to for that purpose alone. Cross bills are also proper against other defendants; its purpose in such cases is to enable the court to settle in one decree the rights of all parties to the cause.

I Foster Fed. Prac., Sec. 169 et seq.  
Shiras Eq. Prac., XCIII.  
Shipman Eq. Pl., 303 et seq.  
Rule 72.

*H. S. Richards.*

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