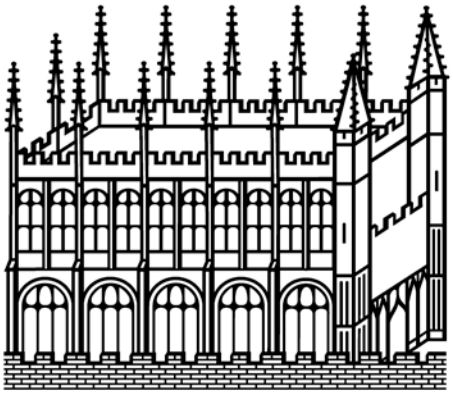

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AN

HISTORICAL TREATISE

OF

A SUIT in EQUITY.

AN

HISTORICAL TREATISE

OF

A SUIT in EQUITY:

IN WHICH IS ATTEMPTED

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

OF

CHANCERY AND EXCHEQUER,

FROM THE

COMMENCEMENT OF THE SUIT

TO THE

DECREE AND APPEAL;

WITH

Occaſional REMARKS on their IMPORT and EFFICACY;

AND

An INTRODUCTORY DISCOURSE on the Riſe and Progreſs of the EQUITABLE JURISDICTION of thoſe Courts.

BY *CHARLES BARTON*,

OF THE INNER TEMPLE, BARRISTER AT LAW.

Quæ noſti, ſine arrogantia poſtulanti imperties; quæ neſcis, ſine occultatione ignorantiæ tibi poſtula impartiri. SEN.

LONDON:

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1796.

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TO THE

STUDENTS OF THE HONORABLE

SOCIETY

OF THE

INNER TEMPLE,

THE FOLLOWING TREATISE

IS INSCRIBED

AS A TESTIMONY

OF THE RECOLLECTION

ENTERTAINED BY THE AUTHOR

OF THE PLEASURE

DERIVED FROM THEIR FELLOWSHIP

DURING THE TERM

OF HIS NOVICIATE.

ADVERTISEMENT.

THE principal deſign of the following SKETCH, is to furniſh the Student with ſuch a knowledge of the Proceedings in our Courts of Equity, as may enable him to underſtand them ſcientifically, and prepare them with accuracy. It is ſubmitted to the judgment of the Profeſſion with, it is hoped, a becoming diffidence, but without apprehenſion; for however conſcious the Author may be of his own deficiency, he is equally ſenſible of their liberality: every allowance, he is perſuaded, will be made for the Errors of a firſt Attempt, and ſome, perhaps, for the unavoidable inaccuracies of a firſt Impreſſion.

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

The Reader is requeſted to attend to the following

ERRATA.

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

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INTRODUCTION.

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

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

ture of thoſe Courts, to the *proceedings* of which his attention is afterwards requeſted; and for this purpoſe a very ſhort account of their ancient and preſent ſtate will, I imagine, be thought amply ſufficient.

FIRST, of the Court of CHANCERY.—I ſhould probably be thought inordinately fond of antiquity, were I to endeavour to ſhew that the equitable juriſdiction of this Court derived its ſource from the *Witenagemote*, or grand council of the Anglo-Saxon government. It is true there is no *direct* authority for this opinion; but it ſeems to be founded on fair and probable grounds of deduction [a]. We are informed by the records

[a] In the few obſervations which the reader is here preſented with, relative to the origin and ancient juriſdiction of our Courts of Equity, he would not readily forgive me were I to perplex him with references to the *various* authorities from which they are extracted. It may be proper, however, to ſay in general, that thoſe upon which I have principally relied, are *Glanville*, *Spelman*, *Coke*, and *Madox*: though I have occaſionally found it neceſſary to reſort to the ancient records, from whence thoſe treatiſes were compiled:

cords of that period, that thoſe auguſt aſſemblies, when met to deliberate on the affairs of the nation, undertook alſo the deciſion of all ſuch cauſes between ſubject and ſubject, as they conceived to be of too great importance, or too much difficulty, for the determination of the ordinary tribunals. When the abolition of trials by ordeal and perſonal combat afterwards gave riſe to ſuch frequent appeals to the Court, as to interfere with the more immediate and important objects of its meeting, a certain number of its members appear to have been delegated for the particular purpoſe of diſcharging this inferior duty. This delegation, from the place in which it uſually aſſembled, was denominated the *Aula Regis* [a]. The

piled: And in digeſting the materials which I met with in theſe ſeveral authorities, I have derived no ſmall aſſiſtance from the ingenious work of Profeſſor *Millar* on the *Engliſh Government*.

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

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

ture of the caſe might require. At the early period we now allude to, when the rules of law were few and ſimple, and the objects of diſpute, comparatively, neither numerous nor important, applications for this purpoſe were, probably, ſeldom neceſſary: but on the acceſſion of *William* I. then the Aula Regis became the king's ordinary Court Baron, and by the extenſion of the feudal tenures, drew to itſelf the greater part of the judicial buſineſs of the nation, interpoſitions of this ſort, occaſioned by the more various inſtances of imperfection in the rules of the Common Law, which the multiplication of ſuits before the juſticier naturally gave riſe to, became ſo frequent, as to be deemed burthenſome to the monarch [a]; they were therefore left, by degrees, to the deciſion of the *Chancellor*, who being the king's ſecretary, and alſo regiſtrar of the decrees of the Aula Regis, was ſuppoſed to be more particularly converſant with the nature of judicial inveſtigations [b]. When, from the increaſe of civil-

ity

[a] See *Mil.* 330.

[b] A ſimilar juriſdiction appears to have been acquired by the ſame officer, in many other nations of Europe; as a

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

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

[a] See 3 *Reeves's Hiſt.* 189.

culated

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

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

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

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

ſhould

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

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

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

logue

logue of the matters of conſcience then cognizable by *ſubpœna* in Chancery, which fall within a very narrow compaſs [a]. No regular judicial ſyſtem at that time prevailed in the Court, but the ſuitor, when he thought himſelf aggrieved, found a deſultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an eccleſiaſtic, or ſometimes (though rarely) a ſtateſman, no lawyer having ſat in the Court of Chancery from the times of the chief juſtices Thorpe and Knyvet [b], ſucceſſively Chan-

[a] Though the ſubjects acknowledged at this early period to be cognizable by *ſubpœna* muſt indiſputably have been exceedingly few, when compared with the preſent extenſive juriſdiction of our Courts of Equity, yet the authority which the learned judge here refers to appears to be too imperfect a treatiſe to be relied upon as any concluſive evidence of their ancient limits.

[b] Sir Edward Coke obſerves, ſeemingly with ſome exultation, that "in peruſing the Rolls of Parliament in the times of theſe Lord Chancellors, we find no complaint at all of any proceeding before them; but ſoon after, when a Chancellor was no profeſſor of the law, we find a grievous complaint by the whole body of the realm; and a petition that the moſt wiſe and able men within the realm might be choſen Chancellors, and that he ſeek and redreſs the enormities of the Chancery." 4 *Inſt.* 79.

cellors

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

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

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

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

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

review

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

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

and

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

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

cognizable

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

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

[b] *Plead. Chan.* 5.

properly

properly the ſubject of an equitable juriſdiction) were indeed not only difficult, but abſolutely impracticable. It is nevertheleſs preſumed, that by a proper attention to the nature and conſtitution of our Courts of Equity, and the mode of diſpenſing juſtice which there prevails, the reader will find but little difficulty to determine in any *given* caſe (and this ſeems to be the real purpoſe of ſuch an inquiry) whether it be more properly cognizable in a Court of Equity or a Court of Law :—The original inſtitution of our Courts of Equity, as independent juriſdictions, was, we have ſeen, to ſupply the defects of the Common Law. This principle is ſtill adverted to in the practice of thoſe Courts, and affords a copious ſource of their preſent authority : It extends to all thoſe caſes in which the Courts of Law can afford either no redreſs at all, or not that particular redreſs which equity, or natural juſtice, requires. Therefore, where a perſon had been diſcharged under an inſolvent bill, by which his perſon was protected from arreſt, and his property happened to be of ſuch a nature as not to be ſubject to the

controul of a Court of Law, the Court of Chancery, as a Court of Equity, interfered, and removed the impediments to the plaintiff's judgment [a]; and where a lady's jointure was ſo circumſtanced as that the payment could not be enforced at law, it was decreed in equity [b]. Thus again, where ſubſtantial juſtice requires that a contract be ſtrictly and *ſpecifically* performed, a Court of Equity has authority to compel ſuch performance, becauſe a pecuniary recompence, which is all that a Court of Law can give, would be an incomplete ſatisfaction [c]—*et ſic de ſimilibus* [d].

We

[a] *Edgell* v. *Haywood* et *al.*—3 *Atk.* 352.

[b] 1 *Chan. Rep.* 5.

[c] From the narrow principles embraced in early times by the Courts of ſtrict Law, no complaint was regarded, unleſs the plaintiff had ſuffered in his pecuniary intereſts; and, conſequently, upon the breach of contract, nothing further could be claimed than reparation of the damage incurred. In a more equitable view, it appeared that every innocent and reaſonable purpoſe of the contractors ought to be enforced, although the loſs, perhaps, ariſing from the failure of performance could not be eſtimated in money. A Court of Equity therefore was accuſtomed to enjoin that a contract ſhould be carried into expreſs and ſtrict execution. *Millar*, 482.

[d] A ſimilar principle ſeems to govern the conſtruction of mortgages and other ſecurities for the re-payment of

We have alſo ſeen, that as well before as after the Court of Chancery had acquired an original juriſdiction, it was filled by eccleſiaſtics: theſe naturally entertained a predilection for the *civil*, as connected with the *canon* or eccleſiaſtical law; they conſequently adopted its rules and principles in their mode of diſpenſing juſtice [a], and (agreeably to the practice

money, and alſo the technical *truſt* or ſecond uſe, though by ſome writers theſe are claſſed under ſeparate heads of juriſdiction. See 3 *Black. Com.* 436, 439. The interference of Courts of Equity (concurrently with thoſe of Law) in caſes of *partition*, *aſſignment of dower*, and matters of *account*, may alſo be juſtified on a like principle, for though Courts of Law have ſufficient authority to inveſtigate ſubjects of this nature, yet the eſtabliſhed modes of proceeding by which thoſe Courts are regulated, neceſſarily ſubject the parties to great inconveniences and delay. We may, however, with Sir *J. Mitford*, remark, that the Courts of Equity having gone the length of aſſuming juriſdiction in a variety of complicated caſes of account, of partition, and aſſignment of dower, ſeem by degrees to have been conſidered as having in theſe ſubjects a concurrent juriſdiction with the Courts of Common Law, *in caſes where no difficulties would have attended the proceedings in thoſe Courts. Plead. Chan.* 111. This obſervation will apply to a variety of other caſes at preſent cognizable in our Courts of Equity.

[a] This may ſeem to account for the proceedings in the Court of *Chancery* only; but it is natural to ſuppoſe that the

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

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

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

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

accident,

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

[a] 1 *Roll. Abr.* 374—4 *Inſt.* 84.

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

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

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

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

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

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

Having

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

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

AN HISTORICAL TREATISE OF A *SUIT in EQUITY.*

Of Instituting a Suit in Equity.

THE method of inſtituting a Suit in our Courts of Equity, is by preferring a Bill, on the part of a Subject, or an Information, on the part of the Crown (1), to the Equitable Juriſdiction of thoſe Courts, ſtating

(1) The difference between a *Bill* and an *Information*, is little more than in form; the Bill running in the ſtile of a petition from the party himſelf, whilſt the Information is offered as a narrative of facts related by an officer of the Crown; whatever, therefore, in the enſuing Treatiſe is ſaid of the one, will, unleſs otherwiſe expreſſed, be equally applicable to the other.

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

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

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

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

[b] *Plead. Chan.* 36.

of

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

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

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

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

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

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

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

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

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

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

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

An Original BILL *in* CHANCERY.

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

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

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

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

Eſſex,

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

(1) It is material that the deſcription and place of abode of the Plaintiff ſhould be ſet forth in the Bill, that the Defendants may know where to apply to him, ſhould they be diſpoſed to accede to his demands, or ſhould it be neceſſary to reſort to him for the payment of coſts, in compliance with any order or proceſs of the Court, which may iſſue againſt him during the progreſs of the Suit.

If the Bill be exhibited in the Court of *Exchequer*, "Debtor and Accountant to his Majeſty, as by the records of this Hon. Court, and otherwiſe, it doth and may appear," is inſerted after the Complainant's place of abode; the uſe of this ſuggeſtion is to give the Court cognizance of the Suit; to underſtand which, the reader muſt recollect, that the Court of Exchequer was originally conſtituted for the ſole purpoſe of recovering the king's revenue; and that by the Common Law, every man was permitted to ſue another in that Court in which he himſelf was bound to attend. By this allegation, therefore, (the truth of which the benignity of the Court never ſuffers to be queſtioned) the Plaintiff becomes entitled to inſtitute his Suit. Upon theſe fictions of law, Sir *William Blackſtone* obſerves, that though they may at firſt ſtartle the Student, he will, on further conſideration, find them to be highly beneficial and uſeful. In the preſent caſe, it gives the Suitor the choice of more than one tribunal, and frequently, as in the Court of King's Bench where a ſimilar fiction prevails, prevents the circuity and delay of juſtice, by allowing that Suit to be originally, and in the firſt

Samuel Dickenſon, *of*, *&c.* (1) THAT (2) Thomas Atkins, *of* Taunton, *in the County of* Somerſet, *Eſq. being ſeized and poſſeſſed of a very conſiderable real and perſonal Eſtate, did, on or about the fourth day of March, in the year of our Lord* 1742, *duly make and publiſh his laſt Will and Teſtament in writing; and thereby,* 3. Premiſes.

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

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

(2) The Plaintiff's caſe muſt here be ſtated explicitly and fully, but yet with as much conciſeneſs as is conſiſtent with perfect intelligibility. If it be extended to an unneceſſary length, by the introduction of circumſtances, either totally irrelevant, or not material to the merits of the queſtion; or by the recital of deeds, &c. in *hæc verba*, when the ſubſtance would have been ſufficient, the Court, upon application, will order the ſuperfluous matter to be expunged, as occaſioning unneceſſary expence to the parties, in taking copies of the proceedings. If, on the other hand, it be too briefly ſtated, to be clearly intelligible, or if circumſtances material to be ſtated, are omitted, the Bill may be demurred to, as inſufficient to give the Court ſuch complete poſſeſſion of the merits of the caſe, as would enable it to do effectual juſtice to the parties.

amongſt

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

(1) Executors of the Will.

that

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

4. Confederacy.

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

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

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

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

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

made

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

5. Charging Part.

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

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

6. Juriſdicial Clauſe.

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

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

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

7. Interrogatory Part.

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

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

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

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

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

and

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

8. Prayer of Relief.

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

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

quire,

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

9. Prayer of Proceſs.

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

(2) If the Plaintiff's caſe require that a ſpecial order of Court ſhould be obtained, as an *injunction* to ſtay proceedings at law, or for the preſervation of property in diſpute during the pending of the Suit, the prayer for ſuch order is uſually inſerted immediately before this for the *ſubpœna*. It varies, of courſe, according to the purpoſe it is intended to anſwer; if it be to ſtay an action at law, it may be thus:

"*May it pleaſe your Lordſhip to grant unto your Orator, not only his Majeſty's moſt gracious Writ of Injunction, iſſuing out of, and under the ſeal of this Hon. Court, to reſtrain the ſaid* A. B. *from proceeding at Law againſt your Orator, touching*

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

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

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

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

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

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

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

things)

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

A. MANNING (2).

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

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

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

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

In peruſing the form we have here given of a Bill in Equity, the ſtudent may probably be lead to join in the common remark, that "every Bill contains the ſame ſtory three times told;" But Sir *John Mitford* judiciouſly obſerves, upon this inſiduous charge, that though in the hurry of buſineſs it may be difficult to avoid giving ſome room for ſuch a reproach, by too indiſcriminate a uſe of the ſeveral parts of a Bill, on every occaſion, yet, if the Bill be prepared with due attention, its ſeveral parts will be found to be "perfectly diſtinct, and to have their ſeparate and neceſſary operation [a]."

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

preſented to the Court. Anciently, it is ſaid, the Court itſelf peruſed the Bill, before it was filed, to ſee whether the Petition were orderly and proper, but on account of the increaſe and multiplicity of buſineſs, afterwards left it to the honour of the Bar. See *For. Rom.* 91. In the *Exchequer*, however, the ſignature of one of the Barons is ſtill requiſite, before proceſs can iſſue.

[a] *Plead. Chan.* 46.

poſe

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

A Bill of INTERPLEADER

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

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

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

norant

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

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

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

the

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

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

that

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

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

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

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

If

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

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

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

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

A Bill of CERTIORARI.

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

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

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

IN

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

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

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

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

Another

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

Sewell Winter.

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

Th. C.

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

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

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

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

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

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

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

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

may be loſt by the death, or abſence from the realm, of a material witneſs (1).

This Bill, after it has ſet forth the general circumſtances of the Plaintiff's caſe, the matters reſpecting which he is deſirous of giving evidence, ſhewn an intereſt in the ſubject ſufficient to entitle him to the aid of the Court [a]; and alſo "an intereſt in the Defendant to conteſt the title of the Plaintiff in the ſubject of the propoſed teſtimony [b]," prays,

THAT *the ſeveral witneſſes to the ſaid Indenture* (or as the caſe may be) *may be examined as*

Plead. 51; and ſee 2 *Peere Wms.* 541.—3 *ib.* 77.—1 *Atk.* 450.—3 *ib.* 17, 132, where (particularly in the laſt caſe, *Dormer* v. *Forteſcue*) this doctrine ſeems to be fully recognized; ſee alſo *poſt*, 56, n. (1).

(1) This practice is agreeably to the uſage of the Roman law in caſes where any one foreſaw he might have occaſion for proof by witneſſes, and feared they might die before he ſhould have occaſion to uſe their teſtimony. See *Rep. Temp. Finch* 391. *Marg.*

[a] *Rep. T. Finch.* 391.

[b] *Mit. Plead.* 51.

to

to the due execution thereof, and their teſtimony perpetuated, MAY IT PLEASE YOUR LORDSHIP *to grant* ſubpœna (1), *&c.*

A Bill of DISCOVERY,

Is a fourth ſpecies of original Bill by which a ſuit may be commenced in a Court of Equity: Every Bill, except that of *Certiorari*, may in truth be conſidered as a Bill of *Diſcovery*, for every Bill ſeeks a diſcloſure of circumſtances relative to the Plaintiff's caſe; but that uſually and *emphatically* diſtinguiſhed by this appellation is a Bill "for the diſcovery of facts, reſting in the knowledge of the Defendant, or of deeds or writings, or other things, in his cuſtody or power, and ſeeking no *relief* in conſequence of the diſcovery [a]."

(1) "That your Orator may have ſuch other relief," &c. which the reader recollects preceded the prayer of *ſubpœna* in the Bills we have hitherto noticed; and "to ſtand to obſerve and abide ſuch order, decree," &c. which concluded thoſe Bills, he perceives are here omitted, the Bill would otherwiſe be demurrable to as praying *relief* alſo. See 3 *Atk.* 439.—2 *Brow. Ch. Ca.* 319.—4 *ib.* 480.

[a] *Mit. Plead.* 52.

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

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

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

Theſe

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

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

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

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

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

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

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

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

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

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

fore

fore obſerved [a], differs from a *Bill* little otherwiſe than in its name; as will appear by the ſkeleton we ſhall here give.

To the Right Honourable, &c.

INFORMING, *ſheweth unto your Lordſhip* Sir Alexander Scott, *Knt. His Majeſty's Attorney General* (1). *That, &c. and his Majeſty's ſaid Attorney General* (2) *further ſheweth, &c. But*

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

(1) If the matters in litigation do not concern the immediate rights of the Crown itſelf, but only thoſe which are entruſted to its care, the officers depend on the relation of the parties at whoſe inſtance the ſuit is commenced, in which caſe "at and by the relation of *Gabriel Shaddock*, rector of the pariſh of Shefford, in the County of Warwick, and of *William Mills* and *John Pye*, Churchwardens of the ſame pariſh, on behalf of themſelves and the reſt of the pariſhioners and inhabitants of the ſaid pariſh," *(or as the caſe may be)* is inſerted here. Sometimes indeed, though the ſubject of the ſuit do include the immediate rights of the Crown, a nominal relator is, out of tenderneſs to the Defendant, inſerted in the information to ſuſtain the coſts (the King paying no coſts), ſhould the ſuit have been improperly commenced; and this practice is univerſally recommended by the Courts. See *Prec. Chan.* 13.—1 *Vern.* 277, 370.—*Mit. Plead.* 23. n. (e.)

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

now

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

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

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

[a] As ſee APPENDIX.

Of Appearance to a Suit in Equity.

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

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

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

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

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

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

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

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

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

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

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

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

appear

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

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

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

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

things

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

COURTENAY.

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

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

An

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

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

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

 ſufficient

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

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

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

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

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

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

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

ELIOT.

By the Barons,

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

FOWLER.

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

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

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

King's Remembrancer's Office,

F.

But if the Defendant be a Peer, or Peereſs, of the realm, or a Lord of Parliament, inſtead of the Writ of *Subpœna* in the firſt inſtance, a *letter* under the ſignature of the Court, is tranſmitted to him, acquainting him of the exhibition of the Plaintiff's Bill (1); of which an office copy is at the ſame time delivered to him. This letter is ſtiled a *Letter*

(1) The practice of ſending Letters Miſſive to Peers previous to the proceſs of Subpœna, is ſaid to have been firſt introduced about the 16th year of *Elizabeth:* Lord *Bacon*, Chancellor, appears to have been the firſt who adopted this polite method of acquainting his order with the proceedings which had been inſtituted againſt them; and it has continued ever ſince. See *Seld.* 1543.—*For. Rom.* 65.—*Prac. Reg.* 341. It is obſervable, that a ſimilar practice prevailed in the Roman Law, where, if the Defendant was *perſona illuſtris, vel clariſſima*, he was cited in *writing* as being more reſpectful than the uſual mode of citation, *obtorto collo*. See *For. Rom.* 23. Alſo *Hor. Sat. lib.* 1. *S.* 9. *l.* 75.

Miſſive,

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

A LETTER MISSIVE *in* CHANCERY.

My Lord,

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

I am,

Your Lordſhip's humble Servant,

THURLOW, C.

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

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

A LETTER MISSIVE *in the* EXCHEQUER.

To the Right Honourable Henry *Earl of Cadogan.*

May it pleaſe your Lordſhip,

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

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

regard

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

Your Lordſhip's very loving friends,

ARCH. MACDONALD,

A. THOMPSON.

Weſtminſter, *the firſt day of* July, 1794.

It is to be obſerved, however, that theſe *Letters Miſſive* are no *proceſs* of the Court (1), but mere *complimentary* notices, which the Defendant may attend to or not at his pleaſure. If he appear, it is well, but if not, a *Subpœna* muſt be iſſued againſt him, as in common caſes (2).

The *Subpœna* having been properly ſerved

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

(2) The reaſon of its being neceſſary to iſſue a *Subpœna*, in caſe of inattention to the Letter Miſſive, is, that all ſubſequent proceedings to compel an appearance, are ſo many proceſſes of *contempt*, founded on a diſregard of the *Seal of the Court:* They cannot, therefore, be awarded on diſobedience to a Letter Miſſive only, which, being a mere *ex gratia* notice, can induce no ſuch contempt.

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

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

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

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

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

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

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

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

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

ture

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

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

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

(2) See *poſt p.* 79. n. (1).

An ATTACHMENT *in* CHANCERY.

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

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

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

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

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

minſter,

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

ARDEN,
WINTER.

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

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

In the *Exchequer* it is thus :

An ATTACHMENT *in the* EXCHEQUER.

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

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

tach

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

ELIOT.

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

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

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

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

Upon

Upon theſe writs the ſheriff returns either *cepi corpus*, I have taken the Defendant, or *non eſt inventus*, he is not to be found. If the Defendant be apprehended (1), he is detained in cuſtody till he enter his appearance, and put in his Anſwer to the Complainant's Bill; or, on refuſal, an *habeas corpus* is awarded, commanding the Sheriff to bring him into Court, or a *Meſſenger* of the Court is diſpatched for the purpoſe (2). But in the *Exchequer* "there is

(1) It is to be obſerved, that though the Attachment *iſſues* againſt all perſons indiſcriminately, yet it is not *executed* upon the perſons of Peers, and Lords or Members of Parliament, thoſe perſons being, for reaſons of policy, privileged from every ſpecies of arreſt; and the uſe of the attachment iſſuing, is only for the purpoſe of grounding the ſubſequent proceſs of *ſequeſtration*, as we ſhall ſee hereafter. The ſame may likewiſe be obſerved in reſpect of Infants, upon whom the Attachment, though ſealed and entered as in common caſes, is never ſerved; but an order of Court, founded on the attachment, is made to bring the infant into Court, where a guardian is appointed to defend his Suit.

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

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

But if the Sheriff return *non eſt inventus*, an additional proceſs is awarded againſt the Defendant, an *Attachment with Proclamation*, which, beſides the ordinary form of Attachment, directs the Sheriff to cauſe public proclamations to be made throughout the County to ſummon the Defendant, on his allegiance, perſonally to appear and anſwer the charges brought againſt him[b].

confined to the cities of *London* and *Briſtol*, on account of the amerciaments in thoſe places belonging to their reſpective Corporations; but a meſſenger is now ſent indifferently to all parts alike. See 1 *Vern.* 154. *ibid.* 344. 2 *Atk.* 507.

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

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

The

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

An ATTACHMENT *with* PROCLAMATIONS *in* CHANCERY.

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

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

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

GEORGE, *&c. To the Sheriff of* Berkſhire, *greeting: We command you, that you omit not by reaſon of any liberty, but enter the ſame, and make public proclamation in ſuch places in your Bailiwick as you ſhall think moſt convenient, that* Edward Willis *do, on pain of his allegiance which he oweth to us, perſonally appear before the Barons of our Exchequer, at* Weſtminſter, *on the day of next; And, in the mean time, omit not by reaſon of any liberty, but that you enter the ſame and attach, &c.* (as in the ſingle Attachment.)

Should this Writ alſo be returned *non eſt inventus*, and the Defendant ſtill remain in contempt, a *Commiſſion of Rebellion* is awarded againſt him for not obeying the king's proclamations, according to his allegiance.

This

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

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

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

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

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

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

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

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

ARDEN,
WINTER.

A SERJEANT AT ARMS.

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

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

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

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

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

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

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

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

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

A SEQUESTRATION *in* CHANCERY.

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

and

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

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

Witneſs

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

ARDEN.

WINTER.

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

A SEQUESTRATION *in the* EXCHEQUER.

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

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

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

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

ELIOT.

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

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

the

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

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

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

[a] 10 *Rep.* 32.

A Dis-

A DISTRINGAS *in* CHANCERY.

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

ARDEN.

WINTER.

In the *Exchequer* it is as follows:

A DIS-

A DISTRINGAS *in the* EXCHEQUER.

George, &c. To the Sheriff of the City of London *greeting: We command you that you omit not, by reaſon of any liberty, but enter the ſame, and diſtrain the Mayor, Commonality, and Citizens of our ſaid City of London, by all their lands and chattels in your Bailiwick, ſo that they, or any others, by their orders, lay hands on them, until you are otherwiſe commanded by us concerning the ſame, and that you anſwer to us the iſſues of the ſaid lands, and have their bodies before the Barons of our* Exchequer *at* Weſtminſter, *on the day of next, to appear to and anſwer a certain Engliſh Bill lately exhibited againſt them before the Chancellor and Barons of our ſaid* Exchequer, *by* James Willis, *Plaintiff, and that you then have there this Writ. Witneſs, &c. at* Weſtminſter, *the day of in the year of our reign.*

ELIOT.

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

FOWLER.

After

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

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

[a] *Prec. Chan.* 129.—2 *Vern.* 395.

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

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

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

[a] 3 *Com.* 444.

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

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

(1) To obviate the injuſtice which muſt frequently ariſe to the Plaintiff from the Defendant's obſtinately refuſing to come to iſſue with the Plaintiff reſpecting the matters in diſpute, the Roman Law entertained a *fictitius* conteſtatio litis, which they called a *quaſi* conteſtatio. This they ſuppoſed to take place immediately after the proclamation or *primum decretum*; upon which, if the Defendant neglected to appear, they allowed the Plaintiff to proceed to his proof, which if he eſtabliſhed, the *ſecundum decretum* adjudged him the thing demanded. See *For. Rom.* 322.—*Gibs. Cod.* T. xliv. c. 2, 4.

limited

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

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

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

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

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

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

Of Defence to a Suit in Equity.

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

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

A Disclaimer.

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

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

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

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

(1) See *poſt*, p. 115. n. (1).

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

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

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

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

thereof; AND *this Defendant doth deny all and all manner of unlawful combination and confederacy unjuſtly charged againſt him in and by the ſaid Complainant's ſaid Bill of Complaint, without that any other matter or thing in the ſaid Complainant's ſaid Bill of Complaint contained material or neceſſary for this Defendant to make anſwer unto, and not herein and hereby well and ſufficiently anſwered unto, confeſſed, or avoided, traverſed, or denied, is true; all which matters and things this Defendant is ready to aver, maintain, and prove, as this Honourable Court ſhall award, and humbly prays to be hence diſmiſſed, with his reaſonable coſts and charges in this behalf moſt wrongfully ſuſtained* (1).

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

(1) See *poſt*, p. 121. n. (1).

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

Suit;

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

A DE-

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

[b] 2 *Atk.* 210. 2 *Anſtr.* 478.

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

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

A DEMURRER,

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

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

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

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

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

Defen-

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

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

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

ſay

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

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

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

be

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

A. STAINSBY (1).

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

A PLEA.

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

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

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

the

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

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

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

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

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

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

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

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

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

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

charges

charges in this behalf moſt wrongfully ſuſtained.

A. STAINSBY (1).

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

An ANSWER

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

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

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

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

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

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

upon

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

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

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

Theſe Defendants now, and at all times hereafter, ſaving and reſerving to themſelves all manner of benefit and advantage of exception to the many errors and inſufficiencies in the Complainant's ſaid Bill of Complaint contained (1), *for Anſwer*

[a] *Mit. Plead.* 15.

[b] *Ante*, p. 29.

(1) This prelude to an Anſwer, Sir *J. Mitford* thinks, was originally intended to prevent a concluſion that the Defendant, having ſubmitted to anſwer the Bill, admitted every thing which by his Anſwer he did not expreſsly controvert; and eſpecially ſuch matters as he might have objected to by Demurrer or Plea. *Plead. Chan.* 249. And though it appears at preſent to be entirely uſeleſs, and difficult as it in general is, to account, in a ſatisfactory manner, for the many

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

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

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

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

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

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

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

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

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

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

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

reaſonable

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

G. MADDOCKS (2).

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

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

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

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dant to reſort to, in conjunction with one or other or all of thoſe we have already mentioned; as where the Defendant is unable to make a complete Defence to the Plaintiff's Bill, without the poſſeſſion of ſome facts which reſt in the knowledge of the Plaintiff himſelf, or ſome of the Co-Defendants to the Suit, it may become expedient, for the purpoſe of procuring ſuch diſcovery, to exhibit a Cross Bill againſt the Plaintiff or ſuch Co-Defendant (1). This Bill differs from an original Bill no otherwiſe than as ariſing from matter already in litigation, it is not neceſſary to alledge any ground of Equity to ſupport the juriſdiction of the Court.

Theſe ſeveral Defences if the Defendant live within the range of the Court, i. e. within 20 miles in Chancery and 15 in the Exchequer, are required to be ſigned by counſel; and, in ge-

(1) "The Croſs Bill is a *Defence*, and always conſidered ſo." *Per Hard. Ch. Kemp* v. *Mackrell.* 3 *Atk.* 812.

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

But if the Defendant reſide beyond the range of the Court, a *Dedimus Poteſtatem* iſſues (2) to Commiſſioners, appointed for the purpoſe of taking his Anſwer at the place of his reſidence; in which caſe the Anſwer, or other Defence, need not be ſigned by counſel,

(1) The Croſs Bill is, of courſe, excepted, and ſee preceding notes. An exception is alſo to be noted in reſpect to the Attorney General, who acting by inſtruction only, and being, perſonally, a ſtranger to the real merits of the caſe, is not required to make Oath of the truth of his Defenſive Allegations.

(2) This is applied for by *motion* to the Court, and if the Defendant regularly appeared to the Plaintiff's Suit, and be not in contempt, it is granted as of courſe; but if the Defendant be in contempt to an "Attachment with Proclamation," the *Dedimus* will not be iſſued till he has either offered ſatisfactory reaſons for his default, or an affidavit be produced of his inability to travel: for as the Dedimus is grantable only by the courteſy of the Court, it is with reaſon withheld whenever the Defendant has ſhewn himſelf unworthy of ſuch an indulgence.

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

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

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

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

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

GEORGE

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

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

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

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

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

lay,

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

ARDEN,

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

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

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

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

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

that

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

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

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

ELIOT.

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

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

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

Of Exceptions to a Defendant's Answer.

IF the Anſwer of the Defendant, when filed, appear to be defective or evaſive (1), the Plaintiff may take advantage of ſuch inſufficiency by *Exceptions* (2), in like manner

(1) Or if the Plea or Demurrer of the Defendant be overruled upon hearing, and the Defendant *anſwer* alſo, (even by denying Combination) the Plaintiff muſt except to the Defendant's Anſwer, otherwiſe he will not be obliged to amend it; but if the Demurrer or Plea be to the whole Bill, this is not neceſſary. See *Cotes* v. *Turner*, *Bunb.* 123.

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

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

The form of theſe Exceptions is the ſame in both Courts, and is this :

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

In CHANCERY.

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

Contumacy, to give direct and unequivocal anſwers to each article; and this was formerly the practice, we have before obſerved, in our own Courts; the Maſters in *Chancery*, and the Barons of the *Exchequer*, having been uſed to take the Defendant's Anſwer to the ſeveral Interrogatories of the Bill from his own mouth. See *ante*, p. 12. n. (2). and *For. Rom.* 91. But th having been afterwards left to Counſel and Commiſſioners, ſometimes proved to be ſo negligently performed, as to render the admiſſion of Exceptions neceſſary in juſtice to the parties.

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

and

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

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

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

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

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

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

A. MANNING.

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

are

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

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

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

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

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

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

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

judgment of the Court, and obtain a different determination.

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

Exceptions to the Maſters Report are in the following form:

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

In CHANCERY.

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

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

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

of

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

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

Second Exception. *For that, &c.*

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

WADMAN.

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

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

But if the Maſter's Report be confirmed, and the Anſwer conſequently determined to be inſufficient, the Defendant muſt, within the time before mentioned, *poſitively*, and without further evaſion, put in a further Anſwer to the Plaintiff's Bill. Should his further Anſwer be alſo inſufficient, it may be excepted to in like manner as the firſt. But if it be a third time reported inſufficient, the Defendant will be committed to the *Fleet* priſon, till he put in a full and complete Anſwer to every allegation material to be replied to; and if his contumacy ſtill continue, the Plaintiff's Bill will be taken *pro confeſſo* (2).

But,

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

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

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

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

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

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

An

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

Of Replication to Defendant's Answer.

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

The

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

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

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

In CHANCERY.

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

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

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

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

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

The

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

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

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

unto

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

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

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

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

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

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

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

A. MANNING.

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

Plaintiff's

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

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

Of Rejoinder to a Plaintiff's Replication.

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

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

The

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

Subpœna to REJOIN *in the* EXCHEQUER.

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

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

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

ELIOT.

No Indorſement—But labelled,

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

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

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

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

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

or

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

their ſaid Anſwer they have already ſeverally prayed.

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

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

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

OF

Of the Examination of Witnesses.

IN the ſeveral proceedings we have hitherto had occaſion to enumerate; as applicable to our Courts of Equity, the reader has perceived a great reſemblance in *ſubſtance*, though generally a difference in *form*, to thoſe uſed in our Courts of Common Law. But in the Examination of Witneſſes, a material difference prevails, both in form and effect. The Examination in Courts of Law being *ore tenus*, in the preſence of the judge and of the Court, and *impromptu* at the time of trial; whilſt that in the Courts of Equity, agreeably to the Civil Law, is conducted in *private*, and upon Interrogatories, or queſtions in writing, *previouſly* framed for the purpoſe (1).

In

(1) The writers upon our Common Law never fail to appriſe the ſtudent of the ſuperior advantages of the former to the latter mode of examination: their remarks are certainly founded on reaſon; and they are ſanctioned by experience. In a private and ſecret Examination, taken down in

In *Chancery*, if the witneſſes reſide within 20

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

20 miles of *London* (1), this Examination is taken before a public officer, appointed by the Court for that particular purpoſe; but if they reſide beyond that diſtance, a Commiſſion, or *Dedimus Poteſtatem* is granted to four Com-

conformable to that of our Common Law; and it would be far from an incurious or uſeleſs enquiry, to trace the ſteps by which ſo important a variation from the original and, apparently, more wholeſome practice was effected, and the reaſons by which it was produced. It is, however, by no means the only inſtance to be met with in hiſtory, of the wiſeſt inſtitutions degenerating from their original eſtabliſhment; frequently by the intereſted policy, and ſometimes by the negligence, of the ſovereign or the legiſlature.

This mode of Examination by written Interrogatories, is, perhaps, the moſt exceptional part of the Conſtitution of our Courts of Equity, and, it is feared, has not unfrequently been the means of ſheltering from juſtice frauds which would have been detected by an *oral* Examination. It was formerly, however, carried on in a manner which rendered it ſomewhat leſs exceptionable than it is at preſent. See *poſt*, p. 159, n. (2).

(1) The common range of the Court of Chancery, we have before ſeen to be *ten* miles, and this is the diſtance limited by the *Court* in reſpect to the Examination of Witneſſes, (ſee *Ord. Chan.* 109); but in *practice* commiſſions are ſeldom applied for, unleſs the witneſſes reſide at leaſt 20 miles from *London*, as the expence of the Commiſſion, when they reſide at a leſs diſtance, is found to exceed that of a perſonal attendance before the Examiner.

miſſioners

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

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

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

In

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

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

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

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

[a] *Fow. Prac.* 62.

of

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

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

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

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

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

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

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

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

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

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

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

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

ARDEN.

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

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

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

Willis

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

ARDEN.

WINTER.

In the *Exchequer* the form is thus:

A COMMISSION *to examine Witneſſes in the* EXCHEQUER.

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

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

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

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

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

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

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

unto

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

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

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

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

ELIOT.

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

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

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

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

Subpœna *ad teſtificandum* in *Chancery*.

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

tions taken down in writing by the Commiſſioners.

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

Subpœna *ad teſtificandum* in the *Exchequer.*

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

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

The

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

INTERROGATORIES *exhibited in* EQUITY.

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

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

Firſt

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

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

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

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

in

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

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

A. MANNING (1).

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

After

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

DEPOSITIONS *in* EQUITY *by* COMMISSION.

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

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

the

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

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

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

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

To

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

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

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

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

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

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

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

DEPOSI-

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

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

DEPOSITIONS *in* EQUITY *before an* EXAMINER.

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

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

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

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

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

A. MORGAN,
R. HINDE (2).

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

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

[a] *ante*, p. 175.

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

ſitions

ſitions have not been opened or altered ſince they were delivered to his charge." They are then committed to the cuſtody of the *clerk in Court*, who prepared the Commiſſion, if taken in the Country, or detained by the *Examiner*, if taken in Town, till *publication* has paſſed (1) by rule or order of Court. After which they may be inſpected, or copies of them delivered, at the requeſt of any of the parties.

After publication has paſſed, the parties, regularly, are to proceed to a Hearing; but ſhould the evidence on either ſide appear to be exceptionable, on account of the diſcredit or incompetency of any of the Witneſſes, leave may be obtained, on motion, to object

(1) When the examination of Witneſſes on both ſides is perfected, either party ſerves the other with a rule or order of Court, importing that the Depoſitions will be made public, unleſs ſufficient cauſe be ſhewn againſt it, within a time therein expreſſed. If no cauſe be ſhewn, the rule is made abſolute; this is termed "paſſing publication," and abſolves the Commiſſioners and Examiner from their reſpective Oaths of ſecrecy.

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

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

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

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

" *by*

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

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

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

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

A MANNING.

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

Of the Hearing of a Cause in Equity.

THE Cauſe being now ripe for hearing, it may be ſet down (1) at the inſtance of either party; and a Subpœna to hear judgment (2) procured and ſerved as in other caſes.

The

(1) In Chancery, the Cauſe may be ſet down either before the Lord Chancellor, or the Maſter of the Rolls, at the diſcretion of the clerk in Court, regulated by the importance of the Suit, and the number of Cauſes depending before each. Till the beginning of the laſt reign, the authority of the Maſter of the Rolls to determine Cauſes was much doubted and litigated. (3 *Blac. Com.* 450.) By the 3 *Geo.* II. c. 30, it was therefore declared that "all orders and decrees made by the Maſter of the Rolls (except only ſuch as by the courſe of the Court are appropriated to the great ſeal alone) ſhall be deemed valid orders and decrees of the Court of Chancery, ſubject nevertheleſs to be diſcharged or altered by the perſon or perſons holding the cuſtody of the great ſeal, and ſo as that the ſame be not enrolled till ſigned by him or them."

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

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

Subpœna to HEAR JUDGMENT *in* CHANCERY.

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

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

[a] *ante*, p. 62.

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

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

COURTENAY.

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

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

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

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

Subpœna

Subpœna to HEAR JUDGMENT *in the* EXCHEQUER.

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

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

dants:

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

ELIOT.

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

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

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

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

more

more particularly into the nature, circumſtances, and merits of his Client's caſe, and informs the Court of the points in iſſue between the parties. Such parts of the Depoſitions and Anſwer of the Defendant as the Plaintiff chuſes to call for, are then read, for the purpoſe of receiving the remarks and animadverſions of his counſel. The Defendant afterwards proceeds in the ſame manner to make his Defence, and the Plaintiff's counſel are heard in reply, which ends the *forenſis litigatio*; and the Court proceeds to pronounce it's *Decree*, which is the final judgment or ſentence of the Court, upon the rights of the ſeveral parties in the Cauſe (1), and is minuted down by the Regiſter, from the mouth of the Chancellor or of the Barons.

(1) In a preceding page (121), we have obſerved upon the nature and uſe of a Croſs Bill, for the purpoſe of removing difficulties to the effectual and equitable determination of a Cauſe; if ſuch difficulties ſhould remain undiſcovered, or be unremoved, till the Hearing, the Court will then direct a Bill of this nature to be exhibited, and reſerve the directions or decree, which it may afterwards pronounce, till ſuch new Cauſe be ripe for Hearing. 2 *Ch. Ca.* 248.

But

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

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

A Sub-

A Subpœna to SHEW CAUSE *in* CHANCERY.

GEORGE *the Third, &c. To* Edward Willis, *greeting: for certain cauſes offered before us, in our Chancery, we command and ſtrictly enjoin you, that, laying all other matters aſide, and notwithſtanding any excuſe, you perſonally be and appear before us, in our ſaid Chancery, on the day of next* (1), *whereſoever it ſhall then be, then and there to ſhew good and ſufficient cauſe* (2) *in a certain matter, in our ſaid Chancery, now in controverſy between* James Willis, *an Infant, Complainant, and* Edward

(1) The *Subpœna* to ſhew Cauſe, being a *judicial* proceſs, muſt be made returnable in *Term*, and on a day *certain*, it will otherwiſe be ſet aſide for irregularity. See *For. Rom.* 155.

(2) Viz. againſt the *Decree niſi*. The part of the Decree here referred to, uſually runs thus: "And this Decree is to be binding upon the Defendant, unleſs he, being ſerved with a *Subpœna* for that purpoſe, ſhall, at the return thereof, ſhew unto this Court good cauſe to the contrary." It is alſo made a part of ſuch Decree, that "before the ſaid Defendant is to be admitted to ſhew ſuch Cauſe, he is to pay unto the Plaintiff his coſts of this day's default of attendance, to be taxed by one of the Maſters of this Court."

Willis

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

COURTENAY.

Indorſed—"*By the Court.*"

T. C.

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

COURTENAY.

In the *Exchequer* the form is thus:

Subpœna to SHEW CAUSE *in the* EXCHEQUER.

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

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

ELIOT.

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

If

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

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

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

Of the Decree in Equity.

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

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

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

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

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

The

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

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

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

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

ably to equity and good conſcience." This Decree recites the ſeveral pleadings, orders, and material proceedings had in the Cauſe, in the following manner:

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

This Cauſe, coming on this day to be heard and debated before the Right Honourable the Lord High Chancellor of Great Britain, in the preſence of counſel, learned on both ſides, the ſubſtance of the Plaintiff's Bill appeared to be That, &c. (here the Plaintiff's Bill is ſhortly recited). THEREFORE *that the ſaid Defendant*

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

may

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

THURLOW, *C.*

WINTER *for the Plaintiff.*

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

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

(1) Six months are allowed the party gaining the Cauſe, to enroll the Decree; if he delay it till after that time, he muſt apply to the Court to enroll it, *nunc pro tunc*, which is granted of courſe. Note, Orders for enrolling Decrees *nunc pro tunc* are not, by the preſent practice of the Court, entered and paſſed with the Regiſter, as other orders are; this omiſſion ſeems to be juſtly animadverted upon by *Gilbert* as improper and dangerous, "for ſuppoſe one of the errors aſſigned by a Bill of Review ſhould be, that by the ancient rules and practice of the Court the Decree is to be enrolled by ſuch a time, and yet upon the face of the enrollment it appears to have been enrolled afterwards, without any leave or order of the Court for its being ſo; how will ſuch an error or miſtake be ever cured or got over." *For. Rom.* 189.

(2) If, however, it be only a trifling miſtake, it is ſometimes, to ſave expence to the parties, rectified in the Regiſter's minutes without going to a Re-hearing.

Of Re-hearing a Cause in Equity.

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

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

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

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

The

The form of ſuch Petition may be thus:

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

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

The Humble Petition of the Defendants,

Sheweth,

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

(1) The Petition muſt ſtate particularly the objections which are conceived to lie againſt the Decree, that the Court may be competent to decide upon the propriety of the application; and if the whole Decree generally be complained of, the caſe of the Petitioners and the decretal part of the order are ſhortly ſet forth; and an intimation is alſo uſually given (eſpecially

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

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

G. MADDOCKS.
A. STAINSBY (1).

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

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

In

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

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

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

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

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

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

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

THURLOW, *C.*

WINTER *for the Plaintiff.*

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

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

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

A WRIT

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

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

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

relates

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

COURTENAY.

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

The

* *ante*, p. 74—100.

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

The form of the Sequeſtration may be thus:

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

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

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

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

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

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

duly

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

* *ante*, p. 91.

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

ELIOT.

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

The form of this Writ may be thus:

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

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

ages, lands, and premiſes, and of every part and parcel thereof to the ſaid ——————— *and hereof fail not at your peril. Witneſs ourſelf at* Weſtminſter, *the day of in the 36th year of our reign.*

ELIOT.

Of Reviewing Decrees in Equity.

IF, after the Enrollment of the Decree, any new matter or evidence be diſcovered, which could not have been had, or uſed, when the Decree paſſed[a]; or if an apparent Error of Judgment appear on the face of the Decree[b], it may be re-conſidered by means of a Bill of Review (1).

But

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

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

(1) A Bill of Review cannot be filed without leave of the Court, "becauſe the *Chancery* being the Court of the Prince, and the laſt reſort, the Decrees cannot be changed or altered without leave." *For. Rom.* 185. But this applies only to thoſe caſes where the Bill is founded on the diſcovery of new matter; for when the error in the Decree appears upon the face of it, the leave of the Court is not neceſſary. And this leave is never granted till the party has actually paid obedience to the Decree, as far as he can do it without prejudicing the rights he may ſeek to eſtabliſh by the Review, (unleſs indeed in ſome *ſpecial* caſes, where the Court will diſpenſe with the *immediate* performance of the Decree, upon the parties entering into ſufficient ſurety for its performance

 eventually)

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

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

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

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

This

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

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

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

James

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

A. STAINSBY.

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

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

Of Appeal to the House of Lords.

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

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

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

Petition to that aſſembly in the following form:

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

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

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

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

The

The Humble Petition and Appeal of the ſaid Defendants

SHEWETH,

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

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

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

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

EDWARD WILLIS,
WILLIAM WILLIS, } *Appellants.*

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

This Petition is lodged with the clerk of the Houſe, (with whom the Appellant depoſits 20l. and within eight days enters into a recognizance of 200l. to ſatisfy coſts to the other party, in caſe the Decree be affirmed[a];) and being read in the Houſe, the Reſpondent is ordered to have a copy of the Appeal, and a

(1) In order that the Houſe may not be troubled with frivolous appeals, preferred for the purpoſe of vexation and delay, it is required that the Appellant's Petition be ſigned by two counſel of character, as a teſtimonial of the propriety of the Appeal; and, by order of the Houſe, 1697, they are to be "thoſe who have been of counſel in the ſame Cauſe in the Courts below, or ſhall attend as counſel at the bar of the Houſe, when the ſaid Appeal ſhall come on to be heard."

[a] Ord. 27th Jan. 1710.

time

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

The Form of Respondent's Answer.

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

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

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

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

and

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

A. MANNING.

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

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

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

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

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

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

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

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