GERMANE PLEADINGS IN THE COURT OF CHANCERY

(*Concluded*)[1]

II. The Counterclaim

Prior to 1915[2] and the adoption of the present Chancery Rules, the defendant employed a cross-bill[3] for affirmative relief;[4] or, in a divorce action a cross-petition.[5] One of the rules

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1. This is the concluding part of an initial article published in 2 University of Newark Law Review 145, in which the requirement of germaneness was considered with reference to the amending of the original bill.

2. The present Chancery Rules (as amended) were authorized by the Chancery Act of 1915 (Cumm. Supp. [1924] pp. 271, 272, §§ 116, 124). They were promulgated in 1916 and went into effect, January 1, 1917. A similar order of promulgation was made by the present Chancellor with respect to the existing rules and certain amendments thereto, in 1933, operative on and after January 1, 1934. The date, 1915, is taken merely as a convenient dividing point for purposes of discussion. To the extent of any conflict between the Chancery Rules and the Chancery Act of 1915, the former govern. Cumm. Supp. (1924), p. 272, § 124; Weinberger v. Goldstein, 99 N.J.Eq. 1, 132 Atl. 659 (Ch. 1926), *aff'd*, 101 N.J.Eq. 310, 137 Atl. 920 (1927).

3. A cross-bill seeking discovery was denominated a "pure cross-bill". Story, Eq. Pl. (10th Ed.), § 389. A cross-bill seeking relief was called "an original bill in the nature of a cross-bill". Coogan v. McCarron, 50 N.J.Eq. 611, 25 Atl. 330 (Ch. 1892). Pure cross-bills were defensive in character; a cross-bill seeking affirmative relief—offensive or aggressive. For both, the counterclaim is now employed. But the distinction retains some importance in determining whether the dismissal of the original bill carries with it *ipso facto* a dismissal of the counterclaim. Trust Co. of N. J. v. McGuinness, 104 N.J.Eq. 1, 144 Atl. 110 (Ch. 1928); Coogan v. McCarron, *supra*. Counterclaims in lieu of pure cross-bills for discovery are infrequent in the present practice due to the superior facilities of interrogatories under Chancery Rule 84; see, Pettit v. Port Newark Nat. Bank, 110 N.J.Eq. 324, 160 Atl. 34 (Ch. 1932); Hoffman v. Maloratsky, 112 N.J.Eq. 333, 164 Atl. 260 (E.&A. 1933).

4. Ordinarily no affirmative relief was accorded the defendant in the absence of a cross-bill yet there are cases in which the rule is relaxed to prevent prejudice to the substantive rights of the parties. Ames v. Franklinite Co., 12 N.J.Eq. 66, 507, 512 (E.&A. 1859); Vandeveer v. Holcomb, 17 N.J.Eq. 87 (Ch. 1864); O'Brien v. Hulfish, 22 N.J.Eq. 471 (E.&A. 1871); Talman v. Wallick, 54 N.J.Eq. 655, 33 Atl. 1059 (E.&A. 1896); Green v. Stone, 54 N.J.Eq. 387, 34

early formulated was that the matter of the cross-bill could not be broadened beyond the scope of the original bill.[6] No distinction was taken between cross-bills directed against the complainant, and those against co-defendants, and third parties, the rule being that irrespective of who was the defendant on the cross-bill, the matter thereof must be "within the scope of" the original bill.[7] In later cases a short way of stating this requirement was employed which was that the cross-bill must be "germane" to the original bill.[8]

Atl. 1099, 55 A.S.R. 577 (E.&A. 1896); Monohan v. Collins, 71 Atl. 617 (Ch. 1908). *Cf.*, Gray v. Taylor, 38 Atl. 951, s.c. 59 N.J.Eq. 621, 44 Atl. 668 (E.&A. 1899); Brady v. Carteret Realty Co., 82 N.J.Eq. 620, 90 Atl. 257 (E.&A. 1914). Similarly in suits for an account. Scott v. Lalor's Ex'rs, 18 N.J.Eq. 301 (Ch. 1867).

5. Von Bernuth v. Von Bernuth, 76 N.J.Eq. 487, 74 Atl. 700, 139 A.S.R. 484 (Ch. 1909).

6. Carpenter v. Gray, 37 N.J.Eq. 389 (Ch. 1883); Krueger v. Ferry, 41 N.J.Eq. 432, 5 Atl. 452, *aff'd*, 43 N.J.Eq. 295, 14 Atl. 811 (1887); Doremus v. Paterson, 70 N.J.Eq. 296, 62 Atl. 3, *aff'd*, 71 N.J.Eq. 789, 71 Atl. 1134 (1906); Wood v. Haddonfield, etc., Co., 81 N.J.Eq. 289, 86 Atl. 956 (Ch. 1913); Bacharach v. Bartlett, 81 N.J.Eq. 248, 86 Atl. 966 (Ch. 1913); Story, Eq. Pl., (10th Ed.) §§ 389, 401.

7. Kirkpatrick v. Corning, 39 N.J.Eq. 136 (Ch. 1884); Carpenter v. Gray, *supra*, note 6; Green v. Stone, *supra*, note 4; Haberman v. Kaufer, 60 N.J.Eq. 271, 47 Atl. 48 (Ch. 1900), complainant joined as party defendant on the cross-bill in several capacities; Doremus v. Paterson, *supra*, note 6, complainant and third parties made defendants on the cross-bill. Similarly since 1915. Seacoast Development Co. v. Beringer, 100 N.J.Eq. 295, 134 Atl. 770 (E.&A. 1926).

With respect to the equitable character of the cause of action exhibited by the cross-bill—the rule being that only causes cognizable in equity were appropriate for cross-bill—a distinction *was* taken between cross-bills against third parties and those against the complainant, for as to the latter a "different and more liberal rule" applies. V.C. Howell in, Asbury Park, etc., Co. v. Neptune, 73 N.J.Eq. 323, 67 Atl. 790 (Ch. 1907), modified on appeal for other reasons, 75 N.J.Eq. 562, 74 Atl. 998 (1909). See, 2 DANIELL, CHANCERY PRACTICE, (6th Ed.) § 1549.

8. Hackensack Trust Co., v. Kelly, 118 N.J.Eq. 587, 180 Atl. 621 (Ch. 1935); Soos v. Soos, 14 N.J.Misc. 393, 185 Atl. 386 (Ch. 1936); Haberman v. Kaufer, *supra*, note 7; Wood v. Haddonfield, etc., Co., *supra*, note 6; Backarach

The content of this requirement may be best seen by referring to some of the many cases illustrating its application wherein cross-bills were sustained as presenting matter within the scope of the original bill and germane to it: on a bill for an accounting against an agent, the defendant's cross-bill for payment for services rendered was allowed by Chancellor McGill over the complainant's objection, on the ground that the cross-bill was necessary for the "complete determination of all the matters involved in the litigation which the original bill inaugurated".[9] On a bill for accounting for rents from lands the title to which stood in the complainant's name, Vice-Chancellor Van Fleet permitted a cross-bill by the defendant to establish a resulting trust in the land in the defendant's favor over complainant's objection that the cross-bill injected "a question entirely foreign to the matter put in litigation by the original bill".[10] Other instances of cross-bills deemed to be within the scope of the original bill, and germane to it are: a cross-bill to impress land with an equitable lien, on a bill to partition the land;[11] a cross-bill for reformation of a deed on a bill against

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v. Bartlett, *supra*, note 6; Prince v. Hart, 84 N.J.Eq. 476, 94 Atl. 571 (E.&A. 1915).

Other statements of the rule are: "A cross-bill should be confined to matter contained in the original bill". Carpenter v. Gray, *supra*, note 6; it should not set up "new and distinct matter not essential to the proper determination of the matter put in litigation by the original bill". Krueger v. Ferry, *supra*, note 6; Doremus v. Paterson, *supra*, note 6; Backarach v. Bartlett, *supra*, note 6. J. Story: "A cross-bill should not embrace new and distinct matters not embraced in the original suit." Eq. Pl. (10th ed.) § 401; see also, §§ 389, 399, 400. MILLER, EQUITY PROCEDURE, § 192. WHITEHOUSE, EQUITY PRACTICE, § 277.

In other jurisdictions, germaneness of cross-bill is also commonly insisted upon. Sieling v. Uhl, 160 Md. 107, 153 Atl. 614 (1931); *In re* Chelsea Exch. Corp. (Del. Ch.) 159 Atl. 433 (1932); Paine v. Sackett, 25 R.I. 561, 57 Atl. 376 (1904).

9. Hutchinson v. Van Voorhis, 54 N.J.Eq. 439, 35 Atl. 371 (Ch. 1896).

10. Beck v. Beck, 43 N.J.Eq. 39, 10 Atl. 155 (Ch. 1887). See Prince v. Hart, *supra*, note 8.

11. Clark v. Van Vleef, 75 N.J.Eq. 152, 71 Atl. 260 (Ch. 1908) (cross-

an assuming grantee for the deficiency due after sale of the mortgaged land;[12] a cross-bill for specific performance of a trust on a bill for specific performance of a contract;[13] a cross-bill to have title quieted on a bill to establish a trust in land;[14] a cross-petition for separate maintenance on a petition for divorce;[15] or a cross-petition for divorce on a petition for annulment.[16]

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bill stricken for substantive defects). But not when the cross-bill merely prays for payment from the proceeds of the sale. Greiss v. Noisky, 82 N.J.Eq. 1, 87 Atl. 115 (Ch. 1913); Story, Eq. Pl., (10th ed.) § 391a.

12. Green v. Stone, *supra*, note 4. *Cf.*, Stevens Inst. v. Sheridan, 30 N.J.Eq. 23 (Ch. 1878); Duryee v. Linsheimer, 27 N.J.Eq. 366 (Ch. 1876).

13. Haberman v. Kaufer, *supra*, note 7.

14. Manley v. Mickle, 55 N.J.Eq. 563, 37 Atl. 738 (E.&A. 1897) (without discussion of germaneness).

15. Gleason v. Gleason, 15 N.J.Misc. 197, 190 Atl. 82, 84 (E.&A. 1937), *semble*, (consolidation ordered); or conversely, O'Brien v. O'Brien, 103 N.J.Eq. 214, 142 Atl. 898, *aff'd*, 105 N.J.Eq. 250, 147 Atl. 911 (1929); Gilson v. Gilson, 116 N.J.Eq. 556, 174 Atl. 685 (E.&A. 1934) without discussion; Loughran v. Loughran, 121 N.J.Eq. 233, 189 Atl. 63 (E.&A. 1937).

16. Poe v. Carter, 121 N.J.Eq. 84, 187 Atl. 34 (E.&A. 1936) without discussion.

No New Jersey decision has been found wherein the germaneness of a counterclaim of a non-matrimonial cause of action, to a suit of a matrimonial character has been considered. The nearest approach to such a result which has been discovered is, Vogt v. Vogt, 105 N.J.Eq. 566, 148 Atl. 618 (Ch. 1930), where without discussion or apparent objection, a defendant was allowed to counterclaim for an accounting of joint property in a suit for divorce. See Spingarn v. Spingarn, 8 N.J.Misc. 423, 150 Atl. 764. Elsewhere the counterclaiming of non-matrimonial suits, to bills of a matrimonial character, is treated as not germane. Burke v. Burke, 208 Ala. 502, 94 So. 513 (1912) (bill for partition of land brought by husband; wife counterclaimed for separate maintenance; held, not germane).

In counterclaiming matrimonial causes *of a different character* from the matrimonial cause asserted in the bill, the cases cited, *supra*, note 6, evince a more liberal rule than in case the complainant seeks by amended bill to state a matrimonial cause of a different character than the one stated in the original bill. Fodor v. Kunie, 92 N.J.Eq. 301, 112 Atl. 598 (Ch. 1920); 2 UNIVERSITY OF NEWARK LAW REVIEW 144. It may be, therefore, that what is germane to the original bill for purposes of counterclaiming is something different from what is germane for purposes of amending.

On the other hand, a few situations may be noted where the cross-bill was rejected as presenting matter without the scope of the original bill and not germane to it. In suits *in rem* in character, cross-bills setting up cross-demands for money without a prayer that for sums as were due, the land be impressed with a lien, were rejected as alien to the original bill.[17] Similarly, on a bill to establish a municipal mechanic's lien, a counterclaim of a suit *in personam* was disallowed as not germane.[18] Without explicit statement to this effect the cases indicate that the original bill being *in rem,* or *quasi in rem,* the cross-bill is to be restricted to matters *in rem* and to the *res* under litigation.[19] Thus on a bill by a trustee to foreclose a trust-mortgage, a cross-bill setting up an alleged breach of trust by the trustee, was held to be foreign to the limited scope of the original foreclosure bill.[20] Aside from this limitation imposed on the cross-bill growing out of the *in rem* character of the original suit, cross-bills may be further disallowed if they tend to delay and embarrass the original suit; for this reason a cross-bill for an accounting was denied in a suit to partition land.[21] Another restriction on the use of the cross-bill, and arising out

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If the test of what is germane to the original bill for purposes of counterclaiming, is whether the matter of the counterclaim could have been properly joined in the original bill (as has been suggested in another jurisdiction. Sieling v. Uhl, *supra,* note 8), the counterclaiming between spouses of a non-matrimonial cause, to a matrimonial suit, or *vice versa,* might be regarded as not germane since Chancery Rule 20 forbids the joinder of matrimonial and non-matrimonial causes without the leave of court. See *infra,* notes 33, 85, 95.

17. Greiss v. Noisky, *supra,* note 11.

18. United States F. & G. Co. v. Newark, 72 N.J.Eq. 841, 61 Atl. 904 (Ch. 1907); Norton v. Sinkhorn, 63 N.J.Eq. 313, 50 Atl. 506 (E.&A. 1901).

19. United States F. & G. Co. v. Newark, *supra,* note 18. And similarly would seem to be, Haberman v. Kaufer, *supra,* note 7.

20. Wood v. Haddonfield, etc., Co., *supra,* note 6.

21. Speer v. Speer, 14 N.J.Eq. 240, 250 (Ch. 1862); Greiss v. Noisky, *supra,* note 11; *Cf.,* Doremus v. Paterson, *supra,* note 6; Paine v. Sackett, *supra,* note 8; Krueger v. Ferry, *supra,* note 6, wherein V.C. Van Fleet rejected a cross-bill *inter alia* for "considerations of . . . convenience".

of the requirement of germaneness, somewhat less clearly established by the cases, goes to the capacity in which the complainant initiates the original suit: cross-bills against him in another or different capacity are not germane.[22]

Prior to 1915, therefore, the defendant was not permitted to broaden the issues of the original suit by setting up by cross-bill matter without the scope of the original bill. But the rule was not applied by the court of its own initiative.[23] Doubtless the court by reason of its inherent power to control all the pleadings could *sua sponte* strike a cross-bill for lack of germaneness.[24] An examination of the cases, however, fails to disclose a case of it having done so: invariably when a cross-bill was disallowed for lack of germaneness, it was done on objection of the complainant taken by motion. Reasons for the restriction on the use of the cross-bill were well-stated by Vice-Chancellor Van Fleet: "The new facts which it is proper to introduce into a pending litigation by means of a cross-bill, are such, and such only, as it is necessary for the court to have before it, in deciding the questions raised in the original suit, to enable it to do full and complete justice to all parties before it in respect to the cause of action on which the complainant rests his right to aid or relief".[25] A statement of Vice-Chancellor Stevens is reminiscent of jurisdiction by original writ: "The cross-bill is auxiliary to the proceedings in the original suit and

22. Tompkins v. Finance Co., 78 Atl. 398 (Ch. 1910); Wood v. Haddonfield, etc., Co. *supra*, note 6; Bacharach v. Bartlett, *supra*, note 6 (bill by a shareholder in his capacity as such). *Cf.*, Haberman v. Kaufer, *supra*, note 7; McAnarney v. Lembeck, 97 N.J.Eq. 361, 127 Atl. 197 (E.&A. 1925).

23. Thiele v. Perkins, 92 N.J.Eq. 79, 111 Atl. 666 (Ch. 1920) (court will not ordinarily interpose objection of non-germaneness to an amended bill; the same would seem to apply equally to a counterclaim).

24. Allen v. Fury, 53 N.J.Eq. 35, 30 Atl. 551 (Ch. 1894) *semble*. And by analogy to a mullifarious bill. Healey v. Walbrook Park Co., 118 N.J.Eq. 80, 177 Atl. 688.

25. Krueger v. Ferry, *supra*, note 6 (41 N.J.Eq. 432 at p. 436).

dependent on it".[26] A sense of judicial fitness of things is suggested as the basis for this restriction on the use of the cross-bill for otherwise new matter might be introduced into a litigation "without end".[27] Then too the convenience of the complainant is suggested as the basis for the rule for he is not to be delayed, embarrassed or prejudiced by broadening through cross-bill, the scope of the original suit.[28] In effect, therefore, if not in so many words, the complainant is accorded status as *magister litis,*[29] for his original bill defines the scope of the proposed litigation. No account seemingly was taken of possible delay, prejudice or inconvenience to the defendant when the matter of the cross-bill was not strictly germane, even though his cross-bill stated a case for equitable relief; a suit *de novo* by original bill was his only recourse.[30] A cross-bill not germane would confuse the issues and was to be avoided although ordinarily no jury trial was involved.[31] When the bill was *in rem,* and the cross-bill, *in personam,* germaneness was strictly required due doubtless to inherent trial inconveniences arising in such a case.[32] From the cases the test laid down of "germaneness" lacked objectivity: the only case suggesting that it might mean "arising from the same transaction," rejected this test of ger-

26. Doremus v. Paterson, *supra,* note 6 (70 N.J.Eq. 296 at p. 297).

27. Allen v. Fury, *supra,* note 24.

28. Plum v. Smith, 56 N.J.Eq. 468, 39 Atl. 1070 (Ch. 1898); Speer v. Speer, *supra,* note 21; Krueger v. Ferry, *supra,* note 6; Greiss v. Noisky, *supra,* note 11.

29. Williamson v. N. J. S. R. Co., 25 N.J.Eq. 1 at p. 23 (Ch. 1874) *semble;* Speer v. Speer, *supra,* note 21, *semble.*

30. Richman v. Donnell, 53 N.J.Eq. 32, 30 Atl. 533 (Ch. 1894); Tompkins v. Finance Co., *supra,* note 22; Plum v. Smith, *supra,* note 28; Allen v. Fury, *supra,* note 24.

31. Plum v. Smith, *supra,* note 28. Yet equity assumes jurisdiction over complicated accounts where the items are likely to confuse a jury. Bellingham v. Palmer, 54 N.J.Eq. 136, 33 Atl. 199 (Ch. 1895); Cranford v. Watters, 61 N.J.Eq. 284, 48 Atl. 316 (Ch. 1901).

32. Cases cited, *supra,* notes 20 and 21.

maneness.[33] Although the rule was frequently re-iterated, it was done not so much for the purpose of a factual approach to determine what was or was not germane in a given case, as for authority for the rule itself.[34] Accordingly little, if any predictability, is yielded by the past precedents dealing with germaneness.[35]

Cross-bills in foreclosure of mortgages, however, were early excepted from the restriction imposed on cross-bills generally. This was because of a statute permitting in foreclosure "all just set-offs . . . in ascertaining the amount due . . . in the same manner as the like set-offs are allowed in actions at law".[36] By this enabling act a defendant in foreclosure may by cross-bill, (or by counterclaim in lieu thereof today), set off cross-demands which are not germane to the mortgage debt, or to the mortgage, being foreclosed.[37] The practice of counterclaiming set-offs in

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33. In Trotter v. Heckscher, 40 N.J.Eq. 612 (E.&A. 1885), a bill was brought for an accounting on a contract; the defendant sought by cross-bill to set-off damages for breach of a collateral covenant. The matter of the cross-bill was recognized as arising out of the same contract, or transaction, but that circumstance was not held to create any "bond of union", because the original bill was for the performance of the contract, and the cross-bill was for the breach thereof. *Cf.*, Sieling v. Uhl, *supra*, note 8; also *supra*, note 16 (last paragraph); *infra*, notes 85, 89

34. This observation, though true in many cases, is hardly applicable to Haberman v. Kaufer, *supra*, note 7.

35. The difficulty of determining what is germane to the cause of action set forth in the original bill, would seem to be the same difficulty inherent in the determination of what constitutes the "cause of action" previously discussed in 2 UNIVERSITY OF NEWARK LAW REVIEW 145, at p. 163. But the requirement of germaneness, whatever its content, has been described as "imperative". Paine v. Sackett, *supra*, note 8.

36. 1 C.S., p. 433, § 61; Bovit v. Mantel, 108 N.J.Eq. 11, 153 Atl. 638 (Ch. 1931) without discussion

37 Corson v. Bailey, 98 N.J.Eq. 323, 129 Atl. 145 (E.&A. 1925).

Prior to the statute (*supra*, note 36) set-offs were excluded because of the *in rem* character of foreclosure. Parker v. Hart, 32 N.J.Eq 225, 844 (E.&A. 1880) (*ergo*, not germane). But even before the statute, if there was an agreement that the sum proposed as a set-off, should be received and credited on the

foreclosure in chancery, set-offs that are independent of and unrelated to the matter of the original bill, is strictly limited, as at law,[38] to liquidated sums:[39] it does not extend to setting off unliquidated sums.[40] But the defendant may—he does not have to setoff: counterclaiming of independent cross-demands, therefore, is permissive and not mandatory.[41] A distinction must

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mortgage debt, it was allowed as an affirmative defense of payment or recoupment. Parker v. Hart, *supra*. And recoupments or payment are properly pleaded by answer. Wilson v. Stevens, 105 N.J.Eq. 377, 148 Atl. 392 (Ch. 1929). And not by cross-bill. Krueger v. Ferry, *supra*, note 6. In O'Brien v. Hulfish, 22 N.J.Eq. 471, however, matter, apparently a matter of recoupment, was held to be available to the defendant only on cross-bill. (E. & A. 1871). But under the present practice, recoupment may also be set up by counterclaim in diminution of the mortgage debt. Curtis-Warner Corp. v. Thirkettle, 99 N.J.Eq. 806, 134 Atl. 299, *aff'd*, 101 N.J.Eq. 279, 137 Atl. 408 (1927).

The inherent power of equity to allow an equitable set-off is not superseded or limited by the above statute. Yet the grounds which ordinarily must exist for the allowance of an equitable set-off, and the reasons for such, are inapplicable to a foreclosure suit because of its *in rem* character. See, Carr v. Hamilton, 129 U.S. 252, 255 (1888); Trotter v. Heckscher, *supra*, note 33; 39 HARVARD LAW REVIEW 256, 257n; CLARK, CODE PLEADING, p. 436; Loyd, *The Development of Set-offs*, 64 UNIV. OF PA. LAW REVIEW 541.

38. Roseville Trust Co. v. Barney, 88 N.J.L. 146, 96 Atl. 69, *rev'd*, (other grounds), 89 N.J.L. 550, 99 Atl. 343 (1916); Richman v. Bauerle, 114 N.J.Eq. 164, 168 Atl. 451 (E.&A. 1933) *semble;* 4 C.S., p. 4846; HARRIS, PL. & PR. IN NEW JERSEY, §386.

39. Links v. Marlowe, 83 N.J.L. 389, 84 Atl. 1056 (S.C. 1912).

40. Commonwealth Title Co. v. N. J. Lime Co., 86 N.J.Eq. 450, 100 Atl. 52 (E.&A. 1916); Mirkin v. Bowker, 133 Atl. 41 (Ch. 1926); Corson v. Bailey, *supra*, note 37; Curtis-Warner Corp. v. Thirkettle, *supra*, note 37; Richman v. Bauerle, *supra*, note 38, *semble*. Thus, in foreclosure, the defendant mortgagor is entitled on a counterclaim by way of set-off, to credit for any usury, in the same manner as at law. Kobrin v. Hull, 96 N.J.Eq. 41, 124 Atl. 365, *aff'd*, 97 N.J.Eq. 546, 128 Atl. 921 (1925); Bovit v. Mantel, *supra*, note 36. But on a proposed set-off which is unliquidated, equity may, *under equitable circumstances*, stay execution of its decree until the defendant can recover at law and then plead the judgment as an offset against the complainant. Berla v. M. & L. Holding Co., 105 N.J.Eq. 592, 149 Atl. 64, *aff'd*, 107 N.J.Eq. 598, 154 Atl. 629 (1931). As to equitable set-offs, see, *supra*, note 37.

41. Midland Corporation v. Levy, 118 N.J.Eq. 76, 177 Atl. 685, *aff'd*, 120 N.J.Eq. 197, 184 Atl. 516 (1935). As to the application in such a case of *res*

be taken, however, between the statutory practice governing set-offs in foreclosure, and matters of strict recoupment.[42] Recoupment from its very nature is related to the cause of action asserted in the bill, and is perforce germane to it, and accordingly allowed as a matter of inherent power and practice.[43] It should be further noted that in recouping, the defendant is not limited, as on set-offs, to liquidated sums: the defendant may recoup in foreclosure or other suits, demands that are either liquidated or unliquidated.[44] A typical case in foreclosure of recouping unliquidated sums, is found in the foreclosure of a *purchase-money mortgage,* for in foreclosure of such a mortgage the defendant may by answer, or counterclaim, have an abatement of the sum due thereon, on account of any fraud of the mortgagee-vendor which resulted in the payment of a higher price than otherwise would have been paid for the property.[45]

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adjudicata, cf., Usbee B. & L. Ass'n v. Ocean Pier Realty Co., 112 N.J.Eq. 584, 165 Atl. 580 (Ch. 1933); Vanderbilt v. S. & W. Holding Corp., 112 N.J.Eq. 584, 165 Atl. 634 (Ch. 1933); Yeskel v. Gross, 105 N.J.L. 308, 144 Atl. 312, *aff'd,* 106 N.J.L. 611, 148 Atl. 920 (1930); Keim v. Brown, 121 N.J.Eq. 86, 187 Atl. 201 (E. & A. 1936); Midland Corp. v. Levy, *supra;* Montclair Sav. Bank v. Sylvester, 122 N.J.Eq. 518, 194 Atl. 811 (E. & A. 1937).

42. Norton v. Sinkhorn, 63 N.J.Eq. 313, 50 Atl. 506 (E. & A. 1901); also V.C. Berry's lucid opinion in, Curtis-Warner Corp. v. Thirkettle, *supra,* note 37; Kruger v. Ferry, *supra,* note 6.

43. Formerly made by answer, it is now ordinarily set up by way of counterclaim. See, *supra,* note 37.

44. Curtis-Warner Corp. v. Thirkettle, *supra,* note 37; Norton v. Sinkhorn, *supra,* note 42; Corson v. Bailey, *supra,* note 37. See, Cook v. Soden, 12 N.J.Misc. 337, 171 Atl. 558 (S.C. 1934); CLARK, CODE PLEADING, p. 436.

45. Shannon v. Marsolis, 1 N.J.Eq. 413 (Ch. 1831); O'Brien v. Hulfish, *supra,* note 37, *semble*; Kuhnen v. Parker, 56 N.J.Eq. 286, 38 A. 641 (Ch. 1897); Redrow v. Sparks, 76 N.J.Eq. 133; 79 A. 450 (Ch. 1909); Hawthorne v. Odenson, 94 N.J.Eq. 588, 120 Atl. 797 (Ch. 1923). The practice of recouping by way of counterclaim unliquidated damages includes also instances where there is failure in whole or part of the consideration, *viz.,* where the mortgagor-vendor fails to construct sidewalks and curbing as agreed: Curtis Warner Corp. v. Thirkettle, *supra,* note 37; or where the acreage is less than as fraudulently represented by the mortgagee-vendor; Dayton v. Melick, 32 N.J.Eq. 570, 34 N.J.Eq. 245 (E. & A.

But the practice of recouping unliquidated damages for fraud in foreclosure, is limited to purchase-money mortgages: it does not extend to foreclosure of mortgages other than purchase-money mortgages.[46]

If a cross-bill sets up in foreclosure, a liquidated set-off, it might seem that under principles governing set-off at law, the defendant, to the extent that his cross-demand exceeds the sum due the complainant, might take a personal decree against the complainant for such excess.[47] But such is not the case: the foreclosure suit is a proceeding *in rem;* a decree against the complainant would be *in personam;* to the extent of an excess, therefore, the demands are not mutual or in the same right.[48] And thus no decree for an excess is allowable.[49] In spite of a general provision in the present Chancery Rules allowing a

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1881); or, where there is error in boundary lines due to the vendor's deceit or gross mistake; Brownback v. Spangler, 101 N.J.Eq. 388, 139 Atl. 524 (Ch. 1927) (equitable fraud); Bonded B. & L. Ass'n v. Noll, 111 N.J.Eq. 163, 161 Atl. 828 (Ch. 1932); or, on failure of the vendor to fill in lowlands as agreed; Peterson v. Reid, 76 N.J.Eq. 377, 74 Atl. 662, *rev'd oth. gr.*, 80 N.J.Eq. 450, 85 Atl. 250 (1912); or, for non-performance of the vendor's other promise; Feinberg v. Rowan, 111 N.J.Eq. 138, 161 Atl. 673 (Ch. 1932), but for such to be an abatement by way of recoupment, the performance—not the promise, must be the consideration. Peterson v. Reid, *supra;* Feinberg v. Rowan, *supra;* or, where there is a breach of covenant against encumbrances; Emery v. Hansen, 107 N.J.Eq. 117, 151 Atl. 731 (E. & A. 1930) but not where there are encumbrances and there is no covenant against such or no deceit or gross mistake by the mortgagee-vendor; Security Trust Co. v. Reed, 101 N.J.Eq. 53, 137 Atl. 785 (Ch. 1927); Emery v. Hansen, *supra; Cf.,* Richman v. Bauerle, *supra,* note 38.

46. Holloway v. Hendrick, 98 N.J.Eq. 713, 129 A. 702 (E. & A. 1925) *semble;* Snyder v. Czerminski, 108 N.J.Eq. 113, 154 Atl. 199 (Ch. 1931), *semble,* Emery v. Hansen, *supra,* note 45.

47. HARRIS, PL. & PR. IN N. J., § 386; CLARK, CODE PLEADING, p. 449.

48. Norton v. Sinkhorn, *supra,* note 42; Waterworks Eq. Co. v. McGovern, 96 N.J.Eq. 520, 126 Atl. 411, *aff'd,* 98 N.J.Eq. 701, 130 Atl. 921 (1925) *semble,* CLARK, CODE PLEADING, pp. 464-466. Since 1880, no deficiency decree against mortgagor may be entered in a foreclosure suit, 3 C.S., p. 3420, § 47. The former practice was *contra.* Pruden v. Williams, 26 N.J.Eq. 210 (Ch. 1875).

49. Norton v. Sinkhorn, *supra,* note 42; Yeskel v. Gross, *supra,* note 41; HARRIS, PL. & PR. IN N. J., at p. 380; CLARK, CODE PLEADING, pp. 464-467.

decree for an excess on a counterclaim, this rule would seem to be unchanged.[50] The allowance to the defendant of a decree for an excess under the rules would seem to be appropriate only when the demands are of the same right, *viz.*, when the original bll was for *in personam* relief as in a suit for an account.[51] In recouping the defendant is similarly not entitled to a decree for an excess but for an additional reason: *viz.*, the very nature of recoupment for its purpose is to reduce or abate the complainant's demand.[52] Although formerly the practice was to plead recoupments by answer and not by cross-bill,[53] the practice now is to plead them by counterclaim,[54] but the change in the form of the pleading had not operated to change the rule disallowing a decree for an excess.[55] Counterclaiming, therefore, in foreclosure, is a more comprehensive term than either set-off or recoupment, including either or both, yet it does not in either case entitle the defendant to any decree against the complainant for an excess.[56]

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50. Chancery Rule 72; Midland Corp. v. Levy, *supra,* note 41.

51. Chancery Rule 72; Carey v. Brown, 92 N.J.Eq. 497, 113 A. 499 (Ch 1921), *semble.*

52. Norton v. Sinkhorn, *supra,* note 42; Emery v. Hansen, *supra,* note 45; CLARK, CODE PLEADING, pp. 437-439.

53. Norton v. Sinkhorn, *supra,* note 42; Waterworks Eq. Co. v. McGovern, *supra,* note 48; Kuhnen v. Parker, *supra,* note 45; Parker v. Hart, *supra,* note 37; Krueger v. Ferry, *supra,* note 6. In O'Brien v. Hulfish, *supra,* note 37, the Chancellor had held a cross-bill appropriate in a case where apparently all that the defendant was seeking was an abatement of the debt. On an appeal, the ruling was allowed to stand due somewhat to the reluctance of the appellate court to interfere with the procedural rules of the Court of Chancery; (22 N.J.Eq. 471 at p. 477). But see Melick v. Dayton, *supra,* note 45; Kuhnen v. Parker, *supra,* note 45. If, however, the defendant wishes rescission for fraud, a cross-bill is appropriate. Hawthorne v. Odenson, *supra,* note 45.

54. Emery v. Hansen, *supra,* note 45; Brownback v. Spangler, 101 N.J.Eq. 388, 159 Atl. 524 (Ch. 1927); Curtis-Warner Corp. v. Thirkettle, *supra,* note 40.

55. Emery v. Hansen, *supra,* note 45. If the amount of the counterclaim is less than the mortgage debt, the defendant is entitled to a deduction; if more, to a stay. Emery v. Hansen, *supra,* note 45. *Cf.* Midland Corp. v. Levy, *supra,* note 41; Richman v. Bauerle, *supra,* note 38.

56. Ehret v. Hering, 99 N.J.L. 73, 122 A. 598 (S.C. 1923); Curtis-Warner

In 1915 when the present Chancery Rules were authorized, and later adopted, significant changes were made in the previous practice. Among these changes, cross-bills *eo nomine* were abolished: in lieu thereof, counterclaiming in the answer for affirmative relief was substituted.[57] The cross-bill lost its status as an independent pleading being incorporated in the answer as a part thereof. In Part II, Section 3 of the rules captioned: "JOINDER OF CAUSES OF ACTION; COUNTERCLAIM" it is provided: "*Subject to the provisions of other rules herein contained,* a defendant may counterclaim or set-off *any* cause of action against the complainant. He may . . . issue subpoena against any third party necessary to be brought in; *but in the discretion of the court, separate hearings may be ordered;* or, *if the counterclaim cannot be conveniently disposed of in the pending action, the court may strike it out*" (Italics supplied.)[58]

This rule seemingly presented an opportunity to broaden the basis of matter appropriate for the new counterclaim.[59] With regard to counterclaims against the complainant, the use of the word *any* would seem to be all-inclusive.[60] With respect to counterclaims against third persons, separate hearings were authorized, but nevertheless subject to dismissal if lacking in trial convenience even on separate hearings.[61] As to counterclaims against co-defendants nothing is said. What happened when this rule came up for judicial interpretation? The first italicized matter—*subject to the provisions of other rules herein contained* was seized on as controlling. This carried the construc-

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Corp. v. Thirkettle, *supra,* note 40; Midland Corp. v. Levy, *supra,* note 41; Emery v. Hansen, *supra,* note 45; Beller v. Fenning, 101 N.J.Eq. 430, 139 A. 327 (Ch. 1927).

57. Chancery Rule 70.

58. Chancery Rule 28.

59. See Chancery Rule 4 wherein it is stated that the object of the rules is "to facilitate business and advance justice."

60. Chancery Rule 28 (first sentence).

61. Chancery Rule 28 (second sentence)

tion of the rule in question, found in the Part II dealing with joinder of causes, and perforce the content of pleadings, to Part III, dealing with the form of pleadings, and to that particular section and rule dealing with the form of the counterclaim wherein it is stated: "Any matter, *being the proper subject of a cross-bill under the existing practice,* may be set up by counterclaim". (Italics supplied).[62] Thus a rule fixing the content of

62. McAnarney v. Lembeck, *supra,* note 22; Beller v. Fenning, *supra,* note 56; Pettit v. Port Newark National Bank, 110 N.J.Eq. 324, 100 Atl. 34 (Ch. 1932). See 4 MERCER BEASLEY LAW REVIEW 90, where the change of practice is referred to as "a change in name only."

In response to a suggestion apparently made by counsel, that in McAnarney v. Lembeck, *supra,* note 22, the Court of Errors and Appeals perhaps might have overlooked Chancery Rule 28, V. C. Backes (in Beller v. Fenning, *supra,* note 56) replied: "The context of the rule [Rule 28] does not permit the lattitude of construction claimed for it. In terms and in effect it is circumscribed by, consistent with and subject to, the provisions of Rule 70. The rule invoked [Rule 28] as to counterclaims was not intended to allow alien issues . . . Neither of the rules has the effect of substantially altering the existing practice." V. C. Backes further stated in affirming the rule of McAnarney v. Lembeck, *supra,* note 22, and denying that Rule 28 had broadened the basis for counterclaiming,—"carried to its extreme, that would permit a wife to ask for support in her husband's suit to decree a resulting trust in lands held by her, or allow an action for damages for assault and battery as an offset to a foreclosure suit." Beller v. Fenning, *supra,* note 56. But does the Vice Chancellor overstate the *contra* argument in demolishing it?

It is not suggested that Chancery Rule 28 was intended or could be reasonably construed to allow a defendant to counterclaim *any alien* issue as of course. It might well be thought, however, that the substitution of a counterclaim for a cross-bill was intended to effect with respect to the counterclaim more than insubstantial changes of terminology. "Otherwise it were folly to trouble ourselves with new names." J. Hough in Boyd v. N. Y. & H. R. Co., 220 Fed. 174 at p. 178. It may therefore, be reasonably thought, that although any alien issue is not allowable by counterclaim as of course, nevertheless such alien issues as, in the discretion of the trial court, with or without separate hearings (as are provided for in the rule) *are conveniently triable with the original cause,* are permitted under and contemplated by Chancery Rule 28. In answer, therefore, to the extreme case, stated above by Vice-Chancellor Backes, the answer would be of course the denial of such a counterclaim as he supposed, for the obvious lack of trial convenience.

The substitution, therefore, at that time, of trial convenience as the test of counterclaiming in equity, instead of the earlier elusive test of germaneness would seem to have been desirable for two reasons: (a) it would have substituted a simple

a pleading, was held to be circumscribed by a rule apparently intended to effect a change of form. And by this rationalization, the old rule was re-affirmed, to-wit, the counterclaim must not expand the suit beyond the scope of the original bill, or, as has been stated both before and since the rules, must be germane to the bill.[63] Now it cannot be demonstrated that this conclusion was erroneous. It certainly was not an oversight[64] for the conclusion was carefully rationalized.[65] Perhaps of the alternatives presented, other phraseology might have been seized on as significant and a result arrived at more consonant with liberal procedure.[66] Undoubtedly a contrary conclusion would

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and understandable test for one that is highly subjective giving unpredictable results and (b) would have established the court itself as *magister litis* rather than the complainant

63. Thus on a shareholder's bill for an account from corporate officers of corporate money wrongfully appropriated by the defendant officers, a counterclaim that the complainant account for money that he as manager of the corporation's plants had misappropriated, the counterclaim was stricken as not germane to the matter of the original bill. McAnarney v. Lembeck, *supra,* note 20. Similarly, on a bill for an account by three tenants in common of land, against a fourth, for his share of the interest, taxes, etc., a counterclaim by such fourth tenant for partition was stricken on motion as without the scope of the original bill. Beller v. Fenning, *supra,* note 56 (but on bills for partition, counterclaims for an account have been allowed. Casper v. Walker, 33 N.J.Eq. 35). See also, Pettit v. Port Newark Nat. Bank, *supra,* note 62.

With respect to bringing in third parties on counterclaim, the old practice was similarly deemed to be unchanged. Seacoast Dev. Co. v. Beringer, 110 N.J.Eq. 295, 134 Atl. 770 (E. & A. 1926); Hoffman v. Maloratsky, 112 N.J.Eq. 333, 164 Atl. 260 (E. & A.) *semble.*

64. In McAnarny v. Lembeck, *supra,* note 22, Rule 70 was cited but Rule 28 was not in a *per curiam* opinion.

65. Beller v. Fenning, *supra,* note 56. V.-C. Baches' conclusion, herein, that "the change was purely of terminology" is of course an authoritative ruling consciously arrived at and in line with earlier cases. It was doubtless born of long experience under the earlier practice, and perhaps may be taken as evidence of the traditional judicial reluctance to abandon the old and accept the new. Chancery Rule 4 states the design of the rules as "to facilitate business and advance justice." If this be true, the question arises—what price changes in name only?

66. Thus instead of subordinating Rule 28 to Rule 70, they doubtless could have been integrated to effect the general design of the rules expressed in Rule 4

have been in keeping with the general aim of the new rules to sweep aside much of the old that was technical and obstructive.[67] It would seem that the purpose of the Chancery Rules in abolishing the demurrer, plea and cross-bill, substituting equivalents therefor, was to effect more of a procedural reform than results from a mere substitution of names. As Judge Hough remarked referring to similar changes in the Federal equity practice: "These probable equivalents are referred to only as aids in passing from the old to the new; for, if the modern practice is worthy of acceptance, *its excellence will not arise from doing the old things under new names.* The new method must show itself a better, quicker, more far-reaching instrument for ascertaining truth; *otherwise it were folly to trouble ourselves with new names".* (Italics supplied.)[68] It is submitted that more emphasis on the word *any* in Rule 28—more consideration of the provision allowing separate hearings where third parties were brought in on counterclaim—more importance to the provision allowing dismissal of the counterclaim when lacking in trial convenience, would have been in keeping with the general aim of the new rules and would have quite properly broadened the basis of counterclaiming in chancery.[69] Instead of germane-

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and thus avoided any seeming repugnancy between the two rules.

67. V.-C. Backes in discussing Chancery Rule 13 (permitting intervention) showed less reluctance to accept the changes effected by the new rules of 1915: "The aim of the Act of 1915 was to enable the Chancellor to simplify the practice, and this he has done by rules which have brushed aside much that was technical and obstructive, and has broadened the procedure so that rights *may be promptly determined whenever the issue may be conveniently* presented" (Italics supplied). Fisovitz v. Cordosco Const. Co., 102 N.J.Eq. 354, at p. 355, 140 Atl. 573.

68. Boyd v. New York & H. R. Co., 220 Fed. 174, at p. 178 (1915).

69. Such an approach is suggested in a recent opinion of C. J. Brogan, where, in affirming the dismissal of a counterclaim as unrelated to the bill, he remarked: "Manifestly it [the counterclaim] could not conveniently be tried in this case and the court was within its discretion in striking it out (Chancery Rule 28)." Rose v. Jerome Harvey Dev. Co., 113 N.J.Eq. 161 at p. 164, 166 Atl. 149 (E. & A. 1933). A similar approach i.e. of trial convenience, was also properly taken in Midland Corp. v. Levy, *supra,* note 41, in striking a counterclaim of set-off in foreclosure as

ness, if Rule 28 been interpreted apart from Rule 70, would have been substituted a simple and understandable test for counterclaiming: trial convenience in the discretion of the court. Judge Hough's further remarks are pertinent: "Whether the panorama now afforded is real reform depends almost altogether on how sympathetically and skillfully the new procedure is administered".[70] Counterclaims in equity, therefore, under the present Chancery Rules, like its predecessor pleading—the cross-bill, must be germane to—must not expand the issues in litigation beyond the scope of—the original bill—in spite of the broader practice at law of counterclaiming in a common law action *any* cause of action—subject to the discretion of the court—which the defendant may have against the plaintiff.[71]

Interesting contrasts are found in other jurisdictions. Under the Federal equity rules the scope of the counterclaim has been broadened in an effort to expedite litigation. The former Federal equity rule applicable provided for the counterclaiming by answer (a) "any counterclaim arising out of the

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not conveniently triable, which for reasons previously stated (*ubi supra,* note 37 *et seq.*) was without the requirement of germaneness. DEAN CLARK, CODE PLEADING, p. 446, treats Beller v. Fenning, *supra,* note 56, as a case of the pragmatic or trial convenience approach.. But V.-C. Backes' opinion therein, indicates that he regards the old rules as unchanged, and these rules required germaneness. Unless therefore, germaneness means merely trial convenience, (and if this is so, the secret seems to be nowhere divulged) the counterclaim must establish not only trial convenience of his counterclaim, but further, that it has that kinship with the matter of the original bill, as to be germane to it.

70. 220 Fed. 174, at p. 178. (Boyd v. New York & H. R. Co.).

71. Sun B. & L. Ass'n v. Gross, 110 N.J.Eq. 179, 159 Atl. 401 (Ch. 1932), (bill of foreclosure; counterclaim against complainant by assuming grantee to have deed containing assumption clause declared void as having been inserted in the deed without the knowledge of the counterclaimant, held, over complainant's objection, germane (distinguishing Green v. Stone, *supra,* note 4 as a suit *in personam*). *Cf.,* Rose v. Jerome Harvey Dev. Co., *supra,* note 69. See further, Workingman's B. & L. Ass'n v. Del Vichio, 8 N.J.Misc. 563, 151 A. 282 (Ch. 1930); Hoffman v. Maloratsky, *supra,* note 63. And *a fortiori* as to counterclaims against third parties. Seacoast Dev. Co. v. Beringer, *supra,* note 63. As to the practice at law, see CUM. SUPP. (1924) 163-288, p. 2815.

transaction which is the subject matter of the suit," and (b) "any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity . . . ".[72] Old rules of practice die hard. Early Federal decisions displayed the usual reluctance to give full force and effect to this rule particularly with respect to its second category—"set-off or counterclaims which might be the subject matter of an independent suit".[73] But it was later settled that the rule meant just what it said—"any set-off or counterclaim," without regard to whether it was or was not germane to the original bill.[74] In New York by recent amendment to the New York Practice Act the same result has been achieved.[75] And similarly under other codes.[76] The rule relating to counterclaiming in the new Federal civil procedure rules similarly extends the base for counterclaiming.[77]

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72. Federal Equity Rule 30 (based on Order XIX of the English Supreme Court of Judicature). *Cf.*, New Rules of Federal Civil Procedure (Rule 13).

73. Terry Steam Turbine Co. v. B. F. Sturtevant Co., 204 Fed. 103 (1913) and other cases cited in Victor Talking Machine Co. v. Brunswick-Balke-Collender Co. 278 Fed. 758 (1922) confirming J. Hough's observation on the interpretation of new rules designed to simplify procedure: "That early efforts will sometimes be mistakes is to be expected." Boyd v. New York & H. R. Co., 220 Fed. 174 at p. 178.

74. Moore v. N. Y. Cotton Exchange, 270 U.S. 593, 46 S.C. 367, 45 A.L.R. 1370 (1926); Krentler etc. Co. v. Leman, 13 F (2d) 796 (1910); Hauserman Wright Metal, 1 F. Supp. 43 (1932). And even when the rule has been accepted, evidences of judicial reluctance and indecision to go along with the change are not lacking. Victor Talking Machine Co. v. Brunswick-Balke-Collender Co. *supra* note 73.

75. Laws of 1935 c. 339; New York Civil Procedure Act §58 (subject to the discretion of the trial court). See note 37, COLUMBIA LAW REVIEW 462.

76. In England (English Order XIX Rule 3; XXI, Rule 15) counterclaiming in chancery is not restricted to matters of the original bill but may include wholly independent matters if conveniently triable with the original bill. Beddell v. Maitland, L.R. 17 Ch. Div. 181 (1881); Gray v. Webb, L.R. 21 Ch. Div. 802 (1886). Similarly, in Illinois. See, Hinton, *An American Experiment with English Rules of Practice*, 20 ILLINOIS LAW REVIEW 533. Similarly, California Pacific Finance Corp. v. Superior Court, 25 Pac. (2d) 982 (1933); 90 A.L.R. 384.

77. Rule 13. See Lane, *Federal Equity Rules*, 35 HARVARD LAW REVIEW 276, at p. 288.

The practice in New Jersey of counterclaiming only germane matters doubtless has the full force of *stare decisis* behind it.[78] But for reasons that seem to be largely historical.[79] The power accorded to the Chancellor under the Chancery Act of 1915 of making new rules, creates an ease and facility of change of procedure not generally found.[80] Substantial reasons exist for a re-examination of the rule.[81] And the requirement as to germaneness of counterclaim, seems to have originally been

78. Certainly in the recent cases of Beller v. Fenning, *supra,* note 56, and Pettit v. Port Newark Nat. Bank, *supra,* note 62, decisions in the Court of Chancery, can be found no relaxation of the rule. *Cf.,* Rose v. Jerome Harvey Dev. Co., *supra,* note 69.

79. But see, COHEN, LAW AND THE SOCIAL ORDER, p. 7.

80. CUMM. SUPP. (1924) §§ 33-124, p. 272; Fisovitz v. Cordosco Const. Co., *supra,* note 67.

81. Particularly incongruous is the rule in a court where an often proclaimed desideratum is stated to be the avoidance of multiple suits. *Cf.,* Pacific Finance Corp. v. Superior Court, *supra,* note 76 where the purpose of a code provision allowing the counterclaiming of independent and unrelated matters, is said to be "to prevent multiplicity of suits."

In other instances the Court of Chancery does not hesitate in shaping litigation with a view to the avoidance of multiple suits and unnecessary costs. Thus in the interest of economy and the avoidance of double suits, causes, where conveniently triable together, are consolidated over the objection of a litigant and without regard to any self-imposed limitation of germaneness. Burnham v. Dalling, 16 N.J.Eq. 310 (Ch. 1863); Mutual Sec. Corp. v. Harris Corp., 100 N.J.Eq. 365, 135 Atl. 337 (Ch. 1926); Levin v. Wenoff, N.J.Misc. 603, 146 Atl. 789 (Sup. Ct. 1929); Jennings v. Studebaker Corp., 112 N.J.Eq. 591, 165 Atl. 631 (Ch. 1933); Gleason v. Gleason, 15 N.J.Misc. 197, 190 Atl. 82 (Ch. 1937); TYREE, CHANCERY PRACTICE IN NEW JERSEY (2nd ed.) § 32.

In case of the non-residency of the complainant, the hardship that is likely to ensue by putting the defendant to an independent suit, would seem to justify a counterclaim whether germane or not. In some jurisdictions, by legislation, the defendant is allowed a counterclaim in such case. See, 37 COLUMBIA LAW REVIEW 462 at p. 469, n. 8; p. 474, n. 64; 29 MICHIGAN LAW REVIEW 604. And even without legislation, the same result is readily obtained by an extension of the principle of equitable set-off allowed in cases when the complainant is insolvent, to the case where the complainant is a non-resident. North Chicago etc. Co. v. St. Louis etc. Co., 152 U.S. 596, 617, 14 S.C. 710, 716 (1894); 3 Story, EQ. JUR., (14th ed.) § 1875. See Trotter v. Heckscher, *supra,* note 33; 39 HARVARD LAW REVIEW 256.

associated with and to have grown out of—as in the case of the amended bill, the doctrine of jurisdiction by original writ, or more likely perhaps the principle of *magister litis*.[82] In application the test lacks objectivity and gives the pleader in counterclaiming only a most general notion of what may be properly incorporated in a counterclaim.[83] An examination of the precedents gives little help to the careful pleader in forecasting what in a given case is, or is not germane, due to the difficulties inherent in applying a vague and notional standard to variant factual situations.[84] Even such a test as "arising out of the same transaction or series of transactions" as the matter of the original bill,[85] or "connected" therewith might prove a more defini-

82. Williamson v. N. J. So. Ry. Co., *supra*, note 29, *semble*.

83. Although "of the same germ" may in some fields be valuable in determining relationships, yet as applied to pleadings, it seems at best but an elusive figure of speech, and an unscientific yardstick for determining the proper scope of pleadings, whether the amended bill or counterclaim is being measured. In fact, germaneness of one does not seem to be always the same kind of germaneness when applied to the other. See *supra*, note 16; *Cf.*, Sun B. & L. Ass'n v. Gross, *supra*, note 71. *Cf.*, Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, 158 A. 133 (Del. 1931) wherein it is stated that the basis of counterclaiming is broader than in intervening.

84. *Supra*, note 34.

85. For a case employing such a test, see, Sieling v. Uhl, (Md.), 153 Atl. 614 and suggested, perhaps, in B. & B. Inv. Co. v. Kaufman, 100 N.J.Eq. 393, 136 Atl. 186 (Ch. 1927); see, CLARK, CODE PLEADING, § 100.

If the principles governing joinder of causes in a single bill, were to be accepted as governing the content of a counterclaim, a distinction, doubtless, would have to be taken between counterclaims against the complainant and those against third parties (and co-defendants). For with respect to a counterclaim against a complainant, the analogy would necessarily be taken to a joinder by a single complainant of two causes of action against a single defendant. The present practice in New Jersey permits such a joinder regardless of whether the two causes arose from the same transaction, subject only to the test of convenience. Gierth v. Fidelity Trust Co., 95 N.J.Eq. 163, 115 Atl. 397, 18 A.L.R. 976 (E. & A. 1921) *semble;* Clark v. Clark, 13 N.J.Misc. 49, 176 Atl. 81 (Ch. 1935) (except in certain cases; Chancery Rules 18, 19 and 20); Healey v. Walbrook Park Co., 118 N.J.Eq. 80, 177 Atl. 688, *aff'd*, 120 N.J.Eq. 199, 184 Atl. 518 (1936); Chancery Rules 21 and 22. It is submitted that if the hearing of two causes on bill and answer is

tive test in determining the proper scope of a counterclaim, but inhering even in these standards are difficulties of no little degree.[86] A simpler rule at any rate, and one more in line with the trend of liberal procedural reform would permit the counterclaiming of any matter against either the complainant or a co-defendant which in the discretion of the trial court may be conveniently heard[87]—subject only to the jurisdictional limitations of the Court of Chancery.[88] To put the defendant to his

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allowed, the hearing of two causes on bill and counterclaim (assuming trial convenience in both cases) is equally allowable, unless the complainant's status as *magister litis* is worthy of preservation under modern practice.

With respect to counterclaims against third parties and co-defendants, the analogy in this case would be taken to the joinder of causes by different complainants against a single defendant. Here, since joinder would be allowed only if the causes arose from the same transaction and presented a common question of law or fact (Chancery Rule 23), the counterclaim would be similarly governed.

The effect, therefore, of taking the principles governing joinder as determinative of germaneness, would be to substitute trial convenience as the test of counterclaiming only in those counterclaims in which the defendant seeks relief against the complainant. See *infra*, note 95.

86. See, Gavit, *The Code Cause of Action*, 30 COLUMBIA LAW REVIEW, 802 at p. 822.

87. With respect to counterclaims against the complainant, this would be doing exactly what is done in cases of joinder of causes, the only change being to deprive the complainant where the second cause is on counterclaim of *magister litus*. Some evidences of such a pragmatic approach are to be found in: Rose v. Jerome Harvey Dev. Co. *supra*, note 69; and perhaps, Beller v. Fenning, *supra*, note 56; see also *supra*, note 85; CLARK, CODE PLEADING, p. 455.

With respect to counterclaims against co-defendants, and third parties, the change suggested above, involved an extension of analagous principles which now govern joinder of causes. Since the desirability of extending these principles has not been deemed to be within the scope of the present writing, the suggestion above made, may be taken as limited to counterclaims against the complainant for which logical parallels already exist in the present practice. The writer believes that the broadening of the base of counterclaiming against others than the complainant along the lines of trial convenience is equally desirable, which doubtless would carry with it as a corollary the broadening of the principles governing joinder under Chancery Rule 23. Such a pragmatic approach finds support in *The Code Cause of Action*, Wheaton, 12 CORNELL LAW QUARTERLY 1; see also, 50 HARVARD LAW REVIEW 1017, at p. 1025.

88. The changes under consideration are of course adjective and not substan-

own action against the complainant where the matter is conveniently triable but not germane, seems unduly punitive and arbitrary, and tending to delay litigation, increase costs, and congest the calendar. Such a rule would not of course permit the counterclaiming of *any* alien matter[89]—but only such matter as within the discretion of the trial court is conveniently triable with the pending cause.[90] The burden, if any there is—

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tive. Counterclaims ordinarily must state matter cognizable in equity although the rule seems not to be strictly applied in the case of counterclaims against the complainant. Asbury Park etc. Ry. Co. v. Neptune, *supra,* note 7; Prince v. Hart, 84 N.J.Eq. 476, 94 Atl. 571 (E. & A. 1915); TYREE, CHANCERY PRACTICE IN NEW JERSEY (2nd ed.) § 136. The matters under consideration, therefore, do not involve to any degree an extension of the jurisdiction of the Court of Chancery.

89. See *supra,* note 62.

90. The test of germaneness suggests some *a priori* standard of kinship. It is believed that any such test is illusory. To substitute trial convenience therefor, as a matter addressed to the discretion of the court would seem to substitute "conscientious judgment" for arbitrary action. Hoffman v. Maloratsky, *supra,* note 63; see, Isaacs, *The Limits of Judicial Discretion,* 32 YALE LAW JOURNAL 339; 37 COLUMBIA LAW REV. 462 at p. 470, notes 38-39. Morris R. Cohen: "The legalist's dilemna, either a rigid rule without discretion on the part of the judge or else arbitrary caprice, does not, however, exhaust all possibilities." LAW AND THE SOCIAL ORDER, p. 263.

Doubtless in the exercise of this "conscientious judgment" some of the considerations which may have previously affected the question of germaneness, would also affect trial convenience, but at least the question would be simply stated.

Factors affecting trial convenience conceivably might be: (a) the character of the suit as *in rem* or *in personam;* see, *supra,* notes 18, 19, 20, and Pierce v. Old Dominion Smelting Co., 67 N.J.Eq. 399, 58 Atl. 319 (Ch. 1904); Rodman v. Manganese Steel Co., 75 N.J.Eq. 295, 72 Atl. 963 (E. & A. 1909); Beller v. Fenning, *supra,* note 56; (b) the capacity in which the complainant sues; see *supra,* note 22; Chancery Rules 18 and 19; (c) the manner in which the original suit was matured, *viz.,* whether by bill or subpoena or by order to show cause under Chancery Rule 130; *cf.,* Pierce v. Old Dominion Smelting Co., *supra;* Rodman v. Manganese Steel Co., *supra,* (d) the matrimonial or non-matrimonial character of the original suit; Clark v. Clark, *supra,* note 85; Chancery Rules 6 and 20, (e) the residency or non-residency of the complainant (or insolvency or solvency); see *supra,* note 81 (last paragraph); (f) the immediacy or non-immediacy of the relief sought by the original bill as affecting the question of delay; (g) the contested or non-contested character of the respective suits—original and counterclaim; (h) the possibility of a jury trial in one or both of the suits (i) the statutory or non-statutory character

on judicial discretion, is less it would seem than that entailed in the examination of the past precedents in an effort to establish germaneness.[91] In situations of questionable trial convenience, a decision favorable to the counterclaim might be arrived at through the device of separate hearings allowed under the present rules.[92]

Several solutions of the problem seem feasible. (a) More frequent judicial resort to Chancery Rule 4 authorizing departure from the rules when necessary "to facilitate business and advance justice";[93] or, (b) a restatement of Chancery Rule 28 divorcing it from Rule 70;[94] or, (c) correlating the rules governing counterclaiming with those governing joinder of causes in the original bill, and thus recognizing the clear inter-relation between the two problems;[95] or, (d) the adoption of a new rule

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of the original suit and that of the counterclaim; Fodor v. Kunie, *supra*, note 16. See 37 COLUMBIA LAW REVIEW 472, where some of the above considerations and others are suggested, as determinative in deciding trial convenience.

91. Since under the present practice, the enquiry is as to both (a) trial convenience, Beller v. Fenning, *supra*, note 56; Rose v. Jerome Harvey Dev. Co, *supra*, note 69, and (b) germaneness, Prince v. Hart, *supra*, note 8; McAnarney v. Lembeck, *supra*, note 22; Seacoast Dev. Co. v. Beringer, *supra*, note 63, the change proposed would actually diminish the burden on the court—substituting a single for a dual standard for counterclaiming.

92. Chancery Rule 28.

93. Chancery Rule 4 establishes a judicial lattitude in the application of all Chancery Rules. The power of a vice-chancellor to dispense with the rules in a given case in order "to facilitate business and advance justice" seems to be limited in only one instance, i.e., to the acquiring of jurisdiction under Rule 130; Scranton Button Corp. v. Neonlite Corp., 105 N.J.Eq. 708, 149 Atl. 369 (Ch. 1930). Aside from this limitation, applications to invoke Rule 4 have been infrequently received by the court with favor. See, Labruna v. Labruna, 94 N.J.Eq. 350, 125 Atl. 1932 (Ch. 1923); Wright v. Stauback, 3 N.J.Misc. 1062, 131 Atl. 100 (Ch. 1925); Paper & Textile Mach. Co. v. Newlin, 101 N.J.Eq. 115, 137 Atl. 314 (Ch. 1927). *Cf.*, Downs v. Jersey Central P. & L. Co., 115 N.J.Eq. 348, 170 Atl. 835, *aff'd*, 117 N.J.Eq. 138, 174 Atl. 887 (1934).

94. See, *supra*, note 66.

95. The inter-relation between what may be counterclaimed and what may be joined would seem to be clear. See, 37 COLUMBIA LAW REVIEW 462, at p. 464 n. 8, 466n. 21. This has been previously considered in note 85, *supra*. The joinder

permitting the counterclaiming of any matter along the lines of the rule recently adopted to govern Federal civil proceedings.[96]

III. INTERVENTION

With reference to an intervention by a third party in a pending chancery suit, the Chancery Rules provide that "where a person not a party, has an interest or title which the decree will affect, the court, on his application, shall direct him to be made a party".[97] The practice under this rule is to apply for an

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of causes under the former Federal equity rule was even broader than under the New Jersey Chancery Rules. Under Federal Equity Rule 26, causes by or against several persons could be joined wherever sufficient grounds appeared therefor, i.e. "trial convenience" at the discretion of the trial court. Radio Corp. of America v. Lehr Auto Supply Co., 29 F. (2d) 162 (1928); Eclipse Machine Co. v. Harley Davidson Motor Co., 244 Fed. 463 (1917). See Rule 18 of the new Federal Rules for Civil Procedure.

96. Rule 13

With reference to counterclaiming on the basis of trial convenience, certain collateral matters may be briefly noted: (a) Whether judicial discretion is to be applied to determine the convenience of the counterclaim, *sua sponte*, or only on the objection of the complainant, or both. Under the old yardstick of germaneness the latter seems to be the practice since the court has the inherent power to control the pleadings for its own protection as much in the case of a non-germane counterclaim, as in the case of an improper joinder, where the power is exercised *sua sponte;* Rodman v. Manganese Steel Co., *supra*, note 90; Healey v. Walbrook Park Co., *supra*, note 85. *Cf.*, Thiel v. Perkins, 92 N.J.Eq. 79, 111 Atl. 666 (Ch. 1920) wherein a non-germane amended bill was allowed no objection having been interposed by the defendant See *supra*, notes 23 and 24.

(b) Whether the counterclaimant has the burden of establishing trial convenience, or the complainant on objection has to show the lack of it. Under the present test of germaneness, no New Jersey decision has been found specifically localizing the burden. In the case of joinder it seems to be that the complainant must justify the joinder. Healey v. Walbrook Park Co., *supra*, note 85 In New York the party resisting the joinder has the burden. See, 37 COLUMBIA LAW REVIEW 462, at p. 475n.71.

97. Chancery Rule 13 (paragraph 3). That the intervenor have an interest is generally a prerequisite of intervention. See 38 COLUMBIA LAW REVIEW 156. But ordinarily one entitled to intervene, is under no duty to do so. Chase National Bank v. Norwalk, 290 U.S. 431, 54 S.C. 475 (1934). Intervention by petition is

order of intervention by petition and on notice to the parties to the pending cause.[98] The rule does not, however, contemplate that any one shall be admitted as a party merely on application: some scrutiny of the claim asserted by the intervenor is necessary to prevent the assertion of trivial, groundless or unrelated claims. The petition, therefore, should make a reasonably *prima facie* showing of the existence in the intervenor of "an interest or title which the decree will affect" and which equitably he ought to be permitted to have tried out.[99] The practice accordingly is to support the petition with affidavits, or such other proof, as will establish *prima facie* such an "interest or title".[100] The purpose of the present rule was to broaden somewhat the scope of intervention and to let in "parties in all manner of suits whose interests will be affected by the decree, so that they may have their day in court and be heard in the pending suit . . . ": but with two limitations: (1) the matter of the intervention must be conveniently triable with the matter of the pending cause,[101] and (2) must be pertinent or germane there-

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also allowable on causes being heard on appeal to the Court of Errors and Appeals. Grobholtz v. Merdel Mtg'ge Inv. Co., 115 N.J.Eq. 411, 170 Atl. 815 (E. & A. 1934).

98. Notice of the application must be given to both the complainant and defendant. Perrine v. Perrine, 63 N.J.Eq. 483, 52 Atl. 627, *aff'd*, 65 N.J.Eq. 719, 60 Atl. 1134 (1903). But if the bill is filed for the benefit of other parties who may care to come in, then notice to the complainant is not required; but in such a case, notice to the defendant must be given. Perrine v. Perrine, *supra*. The intervenor takes the records "as he finds it" and becomes bound by it. McAlpin v. Universal Tobacco Co., 57 A. 418 (Ch. 1904); Sokoloff v. Wildwood Pier & Realty Co., 113 N.J.Eq. 159, 166 Atl. 218 (E. & A. 1933).

99 Boehm v. Rider, 96 N.J.Eq. 167, 125 A. 23 (Ch. 1924).

100. Sternberg v. Vineland Trust Co., 107 N.J.Eq. 255, 152 Atl. 370 (Ch. 1930).

101. Fisovitz v. Cordusco Const. Co., *supra*, note 67; *cf.*, Gross v. Penna. Mtg. Co., 101 N.J.Eq. 51, 137 Atl. 89, *aff'd*, 104 N.J.Eq. 439, 146 Atl. 328 (1929). See, Evening Times etc. Co. v. American Newspaper Guild, 122 N.J.Eq. 545, 195 Atl. 378 (Ch. 1937), as to intervention by persons subjected to "secondary picketing".

to.[102] The Chancery Rules of 1915, therefore, while giving to an intervention a wider scope and sweep than theretofore had been allowed, is nevertheless found to be restricted to matters germane.[103] The troublesome question, therefore, of what is germane re-occurs with similar difficulties as have been discussed in analyzing the same requirement when applied to the amended bill and counterclaim.

But happily the cases are fewer. Under a creditor's bill filed as a class bill, intervention by another creditor would be germane but not a creditor's bill brought for the sole benefit of the complainant creditor.[104] But on a bill by a trustee-mortgagee for instructions, an intervention praying for the removal of the trustee-complainant for malfeasance and mismanagement

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102. Caruso v. Caruso, 101 N.J.Eq. 350, 139 Atl. 812 (Ch. 1927); Fisovitz v. Cordusco Const. Co., *supra,* note 67; Hackensack Trust Co. v. Kelly, 118 N.J.Eq. 587, 180 Atl. 621 (Ch. 1935); Kristeller v. Eisenverg, 122 N.J.Eq. 467, 194 Atl. 783 (Ch. 1937).

103. Prior to 1915, intervention was controlled by statutory provisions (1 C.S. pp. 421, 422 §§29, 30) since repealed. Under those provisions the doctrine of *magister litus* was fully established and no intervention was allowed by a stranger over the complainant's objection. Williamson v. N. J. So. Ry. Co., *supra,* note 29. But even under the earlier practice certain exceptions were allowed: (a) by statute in foreclosure suits 1 C.S. p. 432 §58; *infra,* notes 8 and 9; (b) by statute in divorce; 2 C.S. p. 2034 §17; *infra,* note 7; (c) in the case of a *cestui que trust.* Melick v. Melick, 17 N.J.Eq. 156 (Ch. 1864). STORY, EQUITY PLEADING, (10th ed.) §208. At a somewhat later time, but prior to 1915, the rule of *magister litus* was re-stated in terms of the requirement that any intervention was restricted to the issues raised by and the scope of the original bill. Shepard v. Myers, 73 N.J.Eq. 573, 74 Atl. 140 (Ch. 1907). After the Chancery Act of 1915, and Chancery Rule 13, which admittedly broadened the permitted scope of an intervention (Fisovitz v. Cordusco Const. Co., *supra,* note 67) to include interventions by persons whose interest or title the decree might affect and over the complainant's objection, but only in those cases where the matter of the intervention was germane to the original bill. Hackensack Trust Co. v. Kelly, *supra,* note 102. Caruso v. Caruso, *supra,* note 102.

104. Fisovitz v. Cordusco Const. Co., *supra,* note 67. *Cf.,* Iauch v. De Socarras, 56 N.J.Eq. 524, 39 Atl. 381 (Ch. 1898); Mallory v. Kirkpatrick, 54 N.J.Eq. 50, 33 Atl. 205 (Ch. 1895); Jones v. Davenport, 46 N.J.Eq. 237, 19 Atl. 22 (E. & A 1890); Perrine v. Perrine, *supra,* note 98.

is not germane in that it presents an independent controversy beyond the scope of the original bill.[105] In several instances intervention by statute is allowed: thus, in a divorce suit the co-respondent is permitted to intervene as a matter of statutory right;[106] similarly, in foreclosure of a mortgage, the holder of a recordable but unrecorded lien, may intervene as of right.[107] But the holder of a latent equity, not evidenced by a recordable instrument cannot intervene; such lienor must proceed it by original bill.[108] Although any intervention must in general be subordinate to the pending suit and must undoubtedly be conveniently triable therewith, yet this further requirement of germaneness seems archaic—a throwback either to the doctrine of jurisdiction by original writ or the ancient principle of *magister litis.*[109]

A simpler and certainly more understandable rule would be to subordinate an intervention to the pending suit *solely* from the standpoint of convenience of trial. Doubtless under such a rule some matters not germane to the pending suit would be equally excluded as heretofore because of the obvious lack of

105. Hackensack Trust Co. v. Kelly, *supra,* note 102. *Cf.,* Boehm v. Rider, *supra,* note 99 (bill for construction; intervention for specific performance on proper amendments).

106. 2 C.S., p. 2034 § 17; Duke v. Duke, 72 N.J.Eq. 513, 73 Atl. 837 (Ch 1906); Gray v. Gray, 95 N.J.Eq. 561, 123 Atl. 361 (Ch. 1924); Marchese v. Marchese, 98 N.J.Eq. 379, 129 Atl. 131 (E. & A. 1925); Kaiser v. Kaiser, 98 N.J.Eq. 719, 130 Atl. 602 (E. & A. 1925); Robinson v. Robinson, 13 N.J.Misc 201, 178 Atl. 180 (Ch. 1930); see, 39 HARVARD LAW REVIEW 1090, 1098.

107. 1 C.S. p. 432, §58; Weinberger v. Goldstein, 99 N.J.Eq. 1, 132 Atl. 659, *aff'd,* 101 N.J.Eq. 310, 137 Atl. 920 (1927). Intervention may be allowed even after final decree on a petition to vacate the same. Cawley v. Leonard, 28 N.J.Eq. 467 (E. & A. 1877). *Cf.,* New Home B. & L. Ass'n v. Wel-bilt Const. Co., 98 N.J. Eq. 545, 131 Atl. 523 (Ch. 1925); Riverside B. & L. Ass'n v. Bishop, 98 N.J.Eq. 508, 131 Atl. 78 (Ch. 1925). Intervention by an attorney to establish his lien is also appropriate. McCarthy v. McCarthy, 117 N.J.Eq. 22, 174 Atl. 751 (E. & A. 1934) *semble*

108. First National Bank v. Leslie, 106 N.J.Eq. 564, 151 Atl. 501 (Ch. 1930).

109. *Cf.,* Williamson v. N.J. So. Ry. Co., *supra,* note 29.

convenience in the intrusion of such matters into a pending suit. But the basis of the exclusion would be—not their non-germane character, but the lack of trial convenience. Doubtless other matters merely *connected* with the pending suit (which under the present rule of germaneness would be excluded) might be properly brought into a pending suit for a complete disposition thereof where there exist therefor sufficient reasons of convenience. This was the theory of joinder in the former Federal equity practice, and no essential difference is perceived between the assertion of two causes by A and B against C in an original bill, where reasons of convenience exist therefor, and the addition by intervention of the suit by B against C, to a proceeding previously instituted by A against C.[110] A less radical departure from the present practice, and offering some improvement would be to restate germaneness in terms of "the same transaction" rule, and thus allow intervention where original joinder would have been appropriate.[111] Clarification of the basis of intervening would be a definite gain even if there were no broadening of the basis.[112] Since intervention in the Court of Chancery

110. Former Federal Equity Rule 26. It is true that in an intervention, the intervenor is uninvited, whereas in the case of the joinder, he is a party with the consent of at least one of the other litigants. But for expeditious litigation, the wishes of the litigant parties to the suit are not always compatible. See *supra*, note 81.

111. Under Chancery Rule 13, a person who is not a party who "has an interest or title which the decree will affect" on his application will be permitted to become a party to the suit. The sense of this rule would seem to be merely that omitted necessary parties may intervene. Doubtless omitted proper parties may likewise intervene under the rule. The recognition of the inter-relation of an intervention and joinder in the allowing of an intervention on a matter that might have been originally joined with the matter of the original bill, would operate at least to free the intervenor of the burden of satisfying such an indeterminate measure or test, as "germaneness".

112. Under former Federal Equity Rule 37, anyone claiming an interest in the litigation may at any time be permitted to intervene, with the proviso, however, that the intervention shall be subordinate to and in recognition of the propriety of the main proceeding. Moore and Levy, *Federal Intervention*, 45 YALE

where not accorded by statute as of right,[113] is addressed to the discretion of the court,[114] no such *reductio ad absurdum* as the fusion of the entire docket into a single suit is conceivable. But a realistic approach along the lines of "what can be done, will be done" with due regard to the rights of the parties already before the court, in the interest of a full and complete adjudication of all matters connected with the matter of the pending suit that can be conveniently disposed of in one suit, would seem to be in keeping with trend of modern procedure[115] and would more effectually consummate the general aim of the Chancery Rules.[116]

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UNIVERSITY OF NEWARK,
JANUARY 2, 1938.

LAW JOURNAL 565. See, Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, 158 Atl. 133 (Del. 1931); 43 YALE LAW JOURNAL 127. Dean Clark has suggested a broadening of the basis of intervening under the Federal Equity Rule. 44 YALE LAW JOURNAL 1291 at p. 1321; CLARK, CODE PLEADING, p. 287.

113. *Supra*, notes 7 and 8.

114. Downs v. Jersey Central P. & L. Co., 115 N.J.Eq. 548, 171 Atl. 306 (Ch. 1934). As to whether intervention is a matter of right or discretionary in the Federal equity practice, see, 31 COLUMBIA LAW REVIEW 1312.

115. See 50 HARVARD LAW REVIEW 1025, at p. 1030; new Federal Civil Procedure (Rule 24).

116. Fisovitz v. Cordusco Const. Co., *supra*, note 67, as quoted.