# GERMANE PLEADINGS IN THE COURT OF CHANCERY*

In recent years the word "germane" has been frequently employed in connection with certain chancery pleadings in the Court of Chancery of New Jersey. Thus when an amended bill is offered after a hearing on the original bill as a substituted cause of action for the original bill, it is said that the amended bill must be germane to the original bill. Similarly, the right of a defendant to counterclaim has been restricted to matters germane to the original bill. And in intervention, it is stated that the matter of the proposed intervention must be germane to the pending cause. It is the purpose of this writing to examine these pleadings—the amended bill, the counterclaim and the petition of intervention in the light of this latter-day requirement of "germaneness". The term itself suggests an oversimplification. It bears the ear-marks of a catch-all. Conceivably, its meaning may be constant in the three situations proposed to be examined; or, its content may vary according to whether an amended bill, counterclaim or intervention is involved. Conceivably it may be a happy figure of speech; or, its use may need "to be narrowly watched". The Chancery Act of 1915 was designed to simplify procedure in the Court of Chancery. The requirement of "germaneness" will be examined somewhat in the light of current procedural trends.

## I.

In *Fodor v. Kunie*,[1] Chancellor Walker stated: "Amendments must be germane . . . " In this suit a petition to annul a

* The concluding discussion of germane counterclaims and interventions will appear in the next issue.

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1. 92 N.J.Eq. 301, 112 Atl. 598 (Ch. 1920).

marriage had been filed alleging a statutory ground for anulment (non-age of defendant): the defendant did not answer. The cause was duly referred to a special master who, after a hearing, reported that: the defendant being of the age of fourteen, and the suit being brought by the husband and not by her, the petition should be dismissed. Thereupon the petitioner moved for an order to amend to allege fraudulent concealment or misrepresentation of her age by the defendant. Since the statute recognized no such ground, the proposed suit as amended was addressed to the general jurisdiction of equity. In denying the application for leave to amend, Chancellor Walker announced the requirement of germaneness for the first time under the new rules, stating that the proposed suit was "in no way related to the statutory action" alleged in the original petition. Since the relief sought in both cases was the same, *i.e.,* annulment of the marriage, the requirement must be taken to apply to the grounds of relief stated in the original petition rather than to the purpose or object of the suit. The denial of leave to amend was not based solely on procedural or pleading requisites. Aside from such, Chancellor Walker pointed out that there were substantive difficulties which would bar any relief under general equity jurisdiction. But he observed that a bill or petition "cannot be amended so as to make an entirely different case under the general equity jurisdiction of the court where, as in this case the statute (under which the original petition was brought) is not declaratory of the existing power of the court".[2]

It will be noted that the rule announced by Chancellor Walker was *obiter*: the decision was further grounded on the failure of the amended petition to state a cause entitling the petitioner to any relief and so the decision went to the merits of the application. A further procedural defect was found in the absence of the appointment of a guardian *ad litem* for the

2. 92 N J.Eq. 301 at p. 304

infant defendant.[3] But the requirement of germaneness was unhesitatingly announced as of apparent general application. In the opinion of the court there is to be found no indication that this requirement of germaneness sprang from the circumstance (a) that the suit was a matrimonial one, or one *sui generis*;[4] or (b) that the application for the amendment had

3. *Cf.* N.J.P.L. 1915 p. 539; Gibbs v. Gibbs, 92 N.J.Eq. 542, 133 Atl. 704, at p. 708 (V. C. Buchanan's comment on Fodor v. Kunie, *supra*). If the failure to appoint a guardian were the only defect of the petitioner's case, it would seem not to have required dismissal since the defect could have been cured *pendente lite*. Fodor v. Kunie, *supra*, note 1; Moore v. Moore, 74 N.J.Eq. 733, 70 Atl. 684 (Ch. 1908); Webb v. Webb, 96 N.J.Eq. 1, 124 Atl. 706 (Ch. 1924); Weinstein v. Chelsea etc. Inv. Co., 104 N.J.Eq. 258, 145 Atl. 231 (Ch. 1929); Chancery Rules 181, 194, 195, 250.

4. Usual rules of chancery pleadings are, in the absence of special rule or statute, applied to pleadings in matrimonial suits without distinction. Kornfeld v. Kornfeld, 12 N.J.Misc. 753, 174 Atl. 114 (Ch. 1934). Thus a petition for divorce is, according to the usual practice, subject to motion to strike for failure to state a case. Newton v. Newton, 86 N.J.Eq. 129, 97 Atl. 294 (Ch. 1916); Robins v. Robins, 103 N.J.Eq. 26, 142 Atl. 168 (Ch. 1928); Murstein v. Murstein, 110 N.J.Eq. 352, 160 Atl. 812 (Ch. 1932); Kornfeld v. Kornfeld, *supra*. But with respect to striking an answer on motion the practice in matrimonial suits may differ from the usual practice. See, Zweig v. Zweig, 12 N.J.Misc. 761, 174 Atl. 763, *aff'd*, 111 N.J.Eq. 589, 174 Atl. 485 (E.&A. 1934); *cf.* Weidmann Silk Dyeing Co. v. E. J. Water Co., 88 N.J.Eq. 397, 102 Atl. 858, *aff'd*, 89 N.J.Eq. 541, 105 Atl. 194 (Ch. 1918); TYREE, CHANCERY PRACTICE IN N. J., (2nd Ed.) § 126; see a note, 1 NEW JERSEY LAW REVIEW 182, by R. R. Daly, disapproving any distinction between striking answers on motion under Chancery Rule 67 in divorce suits and in equity suits generally.

It is the practice, in order to safeguard a defendant's rights, that the petitioner will be required to serve the defendant (previously served with petition and citation) with an order to show cause, and annexed copy of the amended petition with the usual twenty day period for answer, since the court cannot say that the defendant would have also failed to appear and answer the cause as amended. Metzler v. Metzler, 69 Atl. 965 (Ch. 1908). Or, if personal service cannot be made, with order of publication. Blauvelt v. Blauvelt, 68 N.J.Eq. 59, 59 Atl. 567 (Ch. 1904).

In causes non-matrimonial in character wherein by reason of the defendant's failure to appear and answer, a decree *pro confesso* has been taken, the rule has been broadly stated that under Section 78 of the Chancery Act (1 N. J. Comp. Stat. 1910, pp. 439, 440) requiring parties to a suit to "take notice at their peril of . . . pleadings, and of the pronouncing of and signing of decrees,"

been made after a hearing had been had, necessitating a second or double hearing;[5] or (c) that the suit was an uncontested cause, having been heard after service on the original petition *ex parte*;[6] or (d) that the rule was limited to cases where the amended bill or petition is a departure from statutory jurisdiction invoked in the original petition, to inherent jurisdiction invoked by the amended bill or petition.[7] Conceivably any one of these circumstances, all of which were present in *Fodor v. Kunie,* might have been the basis of the rule in that particular case, yet since it was stated as a general rule of equity pleading, it will be examined in the generality of its application.

The clear inference of the case is that had the petitioner stated by an amended petition an equitable cause of action to which he would have been entitled to relief, yet it not being

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the defendant is not entitled to further notice of any decree "fairly germane to the subject-matter of the litigation." Martin v. Morales, 102 N.J.Eq. 535, 142 Atl. 31 (E.&A. 1928). Further service, therefore, on an amended bill fairly germane to the original is not ordinarily required. But in divorce actions, the practice is *contra.* Von Bernuth v. Von Bernuth, 76 N.J.Eq. 487, 74 Atl. 700, 39 A.S.R. 484 (Ch. 1908); Succhierelli v. Succhierelli, 101 N.J.Eq. 30, 137 Atl. 839 (Ch. 1927); Chancery Rule 261.

5. Miller v. Miller, 40 N.J.Eq. 475, 2 Atl. 449 (Ch. 1886); Barton v. Barton, 97 N.J.Eq. 404, 128 Atl. 798 (Ch. 1925).

6. Amendments are allowed in contested divorce actions with great liberality, and particularly in amending defensive pleadings. Wilbur v. Wilbur, 90 N.J.Eq. 7, 105 Atl. 664 (Ch. 1918). BIDDLE'S DIVORCE PR. IN N. J. (2nd Ed.) p. 136. But the cases in general do not indicate any lack of liberality in amending the initial pleading in uncontested cases. Wilbur v. Wilbur, *supra;* 2 N. J. COMP. STAT. 2034, § 19.

7. No other case has been found dealing with this feature of Fodor v. Kunie, *supra,* note 1, except Morse v. Metropolitan S. S. Co., 88 N.J.Eq. 325, 102 Atl. 524 (E.&A. 1917) wherein, *before a hearing* a bill for a receiver under general equity jurisdiction, was amended to become a bill for a receiver under the statute. The joinder of two causes, one addressed to the statutory, the other to the inherent jurisdiction, prior to the Chancery Rules of 1915, was held to be improper joinder, the difference in maturing and hearing the two causes thus joined being stressed as indicating the multifarious character of the bill. Pierce v. Old Dominion etc. 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).

germane to the original petition, the petitioner would have to start all over, and proceed by original petition *de novo*. Since the petitioner had stated no cause to which he was entitled to any relief, the protraction of litigation involved in case he might have a good case but not germane, was not considered by the court. The requirement of germaneness, however, was thus elaborated: "Amendments must be germane; that is, akin or closely allied to the pleading amended".[8] By a close reading of the opinion, it is fairly clear that this language means nothing more or less than that the amended bill cannot "make a new case," —that the amended bill cannot substitute "an entirely different case from that made by the original bill". Re-stated in this manner, the rule is substantially the same as has been expressed in earlier decisions prior to the Chancery Rules of 1915.

The two earliest New Jersey decisions cited by Chancellor Walker are *Coddington v. Mott*[9] and *Seymour v. Long Dock Co.*[10] In the first of these cases, *Coddington v. Mott*,[11] a bill was filed for specific performance of a contract for the exchange of land with an alternate prayer for a re-conveyance of land previously conveyed by the complainant to the defendant. After the issues had been made up by filing of answer and replication (whether testimony had been closed did not appear although the time limited for such had expired), the complainant moved for leave to amend the bill by inserting a charge of fraud, and by striking out the prayer for specific performance, and substituting therefor, a prayer that the contract be declared void. Chancellor Green in denying the motion said: "Amendments are made in equity with great liberality. They are in fact made at every stage of the proceedings where the substantial ends of justice will be thereby promoted. But the indulgence has its

8. 92 N.J.Eq. 301 at p. 304.
9. 14 N.J.Eq. 430, 82 Am. Dec. 258 (Ch. 1862).
10. 17 N.J.Eq. 169 (Ch. 1864).
11. *Id. supra*, note 9.

limitations, although, from the very nature of the case, it is difficult to fix the precise line beyond which the court, in the exercise of its discretion will not go".[12] After discussing three previous cases[13] wherein an amended bill had been allowed, he continued: "But it does not seem that in either of these cases, the complainant was permitted *to make a new case*".[14] (italics supplied.) "The complainant now asks to amend his bill . . . by making a new case totally inconsistent with that made by the bill as originally framed . . . It is making a new case which will not be permitted at this stage of the cause".[15] The stage referred to was after a hearing for although it did not appear that the testimony was closed, the court treated that as immaterial since the time allowed therefor had expired.[16] He then concluded: "In *Deniston v. Little,* 2 Sch. & Lef. 11, note, Lord Redesdale said: 'I know of no case which allows an amendment in order to make a new case'. And although there are cases where it has been permitted, before the cause is at issue, and before a sworn answer has been filed, yet even then their propriety has been questioned, and at a later stage of the cause has not been allowed".[17]

A few years later, in *Seymour v. Long Dock Co.,*[18] Chancellor Green's views on an amended bill were re-stated and to a degree enlarged. In this case the application to amend was made after the cause was at issue and after evidence had been

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12. 14 N.J.Eq. at p. 432.

13. Buckley v. Corse, 1 N.J.Eq. 504 (Ch. 1832); Henry v. Brown, 8 N.J.Eq. 245 (Ch. 1850); Philhower v. Todd, 11 N.J.Eq. 54, 312 (Ch. 1857).

14. As to the propriety of the amendment in Buckley v. Corse, *supra,* note 13, Chancellor Green entertained some doubts. But in Henry v. Brown, *supra,* note 13 and Philhower v. Todd, *supra,* note 13, the amendment merely added new parties, or additional prayers for relief, and so did not make a new case. 14 N.J.Eq. at p. 433.

15. 14 N.J.Eq. at p. 434.

16. *Id., supra,* note 15, at p. 434.

17. *Id., supra,* note 16.

18. *Id., supra,* note 10.

taken on both sides. Amendment was allowed as not changing the issue or materially altering the grounds upon which the original bill rested. But the case is significant for the opinions expressed *obiter*. Doubts previously entertained as to whether an amended bill could "make a new case" before the pleadings are brought to an issue seem to have been dispelled for the Chancellor remarked: "The complainant may vary his case by amendment in any way he pleases, however inconsistent with or repugnant to the original bill . . . At this stage of the proceedings (*i.e* before the cause is finally at issue) . . . it is difficult to draw a line beyond which the complainant may not pass in changing his case".[19] He concluded: "And even after issue joined, and before the taking of testimony, the complainant will be permitted to withdraw his replication and amend his bill, *as his case may require*".[20] (Italics supplied.) In 1862 it had been indicated that the filing of the replication is the deadline for the making of a new case by amending;[21] but in 1864, the filing of the replication is not the deadline, for the replication may on leave be withdrawn and the bill amended *as the case may require*. The hearing is now the deadline. Chancellor Green: "But after witnesses have been examined, the time for allowing amendments, except such as do not substantially alter the case,[22] has gone by . . . This is not an arbitrary rule but rests upon clear and familiar principle, and is a valuable safe-

19. 17 N.J.Eq. at p. 171.

20. *Id.*, *supra*, note 19.

21. Coddington v. Mott, *supra*, note 9.

22. Corrective amendments and curative in character are allowed with utmost liberality even after a hearing. Miller v. Miller, *supra*, note 5. (Amendment to divorce petition to include prayer for alimony); Fraser v. Fraser, 77 N.J.Eq. 205, 75 Atl. 979, *aff'd*, 78 N.J.Eq. 246, 81 Atl. 1122 (E.&A. 1911). (Amendment to bill for separate maintenance to declare foreign decree void.) Blauvelt v. Blauvelt, *supra*, note 6. (Omission of jurisdictional allegation as to residence of petitioner in divorce); Morse v. Metropolitan S. S. Co., *supra*, note 7. (Omission of jurisdictional allegation in bill for a statutory receiver); Owens v. Owens, 66 Atl. 929 (Ch. 1907); Wallace v. Wallace, 112 N.J.Eq. 292, 164 Atl. 565 (E.&A. 1933).

guard of the rights of the parties. The evidence must be confined to the issue. The allegations and the proofs must correspond. To prove a charge not made by the bill, and to make a charge not sustained by the proof are alike inoperative to sustain a decree . . . The complaint fails alike in both cases for want of proof".[23]

A change herein is to be noted: previously the court had rested the rule forbidding a new case by amended bill after the hearing, on *stare decisis*—merely quoting Lord Redesdale for the lack of any authority so allowing. But authorities were later pressed on the court so allowing, and the court proceeded to rationalize the rule as not arbitrary in character but resting upon the principle that the allegations and the proofs must agree for there to be an effective decree. A contrary English decision[24] which seemed to allow the "making of a new case" after a hearing, decided by Lord Justice Turner, and pressed upon the court as authority, was dismissed as not improbably resting on some English statute respecting amendments, but in any event as too broad—in that under it leave might be granted to set up by amended bill a new case subject to the only limitation *that it be connected with the matter of the original bill.* Chancellor Green, relying on other authorities, Lord Hardwicke and Chancellor Kent, observed in rejecting so broad a rule as enunciated by Lord Turner: "This grants a latitude of amendment quite as broad as would be allowed to a party before issue joined. It would enable the complainant to make a case not inconsistent with but directly repugnant[25] to the case

23. 17 N.J.Eq. at pp. 171-172.

24. Darnley v. London etc. Ry. Co., 17 N.J.Eq. at p. 174, 9 Jurist (N.S.) 452.

25. C. J. Beasley doubted the right to amend at the final hearing where the amendment would materially falsify the facts originally pleaded. Thornton v. Ogden, 32 N.J.Eq. 723 (E.&A. 1880). See, Redstrake v. Surron, 3 Atl. 693 (Ch. 1886). Under the present rules a distinction in general is taken between inconsistent and contradictory pleadings: the rules allow the former but not the

as made by the original bill". Impelled by these two opinions of Chancellor Green, Chancellor Walker re-affirmed the same rule in *Fodor v. Kunie,* expressing it in terms of "germaneness". And although in the latter case, it is not stated that the amended bill can make a new case, *if before the hearing,* yet the rule must be taken to be thus limited in view of the earlier decisions which were cited to justify the rule in *Fodor v. Kunie.* At all events the practice is to allow amendments making a new case if before the hearing.[26]

In the some seventy-five years that have elapsed since Chancellor Green's opinions, and without interruption by the adoption of the Chancery Rules of 1915,[27] the rule that after a hearing the complainant could not "make a new case" has been uniformly followed. Later cases stated the requirement in terms of "germaneness". And germaneness has been consistently the rule for amending after the hearing. The question naturally arises: what is germane in a given case—what is or what is not a "new case"? This would seem to involve the troublesome question of what is a "cause of action" in equity.[28] A definite group

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latter. Rose v. Jerome Harvey Dev. Co., 113 N.J.Eq. 161, 166 Atl. 149 (E.&A. 1933); Morris v. Jersey Central etc. Co., 118 N.J.Eq. 541, 179 Atl. 683 (Ch. 1935).

26. Seymour v. Long Dock Co., *supra,* note 10; Rector v. Rector, 78 N.J.Eq. 386, 79 Atl. 295 (Ch. 1911); Kaiser v. Kaiser, 98 N.J.Eq. 719, 130 Atl. 602 (E.&A. 1925); *semble;* Morse v. Metropolitan S. S. Co., *supra,* note 7.

27. The Chancery Rules do not indicate any limitation on the scope of an amended bill. The provisions therein merely allow amendment of course without motion and costs if prior to issuance of subpoena. See Chancery Rules 78, 79. If after answer, on leave of court. Chancery Rule 80.

28. See, Clark, *The Cause of Action,* 82 UNIV. OF PENNA. LAW REVIEW 354; McCaskill, *Actions and Causes of Actions,* 34 YALE LAW JOURNAL 614; Gavit, *Code Cause of Action,* 30 COLUMBIA LAW REVIEW 802; Arnold, *A Pragmatic Definition of Cause of Action,* 82 UNIV. OF PENNA. LAW REVIEW 354; Wheaton, *The Code Cause of Action—Its Definition,* 22 CORNELL LAW QUARTERLY 1. See, CLARK, CODE PLEADING, p. 75. At law the same difficulty arises for although the Practice Act of 1912, § 300, allows the amended complaint to state a new cause of action (see *infra,* notes 64, 66), yet when the complaint is thus amended, the statute of limitation is applicable not as of the time of the

of cases indicates that the original theory of the bill is not the "cause of action," and a departure at or after the hearing to another theory is not "making a new case" provided the relief sought is the same as on the original bill.[29] Thus in *Barton v. Barton*,[30] on a contested divorce suit and after a hearing, the petitioner was allowed to depart from his original theory of a constructive desertion which was not proven at the hearing, and to file an amended petition charging actual desertion. In *Metzler v. Metzler*,[31] a petition charging constructive desertion was amended to charge actual desertion. But in both of these cases an order for further service of process on the defendant was entered with the usual period for answer, and a second hearing was set.[32] In a later decision, *McLaughlin v. McLaughlin*,[33] Chancellor Walker approved the practice of changing the

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original suit under the theory of relation back, but as of the time the amended complaint is filed, *i.e.*, if the amended complaint states a new case it must not be barred under the statute at the time of amending. If the amendment merely changes the date of the accident, Riggiel v. Kanengieser, 114 N.J.L. 311, 176 Atl. 605 (E.&A. 1935), or adds new elements of damages, Johnson v. Gick & Bingermann, 9 N.J.Misc. 883 (Sup. Ct. 1931), or changes the plaintiff from a general administrator to *admin. ad. pros.*, Wilson v. Dairymen's etc. League, Inc., 105 N.J.L. 188, 143 Atl. 454 (E.&A. 1928), the amended complaint does not make a new case. But change of defendant is a change of substance and not permitted after the bar of the statute has fallen. Laute v. Gearhart, 11 N.J.Misc. 117, 165 Atl. 115 (Sup. Ct. 1933), *aff'd*, 112 N.J.L. 382, 170 Atl. 646 (1934); Coventry v. Barrington, 117 N.J.L. 217, 187 Atl. 348 (E.&A. 1936). *Cf.* Missouri K. & T. Co. v. Wolf, 226 U.S. 570, 33 Sup. Ct. 135, 57 L. Ed. 855 (1913); note, 4 MERCER BEASLEY LAW REVIEW 204.

29. CLARK, CODE PL., p. 503. And since the relief may vary with the theory of the bill, a change in the relief originally sought by an amended bill is not making a new case. POMEROY, CODE REMEDIES, p. 455; Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901).

30. 97 N.J.Eq. 404, 128 Atl. 798 (Ch. 1925).

31. 69 Atl. 965 (Ch. 1908); followed in Succhirelli v. Succhirelli, *supra*, note 4, in an uncontested cause; *cf.* Smithkin v. Smithkin, 62 N.J.Eq. 161, 49 Atl. 815 (Ch. 1901).

32. *Id.*, note 30, *supra*; *id.*, note 31, *supra*; Thomas v. Thomas, 74 Atl. 125 (Ch. 1909).

33. 90 N.J.Eq. 322, 107 Atl. 260 (Ch. 1919).

theory of the original petition from actual to constructive desertion at or after the hearing but found no necessity for further service and hearing to "safeguard" the rights of the defendant from surprise since the amended cause was based on the same "underlying facts" of the original petition. *Metzler v. Metzler,* allowing further service and hearing, was distinguished[34] as a case where the "underlying facts" of the amended petition were different from those of the original petition. But in all of these cases, the original statutory ground, was also the ground of the amended petition. Whether a shift to a different statutory ground, *viz.,* from desertion to adultery would be germane, is problematical.[35] *Fodor v. Kunie* might be well taken to indicate that in divorce actions, since the jurisdiction is in any case statutory, any amendment setting up a different statutory ground than that originally charged is not "making a new case". Although the above suits were matrimonial and controlled by Section 19 of the Divorce Act[36] permitting amendments which do not affect "the real merits of the cause," in other matrimonial cases, amendments at the hearing changing the theory of the original bill, but seeking the same relief have been allowed (with provisions for a further hearing) as not "making a new case".[37]

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34. 90 N.J.Eq. 322 at p. 328.

35. The only case where the amendment set up a new statutory ground which has been discovered, is Kaiser v. Kaiser, *supra,* note 26, wherein the amendment was offered before a hearing and so, under the rule announced by Chancellor Green in Seymour v. Long Dock Co. *supra,* note 10, was not subject to the restriction of not making a new case.

36. 2 N. J. COMP. STAT., p. 2034, § 19.

37. American Eagle Fire Ins. Co. v. Grant B. & L. Ass'n., 104 N.J.Eq. 83, 154 Atl. 112 (Ch. 1929), *aff'd,* 110 N.J.Eq. 485, 160 Atl. 636 (1932). In this case a bill for money was brought apparently on the theory of an equitable assignment and subrogation. At the hearing misappropriation of trust assets was shown; the bill was amended to conform and without further hearing apparently, the complainant was given a decree on the amended bill although the defendant's answer had doubtless been framed to meet the bill on its original theory (without discussion of germaneness).

Another group of cases involves a change in the operative facts[38] by an amended bill but with no change in the relief sought.[39] Most of such cases indicate that such is not "making a new case" and within the rule of "germaneness". Thus on a bill to set aside a fraudulent conveyance, the fraud not being proved as alleged at the hearing, the complainant was allowed to amend to meet the defendant's own testimony of fraud other than as alleged in the original bill, and a second hearing was ordered.[40] Similarly, a divorce petition was amended to set up facts showing desertion which were not the "underlying facts" of the original petition.[41] Similarly, a petition for divorce on the ground of extreme cruelty may be amended at the hearing to allege other acts of cruelty than those on which relief was sought in the original petition.[42] Similarly, an act of adultery may be alleged by an amended petition not the act alleged in the original petition provided the act alleged in the amended petition had been committed prior to the filing of the original petition.[43] The reason for this last limitation is that whether by an amended or a supplemental bill, in either case, proceedings thereon are taken not as a new proceeding, but as a continuation of the old suit, and the right to sue in equity must exist at the time of the filing of the original bill or petition.[44]

38. *Cf.* CLARK, CODE PLEADINGS, p. 503: "The number of such facts to be considered as a single unit will vary in different cases, . . . and a change in such facts should not be a change in the cause of action so long as the essential fact situation remains the same."

39. This group of cases involves not only a factual change but also in some cases at least a different theory.

40. Assets etc. Ass'n. v. Esposito, 95 N.J.Eq. 585, 123 Atl. 710 (Ch. 1924); Barton v. Long, 46 N.J.Eq. 841, 14 Atl. 566 (Ch. 1888).

41. Metzler v. Metzler, *supra*, note 31. *Cf.* Ch. Walker's comment thereon in McLaughlin v. McLaughlin, *supra*, note 33.

42. Soos v. Soos, 14 N.J.Misc. 393, 185 Atl. 386 (Ch. 1936) (amended counterclaim).

43. Lutz v. Lutz, 52 N.J.Eq. 241, 28 Atl. 315 (Ch. 1894). But adultery subsequent to the time of the original petition may be shown by an amended or supplemental petition to meet the defense of condonation. Lutz v. Lutz, *supra*.

44. Lederer v. Lederer, 95 N.J.Eq. 558, 123 Atl. 241 (Ch. 1924); Gery v.

When the amended bill not only changes the theory of the original bill, but asks for further or additional relief than was originally sought, the amended bill is held "to make a new

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Gery, 113 N.J.Eq. 59, 166 Atl. 108 (E.&A. 1933), wherein a supplemental bill for partition was dismissed because at the time of filing the original the complainant was a tenant by the entirety and not under the statute entitled to maintain partition proceedings, in spite of the fact that the complainant at the time of filing the supplemental bill was thus entitled. Similarly, a supplemental bill setting up a default by the mortgagor subsequent to the filing of the original bill of foreclosure. Szelewa v. Windeler, 110 N.J.Eq. 249, 159 Atl. 677 (Ch. 1932). Similarly, a petition for divorce setting up as a ground for relief an act of adultery, subsequent to the filing of the original petition. Lutz v. Lutz, *supra*, note 43. *Cf.* Stein v. Stein, 180 Atl. 763 (Pa 1935). See, Soos v. Soos, *supra*, note 42, as to an act of cruelty subsequent to the filing of the original counterclaim

If, therefore, the supplemental bill introduces new facts which have occurred since the filing of the original bill on which a decree can be had without reference to the original bill, then a supplemental bill is improper. The complainant should dismiss his original bill and start all over—filing a new bill. Szelewa v. Windeler, *supra*. The reason for this somewhat formal rule rests on the theory apparently that the defendant cannot be haled into court to answer one cause of action, and thereafter in the same suit be called on to defend another *not existing at the time the original bill was filed*. See Goslin v. Edmunds, 188 Atl. 851 (Pa. 1937). Like the amended bill the supplemental bill must be germane to the amended bill. Williams v. Winans, 20 N.J.Eq. 392 (Ch. 1869); Buckingham v. Coving, 29 N.J.Eq. 238 (Ch. 1878); O'Donnell v. McCann, 77 N.J.Eq. 188, 75 Atl. 999 (Ch. 1910); Leonard v. Cook, 21 Atl. 47 (Ch. 1890). But when germane, supplemental bills are to be used in preference to an original bill. Stockton v. American Tob. Co., 53 N.J.Eq. 400, 32 Atl. 261 (Ch. 1895); Vaiden v. Edson, 85 N.J.Eq. 65, 98 Atl. 635 (Ch. 1915); Marneil Realty Corp. v. Twin Brook Realty Corp., 13 N.J.Misc. 419, 179 Atl. 110 (Ch. 1935).

No chancery decision has been found dealing with change in capacity of as "making a new cause of action." If by analogy to law cases, where new cases can be pleaded but involving the statute of limitations, the complainant changes the capacity in which he sues (as at law from general administrator to administrator *ad. pros.*) such is not making a new case. Wilson v. Dairymen's etc. League, Inc., *supra*, note 28; but a change as to the capacity in which the defendant is sued at law is taken to be a substantial change and apparently making a new case. Laute v. Gearhart, *supra*, note 28 (defendant guardian *ad litem* changed to the infant himself); Coventry v. Barrington, *supra*, note 28 (defendant sued as corporation changed to be defendant partners). See, note 28, *supra;* 22 CORNELL LAW QUARTERLY 1, at p. 7.

case"; or is not "germane".[45] In such a case, a change in operative facts is also presented. Thus, on a bill for specific performance of an alleged contract, an amended bill alleging fraud, and praying for cancellation, is not germane.[46] On an original bill by a surviving partner to declare and enforce a resulting trust, the evidence at the hearing failing to establish the trust, the complainant applied for leave to amend the bill to make it one for the settlement of partnership accounts: the application was denied on the ground that such a change would be fundamental which should be asserted by original bill.[47] When the original suit was under the statutory jurisdiction of the Court of Chancery, an amended petition addressed to the general jurisdiction of the court is not germane;[48] nor by a parity of reasoning, could an amended petition set up a case under statutory jurisdiction when the original bill or petition was addressed to inherent jurisdiction.[49] The fact that the same procedure is appli-

45. Thiel v. Perkins, 92 N.J.Eq. 79, 111 Atl. 666 (Ch. 1920); bill for reformation was amended at the hearing to become a bill for rescission, defendant not objecting; but was treated as stating a new case.

46. Coddington v. Mott, *supra*, note 9.

47. Berla v. Straus, 74 N.J.Eq. 678, 75 Atl. 763 (E.&A. 1908); Penny v. Penny, 88 N.J.Eq. 160, 102 Atl. 257 (Ch. 1907), where on a petition for divorce *a mensa et thoro*, the charges not being substantiated at the hearing, was amended to become a bill for separate maintenance under Section 26 of the Divorce Act on application and leave. The change was held material so as to release a surety on a *ne exeat* bond given on the original action.

48. Fodor v. Kunie, *supra*, note 1. A contrast arises here: although non-statutory annulment cannot be sought by amended petition after a hearing, a petition including both grounds for annulment as originally drawn, is not improper joinder. Turney v. Avery, 92 N.J.Eq. 473, 113 Atl. 710 (Ch. 1921).

49. The only case found dealing with such an amendment is one where the amended bill was filed before the hearing and under the rules previously stated, not subject to the limitation of germaneness: a bill filed originally for a receiver under the general equity jurisdiction was *before hearing* amended to become a bill *inter alia* for a statutory receiver. After the hearing it was further amended to supply omitted jurisdictional averments. The latter were corrective in character and did not "make a new case." Morse v. Metropolitan S. S. Co. *supra*, note 7, (without discussion of the procedure). Whether an amended petition addressed to a statutory jurisdiction but a different statutory jurisdiction than

cable to both cases, or that the same relief is being sought in both cases, does not seem to obviate the lack of germaneness.[50] But where the procedure involved under the two types of jurisdiction is different, an additional reason (savoring of trial inconvenience) for non-germaneness would seem to exist.[51] Another instance of "making a new case" which rests to a degree at least on procedural differences and trial inconvenience is the amending of a bill of strict interpleader to become a bill in the nature of an interpleader: such an amendment would seem to be not germane.[52]

The rule, therefore, that at or after a hearing the amended bill will not be allowed if not germane; *i.e.* if it makes a new case, is supported by apparently insurmountable authority.[53] Yet singularly enough, since 1864, the rule seems not to have been re-examined except in the light of *stare decisis*. No provision of the Chancery Rules of 1915 undertook to define or limit

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that of the original petition, is germane is not clear. See, Penny v. Penny, *supra*, note 47; Kaiser v. Kaiser, *supra*, note 26.

50. In Fodor v. Kunie, *supra*, note 1, both suits, the original and the amended, were properly brought by petition, and service was the same and the decree of nullity sought in both cases was the same but the jurisdiction being different, the amended bill was not germane. 2 N. J. COMP. STAT., p. 2033, §§ 10, 11; CUM. SUPP. COMP. STAT. (1924), p. 996, § 38, provides for petition and citation in suits for nullity of marriage whether under the statute or inherent jurisdiction. The latter, formerly brought by bill (McClurg v. Terry, 21 N.J.Eq. 225 (Ch. 1870), are now by petition. Ysern v. Houter, 91 N.J.Eq. 189, 110 Atl. 31 (Ch. 1920); Turner v. Avery, *supra*, note 48.

51. Penny v. Penny, *semble*, *supra*, note 47. Where two causes are joined in an original bill, procedural differences on the two causes are fatal to joinder. Pierce v. Old Dominion etc. Co., *supra*, note 7. Rodman v. Manganese Steel Co., *supra*, note 7.

52. Stevens v. Robinson, 94 N.J.Eq. 30, 118 Atl. 273 (Ch. 1922); Maxwell v. Winans, 96 N.J.Eq. 178, 125 Atl. 38 (Ch. 1924), *semble* (differences as to affidavit, prayers and decree). See further, Woodbridge Tp. v. Middlesex Water Co., 68 Atl. 464 (Ch. 1907).

53. The rule that a complainant cannot make a new case by an amended bill is supported by cases of other jurisdictions. Bank v. Conant, 181 Atl. 361 (Me. 1935); Goslin v. Edmunds, *supra*, note 44.

the scope of an amended bill, and the practice since then, has accepted the yardstick of "germaneness" previously employed for measuring the extent that a complainant could by amending his bill change or alter the original case. It is proposed to examine the rule and the reasons therefor, in the light of changed conditions and current procedural trends.[53a]

Certain comments may be made initially. The limitation on the exercise of judicial discretion in granting leave to amend only to matters germane to the original bill, was in the first instance self-imposed by the Court of Chancery. Lord Redesdale had stated it in the English practice merely from the absence of authority allowing such an amendment and Chancellor Green accepted it on that basis—rejecting a broader rule announced by Lord Turner. Chancellor Green rationalized it—not as an arbitrary rule, but one designed to secure conformity of the decree with the pleadings and proof and to "safeguard" the rights of the parties. But this fails to convince since, if the hearing demonstrates an equitable cause of action on which the complainant is entitled to relief, and the bill is thus amended, any decree therein entered will conform to both the proofs and pleading as amended, and under such a decree the rights of the parties would seem to be fully protected. If it be thought that the unwillingness to try a new case on the amended bill grows out of some feeling of lack of authority of the sitting vice-chancellor, his reference having been on the original and different case of the bill as first filed, the objection would apply equally to making a new case by amended bill prior to hearing but after reference; yet in the latter case, amendments to the extent of stating a new case, originally were and continue to be established practice. That lack of authority to hear a new case is not

53a. Dean Clark: "It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product, and that procedural rules must be continually re-examined and reformed in order to be kept workable." 34 YALE LAW JOURNAL 1, at p. 392; *cf.* Chancery Rule 4.

the basis of the rule is further shown by two circumstances: (a) the rule was originated before the statute was passed authorizing the appointment of vice-chancellors,[54] and (b) the court does not *sua sponte* (although it may do so) initiate the application of the requirement of germaneness: the rule is commonly applied only on the objection of the defendant.[55] Surprise or prejudice to the defendant is perhaps a plausible justification for the rule, but even so, such would not seem to be sufficient reason for compelling the complainant to start all over: it is submitted that the practice evolved when the complainant by amended bill changes his theory or prayers (wherein amendments are readily allowable), of having further service and a second hearing, with costs to the defendant up to that point, might be also applied to an amendment which makes a new case, as where the amendment falls something short of that.[56] Such a practice would amply protect the defendant from prejudice or surprise, and would be doubtless a sufficient deterrent against the complainant's consciously withholding his real cause of action in the drafting of the original bill.[57] To say that the allowing of a new case would encourage careless and slipshod pleading[58] of the case in the original bill rather begs the question as the hearing often develops proofs that even the most

54. Chancellor Green firmly established the rule in 1864. Seymour v. Long Dock Co., *supra*, note 10. Vice-Chancellors were first authorized by statute in 1871. *In re* Vice-Chancellors, 105 N.J.Eq. 759, 148 Atl. 570 (Ch. 1930); 19 N.J.Eq. 577.

55. Thiel v. Perkins, *supra*, note 45.

56. *Cf.* Thiel v. Perkins, *supra*, note 45; Succhierelli v. Succhierelli, *supra*, note 4. See also, *supra*, note 61, note 40.

57. *Cf.* Warner v. Warner, 31 N.J.Eq. 549 (Ch. 1879); Merchant's Nat. Bank v. Burnett Mfg. Co., 32 N.J.Eq. 236 (Ch. 1880); United R. & C. Co. v. Long Dock Co., 41 N.J.Eq. 407, 5 Atl. 578 (Ch. 1886), wherein the fault of the person asking leave to amend justified refusal to grant leave to amend the answer.

58. See, Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 ST. JOHN'S LAW REVIEW 212, at p. 229.

careful and far-sighted pleader could not have anticipated.[59] But even so, no particular convincing reason appears for the visiting in all cases by rule, the sins of the counsel on the head of the complainant to the extent of compelling him to start all over, where at the hearing it is apparent that he is entitled to relief.[60] It would seem in the interest of economy, expeditious litigation, and avoidance of calendar congestion and multiplitious suits, to give the complainant, as *magister litis*, the green signal even to the extent of "making a new case". The prohibition against making a new case seems to be vestigial jurisdiction by original writ.[61]

The rule of "germaneness" when observed in its application does not gain favor. Although in a few situations, the cases give definite clues as to what is or is not germane, in most cases

59. In cases where the complainant mistakes his forum and sues in chancery on a legal cause of action, he is not thus harshly dealt with, for under the Transfer of Causes Act, instead of being compelled to start all over, he may have an order for transfer to law. N. J. CUM. SUPP. (1924), p. 2833. And for the purpose of applying the statute of limitations, the complainant gets the benefit of the earlier but erroneous institution of the suit in equity. Carey v. Brown, 92 N.J.Eq. 497, 113 Atl. 449 (Ch. 1921). The full benefit of the statute is limited by its language which restricts transfer to those cases where the transferring court is *without jurisdiction of the subject matter*. Commonwealth Roofing Co. v. Riccio, 81 N.J.Eq. 486, 87 Atl. 114 (E.&A. 1913). A broader policy would extend the power of transfer to cases of concurrent jurisdiction: this would doubtless operate to convert motions to strike or dismiss on the ground of adequacy of legal relief, into motions for an order of transfer. In view of the language of the statute, and the lack of any inherent power in chancery to order a transfer without an enabling act, the change of practice can be accomplished only through an amendment to the Transfer of Causes Act. Federal Equity Rule 22, in establishing a broader basis of transfer, would seem to be preferable practice. See 44 YALE LAW JOURNAL 387, at p. 416.

60. Under the present practice, the Vice-Chancellor who hears the application to amend, also hears the evidence in open court. Doubtless when the rule originated, practical reasons to support it were found in the fact that the hearing was before a master—the application to amend before the Chancellor. But these reasons, if they once existed, certainly do not apply where the same judge hears both matters, as is the present practice.

61. Wheaton: *Ancient History Should Not Permanently Better Legal Progress*, 22 CORNELL LAW QUARTERLY 1, at p. 16.

the line that separates the original case from "making a new case" is blurred and shadowy. Due to the variant factual backgrounds, past precedents yield little predictability as to what in a given case is or is not germane. The difficulties inherent in the problem of what constitutes a "cause of action" at law, or under code procedure, inhere equally in determining what in equity constitutes the case, and therefore, in determining what constitutes "making a new case".[62] For in equity as at law, almost any amendment may be said to change the original cause of action, and "make a new case".[63] The practice at law in New Jersey,[64] and elsewhere under code procedure,[65] offers a pattern of simplicity and directness. Amendments at law under the Practice Act of 1912, are allowed even to the extent of stating a new case, subject to the discretion of the trial court.[66] But in spite of the general tendency to parallel the practice of the two

62. See, *supra*, note 28.

63. *Cf.* Magliaro v. Modern Homes, Inc., 115 N.J.L. 151, 178 Atl. 733 (E.&A. 1935).

64. Section 300 of the Practice Act (N. J. CUM. SUPP. 1924, p. 2817): " . . . the court may, upon terms, permit, before or at the trial, the statement of a new or different cause of action in the complaint or counterclaim."

65. CLARK, CODE PLEADING, p. 501.

66. *Id., supra*, note 64: Thompson v. Peppler, 91 N.J.L. 160, 102 Atl. 397 (E.&A. 1917); Charlton v. Jersey Mut. Cas. Co., 107 N.J.L. 126, 151 Atl. 852 (E.&A. 1930). The discretion of the court in allowing or disallowing such an amended complaint is not reviewable on appeal. Lutlopp v. Heckman, 70 N.J.L. 272, 57 Atl. 1046 (E&A. 1904). But judicial discretion implies conscientious judgment, not arbitrary action; for clear abuse, therefore, of judicial discretion reversal may be had in the Court of Errors and Appeals. Hoffman v. Malovatsky, 112 N.J.Eq. 333, 164 Atl. 260 (E&A. 1933), *semble*. At law troublesome questions continue to arise (substantively and not procedurally) when the statute of limitations is a defense. See Limpert Bros. v. Stitt, 94 N.J.L. 472, 110 Atl. 832 (E.&A. 1920); Campbell v. Hackensack, 13 N.J.Misc. 578, 179 Atl. 687 (C.C. 1935); Magliaro v. Modern Homes, Inc., *supra*, note 63; 22 CORNELL LAW QUARTERLY 1, at p. 7; 30 COLUMBIA LAW REVIEW 802, at p. 817; *supra*, note 28. Where an amended bill states a new cause of action, the right of the complainant to relief is determined as of the time of the filing of the amended petition. Thiel v. Perkins, *supra*, note 45.

jurisdictions[67] in New Jersey, and the general aim of the Chancery Rules of 1915 to brush aside obstructive objections,[68] the practice in the Court of Chancery with respect to making a new case by an amended bill remains different.[69]

*(To Be Concluded)*

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67. Weinberger v. Goldstein, 99 N.J.Eq. 1, 132 Atl. 659 (Ch. 1926), *aff'd*, 101 N.J.Eq. 310, 137 Atl. 920 (1927).

68. Fisovitz v. Cordusco Const. Co., 102 N.J.Eq. 354, 140 Atl. 573 (Ch. 1928).

69. Fodor v. Kunie, *supra*, note 1.