

It is stated by Mr. Justice Story, in his *Treatise on Equity Pleadings*, sec. 257, "that every fact essential to the plaintiff's title to maintain the bill, and obtain relief, must be stated in the bill, and of course no proof can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court pronounces its decree, *secundum allegata et probata*." And in section 28 of the same work, the author says, "it may be proper, however, to remark, that every material fact, to which the plaintiff means to offer evidence, ought to be distinctly stated in the premises, for otherwise, he will not be permitted to offer or require any evidence of such fact."

These principles have been repeatedly sanctioned by the Court of Appeals of this state, and the rule cannot be questioned, that a complainant in his bill, must put in issue whatever he intends proving, otherwise, the evidence will be excluded. The Court of Chancery decrees only *secundum allegata et probata*. *Haywood vs. Carroll*, 4 H. & J., 518.

This rule is necessary not only to prevent surprise, but the abrogation of it would enable the complainant to take from his adversary the benefit of his answer, which, if responsive to the averments of the bill, would require a stronger measure of evidence to overcome, than if the fact to be proved was not noticed in the pleadings.

In the treatise, of Mr. Justice Story, already referred to, sec. 264, the rule is pressed still further; it being there said, "that if an admission is made in the answer, it will be of no use to the plaintiff, unless it is put in issue by the bill; and the consequence is, that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings."

In this case, the evidence of all the acts of part performance which are relied upon, to save the alleged agreement from the operation of the statute of frauds, is excepted to by the defendants, "upon the ground, that the bill of the complainants alleges no part performance of said supposed contract or agree-