

by the Court of Appeals, that though as a general rule, the defendant might, at the hearing, object that the cause made by the bill does not entitle the plaintiff to equitable relief, though the particular ground of objection only appears upon the face of the bill, and though the issue has been joined upon the answer, that the rule does not apply to mere defences given by statute, and that unless such defences are brought forward by plea, or are relied upon in the answer, they will not avail the defendant at the hearing. This decision, however, only has reference to some defences given by statute against the relief sought by the bill, and does not reach the point now under consideration, which is, whether a defendant to a creditor's bill, who does not distinctly allege himself to be a creditor in his answer, may not after decree, come in upon the fund as a creditor? The general rule as shown by the case referred to is, that if the infirmity of the plaintiff's case appears upon the face of his bill, the defendant may rely upon it at the hearing, no matter how imperfect, or what the character of his answer may be, and that it is only with respect to some defences given by statute that a different rule prevails. But this is not a question of defence at all, either given by a statute or founded upon principles of equity. Wayman made no defence to this bill, but contented himself with stating the reason why he had not executed the trust vested in him by the deed, which, in his answer, he refers to as filed in the cause, and by the recitals of which, he, (Wayman,) does appear to be a creditor.

I cannot think, therefore, that he is precluded from showing himself to be a creditor, either because he does not distinctly state himself to be one by his answer, or because he asked to be dismissed with costs. He was not so dismissed, and could not be, as the legal title to the land was in him.

One of the objects of the trust deed, as shown by its recitals, was to secure Wayman the payment of money *then due* him from Cunningham, and this deed is filed as an exhibit, with the bill, and referred to and admitted by the answer. There can be no sufficient ground for assuming from the mere circumstance that Wayman asked to be dismissed with his costs, that